

Timeline for FATCA implementation - further IRS guidance

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CATEGORY:
ARTICLE

The IRS has released additional guidance in the form of Notice 2011-53 (the "Notice"), announcing that the FATCA rules applicable to foreign financial institutions ("FFIs") will be implemented in phases beginning in June of 2013.

The Notice comes as welcome relief to many institutions increasingly concerned that they will not be able to timely implement appropriate compliance measures; however, a number of significant issues remain unresolved and there is much work still to be done.

Treasury and the IRS continue to work on proposed regulations and draft FFI agreements, and the Notice indicates that proposed regulations are scheduled for release in December of 2011, to be finalized by the summer of 2012. It is also anticipated that draft versions of the FFI Agreement and required reporting forms will be circulated by the summer of 2012.

The Notice provides the following timeline for implementation of the FATCA regime:

FFI Agreements

The IRS will begin accepting applications from institutions wishing to become participating FFIs on January 1, 2013.

The effective date of FFI Agreements entered into at any time before July 1, 2013 will be July 1.

FFIs must enter into FFI Agreements with the IRS by June 30, 2013 in order to ensure that they will be identified as participating FFIs not subject to withholding.

FFIs that enter into an FFI Agreement after June 30, 2013, but before January 1, 2014 will be participating FFIs in 2014, but might not be identified as participating FFIs in time to prevent withholding on January 1, 2014.

Withholding

30% Withholding on US source FDAP payments such as dividends and interest paid to non-participating FFIs will begin on January 1, 2014.

30% Withholding on all other "withholdable payments," including gross proceeds, will commence on January 1, 2015.

The withholding obligations of participating FFIs with respect to "pass-thru" payments will begin on January 1, 2014 with respect to FDAP, and on January 1, 2015 with respect to other withholdable payments. The previously proposed pass-thru payment rule would require FFIs to withhold on both recalcitrant account holders (account holders refusing to provide any required due diligence information) as well as any non-participating FFI investing via the FFI based on the proportion of the FFI's US assets versus its non-US assets, thus some amount of withholding would apply to all recalcitrant account holders and non-participating FFIs regardless of whether they themselves had any US investments.

Account Due Diligence

Participating FFIs will be required to implement procedures with respect to new accounts (as described in Notice 2010-60 and the anticipated regulations) to identify US accounts opened on or after the effective date of their FFI Agreements. So called private banking relationship accounts in excess of \$500,000 will have to be identified, with all required due diligence completed, within one year of the effective date of entering into an FFI Agreement.

A Participating FFI will be required to complete due diligence for all other accounts associated with a private banking relationship (i.e., accounts less than US\$500,000) by the later of December 31, 2014 or the date one year after the effective date of its FFI Agreement.

It remains uncertain whether trustees will be subject to the stricter private banking due diligence requirements, but language in the prior Notice implies that such treatment seems likely.

A Participating FFI will be required to complete due diligence procedures for all other pre-existing accounts by the date two years after the effective date of its FFI Agreement.

Accounts identified as US accounts (or as having an entity owned by one or more substantial US owners) by June 30, 2014 must be reported to the IRS by September 30, 2014; however, reduced reporting obligations will apply.

Reporting with respect to recalcitrant account holders identified by June 30, 2014 will also be required by September 30, 2014.

Coordination with QI Regime

All Qualified Intermediary ("QI"), Withholding Foreign Partnership ("WFP") and Withholding Foreign Trust ("WFT") agreements of entities qualifying as FFI that expire on December 31, 2012 will be automatically extended until December 31, 2013 and any FFI that enters into an FFI Agreement on or before December 31, 2013 will be deemed to have renewed its QI, WFP or WFT agreement.

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