

Client Alert

January 2013

Treasury Releases Final Regulations on FATCA

On January 17, 2013, the Treasury Department (“Treasury”) and the Internal Revenue Service (“IRS”) issued final regulations with respect to the Foreign Account Tax Compliance Act (“FATCA”).¹ A copy of the final regulations is available [here](#). The legislation applies to payments to foreign financial institutions (“FFIs”) and nonfinancial foreign entities (“NFFEs”). In general, FATCA requires certain persons making payments to FFIs and NFFEs to withhold 30 percent of any payment (a “Withholdable Payment”) consisting of either (1) U.S. source periodic income (“Income Payments”), such as interest, dividends and rents or (2) gross proceeds from the sale of property that could produce Income Payments (“Proceeds Payments”), which includes principal payments on debt obligations. A FFI can avoid this withholding, however, if it enters into an agreement (a “FFI Agreement”) with the IRS to become a participating FFI (a “PFFI”) or is otherwise deemed compliant or exempt. FATCA also requires 30 percent withholding on any Withholdable Payment made to a NFFE, unless the NFFE either provides a U.S. beneficial ownership disclosure or is exempt.

The final regulations are complex. In particular, the final regulations (1) reduce administrative burdens for financial institutions with operations in multiple jurisdictions by coordinating their obligations under the final regulations and intergovernmental agreements (“IGAs”); (2) phase in the timelines for due diligence, reporting and withholding and align them with the timelines prescribed in existing IGAs; (3) expand and clarify the scope of payments not subject to withholding; (4) refine and clarify the treatment of investment entities and other categories of institutions deemed to be low-risk; and (5) clarify the compliance and verification obligations of PFFIs.

The final regulations largely follow the proposed regulations.² Notably, the grandfather date for obligations was extended to January 1, 2014, as Treasury recently indicated would be the case, and some efforts were made to address the compliance burdens for FFIs and NFFEs.

Summary of Important Dates

- Obligations outstanding as of January 1, 2014, including any obligation of a secured party to make a payment with respect to collateral securing a grandfathered obligation, and proceeds from dispositions of such obligations will generally be exempt from FATCA withholding.
- FATCA withholding will generally apply to Income Payments made on or after January 1, 2014 and Proceeds Payments made on or after January 1, 2017.
- The grandfather date for obligations giving rise to foreign passthru payments or dividend equivalents under Section 871(m) of the Internal Revenue Code of 1986, as amended (the “Code”) will be the date that is six months after the date on which final regulations defining those types of payments are published.
- The deadline for withholding agents to implement verification procedures under any FFI Agreement is delayed until December 31, 2013 for all PFFIs that receive a Global Intermediary Identification Number (“GIIN”) prior to January 1, 2014.

¹ FATCA is codified in Sections 1471-1474 of the Internal Revenue Code of 1986, as amended.

² A copy of our prior alert addressing the proposed FATCA regulations issued on February 8, 2012 is available [here](#).

- The due date for a PFFI to file its first information report with the IRS with respect to the 2013 and 2014 calendar years is March 31, 2015.

Cooperation with Foreign Governments

The IRS has released two model IGAs. Under the Model 1 IGA, published by Treasury on July 26, 2012, a PFFI reports information about U.S. accounts to the local government, which then exchanges this information with the IRS. PFFIs in jurisdictions that have signed a Model 2 IGA, published by Treasury on November 14, 2012, must register with the IRS and report the information about U.S. accounts directly to the IRS. Under the final regulations, PFFIs covered by a Model 2 IGA are required to follow the final regulations except to the extent expressly modified by the applicable Model 2 IGA.

Expanded Categories of Deemed-Compliant Entities and Exempt Entities

The final regulations expand the categories of foreign entities exempt from FATCA withholding. Holding companies, treasury centers and captive finance companies that are part of a nonfinancial group are excepted from FFI status and passive NFFE status. The final regulations treat passive entities that are not professionally managed as passive NFFEs and provide exemptions for FFIs and passive NFFEs that are part of a nonfinancial group of companies and support the operations of the group.

The final regulations also create new categories of deemed-compliant FFIs. Additional categories include certain credit card issuers that agree to prevent a customer from having a deposit in excess of \$50,000; certain sponsored FFIs for which a sponsoring entity agrees to perform all due diligence, withholding, reporting and other requirements the sponsored FFI would have been required to perform if it were a PFFI; and, through December 31, 2016, certain limited life debt investment entities that were in existence as of December 31, 2011.

Simplified Due Diligence and Administration

Under the final regulations, PFFIs can perform much of the diligence on preexisting accounts with electronic (as opposed to manual) review. For preexisting accounts held by passive NFFEs, the final regulations allow a withholding agent to rely on its review conducted for anti-money laundering due diligence purposes for FATCA compliance.

Grandfathered Obligations

The final regulations provide that grandfathered obligations consist of: (1) any obligation outstanding on January 1, 2014; (2) any obligation that produces a Withholdable Payment solely because the obligation is treated as giving rise to a dividend equivalent pursuant to Code Section 871(m) and the regulations thereunder and that is executed on or before the date that is six months after the date on which obligations of its type are first treated as giving rise to dividend equivalents; and (3) any agreement requiring a secured party to make payments with respect to collateral securing one or more grandfathered obligations (even if the collateral is not itself a grandfathered obligation). If collateral (or a pool of collateral) secures both grandfathered obligations and obligations that are not grandfathered, the collateral posted to secure the grandfathered obligations must be determined by allocating (pro rata by value) the collateral (or each item comprising the pool of collateral) to all outstanding obligations secured by the collateral (or pool of collateral).

Withholding agents that are not issuers or agents of an issuer may, absent actual knowledge, rely on a written statement by the issuer to determine whether the obligation qualifies for grandfathering. If such a withholding agent knows or has reason to know that a modification to the obligation is "material," the withholding agent must treat the obligation as newly issued on the date of the modification. The withholding agent will have reason to know that a material modification has occurred if the issuer provides a disclosure to that effect. The final regulations imply that the withholding agent can rely on a written statement by the issuer that no material modification has occurred (unless the withholding agent has actual knowledge that the statement is incorrect).

The final regulations provide that an obligation will not give rise to a foreign passthru payment if it is executed on or before the date that is six months after the date on which final regulations defining the term foreign passthru payment are filed with the Federal Register.

Reporting and Withholding Requirements

The final regulations expand the types of documentary evidence regarding offshore obligations that a withholding agent may rely on, including information from government websites and reports from government agencies.

For preexisting accounts, a withholding agent may, in certain circumstances, rely on information previously recorded in the withholding agent's file, which could include a pre-FATCA Form W-8 in lieu of obtaining an updated version of the withholding certificate.

The final regulations require the responsible officer, on behalf of the PFFI, to certify every three years to the IRS that the PFFI is in compliance with the requirements of the FFI agreement. Documentation of an account holder's status for FATCA purposes will remain valid indefinitely, subject to a change in circumstances, if the FATCA status claimed is a specified low-risk category.

Taxpayer Preparation

An online registration portal for FFIs (the "Portal") that must register with the IRS will be available no later than July 15, 2013. Registering FFIs will be able to use the Portal to register their status for FATCA purposes (such as a PFFI, deemed-compliant FFI or reporting Model 1 FFI), manage their registration information and, as appropriate, agree to the terms of or make the representations required for their status. Once the IRS approves the FFI's registration, it will issue the FFI a GIIN. Before the Portal opens for registration, Treasury and the IRS will publish a revenue procedure containing all the terms and conditions applicable to FFIs for U.S. withholding responsibilities.

To allow foreign persons to comply with FATCA, the IRS has already released draft versions of revised Forms W-8IMY, W-8ECI, W-8EXP, W-8BEN-E and W-8BEN. The IRS intends to release shortly a new Form W-8BEN-E (for beneficial owners that are entities) and a draft revised Form W-8BEN (for individuals).

The IRS also intends to release shortly a new Form 8966, "FATCA Report," that will be used by FFIs and, in limited circumstances, withholding agents to comply with their FATCA reporting obligations. The IRS intends to issue revised Forms 1042 and 1042-S for withholding agents.

A copy of the final regulations is available [here](#) and a copy of our prior alert addressing the proposed FATCA regulations issued on February 8, 2012 is available [here](#). If you would like to receive more information about the final regulations, please contact any of the lawyers listed on this alert.

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