

Foreign Account Tax Compliance Act (FATCA) Online Registration is Up and Running. Key Deadline Approaches for Foreign Funds

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The four-year-old Frankenstein's monster is ready to roam.

Most non-U.S. hedge funds and other financial institutions **must register with the IRS by April 25** of this year if they wish to avoid onerous withholding taxes with respect to their U.S. investments beginning July 1.

Last month, after many delays (see, e.g., Drinker Biddle Client Alert, [Further Postponement of FATCA Effective Dates Announced](#), 07/12/2013), the Internal Revenue Service (IRS) finally opened its website for the registration of foreign financial institutions (FFIs) for compliance with the requirements of the Foreign Account Tax Compliance Act (FATCA). Foreign hedge funds, investment funds, banks and other FFIs generally need to register and obtain from the IRS a Global Intermediary Identification Number (GIIN) or else become subject to withholding taxes on their U.S.-source investment income.

Enacted as a part of the Hiring Incentives to Restore Employment Act of 2010, FATCA is designed to combat the use of overseas accounts by U.S. taxpayers to evade U.S. tax. To encourage foreign financial institutions to assist the IRS in its quest, FATCA gives them a choice: they can agree to provide information about their U.S. account holders or they can suffer draconian withholding taxes with respect to their U.S. loans and investments.

To comply with FATCA reporting obligations, an FFI generally can either enter into an agreement with the IRS in accordance with FATCA-specified procedures or instead choose to provide the required information in accordance with an Intergovernmental Agreement (an IGA) that has been negotiated between the FFI's home country and the United States. A number of such IGAs have been signed and publicly released (the current list includes Bermuda, Canada, the Cayman Islands, Costa Rica, France, Germany, Guernsey, Hungary, Ireland, Isle of Man, Italy, Japan, Malta, Mauritius, Mexico, the Netherlands, Norway, Slovenia, Spain, Switzerland and the United Kingdom). More are in the works.

The definition of financial institution under FATCA is very broad and includes banks and virtually all forms of investment entities. The definition also includes many investment management companies, investment advisors, and fund administrators. Many other affiliated entities are also swept into the

definition of an FFI, because the statute generally treats all corporations in an affiliated group as part of a single FFI if any member of the group is a financial institution.

The requirements for compliance with FATCA so as to avoid becoming subject to withholding depend on whether the FFI is resident in a jurisdiction that has a “Model 1” IGA, “Model 2” IGA, or no IGA:

- Under a Model 1 IGA, FFIs fulfill their reporting obligations by providing information about U.S. account holders to their home jurisdiction’s taxing authorities. The home jurisdiction then reports this information to the IRS.
- Under a Model 2 IGA, an FFI’s home jurisdiction establishes procedures in cooperation with the IRS that provide for direct reporting to the IRS by the FFI.
- If an FFI is resident in a jurisdiction without an IGA (or chooses not to use an IGA), the FFI must report account information about U.S. account holders directly to the IRS under procedures established under the FATCA regulations. This includes entering into a participating FFI agreement with the IRS. FFIs that register with the IRS under a Model 2 IGA or a FFI agreement are considered Participating FFIs.

The FATCA regulations set forth due diligence procedures and documentation requirements for FFIs to establish whether account holders are or are not U.S. persons. If an FFI is unable to obtain required information or documentation from an account holder, then it generally will need to treat the account holder as a recalcitrant account holder subject to withholding. If the FFI is relying on a Model 1 IGA, however, the documentation requirements and procedures that the FFI must follow with respect to its account holders will depend on that country’s rules rather than the FATCA regulations.

All FFIs, regardless of their home jurisdiction, must generally register with the IRS to obtain a GIIN, even if they do not have to enter into a FFI agreement under the FATCA procedures. (There are some limited exceptions under IGAs for certain kinds of exempt entities, such as foreign central banks of issue and international organizations.) A GIIN is obtained through the IRS website. The GIIN provides a unique identifier to each institution and indicates whether the institution is a lead or independent financial institution, a member of an expanded affiliate group, or a branch. It also indicates the country code of the financial institution. To obtain a GIIN, a FFI must go to the IRS website, select an access code and be assigned a FATCA ID. These should be recorded by the FFI for future use of the website. A FFI must then complete Form 8957 online and then electronically sign and submit its registration.

Registration must be completed by April 25, 2014, to ensure that the FFI can avoid being subject to withholding taxes beginning July 1.

New Forms W-8: The Forms W-8 that foreign entities must supply to U.S. issuers to document that no withholding tax is applicable on payments of dividends and interest by the U.S. issuers to the foreign entities are being updated to include the information necessary to avoid FATCA withholding, including, among other things, the GIIN of the foreign entity. U.S. mutual funds and other investment funds that have non-U.S. investors will generally need to obtain these updated Forms W-8 from any of those investors that are entities.

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