

MEMORANDUM

To: Clients & Friends
From: Armin Gray
Re: Notice 2013-43 – Revised Timeline and Other Guidance Regarding the Implementation of
The Foreign Account Tax Compliance Act (“F.A.T.C.A.”)
Date: July 18, 2013

On July 12, 2013, the Internal Revenue Service (“I.R.S.”) released Notice 2013-43 (the “Notice”), which revises the timelines included in the final F.A.T.C.A. regulations for withholding agents and foreign financial institutions (“F.F.I.s”) to begin their due diligence, withholding, and information reporting requirements. Specifically, the Notice provides for the following:

- A six-month extension for when withholding will begin (*i.e.*, payments after June 30, 2014).
- A six-month extension for grandfathered obligations.
- A six-month extension for implementing new account opening procedures and certain due diligence obligations.
- A six-month extension for expiring withholding certificates. Thus, withholding certificates and documentary evidence that would otherwise expire on December 31, 2013, will expire instead on June 30, 2014.
- A six-month extension for qualified intermediaries (“Q.I.s”), withholding foreign partnerships (“W.P.s”), or withholding foreign trusts (“W.T.s”) agreements that would otherwise expire on December 31, 2013.
- A six-month extension for F.F.I.s to register through the F.A.T.C.A. registration portal, which is expected to open on August 19, 2013. However, the I.R.S. will not issue any global intermediary

identification numbers (“G.I.I.N.s”) in 2013. Instead the I.R.S. expects to begin issuing G.I.I.N.s in 2014. The I.R.S. intends to electronically post the first list of registered F.F.I.s (“I.R.S. F.F.I. List”) by June 2, 2014, and will update the list on a monthly basis thereafter. To ensure inclusion in the June 2014 I.R.S. F.F.I. List, F.F.I.s need to finalize their registration by April 25, 2014.

- A one-year relief of the requirement to file information reports with respect to a participating F.F.I.’s U.S. accounts. Thus, information reports will be required to be filed on March 31, 2015, but only for the 2014 calendar year.

It should be noted that the Notice does not affect the timing provided in the final regulations for withholding on gross proceeds, passthru payments, and payments of U.S. source “F.D.A.P.” income with respect to offshore obligations by persons not acting in an intermediary capacity.

Background

F.A.T.C.A. was passed on March 18, 2010 as part of the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847) with the intent of preventing cross-border tax evasion by forcing F.F.I.s to disclose information on their United States account holders. To create an incentive for F.F.I.s to do so, F.A.T.C.A. added “chapter 4” (*i.e.*, §1471 through §1474) to the Internal Revenue Code, which requires withholding agents to withhold 30 percent of certain payments that have a jurisdictional nexus to the United States. If a foreign entity is classified as an F.F.I. rather than a non-financial foreign entity (“N.F.F.E.”), in order to avoid withholding, the F.F.I. must enter into an agreement (“F.F.I. agreement”) with the I.R.S. (those who enter into an agreement are referred to as a “participating F.F.I.” or “P.F.F.I.”). A participating F.F.I. agrees to, among other things, undertake (i) a due diligence operation to identify its U.S. accounts, (ii) certain withholding obligations on payments it makes to those who are not in compliance with F.A.T.C.A., and (iii) certain other documentation and information reporting requirements.

After the release of three prior notices,¹ on February 15, 2012, the Treasury and the I.R.S. published proposed regulations. Under these proposed regulations, the implementation of F.A.T.C.A. was supposed to begin on January 1, 2013. On October 25, 2012, the Treasury and the I.R.S. released a subsequent announcement, which delayed the implementation of F.A.T.C.A. until 2014.² On January 17, 2013, the Treasury and the I.R.S. published final regulations on F.A.T.C.A. The final regulations provided for a phased implementation of the requirements of F.A.T.C.A., beginning on January 1, 2014, and continuing through 2017. In particular, the final regulations provided that:

- Withholding agents were required to begin withholding on withholdable payments made after December 31, 2013;
- Obligations outstanding on January 1, 2014, would be grandfathered and thus not subject to withholding.
- Due diligence for documenting payees and account holders by U.S. withholding agents and participating F.F.I.s was to be phased in during 2014 and 2015;
- Annual information reporting by participating F.F.I.s was to be phased in starting in 2015 (with respect to information related to the 2013 and 2014 calendar years), with reporting of the full scope of F.A.T.C.A. information required beginning in 2017.

¹ See, *e.g.*, Notice 2010-60 (“Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code”), Notice 2011-34 (“Supplemental Notice to Notice 2010-60, Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code”), and Notice 2011-53 (“Chapter 4 Implementation Notice”)

² Announcement 2012-42 (“Timelines for Due Diligence and Other Requirements Under F.A.T.C.A.”).

In addition to the F.A.T.C.A. regulations, the Treasury and the I.R.S. have been working on I.G.A.s, under which the United States and each F.A.T.C.A. partner country may agree to certain terms in implementing F.A.T.C.A. On July 26, 2012, the Treasury released a model (“Model 1”) for bilateral agreements with other jurisdictions (in both reciprocal and nonreciprocal versions) under which F.F.I.s (“reporting Model 1 F.F.I.s”) would satisfy their F.A.T.C.A. requirements by reporting information on U.S. accounts to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States. On November 14, 2012, the Treasury released a second model agreement (“Model 2”), under which F.F.I.s (“reporting Model 2 F.F.I.s”) would report specified information directly to the I.R.S. in a manner consistent with the final regulations, supplemented by government-to-government exchange of information on request. The model I.G.A.s have been periodically updated since their initial release, including an update as recently as May of 2013. The Treasury has also concluded several I.G.A.s that are listed in the chart entitled F.A.T.C.A. Bilateral Agreements below.

In the preamble to the final regulations, the Treasury and the I.R.S. also announced their intent to create an online F.A.T.C.A. registration portal, which would serve as the primary way for F.F.I.s to interact with the I.R.S. to complete the required registration, agreements, and certifications. The preamble stated that the F.A.T.C.A registration website would be open no later than July 15, 2013. After approval of its registration, the F.F.I. would be assigned a G.I.I.N., which would be used both for reporting purposes and to identify the F.F.I.’s status to withholding agents. The preamble provided that the I.R.S. would electronically post the first list of registered F.F.I.s on December 2, 2013, and would update the list on a monthly basis. To ensure inclusion on the December 2013 I.R.S. F.F.I. List, F.F.I.s would have had to register by October 25, 2013.

The Notice

The Notice revises the timeline for F.A.T.C.A. implantation. More specifically:

- Withholding. Withholding agents generally will be required to begin withholding on withholdable payments made after June 30, 2014, to payees that are F.F.I.s or N.F.F.E.s with respect to obligations that are not grandfathered obligations, unless the payments can be reliably associated with documentation on which the withholding agent can rely to treat the payments as exempt from withholding. However, the Notice does not affect the timing provided in the final regulations for withholding on gross proceeds, passthru payments, and payments of U.S. source F.D.A.P. with respect to offshore obligations by persons not acting in an intermediary capacity.
- Grandfathered Obligations. The definition of grandfathered obligation will be revised to include obligations outstanding on July 1, 2014 (and associated collateral). Thus, no withholding will be required on those instruments even if payments are made after July 1, 2014 (so long as there is no significant modification to the terms of the instrument).
- Account Opening Procedures, Preexisting Accounts and Obligations, and Certain Due Diligence Obligations. Withholding agents generally will be required to implement new account opening procedures by July 1, 2014, or, in the case of a F.F.I., by the later of July 1, 2014 or the effective date of its F.F.I. agreement. Thus the term preexisting obligation and preexisting account will be amended accordingly. Additionally, if a participating F.F.I. registers and receives a G.I.I.N. from the I.R.S. on or before June 30, 2014, the F.F.I. Agreement will have an effective date of June 30, 2014, effectively resulting in a six-month postponement of the deadlines for completing due diligence on preexisting obligations. For withholding agents other than participating F.F.I.s, the deadlines for completing due diligence on preexisting obligations will be postponed by six months (*e.g.*, a withholding agent other than a participating F.F.I. will be required to document payees that are prima facie F.F.I.s by December 31, 2014, instead of by June 30, 2014).
- Information Reporting. The final regulations provide that a participating F.F.I. will be required to file information reports on its U.S. accounts with respect to the 2013 and 2014 calendar years no later than March 31, 2015. The Notice provides that reporting will be required on March 31, 2015, but only with respect to the 2014 calendar year (for U.S. accounts identified by December 31, 2014).

- Validity of Withholding Certificates. For purposes of chapter 3 withholding, withholding certificates and documentary evidence generally expire on the last day of the third calendar year following the year in which the withholding certificate is signed or the documentary evidence is provided to the withholding agent. Withholding certificates and documentary evidence that would otherwise expire on December 31, 2013, will expire instead on June 30, 2014, unless a change in circumstances occurs that would otherwise render the withholding certificate or documentary evidence incorrect or unreliable.
- Automatic Extension of Expiring Q.I., W.P., and W.T. Agreements. All Q.I., W.P., or W.T. agreements that would otherwise expire on December 31, 2013, will be automatically extended until June 30, 2014.
- Intergovernmental Agreements. The Notice provides that the I.G.A.s will, in general, conform to the Treasury regulations either through Article 4, paragraph 6 or, if not in existence, through the “most favored nation” clause. Thus relief provided through the Notice will, in general, apply to I.G.A.s already executed and future I.G.A.s.
- Timeline for Registration. The Notice provides that the F.A.T.C.A. registration website (the “Portal”) is projected to be accessible to financial institutions on August 19, 2013. Other key dates for registration, however, will be extended by six months. Up until the end of this year, each financial institution may begin the process of registering through the Portal with the ability to finalize registration expected to occur in January 2014. Consistent with the 6-month extension, the Notice provides that the I.R.S. will not issue any G.I.I.N.s in 2013. Instead the I.R.S. expects to begin issuing G.I.I.N.s in 2014. According to the Notice, the I.R.S. will electronically post the first I.R.S. F.F.I. List by June 2, 2014, and will update the list on a monthly basis thereafter. To ensure inclusion in the June 2014 I.R.S. F.F.I. List, F.F.I.s need to finalize their registration by April 25, 2014. For payments made prior to January 1, 2015, the Notice provides that while reporting Model 1 F.F.I.s will be able to register and obtain G.I.I.N.s beginning on January 1, 2014, they will have additional time beyond July 1, 2014 in order to ensure that they are included on the I.R.S. F.F.I. list before January 1, 2015.

Conclusion

The Notice provides another extension of time for the implementation of F.A.T.C.A., which is indicative of its overall complexity and the difficulty of its implementation. Although it is possible the Treasury and the I.R.S. may continue to extend F.A.T.C.A. implementation timelines, based on where the process began and how far the process has come, the possibility is likely remote, as the end appears to be nearing. Thus, those who continue to procrastinate with respect to F.A.T.C.A. would be well advised not to do so, as sympathy for non-compliance will not likely exist in light of the numerous extensions that the I.R.S. and the Treasury have thus far provided with respect to F.A.T.C.A. implementation.

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Contacts

If you have any questions about this alert, you may contact the principal of our law firm, Stanley C. Ruchelman, or the author of this client alert, Armin Gray, or Philip Hirschfeld, whose practice includes international tax matters such as F.A.T.C.A.

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Circular 230

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<u>Chart</u>		
<u>Timeline for Implementing F.A.T.C.A., as revised by Notice 2013-43</u>		
Type	Old Timeline	New Timeline
Withholding	Payments made after December 31, 2014	Payments made after June 30, 2014
Gross Proceeds Withholding	No earlier than 2017	No change
Foreign Passthru Payments	No earlier than 2017	No change
Grandfathered Obligations	Obligations outstanding on January 1, 2014	Obligations outstanding on July 1, 2014
New Account Opening Procedures	By January 1, 2014 or, in the case of a participating F.F.I., by the later of January 1, 2014 or the effective date of its F.F.I. Agreement.	By July 1, 2014, or, in the case of a participating F.F.I., by the later of July 1, 2014 or the effective date of its F.F.I. Agreement.
Expiring Withholding Certificates	Expires on December 31, 2013	Expires on June 30, 2014
Q.I., W.P., or W.T. Agreements	Expires on December 31, 2013	Expires on June 30, 2014
F.A.T.C.A. Registration Portal	Expected to open July 15, 2013	Expected to open August 19, 2013
Initial Deadline to Register to be on First I.R.S. F.F.I. List	October 25, 2013	April 25, 2014
First I.R.S. F.F.I. List	December 2, 2013	June 2, 2014
Information Report on U.S. Accounts by Participating F.F.I.	March 31, 2015 for both 2013 and 2014 calendar years	March 31, 2015, for only the 2014 calendar year

<u>Chart</u>	
<u>F.A.T.C.A. Bilateral Agreements</u>	
Date	Country
September 12, 2012	United Kingdom
November 19, 2012	Denmark
November 19, 2012	Mexico
January 23, 2013	Ireland
February 14, 2013	Switzerland
April 15, 2013	Norway
May 14, 2013	Spain
May 31, 2013	Germany