

MP&S TAX ALERT: TREASURY AND IRS RELEASE FINAL RULES ON FOREIGN ACCOUNT REPORTING

The U.S. Department of the Treasury and the IRS have issued comprehensive final regulations implementing Foreign Account Tax Compliance Act (FATCA) information reporting provisions. Under FATCA, foreign financial institutions (FFIs) — including foreign banks, brokers, insurance companies and investment funds — must disclose to the IRS certain information about their U.S.-owned accounts.

The final regulations, set forth in TD 9610, include some notable changes from previous guidance on the requirements. Although the regulations are targeted at FFIs, they illustrate the focus the federal government is putting on foreign accounts and, in turn, the need for individual taxpayers holding such accounts to comply with their own reporting obligations.

Reporting requirements

FATCA requires FFIs to report to the IRS certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. FFIs that fail to provide the required information face significant U.S. withholding taxes, including withholding on proceeds of stock sales.

FATCA also generally requires FFIs to withhold 30% on certain U.S.-connected payments to “recalcitrant” account holders. A recalcitrant account holder is one that fails to provide:

- The information required to determine whether the account is a U.S. account,
- The information required to be reported by the FFI, or
- A waiver of a foreign law that would otherwise prevent reporting by the FFI.

Since the passage of FATCA and the release of proposed implementing regulations in February 2012, many FFIs have expressed concerns about the costs and burdens associated with implementing the law and the legal impediments to compliance in a number of jurisdictions. Some also noted concern regarding the procedural and systems aspects of registering and reporting. The final regulations attempt to address these issues.

Major provisions

Among other topics, the 544 pages of final regulations address:

Intergovernmental agreements. On the same day the proposed regulations were released last year, the Treasury Department and the IRS announced the launch of a cross-border regulatory system in response to FFI concerns that providing the information required by FATCA directly to the IRS would require violations of their local banking secrecy laws. Since then, the Treasury Department has collaborated with foreign governments to develop two alternative model intergovernmental agreements.

FFIs in jurisdictions that have signed Model 1 agreements must report the information about U.S. accounts to their respective governments, which then provide this information to the IRS. FFIs in jurisdictions that have signed Model 2 agreements must register and report information directly to the IRS. The final regulations coordinate the obligations on FFIs under the agreements and the regulations.

Timelines. The final regulations extend the phased-in transition period for the due diligence, reporting and withholding requirements and align the regulatory timelines with the timelines prescribed in the intergovernmental agreements. For example, the due date for the first information report by FFIs to the

IRS on U.S. accounts for the 2013 and 2014 calendar years has been delayed from Sept. 30, 2014, to March 31, 2015.

Investment entities. The regulations clarify the proper treatment of investment entities under FATCA. They allow certain investment entities to be subject to being reported on by FFIs in which they hold accounts, rather than being required to register as FFIs and report to the IRS themselves. The regulations also clarify the types of passive investment entities that must be identified and reported by FFIs.

Passive entities such as trusts that are not professionally managed generally will not be considered FFIs but will be non-foreign financial entities. However, mutual funds, hedge funds and similar investment vehicles established with an investment strategy of investing, reinvesting or trading in financial assets are investment entities that fall within the definition of an FFI.

Insurance companies and accounts. The regulations clarify which foreign insurance companies qualify as FFIs. Generally, an insurance company (or a holding company that is a member of an expanded affiliated group that includes an insurance company) is considered an FFI if it issues or is obligated to make payments under a cash value insurance or annuity contract that is a financial account, meaning the contract has a cash value that exceeds \$50,000 at any point during the calendar year.

Preexisting accounts. Under the regulations, all accounts maintained by an FFI prior to Jan. 1, 2014, are considered preexisting accounts that must be reviewed by Dec. 31, 2015, to document account holders and payees. The regulations, however, exempt from review preexisting accounts with a value of \$50,000 or less that are held by *individuals*.

The threshold goes up to \$250,000 for preexisting accounts held by *entities* and for accounts that are cash value insurance and annuity contracts.

Self-reporting by U.S. taxpayers

FATCA also requires certain U.S. taxpayers holding foreign financial assets with an aggregate value that exceeds certain thresholds to report certain information about those assets on Form 8938, along with their annual income tax returns. As FFIs increasingly report the information, the likelihood of being tripped up by neglecting to file Form 8938 will become greater, as will the likelihood of incurring a costly penalty.

Taxpayers are also required to file Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (FBAR), with the IRS if:

- The taxpayer had a financial interest in or signature authority over at least one financial account located outside of the United States, and
- The aggregate value of all foreign financial accounts exceeded \$10,000 at any time during the calendar year to be reported.

There are several exceptions from the FBAR reporting requirements for individuals with signature or other authority. For more information, please contact us and request a copy of the Tax Alert entitled, "Deadline for foreign asset reporting extended for some filers."

Are you in compliance?

If you hold offshore financial accounts, it is critical that you properly report them to the IRS. The final FATCA regulations will bring a heightened level of scrutiny of your foreign assets. To see if you are in compliance, or if you have questions regarding FATCA regulations, please give us a call.

MP&S TAX PLANNING GUIDE

To facilitate access to the latest tax rules and regulations, MP&S offers an [online tax guide](#) that is updated on an ongoing basis.

FOR MORE INFORMATION



For more information about the FATCA regulations, please contact an [MP&S tax advisor](#) or one of the following specialists:

- [Paul Bercovici](#), Tax Principal, 212.201.2297 or pbercovici@markspaneth.com
- [Solomon Packer](#), Senior Consultant, International Tax, 212.503.6314 or spacker@markspaneth.com
- [James Robbins](#), Tax Principal, 212.503.8971 or jrobbins@markspaneth.com
- [Steven Eliach](#), Principal-In-Charge, Tax Practice, 212.503.6388 or seliach@markspaneth.com

IRS CIRCULAR 230 DISCLOSURE

Treasury Regulations require us to inform you that any Federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

© Marks Paneth & Shron LLP 2013 | www.markspaneth.com
MANHATTAN | LONG ISLAND | WESTCHESTER | CAYMAN ISLANDS
Privacy Policy & Legal Disclaimer