

MEMORANDUM

To: Clients & Friends of the Firm
From: Philip Hirschfeld
Re: Foreign Account Tax Compliance Act (“F.A.T.C.A.”) Update:
Electronic Registration Portal Opens
Date: August 21, 2013

Foreign Financial Institutions (“F.F.I.’s”)¹ may register with the I.R.S. to avoid being withheld upon under F.A.T.C.A.,² which withholding is scheduled to begin on July 1, 2014. On August 19, the I.R.S. opened its long awaited electronic F.A.T.C.A. Registration Website (“Website”), which will 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. An F.F.I. that registers on the Website (“registered F.F.I.”) will, upon approval, receive a Global Intermediary Identification Number (“G.I.I.N.”), which will be used both for reporting purposes and to identify the F.F.I.’s status to withholding agents so as to eliminate potential imposition of withholding taxes under F.A.T.C.A. A registered F.F.I. will be identified on an I.R.S. F.F.I. List that will be posted electronically by June 2, 2014, and will be updated monthly thereafter at www.irs.gov/fatca. Entry on this list is important since U.S. withholding agents will not be able to eliminate withholding unless they can corroborate that the G.I.I.N. is correct on the I.R.S. webpage. To

¹ F.F.I.’s include foreign depository institutions (e.g., banks), investment entities (e.g., hedge funds or private equity funds), custodial institutions (e.g., mutual funds) and certain insurance companies that have cash value products or annuities. Reg. §1.1471-5(d).

² 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).

ensure inclusion in the June 2014 I.R.S. F.F.I. List, an F.F.I. will need to finalize its registration by April 25, 2014. An F.F.I. may also register on paper (*i.e.*, by filing Form 8957), but this is not recommended.³

F.F.I.'s established or operated in a country that has entered into an Inter-Governmental Agreement ("I.G.A.") with the U.S. relating to F.A.T.C.A. compliance are subject to rules that differ from those applicable to other F.F.I.'s, but these F.F.I.'s still have to enter the Website to ensure that no F.A.T.C.A. withholding will occur. For withholdable payments made prior to January 1, 2015, verification of a G.I.I.N. is not required with respect to payees that are reporting Model 1 F.F.I.'s.⁴ As a result, reporting Model 1 F.F.I.'s will have additional time beyond July 1, 2014 to register and obtain a G.I.I.N. in order to ensure that they are included on the I.R.S. F.F.I. List before January 1, 2015.

Background

F.A.T.C.A. was enacted 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

³ Paper registration forms will experience slower processing times than online registration, and registrants will not receive a G.I.I.N. until processing of their paper form is completed.

⁴ As discussed later in this memo, I.G.A.s can be in a Model 1 or Model 2 format. F.F.I.s subject to a Model 2 Agreement will need to register in the Website by April 25, 2014, to prevent withholding on July 1, 2014.

not in compliance with F.A.T.C.A., and (iii) certain other documentation and information reporting requirements.

On January 17, 2013, the Treasury and the I.R.S. published final regulations on F.A.T.C.A.⁵ While F.A.T.C.A. was to take effect in 2013, the final regulations contain a delayed implementation until 2014.⁶ On July 12, 2013, the I.R.S. published an announcement that provides an additional six-month extension for when withholding will begin (*i.e.*, payments after June 30, 2014) and for implementing new account-opening procedures, as well as related requirements to comply with F.A.T.C.A.⁷

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. I.G.A.'s can be one of two types: the Model 1 Agreement (in both reciprocal and nonreciprocal versions), under which F.F.I.'s ("reporting Model 1 F.F.I.'s") in that country would

⁵ T.D. 9610, Jan. 17, 2013. Prior to publication of final regulations, the I.R.S. published proposed regulations and three prior notices detailing procedures to comply with F.A.T.C.A. 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").

⁶ Reg. §1.1471-2(a), which embodied a prior announcement in which this delay was first announced. Announcement 2012-42 ("Timelines for Due Diligence and Other Requirements Under F.A.T.C.A.").

⁷ Notice 2013-43 ("Revised Timeline and Other Guidance Regarding the Implementation of F.A.T.C.A."). See attached chart "Timeline for Implementing F.A.T.C.A., as revised by Notice 2013-43" for further guidance offered in this announcement.

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; and the Model 2 Agreement, 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 Treasury has concluded several I.G.A.'s, which are listed in the chart entitled F.A.T.C.A. Bilateral Agreements at the end of this memorandum.

The F.A.T.C.A. Portal

In the preamble to the final regulations, the Treasury and the I.R.S. announced their intent to create an online F.A.T.C.A. registration portal, which will 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. On August 19, the I.R.S. opened its long awaited Website, which serves as the primary way for F.F.I.'s to interact with the I.R.S. to complete the required registration, agreements, and certifications.

Once the application is submitted and has been approved by the I.R.S., an F.F.I. will be registered and assigned a G.I.I.N., which will be used both for reporting purposes and to identify the F.F.I.'s status to withholding agents, so as to eliminate the potential imposition of withholding taxes under F.A.T.C.A. An F.F.I. that has branches in more than one country will be given a separate G.I.I.N. for each country that they will use to identify any branch in that country. A registered F.F.I. will be identified on an I.R.S. F.F.I. List that will be posted electronically by June 2, 2014 and will be updated monthly thereafter at www.irs.gov/fatca. Entry on this list is important; since U.S. withholding agents will not be able to eliminate withholding unless they can corroborate that the G.I.I.N. is correct on the I.R.S. webpage. Withholding agents may rely on this I.R.S. F.F.I. List to verify an F.F.I.'s G.I.I.N. and not withhold on payments made to the F.F.I. To ensure inclusion in the June 2014 I.R.S. F.F.I. List, an

F.F.I. will need to finalize its registration by April 25, 2014. An F.F.I. may also register on paper (*i.e.*, by filing Form 8957), but this is not recommended.⁸

F.F.I.'s established or operated in a country that has entered into an I.G.A. with the U.S. relating to F.A.T.C.A. compliance are subject to rules that differ from those applicable to other F.F.I.'s., but these F.F.I.'s still have to enter the Website to insure that no F.A.T.C.A. withholding will occur. For withholdable payments made prior to January 1, 2015, verification of a G.I.I.N. is not required with respect to payees that are reporting Model 1 F.F.I.'s. As a result, reporting Model 1 F.F.I.'s will have additional time beyond July 1, 2014 to register and obtain a G.I.I.N. in order to ensure that they are included on the I.R.S. F.F.I. list before January 1, 2015.

The F.A.T.C.A. regulations exempt many categories of F.F.I.'s from the requirement to register and report, including: (i) most governmental entities; (ii) most non-profit organizations; (iii) certain small, local financial institutions; and (iv) certain retirement entities.⁹ Unless otherwise exempt, F.F.I.'s that do not register and agree to report face a 30% withholding tax on certain U.S.-source payments made to them.¹⁰

While the Website is now open, no registration will be able to be finalized in 2013. An F.F.I. will be able to access the Website during this year to first start and then modify its registration information. Any information submitted in 2013 will be stored in the system and will not be regarded as a final submission until the F.F.I. re-enters the Website in 2014 to finalize the registration process. F.F.I.'s are

⁸ Paper registration forms will experience slower processing times than online registration, and registrants will not receive a G.I.I.N. until processing of their paper form is completed.

⁹ Reg. §1.1471-6.

¹⁰ In addition, starting on Jan. 1, 2017, F.F.I.s also face a 30% withholding tax on gross proceeds from the sale of U.S. stock and debt instruments, unless they are in compliance with F.A.T.C.A.

thus able to utilize the remainder of 2013 to become familiar with the process, enter preliminary data and make any necessary changes.

F.I. Classification

The Website will require any Financial Institution (“F.I.”) that may desire to open an account and register to first determine which of the following four categories applies to it:

- 1) **Single F.I.**: A Single F.I. is an F.I. that is not part of an Expanded Affiliated Group (“E.A.G.”) of F.F.I.’s.¹¹ A Single F.I. may also include a foreign branch of a U.S. F.I. that is treated as a Reporting F.I. under a Model 1 I.G.A. or that has in effect a Qualified Intermediary (“Q.I.”) Agreement.

- 2) **Member F.I.**: A Member F.I. is an F.F.I. that is a Member of an E.A.G. that is registering as either a participating F.F.I., a Registered Deemed Compliant F.F.I.¹² or a Limited F.F.I.¹³

¹¹ An E.A.G. is two or more corporations that are connected through stock ownership with a common parent corporation that owns stock directly in at least one of the members of the E.A.G. possessing more than 50% of the total voting power of such corporation and a value of more than 50% of the value of all such stock in the corporation. In general, a partnership or any entity other than a corporation is treated as a member of an E.A.G. if such entity is controlled by members of such group. In general, control means the ownership, directly or indirectly, of more than 50% (by value) of the beneficial interests of the partnership or other entity. See Reg. §1.1471-5(i)(2), Code §954(d)(3).

¹² A Deemed Compliant F.F.I. is an F.F.I. that is treated, pursuant to Code §1471(b)(2) and Reg. §1.1471-5(f), as meeting the requirements of Code §1471(b). A Deemed Compliant F.F.I. is required to register in order to attain such status, which eliminates imposition of the requirements that are imposed on a participating F.F.I. (such as the need to determine if it has U.S. accounts).

However, if that Member is registering as the Lead F.I. for the E.A.G., then such Member's designation is solely as a Lead F.I. A Member F.I. will not be able to register until the Lead F.I. for the E.A.G. first registers since information relating to the Lead F.I. is necessary to complete the registration for such Member F.I.

- 3) Lead F.I.: A Lead F.I. is the Member of an E.A.G. that will initiate the F.A.T.C.A. registration process for each of its Member F.I.s that are registering as either a participating F.F.I., a Registered Deemed Compliant F.F.I., or a Limited F.F.I. A Lead F.I. can be a U.S. F.I., an F.F.I., or a Compliance F.I.¹⁴ An E.A.G. can have more than one Lead F.I.
- 4) Sponsoring Entity: A Sponsoring Entity is an entity that will perform the due diligence and fulfill withholding and reporting obligations of one or more sponsored investment entities or controlled foreign corporations.

¹³ A Limited F.F.I. is a F.F.I. that due to local law restrictions cannot comply with the terms of the F.F.I. Agreement or otherwise be treated as a participating F.F.I. or a Registered Deemed Compliant F.F.I., and that is agreeing to satisfy certain obligations to be treated as a Limited F.F.I.

¹⁴ A Compliance F.I. is a P.F.F.I., Reporting F.I. under a Model 1 or 2 IGA, or U.S. F.I. that agrees to establish and maintain a consolidated compliance program and to perform a consolidated periodic review on behalf of one or more Members F.I.s that are part of its E.A.G. (the compliance group). A Compliance F.I. must meet the requirements to register as a Lead F.I., and as part of that registration, it must identify each Member F.I. that is included in its compliance group. A Compliance F.I. must also have the authority to terminate the F.A.T.C.A. status of each Member F.I. within its compliance group.

F.F.I.'s That May Register

While the need to get a G.I.I.N. is a motivating factor to enter the Website for all F.F.I.'s, F.F.I.'s that register fall into different categories that may have different additional objectives:

- 1) **Model 1 I.G.A. F.F.I.**: F.F.I.'s or branches of an F.F.I. that are treated as a Reporting F.I. under a Model 1 I.G.A. These entities will be able to authorize one or more Points of Contact ("P.O.C.s") that can deal with the I.R.S.,¹⁵ which are allowed for any registered F.F.I. A Model 1 I.G.A. F.F.I. is not required to have a G.I.I.N. before Jan. 1, 2015. However, a Model 1 I.G.A. F.F.I. must register by July 1, 2014, if (i) it has one or more branches (other than a Limited Branch) in countries not covered by a Model 1 I.G.A. or (ii) it is renewing its Q.I., Withholding Foreign Partnership ("W.P.")¹⁶ or Withholding Foreign Trust ("W.T.")¹⁷ status.
- 2) **Model 2 I.G.A. F.F.I.**: F.F.I.'s or branches of an F.F.I. that are treated as a Reporting F.I. under a Model 2 I.G.A. to confirm that it will comply with the terms of the F.F.I. Agreement, as modified by the Model 2 I.G.A.
- 3) **No applicable I.G.A. F.F.I.**: F.F.I.'s or branches of an F.F.I. that are not covered by an I.G.A. need to prevent imposition of F.A.T.C.A. withholding by either: (i) entering into a F.F.I. Agreement with the I.R.S. to be treated as a participating F.F.I., (ii) agreeing to meet the

¹⁵ A P.O.C. is an individual authorized by the F.I. to receive F.A.T.C.A.-related information regarding the F.I., and to take other F.A.T.C.A.-related actions on behalf of the F.I.

¹⁶ A W.P. is a non-U.S. partnership that has entered into a withholding foreign partnership agreement with the I.R.S.

¹⁷ A W.T. is a non-U.S. trust that has entered into a withholding foreign trust agreement with the I.R.S.

requirements of being treated as a Registered Deemed Compliant F.F.I., or (iii) establishing that it is a Limited F.F.I. or Limited Branch.

- 4) Sponsoring Entity: An entity that is seeking to be appointed as a Sponsoring Entity¹⁸ that agrees to undertake the F.A.T.C.A. responsibilities of one or more sponsored F.F.I.'s.
- 5) Q.I., W.P., and W.T.: A F.F.I. that is acting as either a Q.I., W.T. or W.P. to renew its classification as a Q.I., W.P., or W.T.
- 6) U.S. F.I. acting as a Lead F.I.: A U.S. F.I. can elect to be a Lead Member that will act on behalf of its Members that are F.F.I.'s.

Registration Process

The first step is to create an online account, which will include a unique identifier ("F.A.T.C.A. I.D.")¹⁹, which is different than a G.I.I.N., and a password ("Access Code"). Once the account is established, an F.F.I. can enter the Website to register. Information that will be required includes the following:

- Type of F.F.I. (namely, Single F.I., Lead F.I., Member F.I. or Sponsoring Entity);
- Legal name of F.I.;
- Country of residence for local income tax purposes²⁰;
- Mailing address;

¹⁸ Reg. §1.1471-5(f)(1)(i)(F).

¹⁹ The F.A.T.C.A. I.D. is not the same as the G.I.I.N. The I.R.S. warns that the F.A.T.C.A. I.D. should not be given out to third parties since it is the way in which security can be preserved for the F.F.I.'s account and information.

²⁰ If a dual resident, then all relevant countries will need to be disclosed.

- Disclose if it has in effect a Q.I., W.T. or W.P. Agreement;
- Disclose if it has a branch outside its country of tax residence;
- Disclose if F.I. is a tax resident of the U.S. or maintains a branch in the U.S. (other than U.S. territories);
- List each jurisdiction in which it has a branch;
 - Indicate if any branch is a Limited Branch;²¹
 - If a branch is covered by a Q.I. Agreement, indicate if they intend to continue that agreement;
- Provide information about the Responsible Officer (“R.O.”);²²
- Provide information about P.O.C.s;²³

²¹ A Limited Branch is a branch that under the laws of the jurisdiction in which it is located is unable to: (i) report, close, or transfer its U.S. accounts to a U.S. F.I., to a branch of the F.F.I. that will report the U.S. account, to a P.F.F.I., or to a Reporting F.I. under a Model 1 IGA, or (ii) withhold, block, or close an account held by a recalcitrant account holder or nonparticipating F.F.I. or otherwise transfer the account to a U.S. F.I., to a branch of the F.F.I. that will report the account to the I.R.S., to a P.F.F.I., or to a Reporting F.I. under a Model 1 IGA. A Limited Branch also includes a related branch under a Model 1 or 2 IGA that is treated as a nonparticipating F.F.I. branch because it operates in a jurisdiction that prevents such branch from fulfilling the requirements of a P.F.F.I. or deemed-compliant F.F.I.

²² An R.O. is an individual designated by the F.I. in the F.A.T.C.A. Registration System to complete the registration form. An F.I.’s R.O. will be a P.O.C. for the F.I. In addition, the R.O. of an F.I. registering as a Lead F.I. of all or part of an E.A.G. will be a P.O.C. for each Member of that group. Further information on R.O. selection choices is available in the instructions to the Form 8957.

- If a Lead F.I., then complete Part 2 and provide information about Member F.I.'s;
- If a Q.I., W.P., or W.T., complete Part 3 for relevant information.

At the end of the process, an electronic signature must be affixed. By signing, the person is attesting to the following:

“By checking the box, I _____, as RO for the Financial Institution, certify that, to the best of my knowledge, the information submitted above is accurate and complete and agree that the Financial Institution (including its branches, if any) will comply with its F.A.T.C.A. obligations in accordance with the terms and conditions reflected in regulations, intergovernmental agreements, and other administrative guidance to the extent applicable to the Financial Institution based on its status in each jurisdiction in which it operates.”

Conclusion

The long awaited electronic F.A.T.C.A. portal has opened and F.A.T.C.A. compliance is now becoming a reality. While registration cannot be completed until 2014, F.F.I.'s are advised to start the registration process this year so they can make sure the required information is ready for submission next year. To ensure inclusion in the June 2014 I.R.S. F.F.I. List, an F.F.I. will need to finalize its registration by April 25, 2014. F.A.T.C.A. withholding is set to begin on July 1, 2014 and we urge everyone to begin preparation.

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²³ A P.O.C. is an individual authorized by the F.I. to receive F.A.T.C.A.-related information regarding the F.I., and to take other F.A.T.C.A.-related actions on behalf of the F.I. The R.O. can appoint additional P.O.C.s.

Contacts

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

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About Our Law Firm

We provide 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. through branches, and U.S. companies and financial institutions operating abroad. The core practice of the firm includes tax planning for cross-border transactions. This involves corporate tax advice under Subchapter C of the Internal Revenue Code, advice on transfer pricing matters, and representation before the I.R.S. The private client group of the firm also advises clients on matters related to domestic and international estate planning, charitable planned giving, trust and estate administration, and executive compensation. The tax practice is supported by our corporate group, which provides legal representation in mergers, licenses, asset acquisitions, corporate reorganizations, acquisition of real property, and estate and trust matters. The firm advises corporate tax departments on management issues arising under the Sarbanes-Oxley Act. We have offices in New York City and Toronto, Canada. More information can be found at www.ruchelaw.com.

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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	January 1, 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	Opened 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; longer time allowed if I.G.A. applies

<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
June 11, 2013	Japan

Bilateral Agreements have been informally announced by some foreign governments (such as the Cayman Islands), but have not yet been formally signed.