

U.S. Government Issues FATCA Proposed Guidance & Approach to Automatic Exchange of FATCA Information

February 9, 2012

By Sherwin P. Simmons II, Drew LaGrande, Barbara Ruiz-Gonzalez, Jonathan Gopman, and Leanne Reagan

On February 8, 2012, the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") issued the long-awaited Proposed Regulations with respect to the Foreign Account Tax Compliance Act ("FATCA"). FATCA is part of the Hiring Incentives to Restore Employment (HIRE) Act enacted in March 2010. These extremely comprehensive Proposed Regulations implement the information reporting and withholding tax provisions of FATCA.

The areas where the IRS has revised the previous guidance on FATCA include: expanding the scope of grandfathered obligations; extending the transition period for phasing in FATCA; including additional categories of deemed compliant foreign financial institutions; and modifying due diligence requirements.

The Proposed Regulations lay out a step-by-step process for U.S. account identification, information reporting, and withholding requirements for foreign financial institutions (FFIs), other foreign entities, and U.S. withholding agents.

The Proposed Regulations implement FATCA's obligations in stages to minimize burdens and costs consistent with achieving FATCA's overall objectives of reporting. The rules and implementation schedule are also adjusted to allow time for resolving local law limitations to which some FFIs may be subject.

The Proposed Regulations are intended to do the following:

- Reduce the administrative burdens associated with identifying U.S. accounts by calibrating due diligence requirements based on the value and risk profile of the accounts and, in many cases, by permitting FFIs to rely on information they already collect, including information received in compliance with anti-money laundering/"know your customer" rules;
- Expand the categories of FFIs which are deemed to comply with FATCA without the need to enter into an agreement with the IRS in order to focus the application

of FATCA on higher-risk financial institutions that provide services to the global investment community; and

- Phase-in the reporting and withholding obligations of FATCA over an extended transition period in order to provide sufficient lead time for financial institutions to develop necessary systems and maximize the number of financial institutions that will be able to comply with FATCA.

FFIs will be able to register through an online system which will become available by January 1, 2013. FFIs that do not register and enter into an agreement with the IRS will be subject to withholding on certain types of payments relating to U.S. investments.

In conjunction with the proposed regulations on FATCA, the Treasury issued a news release and joint statement indicating that the Treasury had reached an agreement with the governments of France, Germany, Italy, Spain and the United Kingdom for designing a framework to implement the information reporting and withholding provisions by FFIs under FATCA. The Treasury's news release states that the governments of France, Germany, Italy, Spain and the United Kingdom are supportive of the underlying reporting goal of FATCA and the governments expressed their "mutual intent to pursue a government-to-government framework for implementing FATCA - an important step toward addressing legal impediments to financial institutions' ability to comply with the regulations."

The joint statement offers a framework for information sharing pursuant to existing bilateral income tax treaties and allows FFIs to report the necessary information to their respective governments rather than to the IRS. The joint statement does not contemplate an exemption from FATCA for any specific jurisdiction.

The U.S., France, Germany, Italy, Spain and the United Kingdom agree that an intergovernmental approach to FATCA implementation would address compliance, practical implementation, lowering compliance costs and achievement of the reporting objective of FATCA.

In light of these considerations, the U.S., France, Germany, Italy, Spain and the United Kingdom have agreed to explore a common approach to FATCA implementation through domestic reporting and reciprocal automatic exchange based on existing bilateral tax treaties.

Under the proposed framework currently being considered for the intergovernmental

approach, the U.S. and a partner country (the "FATCA partner") would enter into an agreement under which, subject to certain terms and conditions, the FATCA partner would agree to: (i) pursue the necessary implementing legislation to require FFIs in its jurisdiction to collect and report to the authorities of the FATCA partner any required information; (ii) enable FFIs established in the FATCA partner, unless otherwise exempt under FATCA, to apply the necessary diligence to identify U.S. accounts; and (iii) transfer to the U.S., on an automatic basis, the information reported by the FFIs.

In exchange, the U.S. would agree to: (i) eliminate the obligation of each FFI established in the FATCA partner to enter into a separate comprehensive FFI agreement directly with the IRS; (ii) allow FFIs established in the FATCA partner to comply with their reporting obligations under FATCA by reporting information to the FATCA partner rather than reporting it directly to the IRS; (iii) eliminate U.S. withholding under FATCA on payments to FFIs established in the FATCA partner; (iv) identify in the agreement specific categories of FFIs established in the FATCA partner that would be deemed compliant or presenting a low risk of tax evasion; and (v) commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner.

Lastly, as a result of the agreement with the FATCA partner described above, FFIs established in the FATCA partner would not be required to: (i) terminate the account of a recalcitrant account holder; (ii) impose pass-through payment withholding on payments to recalcitrant account holders; and (iii) impose pass-through payment withholding on payments to other FFIs organized in the FATCA partner or in another jurisdiction with which the United States has a FATCA implementation agreement.

Under the intergovernmental approach, the U.S., France, Germany, Italy, Spain and the United Kingdom would commit to working with other potential FATCA partners, the OECD, and, where appropriate, the EU, adapting FATCA into a common model for automatic exchange of information, including the development of reporting and due diligence standards.

In an effort to provide taxpayers with unreported foreign assets the opportunity to comply, the IRS has re-opened the Offshore Voluntary Disclosure Program (OVDP). The OVDP provides a soft landing spot for U.S. citizens and resident account holders of FFIs moving towards FATCA compliance. The OVDP provides a more economical and more convenient resolution for taxpayers to report undisclosed financial accounts than an actual IRS examination (see our updates on the implementation of FATCA and the

release of FATCA guidance [here](#) and [here](#)). With FATCA rapidly approaching, information pertaining to taxpayers will soon become available to the IRS.

The IRS will be providing additional details and Frequently Asked Questions in the near future with respect to the OVDP along with specific program details.

We will continue to provide updates with respect to developments with the OVDP, and FATCA. If you have foreign financial assets, you may contact our FATCA team to discuss your particular facts and circumstances.

This Akerman Practice Update is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.