

January 24, 2013

## Treasury issues final FATCA Regulations

**Summary.** On January 17, 2013, the Treasury released the long-awaited final regulations under the Foreign Account Tax Compliance Act (“FATCA”). These regulations provide guidance on a range of issues under FATCA, most notably clarifying and confirming the specific obligations of foreign financial institutions (“FFIs”). This memorandum describes certain significant changes from the proposed regulations that are particularly relevant to investment funds.

**In General.** FATCA imposes a 30% withholding tax on payments to foreign entities (including FFIs and non-financial foreign entities (“NFFEs”)) unless the foreign entity qualifies for an exemption, of (i) U.S. source interest and dividends, (ii) gross proceeds from the disposition of assets that generate U.S. source interest or dividends (for example, stock and debt of U.S. issuers), and (iii) certain other amounts.

In order to avoid FATCA withholding, foreign-organized investment funds (which will be FFIs) will generally be required to enter into or otherwise comply with an agreement with the IRS to perform due diligence on their “account holders” (i.e. fund investors), to report on certain account holders (generally U.S. persons) to the IRS and to withhold as required by FATCA.

### **Significant Changes.**

**Procedural Matters:** The IRS intends to create an online portal that FFIs will use to enter into an FFI agreement or in certain circumstances, if required, to register.

- Registration is expected to be entirely paperless.
- The IRS also expects to use this portal for certain other required communications with the IRS (e.g., annual FFI certifications).
- The portal will be accessible to financial institutions no later than July 15, 2013.

**IRS Circular 230 disclosure:** To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter that is contained in this document.

- The final regulations extend from June 30 to October 25, 2013 the last date on which a FFI must have entered into a FFI agreement or otherwise registered with the IRS to avoid FATCA withholding when it begins. A FFI that has entered into the agreement or registered by that date will be recognized by the IRS as a participating or deemed-compliant FFI before January 1, 2014.

**Effective Dates:** Under the final regulations, consistent with the proposed regulations, FATCA withholding will begin:

- On payments of U.S. source interest and dividends (and other fixed, determinable, annual and periodical income) made on or after January 1, 2014.
  - The final regulations revise transition rules that may delay withholding on certain payments.
- On gross proceeds on the sale or disposition of assets of a type that could generate U.S. source interest or dividends on or after January 1, 2017.
- The first FATCA information reporting deadlines (for 2013 and 2014 calendar years) are now March 31, 2015.

**Grandfathered Obligations:** “Grandfathering” has been extended to obligations (including debt, and in many cases, credit facilities, revolvers and swaps) outstanding on January 1, 2014 (formerly January 1, 2013).

- Payments on grandfathered obligations will not be subject to FATCA withholding unless the obligation is significantly modified after January 1, 2014.
- The ISDA master agreement is not an obligation. However, derivative transactions under such an agreement evidenced by a confirmation are obligations, and so may be grandfathered.

**Definition of an FFI:** Under the final regulations, FFIs now generally include:

- Fund managers and investment advisors, not just the funds they manage or advise.
- Holding companies formed by investment funds (e.g. to hold portfolio investments).

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**“Sponsored FFIs”:** The final regulations include a new category of “sponsored FFI.”

- This permits a fund manager or trustee to enroll as the “sponsor” for a group of FFIs (such as fund vehicles) that it manages and perform the due diligence and reporting for all of those FFIs.
- A sponsored FFI will not be required to enter into its own FFI agreement.

**Inter-Governmental Agreements:** In some jurisdictions, it is impossible simultaneously to comply with FATCA and with local law.

- The IRS has previously announced its intent to resolve these issues through inter-governmental agreements (“IGAs”) with foreign governments.<sup>1</sup>
- The final regulations clarify how the IGAs will interact with the rules applicable under the code and regulations.

**Further Guidance Expected:** The Treasury expects to release further FATCA guidance, including:

- A revenue procedure providing specific terms of the FFI agreement that FFIs will generally have to enter into to avoid FATCA withholding. The final regulations incorporate the substantive requirements of this agreement.
- New W-8 Forms (W-8 IMY, W-8 ECI, W-8 EXP, W-8 BEN and W-8 BEN-E).
  - The Treasury has already issued draft W-8 forms that include FATCA information.
  - Funds may need to request new W-8 forms from investors once final versions have been released.

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<sup>1</sup> To date, IGAs between the United States and the United Kingdom, Mexico, Denmark, Ireland, Switzerland, Spain and Norway have been signed or initialed.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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