

FATCA's impact on real estate funds

By Philip Hirschfeld

Managers of real estate funds investing in the U.S. need to be aware of the Foreign Account Tax Compliance Act (FATCA). FATCA will impose a new 30% U.S. withholding tax on payments made to a Foreign Financial Institution (FFI) from 1 January 2014 unless the FFI registers with the IRS to participate in the FATCA programme or finds an exemption.

While real estate funds may view themselves differently from funds that invest in stocks/securities, real estate investment funds may be treated as FFIs and need to comply with FATCA to avoid being subject to this new withholding tax.

If the fund holds real estate directly, it should not be treated as an FFI because real estate is not treated as a financial asset and does not meet the definition of a financial institution (even if professionally managed). However, if the fund holds the property indirectly through a subsidiary corporation or partnership, as is commonly done, or invests in mortgages, then the fund would likely be treated as an FFI.

To avoid FATCA withholding, the fund may have to enter into an agreement with the IRS by which they agree to do due diligence to determine their U.S. investors, report those investors' identities to the IRS and possibly withhold tax on certain investors. If the fund is located in a country that has signed an Intergovernmental Agreement with the IRS, the IGA governs and the rules are somewhat more relaxed.

However, the bottom line is that action is needed in order to comply and managers have to assess the impact of FATCA on their organisation.



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The Ruchelman Law Firm provides a wide range of tax planning and legal services for foreign companies operating in the U.S., foreign financial institutions operating in the U.S., and U.S. companies and financial institutions operating abroad. Their core practice is tax planning for cross-border transactions.

Philip Hirschfeld's areas of expertise are offshore voluntary compliance, controversy matters and cross-border tax planning. He is a subcommittee chair of the ABA Committee on the U.S. Activities of Foreigners and is a lecturer on foreign investment in U.S. real estate. He is an avid wildlife photographer, global traveller and computer geek.

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