

## IRS Delays Implementation of FATCA.

On July 14, 2011, the U.S. Internal Revenue Service (“**IRS**”) issued Notice 2011-53 (the “**Notice**”), delaying the implementation of foreign account tax compliance requirements enacted as part of the Hiring Incentives to Restore Employment Act of 2010 (“**FATCA**”). Among other changes, the Notice:

- > delays the application of FATCA withholding;
- > sets out a new timeline for phased-in compliance by participating FFIs; and
- > clarifies the definition of “grandfathered obligations”.

Click [here](#) to view a timeline of the new dates applicable under the Notice.

### Delayed Effective Date for FATCA Withholding

FATCA imposes a 30% withholding tax on certain payments to foreign financial institutions (“**FFIs**”) unless the FFI enters into an agreement (an “**FFI Agreement**”) with the IRS to report information regarding its U.S. “account” holders. FATCA withholding tax applies to:

- > any “**withholdable payment**”, being any payment of U.S. source interest, dividends and certain other income, as well as any gross proceeds from the sale of assets that give rise to U.S. source dividends or interest; and
- > any “**passthru payment**”, being any withholdable payment or a portion of any other payment (even if not U.S. source) made by a participating FFI to a non-participating FFI or “recalcitrant account holder”. (See our April 2011 [U.S. Tax Alert](#) for an expanded discussion of the definition of passthru payments).

FATCA withholding was to begin on January 1, 2013. In response to comments regarding the practical difficulties in implementing FATCA, the IRS has delayed and staggered the dates from which withholding and information reporting will be required.

Under the Notice, no payments will be subject to FATCA withholding until January 1, 2014. From January 1, 2014, FATCA withholding will be required on withholdable payments that are U.S. source payments of interest, dividends and

### Contents

Delayed Effective Date for FATCA Withholding.....	1
Phased-in Compliance .....	2
Clarification of the Scope of Grandfathered Obligations.....	2
Timing of Further Guidance .....	3

certain other income. From January 1, 2015, however, FATCA withholding will be required on all withholdable payments, including principal repayments and other gross proceeds. Further, participating FFIs will not be required to withhold on passthru payments, other than payments of U.S. source interest, dividends and certain other income, before January 1, 2015.

### **Phased-in Compliance**

The IRS will begin accepting FFI applications no later than January 1, 2013. An FFI Agreement entered into by June 30, 2013 will have an effective date of July 1, 2013. An FFI Agreement entered into after June 30, 2013 will be effective when it is entered into. However, the Notice indicates that it may take time to identify participating FFIs, and therefore an FFI that enters into an FFI Agreement after June 30, 2013 may not be identified by the IRS as a participating FFI in time to prevent withholding beginning on January 1, 2014.

Under the Notice a participating FFI will be required to complete the pre-existing private banking account due diligence requirements set out in Notice 2011-34 within one year of the effective date of its FFI Agreement (or in the case of a private banking account with a balance or value of less than \$500,000, the later of the first anniversary of the effective date of its FFI Agreement and December 31, 2014). For all other pre-existing accounts (non-private banking accounts), a participating FFI will be required to comply with the applicable due diligence requirements within two years of the effective date of its FFI Agreement.

By the effective date of its FFI Agreement a participating FFI must have account identification procedures in place for new accounts opened on or after the effective date of its FFI Agreement.

Accounts identified as (i) U.S. accounts, either under the pre-existing due diligence procedures or the new-account identification procedures, and for which the FFI receives an IRS Form W-9 or (ii) recalcitrant accounts on or before June 30, 2014, must be reported to the IRS by September 30, 2014. However, FFIs may elect to be subject to less onerous reporting requirements in respect of identified U.S. accounts in 2014.

### **Clarification of the Scope of Grandfathered Obligations**

The Notice clarifies that no FATCA withholding will apply to passthru payments on obligations (not including any instrument treated as equity or that lacks a definitive expiration or term) issued by non-U.S. issuers on or prior to March 18, 2012.

## Timing of Further Guidance

The IRS anticipates issuing proposed regulations providing guidance on FATCA by December 31, 2011 and anticipates publishing final regulations in the summer of 2012. Along with these regulations, the IRS expects to issue draft versions followed by final versions of the FFI Agreement and reporting forms for use by withholding agents and participating FFIs.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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