

CLIENT MEMORANDUM

IRS Notice on Coordination of FATCA Obligations With U.S. Reporting and Withholding Regimes

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On October 29, 2013, the U.S. Internal Revenue Service released Notice 2013-69, which provides additional guidance on the coordination between the Foreign Account Tax Compliance Act (“FATCA”) and the existing U.S. reporting and withholding regimes, as well as modifications to the final FATCA regulations.¹ The Notice outlines the IRS’ plans to resolve certain outstanding FATCA regulatory issues.

The FATCA Website

The IRS recently launched the website for FATCA registration system (the “Registration Portal”) that will be used by foreign financial institutions (“FFIs”) to register with the IRS and receive Global Intermediary Identification Numbers (“GIINs”) that will, beginning in 2014, allow their counterparties to identify the FFIs as FATCA-compliant, although FFIs will

¹ Please see the Willkie Farr & Gallagher LLP Client Memoranda, “Six-Month Delay of FATCA Deadlines” (July 16, 2013), available [here](#); “Status of FATCA Intergovernmental Agreements” (November 16, 2012), available [here](#); “Internal Revenue Service Revises Timelines For FATCA Implementation In Announcement 2012-42” (November 15, 2012), available [here](#); “IRS Releases Proposed FATCA Regulations” (February 15, 2012), available [here](#); “IRS Releases Timeline For Implementing FATCA, Including Delaying The Deadline Until 2014 For Foreign Financial Institutions’ Compliance With Certain Provisions” (August 4, 2011), available [here](#); and “HIRE Act’s Effects on Investment Funds” (March 25, 2010), available [here](#).

IRS Notice on Coordination of FATCA Obligations With U.S. Reporting and Withholding Regimes

Continued

not be able to register on the website with the IRS before January 2014. The IRS recommends that FFIs complete their registration by April 25, 2014.²

When registration begins, an FFI will generally register as one of the following types of entities:

1. Non-IGA FFI: an FFI that is not in a jurisdiction that has signed an intergovernmental agreement to implement FATCA (“IGA”)³ but will instead comply with the FATCA regulations;
2. Model 1 FFI: an FFI in a jurisdiction covered by a Model 1 IGA;
3. Model 2 FFI: an FFI in a jurisdiction covered by a Model 2 IGA;
4. Deemed-Compliant FFI: certain other limited classes of FFIs; or
5. Limited FFI or Limited Branch: entities that cannot comply with FATCA or otherwise be treated as FATCA compliant due to local law restrictions.⁴

For FATCA purposes, an FFI’s branch will be treated as separate from the FFI itself and may have a different FATCA classification than the FFI.⁵

As part of the FATCA registration process, both Non-IGA FFIs and Model 2 FFIs will be required to enter into an agreement with the IRS that lays out the applicable FATCA obligations (the “FFI Agreement”), including reporting on U.S. accountholders and accountholders that are not compliant with FATCA, and withholding on non-compliant accountholders and non-compliant FFIs.⁶ A Model 1 FFI will not sign an FFI Agreement, but will instead comply with the reporting and withholding requirements described in the Model 1 IGA signed by its home jurisdiction, as implemented by local legislation or regulations.

² See Notice 2013-43, 2013-31 I.R.B. 113.

³ The U.S. Treasury Department maintains a continuously updated list of jurisdictions that have, or are treated as having, an IGA in effect. The list can be found at the following address: <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx> (last visited Nov. 19, 2013).

⁴ An FFI that is also a “sponsoring entity” with respect to one or more FFIs must register twice — once as a sponsoring entity with respect to its sponsored FFIs; and separately as a compliant FFI. The IRS intends to update the FATCA registration user guide to include specific instructions for sponsoring entities.

⁵ For example, an FFI in country X has a branch in country Y. Country X has not signed an IGA with the United States. Country Y has signed a Model 1 IGA with the United States. The FFI will be a “Non-IGA FFI,” but the branch will be a “Model 1 FFI.”

An FFI with one or more branches will provide separate registration information for each branch and will receive a separate GIIN for each branch (provided that the branch is not a Limited Branch).

⁶ The IRS also released a draft FFI Agreement with Notice 2013-69. A Model 2 FFI will comply with the FFI Agreement as amended by the Model 2 IGA signed by its home jurisdiction. Generally, the FFI Agreement incorporates into each relevant section of the FFI Agreement the modifications that apply to a Model 2 FFI under the applicable Model 2 IGA.

IRS Notice on Coordination of FATCA Obligations With U.S. Reporting and Withholding Regimes

Continued

Information Reporting

The IRS intends to issue regulations providing that if an FFI reports a U.S. accountholder (or its account) pursuant to an FFI Agreement or a Model 1 IGA, the FFI will be deemed to have satisfied its information reporting obligations under Chapter 61 of the Internal Revenue Code of 1986, as amended (the "Code"). However, the FFI would still be required to report payments made to the U.S. accountholder to the extent the FFI is required to apply backup withholding to the payment.

Backup Withholding

The IRS regulations will provide that if an FFI has withheld on a payment that would be a "reportable payment" (as defined in Code section 3406(b)(1)) as part of its FATCA withholding obligations under an FFI Agreement, Code section 3406 backup withholding will not apply to that payment. A reportable payment that is not subject to FATCA withholding remains subject to backup withholding, if applicable. Alternatively, an FFI may elect to satisfy its FATCA withholding obligations with respect to accounts held by recalcitrant accountholders (that are known U.S. persons) by performing backup withholding on payments to those holders.

Direct Reporting NFFEs and Sponsored Direct Reporting NFFEs

Notice 2013-69 introduces a new FATCA classification, the "Direct Reporting NFFE." A Direct Reporting NFFE is a Passive NFFE that elects to provide its U.S. owner information directly to the IRS. The Direct Reporting NFFE will do so by reporting its U.S. owners on Form 8966, and registering with the IRS and receiving a GIIN via the Registration Portal. Counterparties of the Direct Reporting NFFE will use the GIIN in order to document the Direct Reporting NFFE. A Direct Reporting NFFE will not be required to sign an FFI Agreement. Further, the IRS and the U.S. Department of the Treasury ("Treasury") intend to allow an entity to sponsor Direct Reporting NFFEs (such an NFFE, a "Sponsored Direct Reporting NFFE"). The sponsoring entity will report the Sponsored Direct Reporting NFFE's U.S. owner information to the IRS on its behalf.⁷

Qualified Intermediaries and Similar Entities

The FATCA regulations will be modified to specify that an NFFE that is a qualified intermediary ("QI"), withholding partnership ("WP") or withholding trusts ("WT") will not be a Passive NFFE. An NFFE that is acting as a QI that receives a payment on behalf of a Passive NFFE will be required (according to its QI agreement, as updated for FATCA) to report the Passive NFFE's U.S. owner information to the IRS. An NFFE that is a WP or WT will be required (pursuant to its WP or WT agreement, as updated for FATCA) to report its U.S. owner information to the IRS.

⁷ Generally under the FATCA regulations, a non-financial foreign entity ("NFFE") that does not have an active trade or business (and is not subject to any other exception), referred to as a "Passive NFFE," must generally provide information about its U.S. owners that directly or indirectly own a 10% or greater interest in the FFI ("U.S. owner information") to the withholding agent in order to be exempt from FATCA withholding. Note that, under the IGAs, the threshold ownership for reporting U.S. owners may be greater than 10%.

IRS Notice on Coordination of FATCA Obligations With U.S. Reporting and Withholding Regimes

Continued

Foreign Insurance Companies Electing U.S. Status

The IRS and Treasury intend to modify the FATCA regulations to specify that foreign insurance companies that have made an election under Code section 953(d) (to be subject to U.S. income tax as if they were U.S. insurance companies) will be treated as U.S. persons for purposes of the FATCA regulations.

Amounts Paid to Nonparticipating FFIs

FFIs are generally required to report certain foreign reportable amounts paid to non-compliant FFIs, regardless of whether the payment is made with respect to a financial account. Notice 2013-69 indicates that this rule will be relaxed for 2015 and 2016 so that FFIs will only have to report foreign reportable amounts paid with respect to a non-compliant FFI's financial account. The FFI also has the option of reporting all amounts paid to an account (e.g., not just foreign reportable amounts) for administrative ease. In addition, if local privacy law prevents the FFI from reporting on a specific account holder (and the FFI is unable to obtain a waiver of this privacy protection from the account holder), the FFI may report the aggregate number of accounts held by non-compliant FFIs and the aggregate amount of foreign reportable payments made to those accounts.

If you have any questions regarding this memorandum, please contact Joseph A. Riley (212 728-8715, jriley@willkie.com) or the Willkie attorney with whom you regularly work.

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