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Timeline for Initial FATCA Implementation Extended

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The Treasury Department (“Treasury”) and the Internal Revenue Service (the “IRS”) announced on July 12, 2013 a general six-month extension to the timeline for initial implementation of the Foreign Account Tax Compliance Act or FATCA from January 1, 2014 to July 1, 2014. They also substantially improved coordination of the FATCA registration process with Treasury’s ongoing efforts in negotiating intergovernmental agreements on FATCA.

Background

FATCA (contained in Sections 1471 through 1474 of the Internal Revenue Code) was enacted in 2010 in order to reduce perceived offshore tax evasion by US persons holding assets through offshore accounts that were not subject to US information reporting to the IRS. FATCA generally requires a foreign payee that is a foreign financial institution (an “FFI”) either (1) to enter into an agreement with the IRS relating to such reporting (an “FFI Agreement”, and such an FFI, a “Participating FFI”) or (2) to comply with local laws that implement an intergovernmental agreement (“IGA”). If an FFI does not satisfy these requirements (and is not otherwise exempt), withholdable payments made to such FFI will be subject to withholding under FATCA at a rate of 30%. FATCA information reporting and withholding requirements generally do not apply to FFIs that are treated as deemed-compliant because they present a relatively low risk of being used for tax evasion or that are otherwise exempt or excepted from FATCA withholding.

On July 12, 2013, Treasury and the IRS issued Notice 2013-43 (the “Notice”), which, as described below, extends the period for entering into FFI Agreements and the date on which FATCA withholding will commence. Prior to the amendment of the final FATCA regulations (the “Final Regulations”) to implement such extensions, taxpayers may rely on the Notice.

Timeline for Initial FATCA Implementation Generally Extended by Six Months

FATCA Withholding. Withholdable payments include: (1) US source interest, dividends, and other fixed or determinable annual or periodical (“FDAP”) payments; (2) gross proceeds from the taxable disposition of property that produces US source interest or dividends; and (3) “foreign passthru payments,” which generally are payments that are made by a Participating FFI and that are attributable to withholdable payments. Under the Notice, withholding, which had been scheduled to begin on January 1, 2014 under the Final Regulations, will now commence on July 1, 2014 for interest, dividends, and other FDAP payments. The Notice does not affect the timeline for implementing withholding in respect of payments of gross proceeds, which continues to begin January 1, 2017, and withholding on foreign passthru payments, which continues to begin no earlier than January 1, 2017.

Grandfathered Obligations. Under the Final Regulations, FATCA withholding will not apply to “grandfathered obligations.” These include any obligation (not including equity instruments) outstanding on January 1, 2014 that is not materially modified thereafter and any debt obligation issued after December 31, 2013 pursuant to a “qualified reopening” of a debt instrument issued before January 1, 2014. The Notice announced that the definition of “grandfathered obligation” will be revised to include obligations outstanding on July 1, 2014 (and associated collateral).

Newly Opened Accounts. The Notice extends by six months (from January 1, 2014 to July 1, 2014) the start date for Participating FFIs to conduct due diligence to determine whether account holders of newly opened accounts (which includes certain debt and equity instruments) are US persons.

Pre-Existing Obligations. Pre-existing obligations are subject to special due diligence procedures for documenting the account holder. The Notice extends the cut-off date for pre-existing obligations by six months from December 31, 2013 to June 30, 2014. As a result, any account, instrument or contract maintained, executed or issued by a Participating FFI, registered deemed-compliant FFI or withholding agent that is outstanding on June 30, 2014 will be treated as a “pre-existing obligation.”¹ Thus, unless an account holder or payee is a *prima facie* FFI, Participating FFIs and withholding agents will have until June 30, 2016 to review pre-existing obligations and to document their holders. Payees that are *prima facie* FFIs must be documented by December 31, 2014 (instead of June 30, 2014).²

Pre-existing obligations held by individuals with a balance or value of no more than \$50,000 (or \$250,000 in the case of cash value insurance and annuity contracts)³ are exempt from this review, and enhanced due diligence procedures apply to pre-existing accounts with a balance or value in excess of \$1,000,000. The Notice extends the relevant date for determining initial account values or balances by six months from December 31, 2013 to June 30, 2014.

Account Reporting. March 31, 2015 remains the due date for the first information report required to be filed by Participating FFIs, but the Notice limits required reporting to the 2014 calendar year and no longer includes account information as of the end of the 2013 year.

¹ For a Participating FFI or registered deemed-compliant FFI whose FFI Agreement or registration is effective on a date after July 1, 2014, however, the relevant testing date for pre-existing obligations is the effective date of the agreement or registration.

² If the FFI Agreement of a Participating FFI has an effective date after June 30, 2014, the timeline is six months from the effective date for documenting *prima facie* FFIs and 24 months from the effective date for all other accounts.

³ Insurance contracts with a value of no more than \$50,000 will not be treated as financial accounts for FATCA purposes.

Effect of Extensions on FFIs Located in IGA Jurisdictions

Treasury has developed in collaboration with foreign governments two alternative IGA models: the Model I IGA and the Model II IGA. IGAs allow foreign governments to implement FATCA in a manner that removes legal impediments to compliance in the relevant foreign country (e.g., bank secrecy laws) and that reduces compliance burdens on FFIs. The Final Regulations integrated the statutory FATCA regime with the IGA structure in many respects.

FFIs in Model II IGA countries (other than those excepted or exempted from FFI status or treated as deemed-compliant) are not relieved from the requirement to enter into an FFI Agreement in order to avoid FATCA withholding. By contrast, non-excepted and non-exempt FFIs located in Model I IGA countries generally are required to identify US accounts pursuant to due diligence rules adopted by the IGA partner country and to report specified information to the relevant governmental authorities of the IGA partner country and not directly to the IRS. This information will be automatically exchanged by the IGA partner country with the IRS. An FFI in a Model I IGA country that complies with its local due diligence and reporting requirements will be treated as a registered deemed-compliant FFI.

Numerous countries have signed IGAs or are in various stages of negotiating IGAs. In particular for FFIs in countries that have signed or intend to sign a Model I IGA, significant uncertainty has arisen regarding their appropriate registration if the IGA has not yet been brought into force through local implementing legislation by the time the registration process will be concluded in order to avoid FATCA withholding (see below). The Notice clarifies that the Treasury will publish a list of countries that have an IGA in effect or, even if the IGA has been signed but not yet brought into force, will be treated as having an IGA effect. The Treasury will publish this list at:

<http://www.treasury.gov/resouce-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>.

If existing IGAs have less generous timelines than those under the Notice, the new timelines under the Notice and future amended regulations will generally apply through the operation of the “most-favored nation” provision of the IGA.

Extended Timeline for FFI Registration Process

The planned opening of the “FATCA Registration Portal” of the IRS was postponed under the Notice from July 15, 2013 until August 19, 2013. The Portal will allow appropriate registration for FFIs as Participating FFIs and, for FFIs in countries with which the Treasury has entered into an IGA (as described above), as registered deemed-compliant FFIs (where a Model I IGA applies) or Model II IGA Participating FFIs (where a Model II IGA applies). Applications for registration cannot be submitted as final before January 1, 2014, but under the Notice registration information will be able to be entered, modified or added beginning August 19, 2013.

In the preamble to the Final Regulations, the Treasury and the IRS announced that they would publish a revenue procedure with the terms and conditions applicable to FFIs for FATCA purposes prior to opening the FATCA Registration Portal. This revenue procedure has not yet been published. In April 2013, the IRS published a paper registration form (IRS Form 8957) that indicates the categories of information likely required from FFIs for the online registration process.

Once a financial institution has registered, the IRS must approve the registration and issue a “global intermediary identification number” (a “GIIN”). The Notice explains that the IRS will issue GIINs beginning in 2014 as registrations are finalized. The IRS intends to publish a monthly electronic “IRS FFI List” of Participating FFIs and registered deemed-compliant FFIs (including reporting FFIs in Model I IGA countries (see above)). Issuance of the first list will be postponed from December 2, 2013 to June 2, 2014. Consistent with this six-month extension, an FFI should finalize its registration at the Portal no later than April 25, 2014 (instead of October 25, 2013) to be included in the first IRS FFI List.

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