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EDITOR'S NOTE: FINANCIAL FRAUD LAW IN THE COURTS

Steven A. Meyerowitz

FATE OF SECURITIES CLASS ACTIONS IN QUESTION FOLLOWING ARGUMENT BEFORE HIGH COURT IN *HALLIBURTON CO. v. ERICA P. JOHN FUND, INC.*

Michael R. Smith, Jeffrey S. Bucholtz, Benjamin Lee, and M. Andrew Zee

TESTIFY FIRST, KNOW WHY LATER: RESPONDING TO CIVIL INVESTIGATIVE DEMANDS FOR TESTIMONY IN FALSE CLAIMS ACT CASES

Karen F. Green and James J. Fauci

THE SURVIVAL GUIDE TO REGULATORY EXAMINATIONS

John Sakhleh

FATCA UPDATE FOR INVESTMENT FUNDS

Joseph A. Riley

DEFERRED PROSECUTION AGREEMENTS ENTER INTO FORCE IN THE UK

Lord Goldsmith QC, Karolos Seeger, Matthew Howard Getz, and Robin Lööf

COMPLIANCE RISK MANAGEMENT: WHAT FINANCIAL INSTITUTIONS NEED TO KNOW ABOUT REPORTING ELDER FINANCIAL EXPLOITATION

V. Gerard Comizio, Kevin L. Petrasic, and Amanda Kowalski

ANTI-MONEY LAUNDERING GUIDANCE ISSUED FOR BANKS SEEKING TO SERVICE MARIJUANA-RELATED BUSINESSES

Jodi L. Avergun and Joseph V. Moreno

DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT UPDATE

David A. Elliott, Rachel Blackmon Cash, Kristen Peters Watson, and E. Jordan Teague

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FATCA Update for Investment Funds

JOSEPH A. RILEY

This article provides an overview of certain obligations that non-U.S. investment funds will have as a result of the Foreign Account Tax Compliance Act.

The Foreign Account Tax Compliance Act (“FATCA”) is designed to achieve greater U.S. tax compliance by generally requiring foreign financial institutions (“FFIs”) and withholding agents to (1) perform diligence on and collect documentation from their account holders and counterparties; and (2) report to the Internal Revenue Service (“IRS”) the amounts of payments made to, and account activity of, U.S. customers and non-compliant FFIs. FATCA is enforced by a withholding tax that is imposed on FFIs that do not comply with FATCA and on account holders or counterparties that do not provide the information necessary to document their FATCA status.

As part of FATCA, FFIs will generally be required to register (with certain exceptions) with the IRS. The IRS has opened an online FATCA registration portal (the “Portal”), which FFIs will use to submit their FATCA registration information to the IRS.¹ The Portal will be the main contact point between FFIs and the IRS for continuing FATCA compliance. FFIs were able to start registering with the IRS via the Portal on January 1, 2014. The IRS has released a comprehensive user guide with step-by-step instructions on how to use the Portal, with the most recently updated version of the user guide.²

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Once an FFI registers on the Portal, it will receive a Global Intermediary Identification Number (“GIIN”) that it will provide to counterparties that need to confirm the FFI’s FATCA compliance (*i.e.*, by checking a GIIN list of compliant FFIs that will be maintained by the IRS and published monthly).

As described below, certain FFIs’ FATCA obligations will be determined by reference to an agreement they sign with the IRS to implement FATCA (an “FFI Agreement”). In December 2013, in Revenue Procedure 2014-13, the IRS released the final language of the FFI Agreement, which generally tracks draft FFI Agreement language released earlier in 2013 with few modifications. Other FFIs may be required to comply with intergovernmental agreements (“IGAs”) signed between their home jurisdictions and the U.S. to implement FATCA. The IRS intends to publish an additional two sets of temporary regulations with respect to FATCA compliance, one that will provide further clarifications and modifications to the FATCA regulations, and one that will provide coordinating rules between the FATCA regulations and the existing U.S. withholding and information reporting regulations. Both sets of temporary regulations are planned to be released in early 2014.

The balance of this article provides an overview of how FATCA applies to non-U.S. funds, including (1) how to determine which set of rules or regulations an FFI must comply with; (2) rules relating to how an FFI’s “expanded affiliated group” (“EAG”) (as that term is defined under the FATCA regulations) may register on the Portal; and (3) a brief summary of FATCA obligations that may apply to a non-U.S. fund. The application of FATCA to any fund, payment made by a fund, or fund investor is a highly factual and specific inquiry.³

NON-U.S. FUNDS ARE GENERALLY FFIS

Generally, non-U.S. funds and investment advisors will be FFIs for FATCA purposes. Under the FATCA regulations, an “investment entity” is an FFI.⁴ Most non-U.S. funds will qualify as “investment entities,” and will, therefore, be treated as FFIs. Since the definition of “investment entity” also generally encompasses investment advisors that have earned more than 50 percent of their gross income for the last three years from providing services as an investment advisor, many non-U.S. investment advisors will also qualify as FFIs.

As noted above, the FATCA regulations generally require funds to do diligence, report, and potentially withhold on their account holders. A fund's "account holders" will generally be its investors (*i.e.*, holders of the fund's equity and debt that is not publicly traded). An investment advisor's "account holders" will generally be its owners.

Note that whether or not a non-U.S. fund makes investments in U.S. assets, or has U.S. investors, is irrelevant for determining whether a non-U.S. fund is classified as an investment entity for FATCA purposes.

FFI AGREEMENTS AND INTERGOVERNMENTAL AGREEMENTS

FFIs will generally be subject to the FATCA regime, although their responsibilities will depend on whether they must comply with an FFI Agreement, an IGA, or both. Certain FFIs may be able to qualify for certain narrowly defined exceptions from FATCA, and will be treated as "Certified Deemed Compliant FFIs." These FFIs will not have to register on the Portal or provide any information to the IRS. An IGA may specify other types of entities that will be treated as Certified Deemed Compliant FFIs.

The U.S. has entered into IGAs with other jurisdictions in order to facilitate the compliance of FFIs in those jurisdictions.⁵ Specifically, the privacy laws in some jurisdictions would generally prevent FFIs from reporting the required information about their account holders. The requirements under the IGAs may differ from the general FATCA requirements in the FFI Agreement and the U.S. FATCA regulations.

The U.S. Treasury Department maintains a continuously updated list of jurisdictions that have, or are treated as having, an IGA in effect.⁶

If a jurisdiction has not signed an IGA, an FFI in that jurisdiction will generally comply with the U.S. FATCA regulations by registering with the IRS as a "Participating FFI" and executing an FFI Agreement. A Participating FFI will perform diligence on its account holders according to the procedures in the U.S. FATCA regulations and the FFI Agreement, and report the applicable account holder information to the IRS.

If a jurisdiction has signed a Model 1 IGA, an FFI in that jurisdiction (a "Model 1 IGA FFI") will comply with the obligations included in the IGA, as implemented by local legislation or regulations. Any U.S. account holder

information will be provided to the FFI's home jurisdiction governmental agency, for eventual transmittal to the U.S. IRS. A Model 1 IGA FFI will register with the IRS as a "Registered Deemed Compliant FFI" in order to receive a GIIN but will not be required to sign an FFI Agreement.

If a jurisdiction has signed a Model 2 IGA, an FFI in that jurisdiction (a "Model 2 IGA FFI") will comply with the FATCA regulations by registering with the IRS as a Participating FFI and signing an FFI Agreement. The requirements in the FFI Agreement will be modified as specified in the Model 2 IGA. Model 2 IGA FFIs will report their account holders' information directly to the U.S. IRS.

FFIs that are not in IGA jurisdictions and that cannot sign FFI Agreements because they are unable to comply with the FFI Agreement (*e.g.*, as a result of local privacy law restrictions) would register as "Limited FFIs," and would be treated by counterparties as non-compliant FFIs. The Limited FFI category is transitional only, and may only be used before January 1, 2016, after which date all Limited FFIs must generally become Participating FFIs or Deemed Compliant FFIs. Otherwise, the former Limited FFIs will be treated as non-compliant FFIs, which could affect the FATCA-compliant status of other members of their EAGs.

Branches of an FFI will be treated as "separate" from the FFI itself for certain FATCA purposes. The FATCA registration user guide defines a "branch" as a "unit, business, or office of a [financial institution] that is treated as a branch under the regulatory regime of a country or is otherwise regulated under the laws of such country as separate from other offices, units, or branches of the [financial institution]." As described below, each FFI will have a "FATCA Status" that describes its compliance (or non-compliance) with FATCA. A branch will have a separate FATCA Status from its "parent" FFI and will receive a separate GIIN. However, branches of an FFI will not have separate registration accounts on the Portal. Instead, the FFI will register its branches (and receive GIINs for the branches) as part of its regular FATCA registration. Note that a branch is subject to the IGA (if any) that the jurisdiction in which the branch itself is located has signed — not the jurisdiction of its "parent" FFI. For example, if a UK FFI has a Cayman branch, the UK FFI will be subject to the UK IGA and the Cayman branch will be subject to the Cayman IGA. The Cayman branch will not be subject to the UK IGA.

REGISTRATION PROCESS

For FATCA purposes, an EAG is generally any group made up of a chain of corporations with 50 percent or greater ownership (by vote and value) that share a common parent corporation, as well as any partnership or trust controlled by any such corporations. All members of an EAG (including branches) that are FFIs must register with the IRS in order for any FFI in the EAG to be FATCA-compliant, unless they are subject to a special exception. Thus, it is important for an EAG to determine which of its entities are FFIs that will need to register on the Portal.

Every FFI in an EAG will have a “Registration Status” for purposes of registering on the Portal. An EAG will be able to determine how it wants its entities to register, *e.g.*, separately, or in one or more groups. If FFIs in an EAG register as a group (whether the entire EAG or a subgroup of the EAG), one FFI, called the “Lead FFI,” may carry out registration on behalf of the other FFIs in the group (the “Member FFIs”). A Lead FFI will also be provided the rights to manage the online account for its Member FFIs, although a Member FFI may submit information and complete the registration process on its own behalf. Note that a Lead FFI is permitted, but not required, to act as a Lead FFI for all of the Member FFIs in its EAG. In other words, an EAG may have one or more Lead FFIs. A U.S. financial institution (“USFI”) may act as the Lead FFI for Member FFIs in its EAG, and will be issued a GIIN. In addition, if an EAG has a consolidated FATCA compliance program, the entity in the EAG that is acting as the “Compliance FI” (*i.e.*, is in charge of the consolidated compliance program) should register as a Lead FFI, and register all of the participants of the consolidated compliance program as Member FFIs. If an FFI is not registering as part of a group, it will register as a “Single FFI.”

Under the FATCA regulations, certain entities (“Sponsoring Entities”) may perform the diligence, withholding, and reporting obligations of one or more non-U.S. investment entities or controlled foreign corporations (such entities, “Sponsored FFIs”). Accordingly, a Sponsoring Entity will manage the registration of its Sponsored FFIs. The IRS intends to provide additional details about how a Sponsoring Entity may register a Sponsored FFI on the IRS Web site. Note that if a Sponsoring Entity is an FFI, it must register on the Portal twice — once as a Sponsoring Entity, and once as a Lead, Member,

or Single FFI, and will receive two GIINs. One GIIN will be used when it is acting as a Sponsoring Entity for other Sponsored FFIs, and the other GIIN will be used when it is acting on its own behalf.

FATCA registration will be completed by a “Responsible Officer” at the FFI. As Responsible Officers have different responsibilities under FFI Agreements and Model 1 IGAs, the definition of Responsible Officer differs depending on the FFI’s FATCA Status. With respect to any FFI that signs an FFI Agreement, a Responsible Officer is an officer of any FATCA-compliant FFI in the FFI’s EAG with sufficient authority to fulfill the duties of a Responsible Officer under an FFI Agreement, as described below. With respect to a Model 1 IGA FFI, a Responsible Officer is an officer of any FATCA-compliant FFI in the FFI’s EAG with sufficient authority to ensure that the FFI meets all of the requirements of being treated as a Registered Deemed Compliant FFI. In the case of a Model 1 IGA FFI, these requirements are presumably that the FFI be in compliance with the applicable Model 1 IGA.

NON-U.S. FUNDS’ FATCA OBLIGATIONS

Generally, a fund will be required to perform diligence on its existing investors in order to classify them as U.S. or non-U.S. investors. If any of the non-U.S. investors are FFIs, a fund will be required to confirm that the FFI is FATCA-compliant. If any of the non-U.S. investors are non-financial foreign entities (“NFFEs”), the fund may have to request (a) information regarding the NFFE’s 10 percent or more U.S. owners; or (b) a representation or documentation that the NFFE does not have 10 percent or more U.S. owners. The classes of NFFEs on which diligence must be performed and the thresholds of U.S. ownership that require reporting may differ under the IGAs. The diligence procedures that the fund will follow depend on whether it has signed an FFI Agreement (as modified by a Model 2 IGA, if applicable), or is subject to a Model 1 IGA. The fund must also put into place procedures to determine if any new investor is reportable (generally, a U.S. investor, an NFFE with reportable U.S. owners, or a non-compliant FFI).

For example, in a typical master/feeder structure, a feeder fund will hold interests in a master fund, and investors will hold interests in the feeder fund. Both the master fund and a non-U.S. feeder fund will generally be FFIs.

However, the master fund's diligence will generally be limited to confirming that its investor, the feeder fund, is a FATCA-compliant FFI. The feeder will need to perform diligence on its investors (*i.e.*, which may be the ultimate beneficial owners of the interests).

A fund that has signed an FFI Agreement (other than a Model 2 IGA FFI) will be required to withhold on certain payments (generally, U.S. source interest, dividends, and gross proceeds from the sale or disposition of instruments that produce U.S. source interest or dividends ("withholdable payments")) made to (1) non-compliant FFIs, and (2) Recalcitrant Account Holders. A "Recalcitrant Account Holder" is generally any account holder that fails to provide identifying information upon request, or fails to waive any privacy law that would prevent an FFI from reporting information on the account holder to the IRS.

The FATCA regulations also require withholding on "passthru payments." A passthru payment is defined as "any withholdable payment or other payment to the extent attributable to a withholdable payment." The IRS has not issued final regulations that specify what constitutes a "passthru payment," although it has specified that withholding on "passthru payments" will begin no earlier than January 1, 2017.

Note that even a fund that has no U.S. investments may receive payments of U.S. source income. For example, if a fund enters a swap with a counterparty, and the fund posts U.S. Treasury bonds as collateral to the counterparty, the counterparty will usually have the obligation to pass any interest on the bonds back to the fund. However, this interest will be U.S. source interest paid on U.S. bonds. If the fund is not compliant with FATCA, the counterparty may be forced to withhold on those payments of U.S. source interest.

A Model 1 IGA FFI or Model 2 IGA FFI will not have to withhold on payments to a Recalcitrant Account Holder, provided that the FFI reports information on the Recalcitrant Account Holder as described below. While under the FATCA regulations, FFIs are generally required to withhold on certain payments made to non-compliant FFIs, the Model 1 IGA and the Model 2 IGA state that the U.S. will work with the signing jurisdiction in order to "develop a practical and effective alternative approach" to withholding on non-compliant FFIs.

A fund that has signed an FFI Agreement (including a Model 2 IGA FFI) will generally be required to report information on account holders that its diligence procedures have determined to be U.S. account holders, as well as Recalcitrant Account Holders. In addition, a fund that has signed an FFI Agreement will generally be required to report payments made to U.S. accounts, as well as payments made to non-compliant FFIs and Recalcitrant Account Holders.

A Model 1 IGA FFI will have similar reporting requirements. As noted above, it will report its U.S. account holders' information, as well as certain payments made to U.S. account holders, to its local governmental authority. It will also be required to report information about Recalcitrant Account Holders and non-compliant FFIs.

TIMELINE FOR REGISTRATION

The IRS has recommended that FFIs register on the Portal by April 25, 2014. However, the IRS has announced that Model 1 IGA FFIs should register by a later deadline — December 22, 2014 — in order to have received a GIIN and be listed on the IRS list of compliant FFIs by January 1, 2015.

NOTES

¹ See <http://www.irs.gov/fatca-registration>.

² See <http://www.irs.gov/pub/irs-pdf/p5118.pdf> (revised Dec. 2013).

³ The summary provided herein is not intended to constitute legal advice, but only to provide a general overview of the application of the FATCA rules to non-U.S. funds. This article went to press before the release of the FACTA information reporting and final and temporary Treasury Regulations published in the *Federal Register* on March 6, 2014 [T.D. 9657, 9658], and does not reflect the contents thereof.

⁴ An "investment entity" includes:

- An entity that primarily conducts as a business (and on behalf of a customer)
 - (i) trading in money market instruments (checks, bills, certificates of deposit, derivatives, etc.); foreign currency; foreign exchange, interest rate, and index instruments; transferable securities; or commodity futures; (ii) individual or collective portfolio management; or (iii) otherwise investing,

administering or managing funds, money or financial assets on behalf of other persons;

- An entity whose gross income is primarily attributable to investing, reinvesting, or trading in financial assets, and the entity is managed (either directly or through another third party service provider) by a bank, custodian, insurance company, or investment entity described in the previous bullet; or
- An entity that functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets.

⁵ The information pertaining to IGAs in this article reflects the model IGAs (updated Nov. 4, 2013) on the U.S. Treasury Department Web site. The terms of executed IGAs may differ from jurisdiction to jurisdiction.

⁶ See <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>.