

IRS Issues Final FATCA Regulations

January 19, 2013

Yesterday, the Treasury Department issued final regulations under the Foreign Account Tax Compliance Act ("FATCA"). In general, the final regulations (1) build on intergovernmental agreements; (2) phase in due diligence, reporting and withholding obligations; (3) expand and clarify the scope of payments not subject to withholding; (4) clarify the treatment of investment vehicles; and (5) clarify the compliance and verification obligations of foreign financial institutions ("FFIs").

Intergovernmental Agreements

In the announcement that accompanied the new regulations, the Treasury Department stated that Norway had joined the United Kingdom, Mexico, Denmark, Ireland, Switzerland and Spain as countries that signed or initialed model FATCA agreements. The FATCA agreements offer a framework for sharing information pursuant to existing bilateral income tax treaties. These intergovernmental agreements streamline FATCA reporting and remove legal impediments to compliance.

Grandfathered Obligations

The final regulations extend the period of time for issuing obligations that will be treated as "grandfathered obligations" not subject to the general requirements of FATCA to January 1, 2014. As a result, debt securities, revolving credit facilities with a fixed maturity date, and swaps subject to a binding legal agreement and issued prior 2014 are considered grandfathered obligations the payments on which are not subject to withholding related to FATCA. The final regulations also state that in connection with a qualified reopening of a debt obligation, the subsequently issued debt obligation will be treated as grandfathered if the original debt obligation was such a grandfathered obligation.

In response to an industry group comment, the final regulations clarify the treatment of collateral posted to secure a swap and provide that as long as the collateral relates to a swap that was issued prior to January 1, 2014, the collateral itself is treated as a grandfathered obligation. However, the final regulations provide that if collateral secures a grandfathered obligation and a non-grandfathered obligation, the collateral posted to secure the grandfathered obligation must be determined by pro rata allocation of the value of the collateral to all outstanding obligations secured by such collateral.

Preexisting Accounts

In response to comments submitted by the international financial community regarding the costs of compliance with FATCA's information reporting requirements, the final regulations define "preexisting accounts" as accounts that were maintained by an FFI prior to January 1, 2014. The final regulations then exempt from review such preexisting accounts for individuals with a balance or value of \$50,000 or less and accounts with a balance or value of \$250,000 or

less with respect to entities. The final regulations also provide that if a preexisting account has a balance or value of \$1,000,000 or less, an FFI is allowed to determine whether such accounts are held by U.S. persons based on a search of electronically searchable account information.

FFI Reliance and Reporting

Further, an FFI can rely on information previously provided by a preexisting account holder that is maintained in its files to determine the status of a payee and whether a payment to such payee would be subject to withholding under FATCA. Additionally, in response to comments, the final regulations provide that a withholding agent, such as an FFI, generally can rely upon a withholding certificate (i.e., Forms W-8) to determine the status of a payee.

FFI reports regarding U.S. account holders for the 2013 and 2014 calendar years are due no later than March 31, 2015. FFIs that are required to register with the IRS to provide information reports required by FATCA can do so pursuant to an on-line web portal. Upon registration, an FFI will be furnished with a Global Intermediary Identification Number ("GIIN") and can use such GIIN to establish its status as a compliant FFI for U.S. withholding purposes.