

FATCA Insights

Observations on latest guidance - Notice 2011-34

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Foreign Account Tax Compliance Act (FATCA) 2nd Notice – Clarification and more to come

On 8 April 2011, the US Department of the Treasury (“the Treasury”) and the Internal Revenue Service (“IRS”) issued Notice 2011-34 as further guidance in respect of the Foreign Account Tax Compliance Act (“FATCA”).

The much anticipated Notice provides guidance in response to certain priority concerns following the release of the initial Notice 2010-60 in August 2010. However, for the majority of affected organisations the latest guidance may fall short of expectations.

Notice provides some relief

Notice 2011-34 addresses several key issues:

Updated procedures for identifying US accounts among pre-existing accounts

The modification of the procedures for identifying US accounts is the most significant development. The redesign of the procedures will provide substantial relief from previous remediation work expected under the guidance of Notice 2010-60.

The Treasury and IRS have revised the procedures to:

- Define a category of account holder as a “private banking account” and apply a defined set of documentary evidence procedures specifically tailored for this account type.
- Simplify the documentary evidence procedures for other account types to “electronically searchable information”, specifically data stored in either tax reporting, customer master or similar files in a form that can be queried (using tools such as SQL).
- Note that information, data, or files are not electronically searchable merely because they are stored in an image retrieval system (such as pdf files or scanned documents).
- Exempt depository accounts held by natural persons with a balance of less than US\$50,000 (or equivalent in a foreign currency).

Deemed compliant FFIs

The Notice provides for a number of deemed compliant FFIs, namely:

- Certain local banks which operate in its jurisdiction only.
- Local FFI members of a participating FFI group whom operate within its country of organisation.
- Certain investment vehicles where holders of direct investment are all participating FFIs or deemed compliant FFIs and the fund prohibits subscription for any interest in the fund by any non-participating FFI.

Whilst the above should provide some compliance relief, proving adherence to the requirements will be challenging. The Treasury and the IRS acknowledge this and are calling for comments on policies and procedures that might otherwise be applied to demonstrate compliance.

For the funds management industry the guidance falls short of any certainty on carve outs for particular classes of funds, with the Treasury and the IRS calling for further comments on categories of funds that may be treated as deemed-compliant.

Defining “passthru payments” and withholding obligations

The Notice sets out the methodology for calculating the amount of a payment that is attributable to a withholdable payment, known as the passthru payment percentage. The percentage is applied to payments made and is used to determine the amount of withholding required on recalcitrant account holders. The Treasury and the IRS are taking further comments and further refinement of the approach is anticipated.

Where to from here?

While the Notice provides clarity on a number of identified issues, the extent of further consultation needed is considerable. The Notice contains more than 15 requests for further comments on a variety of issues through until June 2011, it is clear that final Regulations are some time off. Coupled with a hard-wired start date of 1 January 2013, a “wait and see” approach is no longer a viable option for organisations.

With the clarification regarding the procedures around the examination of pre-existing accounts and categorisation of various types of accounts (for example the defining of private banking), financial institutions will be better placed to commence work on the identification of affected FFIs within their groups and US accounts on which reporting will be required.

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