Wealth Management
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Client Alert

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Treasury Publishes Final FATCA Regulations

On January 17, 2013, the United States Treasury published final regulations ("Final Regulations") interpreting the Foreign Account Tax Compliance Act ("FATCA"). The Final Regulations retain the general structure of the proposed regulations published on February 15, 2012 ("Proposed Regulations"). Reflecting more than 200 comments received by the Treasury and the recently concluded intergovernmental agreements ("IGAs") implementing FATCA, the Final Regulations nevertheless contain significant changes.

Background

The goal of FATCA is to improve income tax compliance by U.S. taxpayers by giving the Internal Revenue Service ("IRS") access to more information about the income and assets in their accounts held in foreign financial institutions ("FFIs"). To achieve that goal, the FATCA statute and Final Regulations impose a 30 percent withholding tax starting in 2014 on certain "withholdable payments" (payments of certain U.S.-source income, including dividends and interest) to FFIs that do not meet conditions identified by the Treasury for "deemed compliant" status and have not entered into a "participating FFI" ("PFFI") agreement with the IRS. The PFFI agreement would, inter alia, require the PFFI to comply with specified due diligence procedures to identify foreign accounts held by U.S. persons or U.S.-owned foreign entities and collect information thereon; to report annually to the IRS specified information about the U.S. account holder and the foreign account's income and assets; to withhold 30 percent on certain "passthru payments" made to accounts of persons ("recalcitrant" account holders) who refuse to provide the requested information or refuse to waive foreign law restrictions on the PFFI's ability to report the required information to the IRS; and to close the foreign accounts of recalcitrant U.S. account holders if foreign law would prevent the reporting of information on those accounts to the IRS. The Treasury and more than 50 countries are negotiating or have entered into IGAs that will provide for information exchange under FATCA.

1. Summary of the Key Differences Between the Proposed Regulations and the Final Regulations

1.1 Definition of FFI

The Final Regulations clarify the definition of a foreign financial institution. The Final Regulations provide for five types of financial institutions: depository institutions, custodial institutions, investment entities, insurance companies and their holding companies, and holding companies or treasury centers that are part of a financial group.

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The Final Regulations clarify that an entity must accept deposits and engage in one or more of the following banking or financing activities to qualify as a depository institution for this purpose: (1) makes personal, mortgage, industrial, or other loans or provides other extensions of credit; (2) purchases, sells, discounts or negotiates accounts receivable, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness; (3) issues letters of credit and negotiates drafts drawn thereunder; (4) provides trust or fiduciary services; (5) finances foreign currency transactions; or (6) enters into, or purchases, or disposes of finance leases or leased assets. An entity that completes money transfers and engages in no other activities is not a depository institution because it does not accept deposits or other similar temporary investments of funds. Also, a depository institution does not include certain lessors and lenders, including entities that act as networks for credit card banks that hold cash collateral from such banks.

A custodial institution is an entity that holds financial assets for the account of others as a substantial portion of its business. The entity's gross income from holding financial assets and related financial services must equal or exceed 20 percent of the entity's gross income over the applicable measuring period (three years or less). In response to requests for clarification, the Final Regulations specify the types of fees that qualify as such income: custody, account maintenance and transfer fees; commissions from transactions; income from extending credit to customers with respect to financial assets held in custody; income earned on the bid-ask spread of financial assets; fees for providing financial advice; and fees for clearance and settlement services.

The Proposed Regulations defined an investment entity as an entity that derives at least 50 percent of its income from the business of investing, reinvesting, or trading in securities, partnership interests, commodities, notional principal contracts, insurance or annuity contracts, or any interest in such instruments.

The Final Regulations expand this definition and specify that an entity is an investment entity if at least 50 percent of its gross income of the entity if the entity during the applicable measuring period (three years or less) is attributable to (a) primarily conducting as a business for or on behalf of customers trading in instruments, portfolio management, or otherwise investing, administering, or managing funds on behalf of other persons (a "Class A" investment entity), (b) investing, reinvesting or trading in financial assets and the entity is managed by an FFI that is a depository institution, custodial institution, insurance company or Class A investment entity (a "Class B" investment entity), or (c) functioning or holding itself out as a fund or other investment vehicle (a "Class C" investment entity). The Treasury stated that it made these changes to conform to the definitions contained in the Model IGAs. The Final Regulations also provide specific guidance through several examples that illustrate the various entities, investment funds, trusts, and real estate funds that constitute an investment entity.

The changes to the definition of investment institution will raise issues for investment managers who thought they were outside the scope of FATCA and raise new questions on the proper treatment of trusts for FATCA purposes. In particular, an entity can be an investment entity if it primarily conducts individual

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or collective portfolio management or otherwise invests, administers, or manages funds, money or financial assets on behalf of others.

Many investment managers understood that they would be outside the scope of FATCA if they did not custody client assets. This appears to be no longer the case. Investment managers are classified as financial institutions under the Model IGAs so this development in the final regulations is not unexpected. However, investment managers who thought they were outside the scope of FATCA because they are outside the flow of payments will need to re-examine their exposure to FATCA. Governments who considered inclusion of investment managers as financial institutions under IGAs to be a negative factor for entering the IGA should no longer consider this a distinction.

An FFI also includes an insurance company or a holding company that is a member of an expanded affiliated group ("EAG," which generally is a group whose members have a greater than 50 percent common owner). The entity must issue or be obligated to make payments for cash value insurance contracts and annuities.

Finally, an FFI includes a holding company or treasury center if it is part of an EAG that includes a depository institution, custodial institution, insurance company, or investment entity, or is formed in connection with a collective investment vehicle or fund established with an investment strategy of investing or trading in financial assets. This would include, for example, private equity funds with non-traded debt and equity interests that are issued by an intermediate company formed in connection with a fund.

1.2 Exceptions to FFI Status

In response to numerous comments, the Treasury adopted several exceptions to FFI status. Certain holding companies, treasury centers, and captive finance companies that are part of a nonfinancial group are excepted from FFI status. Generally, the Final Regulations require that a treasury center is an excepted FFI if it does not hold assets or deposits (other than for an EAG in which it is a member) and its primary activity is to enter into investment, hedging, and financing transactions with or for members of the EAG for specified purposes. However, a treasury center is not excepted from status as an FFI (if it otherwise meets the definition of an FFI) if (1) any equity or debt interest in the entity is held by a person that is not a member of its EAG, and (2) the redemption or retirement of that equity or debt interest is determined primarily by reference to the investment, hedging and financing activities with persons or entities outside the EAG or any member of the EAG that is a Class B investment entity or a passive nonfinancial foreign entity (i.e., a foreign entity that is not an FFI and 50 percent or more of the income of which is passive income). In addition, excepted FFI status specifically would not apply to entities formed in connection with private equity funds and similar arrangements.

The Final Regulations also provide a new exception to FFI status for "excepted inter-affiliate FFIs." These are entities that are dormant, formed for a specific

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deal and not liquidated, or formed for regulatory purposes and not engaged in activities outside of the financial group. An entity is excepted if it does not maintain financial accounts (other than accounts maintained for members of its EAG), does not hold an account with or receive payments from any withholding agent other than a member of its EAG, does not make withholdable payments (payments of certain US-source income, including dividends and interest) to any person other than members of its EAG, and has not agreed to report or otherwise act as an agent for FATCA purposes on behalf of any financial institution.

As in the Proposed Regulations, excepted FFI status is also extended to certain nonfinancial entities in liquidation or bankruptcy and certain non-profit entities. The Final Regulations extend excepted FFI status to certain small insurance companies. Additionally, the reserving activities of an insurance company are disregarded for purposes of determining if the entity is a depository institution, custodial institution, or an investment entity.

1.3 Exempt Beneficial Owners

FATCA withholding is not required on payments to FFIs if the beneficial owner of the payment is an exempt beneficial owner. The Final Regulations expand the definition of exempt beneficial owners, and modify when an entity may qualify as an exempt beneficial owner where only exempt beneficial owners own it. The Final Regulations also clarify that "a person must be a beneficial owner of a payment to be treated as an exempt beneficial owner" as to the payment, except for securities held by foreign central banks of issue and retirement funds.

The Final Regulations expand the definition of exempt beneficial owner to include any intergovernmental or supranational organization that is (1) compromised mostly of foreign governments, (2) recognized as an international organization under foreign law or has a headquarters agreement with a foreign government, and (3) prevents private inurement of its income under the principles outlined in the Final Regulations. The definition of an exempt beneficial owner in the Final Regulations is also expanded to include any entity identified as such by a Model 1 or Model 2 IGA. The scope of retirement funds that qualify as an exempt beneficial owner has been expanded, including several new categories of pension funds. For example, broad participation retirement funds, narrow participation retirement funds, funds formed pursuant to a plan similar to an IRC section 401(a) plan, investment vehicles exclusively for retirement funds and pension funds of an exempt beneficial owner are exempt beneficial owners under the Final Regulations.

Exempt beneficial owner status also applies to entities owned by exempt beneficial owners. An entity may receive loans from a depository institution or issue loans to other exempt beneficial owners without preventing the organization from qualifying as an exempt beneficial owner.

The Final Regulations do not extend exempt beneficial owner status to foreign governments, international organizations, foreign central banks of issue, and the governments of U.S. territories that engage in certain commercial activities. This exception will not apply if the commercial activity is undertaken solely for or on behalf of other exempt beneficial owners.

1.4 Excepted NFFEs

The Final Regulations provide that any excepted non-financial foreign entity ("NFFE") that is an excepted NFFE (generally, an NFFE that does not derive 50% or more of its income from passive income) is the payee, unless it is acting as an agent or intermediary (other than a Qualified Intermediary ("QI") accepting primary withholding responsibility).

The Final Regulations expand the categories of excepted NFFEs to include holding companies and similar entities that are part of and that support a group conducting an active trade or business. In addition, non-profit organizations are now treated as excepted NFFEs instead of deemed compliant FFIs.

1.5 Grandfathered Obligations

Extended deadline for grandfather protection

The Final Regulations extend the cut-off date for grandfathered obligations to January 1, 2014. Payments on obligations issued before January 1, 2014 are not subject to FATCA withholding unless the obligation is materially modified on or after January 1, 2014.

For purposes of this grandfather protection, an "obligation" includes debt instruments, fixed-term credit agreements, derivatives contracts under an ISDA Master Agreement, and certain life insurance and annuity contracts. Grandfather protection will be lost if the obligation is materially modified on or after the grandfather cut-off date.

Grandfathered collateral payments

The Final Regulations align the treatment of payments on grandfathered obligations with payments on collateral posted to secure grandfathered obligations. Payments on collateral posted to secure grandfathered obligations are also grandfathered. Where collateral secures both grandfathered and non-grandfathered obligations, the collateral that secures grandfathered obligations is allocated (pro rata by value) to all outstanding obligations.

Expanded scope of grandfather protection

The Final Regulations provide the following special grandfather cut-off dates:

a. With respect to withholding on foreign passthru payments, an obligation will be grandfathered obligations if the obligation is executed on or before the date that is 6 months after the Treasury publishes final regulations that define the term "foreign passthru payment."

b. With respect to withholding on dividend equivalent payments under IRC section 871(m), obligations will be grandfather protected if the obligation is executed on or before the date that is 6 months after the date on which payments are first treated as dividend equivalent payments.

Identifying grandfathered status.

Withholding agents can rely on a written statement from the issuer (or the issuer's agent) to determine if an obligation is grandfathered so long as the withholding agent does not have actual knowledge to the contrary. A withholding agent (other than the issuer) must treat a modification as material if it knows or has reason to know that there has been a material modification with respect to the obligation. The withholding agent in this case would have reason to know that there has been a material modification if the issuer discloses to the withholding agent that there has been a material modification.

1.6 Account

Definitions of "Account" and "Account Holder"

- Accounts Subject to FATCA

In order to further a risk-based and targeted approach, the Final Regulations generally limit the scope of financial accounts subject to FATCA. In addition, to reduce administrative burdens, the regulations revise the definition of a "preexisting obligation" to permit new accounts of preexisting customers to be treated as preexisting accounts. In this case, the FFI must treat both accounts (as well as any other accounts held by that customer) as one account for purposes of aggregating balances and anti-money laundering ("AML") due diligence procedures. This treatment is also permitted for EAGs and sponsored FFI groups that share documentation within the group.

- Depository Accounts

The scope of regulated depository accounts is limited to accounts for the placing of money (as opposed to the holding of property) in the custody of an entity engaged in a banking or similar business. The Final Regulations now generally exclude from the definition of depository account (1) negotiable debt instruments traded on a regulated market or over-the-counter market and distributed through financial institutions; and (2) advance premiums or premium deposits received by an insurance company. The Final Regulations also clarify that a credit balance with respect to a credit card account issued by a credit card company is a depository account. Amounts held by insurance companies under a guaranteed investment contract or under a similar agreement to pay or credit interest thereon are also treated as depository accounts subject to FATCA.

- Savings Accounts

Substantial revisions were made to the definition of savings account in order to accommodate more savings vehicles without significantly increasing the ability of U.S. persons to use such vehicles to avoid FATCA compliance. The Final Regulations broaden the category of excepted retirement and pension accounts by eliminating the requirements that (i) all contributions to the account be government, employer, or employee contributions and (ii) the contributions be limited to earned income. In addition, the limitation on contributions to such plans is liberalized to allow plans that either have an annual contribution limit of US$ 50,000 or less or a maximum contribution limit of US$ 1,000,000 or less. The category of non-retirement savings accounts is also expanded by requiring

that such accounts be tax favored, rather than limiting contributions by reference to earned income.

- Equity and Debt Interests

The Final Regulations generally narrow the category of debt and equity interests subject to treatment as financial accounts. Debt or equity interests in holding companies and treasury centers of EAGs whose aggregate income is derived primarily from active NFFEs, depository institutions, custodial institutions, and insurance companies (described in more detail above) are now excluded from the definition of a financial account.

The Final Regulations do, however, limit the exception from financial account status provided in the Proposed Regulations for equity or debt interests "regularly traded on an established securities market." The Final Regulations now explicitly link the definition of "regularly traded on an established securities market" for financial account purposes with the definition provided in Treas. Reg. § 1.1472-1(c)(1)(i)(A) and (C), relating to status as an exempt NFFE. That section requires that 50 percent of the voting stock be listed on the exchange, that trades be effected on at least 60 days during the prior year, and that the number of shares traded during the prior year be at least 10 percent of the average number of shares outstanding. A separate rule for the initial year of public offering reduces the number of days the stock must be traded to be considered "regularly traded." Further, the Final Regulations clarify that an interest is not "regularly traded on an established securities market" if the holder of the interest (excluding a financial institution acting as an intermediary) is registered on the books of the investment entity. This condition does not apply, however, if the holder's interest is registered prior to January 1, 2014.

- Insurance and Annuity Contracts

The Final Regulations provide that the following categories of insurance or annuity contracts are not financial accounts: (1) non-investment linked, non-transferable, immediate annuities purchased by the account holder in connection with an exempt retirement or pension account; (2) insurance contracts with a cash value of US$ 50,000 or less; and (3) indemnity reinsurance contracts between two insurance companies. Certain term life insurance contracts are also excluded from financial account status.

- Definition of Account Holder

The Final Regulations confirm that an account held by a disregarded entity is held by the person owning the disregarded entity. The Final Regulations also clarify which persons will be treated as account holders of insurance contracts.

1.7 EAGs and Sponsoring Entities

EAGs

The Final Regulations slightly modify the definition of an EAG. For corporations, the waiting period for reconsolidated entities under IRC section 1504(a)(3) is now ignored for purposes of determining membership in the EAG. Similarly, the limitations found under Treas. Reg. § 1.1504-4(b)(2)(i)(A) are now also ignored.

That regulatory provision considers the treatment of options that, for tax purposes, are issued or transferred instead of the underlying stock being issued, redeemed, or transferred. For non-corporate entities, the rules for EAGs in the Final Regulations clarify that the test of control under IRC section 954(d)(3) is applied without regard to whether such entity is foreign or domestic.

More notably, in response to comments, the Final Regulations now have an exclusion for FFIs that are the recipients of seed capital (an initial capital contribution made to an investment entity that is intended as a temporary investment and is deemed by the manager of the entity as necessary or appropriate for the establishment of the entity). Among the other requirements for this exclusion, the FFI receiving the seed capital must be classified as an investment entity and the contributing entity must be in the business of providing seed capital.

Reducing duplicative documentation within an EAG

The Final Regulations include new provisions aimed at reducing the burden for duplicative documentation, and address EAGs with consolidated obligations held under single-branch, universal or shared account systems. Systems between different branches of the same EAG that share information about account holders or other documentation may be relied upon so long as, inter alia, the required supporting documentation can be produced if necessary and the system is comprehensive in terms of accounts held by any particular customer or in terms of noting and tracking reliability of the data.

Sponsoring entities

The Final Regulations provide for a "sponsoring entity" to perform for a "sponsored entity" (or for an entire "sponsored FFI group") the due diligence, withholding, reporting, and other FFI requirements. Sponsored entities can be investment entities, wholly owned CFCs, or closely-held investment vehicles. This allows an investment manager to coordinate compliance for all of the funds it manages. A sponsoring entity must register as a sponsoring entity with the IRS. A sponsoring entity will only lose its status as such a "material" failure to comply with its obligations as a sponsoring entity. Note, however, that the sponsored entity remains liable for its FATCA obligations.

Consolidated Compliance Program

The Final Regulations describe the compliance program that each PFFI must have in place the PFFI to satisfy the requirements of the PFFI agreement. For EAGs, an FFI may be selected as the "compliance FI," which would perform the periodic review of the compliance program. A sponsoring entity is required to act as the compliance FI for its sponsored FFI group.

1.8 New Rule for Offshore Obligations of Funds

The Final Regulations clarify whether an investment fund constitutes an offshore obligation. In response to comments, the Final Regulations now provide that an offshore obligation specifically includes "an equity interest in a foreign entity if the owner of the interest purchased the interest outside the United States either

directly from the foreign entity or from another entity located outside the United States".

2. Implementation Dates: What has changed and what has stayed the same?

The Final Regulations introduce new deadlines and time frames for FATCA compliance. Many of the timing changes under the Final Regulations were made to align dates with those under the IGAs. The revised timeline generally follows the dates previously set forth in Announcement 2012-42[1].

The effective date of an FFI's PFFI agreement will be December 31, 2013 for FFIs that register and obtain a FATCA identifying number before the end of 2013.

2.1 Withholding Requirements

- Withholding on U.S. source investment income payments begins January 1, 2014 for payments that are not protected under the grandfather rules.

- The deadline with respect to clients identified as prima facie FFIs is July 1, 2014, for U.S. withholding agents, PFFIs (or six months after effective date of the PFFI agreement, if later) and registered deemed-compliant FFIs.

- With respect to other entity clients not identified as prima facie FFIs, the deadline is January 1, 2016 for U.S. withholding agents, PFFIs (or two years from effective date of PFFI agreement, if later) and registered deemed-compliant FFIs.

- The deadline with respect to high value individual accounts is January 1, 2015, for PFFIs.

- The deadline with respect to non-high value individual accounts is January 1, 2016, for PFFIs.

- The Final Regulations provide for phased implementation of withholding on foreign passthru payments and gross proceeds from sales or dispositions of property until January 1, 2017.

- With respect to withholding on payments to NFFEs, withholding agents are not required to withhold with respect to payments made prior to January 1, 2014.

- Withholding agents are not required to withhold on payments made before January 1, 2015, with respect to a preexisting obligation to an NFFE payee that is not a prima facie FFI and for which the withholding agent does not have documentation indicating the payee's status as a passive NFFE with one or more substantial U.S. owners.

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[1] See Announcement 2012-42, 2012-47 IRB 1, available at http://www.irs.gov/pub/irs-drop/A-12-42.pdf

- To coordinate withholding with the Model 1 IGAs, the Final Regulations delay withholding on offshore payment of U.S. source FDAP income until January 1, 2017, if not made by a person not acting as an intermediary with respect to such payment.

2.2 Implementation of New Account Reporting Procedures

The deadline to implement new account procedures is January 1, 2014, for all U.S. withholding agents, PFFIs (or the effective date of the FFI agreement, if later) and registered deemed-compliant FFIs (or the date of registration as deemed-compliant, if later).

All accounts maintained by an FFI as of December 31, 2013, are treated as preexisting accounts.

2.3 Preexisting Obligations for Payments – Withholding Documentation Requirements

- The deadline is June 30, 2014, with respect to clients identified as prima facie FFIs for U.S. withholding agents, PFFIs (or six months after effective date of the PFFI agreement, if later) and registered deemed-compliant FFIs.

- With respect to other entity clients not identified as prima facie FFIs, the deadline is December 31, 2015 for U.S. withholding agents, PFFIs (or two years from effective date of the PFFI agreement, if later) and registered deemed-compliant FFIs.

- The deadline for PFFIs with respect to high value individual accounts is December 31, 2014.

- The deadline for PFFIs with respect to non-high value individual accounts is December 31, 2015.

2.4 Reporting of PFFIs

- If a PFFI agreement has an effective date that is on or before December 31, 2014, the PFFI is required to report U.S. accounts that it maintained during 2013 that are outstanding on December 31, 2013.

- The Final Regulations provide phased implementation of reporting by PFFIs for calendar years 2013 and 2014. PFFIs must file the first information reports for both years on or before March 31, 2015.

3. Changes to Documentation Provisions

The Final Regulations provide some relief from the requirement to use U.S. tax-specific forms by allowing FFIs to rely on substitute forms, written certifications and other documentation in certain circumstances.

3.1 Changes to Documentation Requirements

Some of the significant changes to FATCA's documentation requirements are summarized below:

- The withholding agent may rely on a pre-FATCA Form W-8 to establish the FATCA status of a payee without obtaining additional documentary evidence (unless the withholding agent must obtain additional documentary evidence under the QI rules).

- Documentation for specified low-risk payees will remain valid indefinitely (unless there is a change in circumstances).

- The withholding agent may rely on documentary evidence obtained with respect to the payee in lieu of a Form W-9, in order to establish the entity's status as a U.S. person and rely on the "eyeball test" to determine the payee's status as other than a specified U.S. person.

- New accounts of a preexisting customer can be treated as preexisting accounts without a need to re-document the customer as long as the withholding agent or FFI treats the accounts of that customer as a single account for AML due diligence and other FATCA purposes.

- The Final Regulations modify the documentation requirements for so-called "owner-documented FFIs" as follows:

    - Permitting transitional reliance on AML due diligence documentation for payments made prior to January 1, 2017 on preexisting obligations;

    - Allowing owner-documented FFIs to issue debt instruments to an expanded group of holders (compared with the Proposed Regulations) provided the debt holder is reported in the same manner as an equity holder;

    - Simplifying withholding statements for owner-documented FFIs; and

    - Providing for indefinite validity for withholding certificates and statements with respect to obligations having an aggregate value of US$ 1,000,000 or less.

Other documentation changes include:

- Expanded reliance on written statements without additional documentation for offshore obligations that do not generate payments of U.S. source FDAP income (such as a depository account maintained outside the United States by an FFI). Written statements may be relied upon with additional documentation establishing foreign status of the payee for an offshore obligation that generated payments of U.S. source FDAP income.

- Removal of the requirement that written statements must be made under penalties of perjury for payments made outside of the United States on offshore obligations (other than for payments of U.S. source FDAP income).

- Substitute forms may be prepared and completed in a language other than English as long as the withholding agent furnishes the IRS with a translated version upon request and the forms meet other requirements.

- Withholding certificates with inconsequential errors will remain valid if the withholding agent otherwise has sufficient documentation to cure the error (failure to make a required certification, or to provide a country of residence is not an inconsequential error).

3.2 Form 8966 (FATCA Report)

The Final Regulations announced that the IRS intends to issue a new Form 8966 (FATCA Report) for FFIs and other withholding agents to comply with FATCA reporting obligations. This new form will include all of the information that FFIs need to report to the IRS regarding their U.S. accounts. A draft of Form 8966 was not released with the Final Regulations. The IRS intends to publish Form 8966 in final form later in 2013 or early 2014.

3.3 New and Revised Withholding Certificates

Historically, withholding agents have relied on IRS forms in the "W-8" series to identify payees for purposes of non-resident alien withholding, backup withholding, and the QI withholding regimes. To align FATCA with existing withholding tax regimes, the IRS will issue new and revised W-8 forms.

Prior to publication of the Final Regulations, the IRS released the following revised withholding forms:

- Form W-8IMY Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding

- Form W-8ECI Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States

- Form W-8EXP Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding

- Form W-8BEN Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding (Individual).

In addition, the IRS released a draft new Form W-8BEN-E in 2012 to be used for FATCA certifications. When issued by the IRS in final form, the Form W-8BEN-E will certify that the beneficial owner of a payment or account is a non-US entity. This form will be used by non-US entities to certify their FATCA status to withholding agents.

3.4 Revised Forms 1042 and 1042-S

The IRS intends to release a revised Form 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons) and 1042-S (Foreign Person's U.S. Source Income Subject to Withholding), which will set forth all the information that must be reported by withholding agents to meet their obligations under FATCA and the QI regime. The release of the new Form 1042 and 1042-S is also scheduled for later this year or in 2014.

4. More to Come…

4.1 FATCA Registration Portal

The preamble contains a significant amount of additional information on the online FATCA Registration Portal (the "Portal") that FFIs will use to interact with the IRS and to complete and maintain their FATCA registrations, PFFI Agreements, and certifications. The Portal will be accessible from anywhere in the world and is intended to provide a completely paperless registration process.

According to the preamble, access to the Portal should be available no later than July 15, 2013. FFIs will be able to register and, as appropriate, agree to comply with their obligations as PFFIs or as sponsoring entities. Reporting Model 1 FFIs, other registered deemed-compliant FFIs, and limited FFIs will also be able to register through the Portal, even if a Model 1 jurisdiction and the Treasury have not specified how FFIs in the jurisdiction will register with the IRS. Significantly, the IRS will permit registration of FFIs that are reporting Model 1 FFIs or described as a Reporting Financial Institution under a Model 2 IGA as long as the associated jurisdiction is identified on a list published by the IRS of countries treated as having in effect an IGA, even if any necessary ratification of such IGA in the jurisdiction has not yet been completed.

Each PFFI and registered deemed-compliant FFI will be issued a Global Intermediary Identification Number ("GIIN") beginning no later than October 15, 2013. It is intended that a GIIN will be used as the FFI's identifying number for satisfying reporting requirements and identifying its status to withholding agents. The preamble states that the IRS will post its first IRS FFI List of participating FFIs and registered deemed-compliant FFIs on December 2, 2013. The IRS thereafter intends to update the IRS FFI List on a monthly basis. The last date by which an FFI can register with the IRS to ensure its inclusion on the December 2013 IRS FFI List is October 25, 2013.

The delay in registration is a welcome development, as it gives entities additional time to determine the FATCA status of each entity in an EAG. For some multinational entities, however, a three-month period to register will be insufficient unless the Portal requests minimal information regarding each entity in the EAG.

4.2 Clarification Regarding Terms of the FFI Agreement

The IRS has yet to publish a draft of the PFFI agreement that FFIs outside of Model 1 Jurisdictions will need to enter into if they wish to become PFFIs. In response to requests for additional guidance on the terms of the PFFI agreement, the Final Regulations now set forth all of the substantive requirements applicable under the PFFI agreement. They also clarify that a

default under the PFFI agreement will not result in automatic termination of the PFFI agreement, define what constitutes an event of default, and provide procedures for remediating an event of default should one occur. The PFFI agreement will allow PFFIs to file collective refund claims on behalf of certain account holders and payees and will provide procedures for PFFIs to follow if they are legally prohibited from reporting or withholding in accordance with the PFFI agreement. In recognition of the fact that both ongoing negotiations of IGAs, as well as the unsettled issue of how future guidance will address the treatment of foreign passthru payments, may affect the decision of an FFI to enter into a PFFI agreement, the Final Regulations do not restrict a PFFI's ability to terminate a PFFI agreement. The form of the PFFI agreement will be published in a revenue procedure in the future. The preamble to the Final Regulations states explicitly that the final PFFI agreement will be "fully consistent" with the rules set forth in the Final Regulations. This statement is presumably intended to assure FFIs who wish to begin planning for FATCA implementation that they can rely on the description of the FFI Agreement in the Final Regulations in doing so.

The Final Regulations also delay the effective date of the PFFI agreement until December 31, 2013, for PFFIs that receive a GIIN prior to January 1, 2014. This change is intended to allow FFIs sufficient time to modify systems and to implement the required account opening procedures and to align the effective date of, and due diligence periods under, the PFFI agreement with the timelines provided under the IGAs.

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