WHITE & CASE

Client**Alert**

Tax

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Treasury Issues Supplemental FATCA Guidance

Introduction

On April 8, 2011, in Notice 2011-34 (the "Notice"), the Department of the Treasury (the "Treasury") and the Internal Revenue Service (the "Service") issued supplemental guidance under Sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, which pertain to the new US withholding regime and information reporting requirements for certain accounts maintained by foreign financial institutions (commonly referred to as the Foreign Account Tax Compliance Act provisions, or the "FATCA provisions"). The FATCA provisions were enacted as part of the Hiring Incentives to Restore Employment Act (the "HIRE Act") on March 18, 2010. The Notice provides guidance in response to certain concerns identified by commentators following the publication of preliminary guidance in Notice 2010-60 (the "Preliminary Guidance") (for a discussion of the Preliminary Guidance, please see our *September 2010 Client Alert*).

Part I of this Alert provides a brief overview of the FATCA provisions, and the remaining parts summarize the guidance issued in the Notice. Part 2 outlines the proposed procedures to be followed by foreign financial institutions ("FFIs") to identify US accounts among their preexisting individual accounts if such FFIs enter into an agreement, as described more fully below, with the Secretary of the Treasury (FFIs that enter into such an agreement are referred to as "participating FFIs"). Part 3 defines which payments made by participating FFIs are intended to be "passthru payments" with respect to which such participating FFIs would be required to impose withholding under the FATCA provisions. Part 4 discusses certain categories of FFIs that are intended to be "deemed-compliant" FFIs for purposes of FATCA. Part 5 provides further guidance regarding the obligation of participating FFIs to report with respect to US accounts. Part 6 addresses the application of the FATCA provisions to Qualified Intermediaries. Part 7 explains the intended application of the FATCA provisions to expanded affiliated groups of FFIs. Finally, Part 8 discusses the opportunity for the public to submit written comments with respect to the Notice.

I. Brief Description of the FATCA Provisions

This section provides a brief overview of the FATCA provisions, which generally apply to certain payments made after December 31, 2012 (except for payments with respect to certain grandfathered obligations). For a more detailed discussion, please see our *March 2010 Client Alert*.

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The FATCA provisions generally impose a 30% withholding tax on all "withholdable payments" made to a FFI unless such FFI satisfies certain reporting requirements. For these purposes, a withholdable payment includes any US source payments of interest, dividends, rents, compensation and other fixed or determinable annual or periodical ("FDAP") gains, profits and income, as well as the gross proceeds from the sale or other disposition of property of a type which can produce interest or dividends from US sources. A FFI is any non-US entity that (1) accepts deposits in the ordinary course of banking or other similar business; (2) holds, as a substantial portion of its business, financial assets for the account of others; or (3) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or any interest (including a futures or forward contract or option) in such securities, partnership interests or commodities. Many non-US entities and investment vehicles, including banks, brokerage houses, hedge funds and private equity funds, fall within the scope of the FFI definition.

In order to avoid withholding under the FATCA provisions, a FFI generally will be required to enter into an agreement with the Secretary of the Treasury (the "Secretary") in which such FFI agrees to obtain information concerning whether the accounts it maintains are "US accounts" for purposes of the FATCA provisions (such agreement hereinafter referred to as an "FFI Agreement"). In general, an FFI Agreement will require a participating FFI to (i) obtain sufficient information from each account holder to determine which accounts are US accounts; (ii) comply with verification and due diligence procedures as required by the Secretary with respect to the identification of US accounts; (iii) report annually certain information with respect to any US account maintained by such FFI; (iv) comply with requests by the Secretary for additional information with respect to any US account maintained by the FFI; (v) obtain a waiver (or close the account) in any situation where a foreign law would, but for a waiver, prevent the reporting of any information required by the FATCA provisions; and (vi) deduct and withhold 30 from any "passthru payment" that is made by the FFI to (1) a "recalcitrant account holder" (generally, any account holder who fails to comply with reasonable requests for specific information under the FATCA provisions); (2) another FFI which does not enter into an FFI Agreement with the Secretary; or (3) another FFI which has made an election to be withheld upon rather than withhold on any portion of the payment which is allocable to a recalcitrant account holder or a nonparticipating FFI.

The Notice provides that FFI Agreements will become effective on the later of January 1, 2013 or the date on which the FFI Agreement is executed.

II. Identifying Preexisting Individual Accounts

The Notice modifies the proposed procedures outlined in the Preliminary Guidance for a participating FFI to identify its US accounts that are "preexisting individual accounts," or financial accounts held by individuals as of the date that an FFI Agreement becomes effective. Under these revised procedures, a participating FFI would be required to determine whether such accounts are treated as US accounts, accounts of recalcitrant account holders ("recalcitrant accounts"), or non-US accounts by completing the following steps:

Step 1: "Documented US Person" Accounts

For all account holders that are already documented as US persons for other US tax purposes (e.g., a US person who has provided a Form W-9 for other tax reporting purposes), such account holders' financial accounts would be treated as US accounts for purposes of the FATCA provisions (the "Documented US Person Accounts").

Step 2: Accounts of US$50,000 or Less

All individual depository accounts with a balance or value not exceeding US$50,000 (as of the end of the calendar year preceding the effective date of the FFI Agreement) would be considered non-US accounts for purposes of the FATCA provisions (the "Low Value Accounts").

Step 3: "Private Banking Accounts"

If the account maintained by the participating FFI is considered a "private banking account" (i.e., any account maintained or serviced by the FFI's private banking department or any account maintained or serviced as part of a private banking relationship) that is not a Documented US Person Account or a Low Value Account, the participating FFI would be required to perform the following procedures:

(i) Within the first year in which an FFI Agreement is in effect, all of the FFI's "private banking relationship managers" (generally, officers or other employees responsible for specific account holders on an ongoing basis and who provide advice and recommendations concerning such holders' banking and investment needs) would be required to:

  (a) Identify any client for which the private banking relationship manager has actual knowledge that the client is a US person and request that each such client provide a Form W-9;

(b) Perform a diligent review of the paper and electronic account files and other records for each client with respect to whom they serve as private banking relationship managers, and request the following documentation from each client who, to the best of their knowledge, is identified as having the following "US indicia" (or such client has an associated family member who is identified as having the following US indicia):

i. **US citizenship or lawful permanent resident status:** Form W-9 establishing US status (with a waiver of any applicable restrictions on reporting of the client's information to the Service);

ii. **A US birthplace, a US residence address or a US correspondence address (including a US P.O. box):** either Form W-9 establishing US status (with a waiver of any applicable restrictions on reporting of the client's information to the Service), or a Form W-8BEN (or substitute certification as may be provided in future guidance) and a non-US passport or other similar government-issued evidence establishing the client's citizenship in a country other than the United States (for a client with a US birthplace, the manager is required to obtain a written explanation regarding the client's renunciation of US citizenship or reason the client did not acquire US citizenship at birth); or

iii. **Standing instructions to transfer funds to an account maintained in the United States, or directions regularly received from a US address, or has an "in care of" address or a "hold mail" address that is the sole address with respect to the client:** either Form W-9 establishing US status (with a waiver of any applicable restrictions on reporting of the client's information to the Service), or a Form W-8BEN (or substitute certification as may be provided in future guidance) and documentary evidence establishing non-US status of the client.

(c) Treat all accounts associated with a client as US accounts if the client is identified as a US person or is identified as having US indicia listed in paragraph (b), above, and does not provide the documentation listed above establishing non-US status.

(d) Create and retain lists of all existing clients whose accounts are US accounts, non-US accounts, or recalcitrant accounts.

(ii) Report all US accounts and information regarding recalcitrant account holders by certain designated reporting dates following the close of the first full year covered by its FFI Agreement.

(iii) If a private banking relationship manager subsequently becomes aware that an account holder of a preexisting private banking account has any of the US indicia described in paragraph (i)(b), above, the private banking relationship manger would be required to request the appropriate documentation. If the account holder does not establish non-US status within one year of the date on which the manager discovers the US indicia, the account would be required to be included in the FFI's reporting of its US accounts or treated as a recalcitrant account.

(iv) Ensure that all of the written requests and responses related to the search are retained by the FFI for ten years.

Step 4: Other Accounts with US Indicia

From among the accounts that are not Documented US Person Accounts, Low Value Accounts, or Private Banking Accounts, the participating FFI would be required to determine whether the electronically searchable information maintained by such FFI and associated with such accounts or such account holders include any of the US indicia listed in paragraph (i)(b) of Step 3, above. For this purpose, "electronically searchable information" refers to information that a FFI maintains in its tax reporting files, customer master files or similar files.

For all such accounts identified as containing US indicia, the participating FFI would be required, within one year of the effective date of the FFI Agreement, to request the appropriate documentation as listed above. Account holders that have not provided appropriate documentation within two years of the effective date of the FFI Agreement would be classified as recalcitrant account holders.

Step 5: Other Accounts of US$500,000 or More

For all preexisting individual accounts that are not Documented US Person Accounts, Private Banking Accounts, or Other Accounts with US Indicia, and that had a balance or value of US$500,000 or more at the end of the year preceding the effective date of the FFI Agreement ("High Value Accounts"), the participating FFI would be required to perform a diligent review of the account files associated with the account. To the extent the account files contain any of the US indicia described in paragraph (i)(b) in Step 3, above, the FFI would be required to obtain the appropriate

documentation as listed above within two years of the effective date of FFI Agreement or classify such holders as recalcitrant account holders.

Step 6: Annual Retesting of Account Balances and Values

Beginning in the third year following the effective date of the FFI Agreement, the FFI would be required to perform an annual review of all preexisting individual accounts that did not previously satisfy the requirements to be treated as High Value Accounts, but that would be High Value Accounts if the account balance or value of the account were tested on the last day of the preceding year. From among the accounts identified each year under this test, the FFI would be required to treat as recalcitrant any account for which the required documentation has not been provided by the end of the year.

A responsible officer of the participating FFI would be required to certify to the Service when the FFI has completed the above procedures (other than the procedures described in Step 6) for its preexisting individual accounts and also would be required to certify that FFI management personnel did not engage in activities for purposes of avoiding the identification of accounts as US accounts pursuant to the procedures outlined above.

III. Defining "Passthru Payments" for Purposes of the FATCA Provisions

The FATCA provisions require a participating FFI to deduct and withhold 30% on any "passthru payment" that such FFI makes to a recalcitrant account holder or nonparticipating FFI. A passthru payment is defined as any withholdable payment and other payments "to the extent attributable" to a withholdable payment. The Notice provides that passthru payments are intended to include payments "to the extent attributable" to withholdable payments so that FFIs are encouraged to enter into FFI Agreements even if such FFIs do not directly hold assets that produce withholdable payments (e.g., an FFI holds assets that produce withholdable payments through a blocker corporation).

The Notice rejects public comments proposing to define payments attributable to withholdable payments as those payments that are "directly traceable" to withholdable payments. Instead, Treasury and the Service intend to require participating FFIs to calculate the percentage of their passthru payments that are attributable to withholdable payments (the "passthru payment percentage") by, in general, dividing such FFI's US assets by its total assets. As a result, a participating FFI's passthru payment percentage would take into account indirect interests in assets of a type that could give rise to passthru payments, such as certain interests in or other non-custodial financial accounts held by "lower tier FFIs."

Each participating FFI would be required, at certain specified times, to make available its passthru payment percentage information on, for example, a website or database readily searchable by the public. The determination of when a passthru payment percentage is out-of-date and how frequently a FFI must check for more recently published passthru payment percentages of other FFIs shall be set forth in future guidance. Any participating FFI which does not calculate and publish its passthru payment percentage would be deemed to have a passthru payment percentage of 100%. A nonparticipating FFI and a deemed-compliant FFI would be presumed to have a passthru payment percentage of 0%.

IV. Deemed-Compliant Status for Certain FFIs

Rather than entering into an FFI Agreement, the FATCA provisions provide that certain "deemed-compliant FFIs" may be deemed to satisfy all reporting requirements if they comply with procedures to be detailed by the Secretary. The FATCA provisions provide that such procedures will generally ensure that such FFIs do not maintain US accounts. In addition, the Secretary has the authority to identify classes of institutions that are not subject to the reporting requirements.

The Notice provides that the following classes of FFIs would be deemed-compliant FFIs under the FATCA provisions:

(i) Certain Local Banks

Each FFI in an expanded affiliated group would be treated as a deemed-compliant FFI if (1) each FFI in the expanded affiliated group is, under the laws of its country of organization, licensed and regulated as a bank or similar organization authorized to accept deposits in the ordinary course of its business and is not engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, or commodities; (2) all of the FFIs in the expanded affiliated group are organized in the same country; (3) no FFI in the expanded affiliated group maintains operations outside the country of organization; (4) no FFI in the expanded affiliated group solicits account holders outside its country of organization; and (5) each FFI in the expanded affiliated group implements policies and procedures to ensure that it does not open or maintain accounts for non-residents, non-participating FFIs, or certain non-financial foreign entities.

(ii) Local FFI Members of Participating FFI Groups

A member of an expanded affiliated group that includes one participating FFI ("each an "FFI member" of a "Participating FFI Group") would be treated as a deemed-compliant FFI if (1) the FFI member maintains no operations outside its country of organization; (2) the FFI member does not solicit account holders outside its country of organization; (3) the FFI member

implements the pre-existing account and customer identification procedures required of participating FFIs; and (4) the FFI identifies any US accounts, accounts of nonparticipating FFIs, or accounts of certain non-financial foreign entities, such FFI agrees to enter into an FFI Agreement, transfer such accounts to an affiliate that is a participating FFI within a reasonable period of time, or close such accounts.

(iii) Certain Investment Vehicles ("Funds")

A fund will be deemed-compliant if (1) all holders of record of direct interests in the fund are participating FFIs, deemed-compliant FFIs holding on behalf of other investors, foreign governments or international organizations (including certain agencies and instrumentalities), foreign central banks of issue, or other classes of persons identified by the Secretary; (2) the fund prohibits the subscription for or acquisition of any interests in the fund by any person that is not a participating FFI, a deemed-compliant FFI, a foreign government or international organization (including certain agencies and instrumentalities), a foreign central bank of issue, or any other class of persons identified by the Secretary; and (3) the fund certifies that any passthru payment percentages that it calculates and publishes will be done in accordance with the Notice.

(iv) Other Categories of Deemed-Compliant FFIs

Certain foreign retirement plans pose a low risk of tax evasion, and therefore payments beneficially owned by such retirement plans will be exempt from FATCA withholding. Treasury and the Service intend to provide further guidance on the types of foreign retirement plans that may qualify for such treatment.

V. Reporting on US Accounts

(i) Reporting Account Balance or Value

The FATCA provisions require a participating FFI to report to the Service the account balance or value of each US account unless the FFI elects to be subject to the same reporting requirements as US financial institutions. The Notice clarifies that future regulations intend to limit FFIs' account balance reporting obligations to year-end account balances or values (as opposed to monthly or quarterly account balances or values).

(ii) Reporting Gross Receipts and Withdrawals

Treasury and the Service intend to issue regulations providing that a participating FFI must annually report (i) the gross amount of dividends, interest, and other income paid or credited to a US account; and (ii) gross proceeds from the sale or redemption of property paid or credited to the US account with respect to which the FFI acted as a custodian, broker, nominee, or otherwise as an agent for the account holder. For a US accounts that are non-publicly traded debt and equity interests in a FFI, the FFI would be required to report with respect to such interest, the gross amount of (i) all distributions, interest, and similar amounts credited during the year; and (ii) each redemption payment made during the year.

The amount and character of dividends, interest, other income, and gross proceeds would not be required to be determined in accordance with US federal income tax principles (though they may rely on such principles). Once a FFI has applied a method to determine such amounts, it must apply such method consistently for all account holders and for all subsequent years unless the Commissioner consents to a change in such method.

Generally, if the FFI reports the gross receipts and gross withdrawals of payments from the US account pursuant to the rules above, such FFI would not be required to report tax basis information with respect to such account.

(iii) Branch and Affiliate Reporting

Treasury and the Service intend to publish draft FFI Agreements that require FFIs to identify the branch that maintains the US account being reported. To alleviate concerns that local law would prevent consolidating account holder information across branches or affiliates, participating FFIs would be able to elect to have each branch report information separately regarding the US accounts it maintains. Furthermore, each branch would be eligible to make the election to be subject to the same reporting requirements as US financial institutions.

VI. Qualified Intermediaries

"Qualified intermediaries" ("QIs") that are FFIs are required to comply with the FATCA provisions even if they have agreed, under the law currently in effect, to perform certain withholding and reporting responsibilities with regard to their non-US account holders and US non-exempt recipient account holders. Treasury and the Service intend to issue guidance requiring all FFIs currently acting as QIs to consent to include in their QI agreements the requirement to become participating FFIs (unless they qualify as deemed-compliant FFIs). This requirement will apply to all such QIs as of January 1, 2013.

VII. Expanded Affiliated Groups

(i) In General

The FATCA provisions generally provide that the withholding, reporting, and other requirements imposed on a FFI shall apply with respect to US accounts maintained by the FFI and, except as provided otherwise by the Secretary, with respect to US accounts maintained by each other FFI (the "FFI affiliate") which is a member of the same "expanded affiliated group" that includes the FFI (the "FFI Group"). Treasury and the Service intend to issue regulations requiring that each FFI affiliate of a FFI Group must be a participating FFI or a deemed-compliant FFI; however, the Service intends to require FFI affiliates of FFI Groups to apply for participating FFI or deemed-compliant FFI status through a coordinated application process.

For this purpose, the Service intends to require each FFI Group to designate a "lead FFI." A lead FFI would be required to complete an application and execute either an agreement with the Service to become a participating FFI or a certification for deemed-compliant FFI status, and also would be required to complete an application on behalf of each FFI affiliate. The lead FFI would be required to provide the Service with documentation, in a format to be prescribed, evidencing that each FFI affiliate has agreed to the provisions of an FFI Agreement or certification, depending on whether the FFI affiliate seeks participating or deemed-compliant FFI status. Once an FFI Agreement has been executed, a lead FFI could choose to establish "ongoing points of contact" with the Service for particular members of the FFI Group.

Treasury and the Service also intend to provide FFI Groups with an option under which a designated FFI could be appointed by some or all of the FFI affiliates in the FFI Group to assume an oversight role with respect to FATCA compliance by the FFI Group.

(ii) Centralized Compliance Option for Certain Investment Funds

In addition, Treasury and the Service are considering whether a "centralized compliance option" should be provided for investment funds that are associated with a common asset manager or other agent. Under this approach, the asset manager or other agent would execute a single FFI Agreement on behalf of each member of a group of funds that contracts with the asset manager or other agent to perform the functions required under the FFI Agreement with respect to the fund. This option would be restricted to those cases in which the asset manager or other agent is able to monitor each fund's compliance with its FFI Agreement based on its legal agreements and other arrangements with each fund.

VIII. Public Comment and Future Guidance

Treasury and the Service request written public comments regarding the issues described in the Notice by June 7, 2011. They intend to issue future regulations incorporating the guidance described in the Notice and addressing other matters necessary to implement the FATCA provisions.

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