

APRIL 15, 2011

Insights into Recent Regulatory, Judicial and Legislative Developments

Atlanta
Charlotte
Dallas
Los Angeles
New York
Research Triangle
Silicon Valley
Ventura County
Washington, D.C.

New IRS Guidance on FATCA: More Positive than Initial IRS Guidance

On April 8, 2011, the IRS unveiled in Notice 2011-34 (the "Notice") additional guidance on the Foreign Account Tax Compliance Act provisions designed to detect U.S. persons who may be evading U.S. tax by holding income-producing assets through accounts at foreign financial institutions (FFIs) or other foreign entities. Previously (August 27, 2010), the IRS issued Notice 2010-60, which provided initial guidance on a number of priority issues, including the definition of a FFI, the scope of collection of information and identification of U.S. account holders by FFIs, and exemptions from the withholding requirements. The most recent Notice modifies and supplements the previous guidance.

Pre-Existing Individual Accounts

The Notice provides detailed procedures for identifying U.S. accounts of participating FFIs. If it is determined that an account is a U.S. account, the FFI must obtain and report certain information to the IRS. The Notice sets forth the following steps in identifying a U.S. account:

- 1) account holders documented as U.S. persons for other U.S. tax purposes will be treated as having U.S. accounts;
- 2) if an account is not identified as a U.S. account under the previous step, accounts with a balance or value of \$50,000 or less may be treated as a non-U.S. account;
- 3) if an account is not identified as a U.S. account under the previous two steps, a new category of private banking accounts maintained at a FFI must be identified by a "private banking relationship manager" to the best of the manager's knowledge in order to identify indicia of U.S. status by performing a "diligent review" of the paper and electronic account files and other client records; the FFI must also request certain documentation (including a W-9, W-8BEN, a statement waiving restrictions for IRS reporting, a non-U.S. passport and/or other relevant documentary evidence as applicable) in order to ascertain the U.S. account status;
- 4) if an account is not identified as a U.S. account under the previous three steps, six indicia of U.S. status (including U.S. citizenship or green card status, U.S. birthplace, U.S. residence address (including a U.S. P.O. Box), standing instructions to transfer funds to an account maintained in the United States or directions regularly received from a U.S. address, a sole address that is an *in care* of address or *hold mail* address, or a power of attorney or signatory authority granted to a person with a U.S. address) must be sought from electronically searchable information maintained by the FFI in order to identify U.S. account holders, and the FFI must request certain documentation (as described above) in order to ascertain the U.S. account status; and
- 5) if an account is not identified as a U.S. account under the previous four steps, where the account has a balance or value of \$500,000 or more, the FFI must perform a "diligent review" of the account files associated with the account in order to look for indicia of U.S. status (as described above) and must request certain documentation (as described above) in order to ascertain the U.S. account status.

The Notice also requires a chief compliance officer of the FFI to certify completion of the above identification procedures, and to certify that FFI management personnel did not engage directly or indirectly in any activity to encourage or advise U.S. account holders on how to avoid identification of their accounts as U.S. accounts.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

Jack Cummings
Editor

The Atlantic Building
950 F Street, NW
Washington, D.C. 20004-1404
202.239.3300
Fax: 202.239.3333

www.alston.com

“Pass-thru” Payments

The Notice provides further guidance on the concept of a “pass-thru” payment. Under section 1471(b)(1)(D), a participating FFI must withhold 30 percent of any “pass-thru” payment made to a recalcitrant account holder or non-participating FFI. The Notice rejected requests to define the term based on whether the payment was directly traceable to a withholdable payment. Instead, the Notice provides that a payment made by an FFI will be a “pass-thru” payment to the extent of (i) the amount of the payment that is a withholdable payment, plus (ii) the amount of the payment that is not a withholdable payment multiplied by, (A) in the case of a custodial payment, the “pass-thru payment percentage” of the entity that issued the interest or instrument, or (B) in the case of any other payment, the “pass-thru payment percentage” of the payor FFI.

The pass-thru payment percentage is to be determined by dividing the sum of the FFI’s U.S. assets by the sum of the FFI’s total assets as of quarterly testing dates. The term “U.S. assets” refers to, among other items, any asset (at gross value) on the balance sheet that could give rise to a pass-thru payment using the FFI’s accounting methods used for reporting to its interest holders. Each participating FFI will be required to make available its pass-thru payment percentage on a website or publicly searchable database.

“Deemed Compliant” FFIs

Under section 1471(b)(2), the Secretary may treat an FFI as meeting the requirement of entering into an FFI agreement with the IRS—a so-called “deemed-compliant” FFI. The Notice lists specific categories of FFIs that may be treated as deemed-compliant FFIs and provides rules that an FFI must observe in order to retain its deemed-compliant status. The general categories include i) certain local banks that essentially abide by practices that ensure that the FFI only service local non-U.S. customer; ii) local FFI members of a participating FFI group that do not maintain operations outside their country of organization, and comply with pre-existing account-holder identification procedures; and iii) certain collective investment vehicles that have participating or deemed compliant FFI account holders and comply with pass-thru website or publicly searchable database publication rules.

Reporting of U.S. Accounts

The Notice modifies certain U.S. reporting requirements for FFIs set forth in the initial guidance by providing that future regulations will allow for the reporting of the highest year-end account balances instead of the highest month-end or quarterly balances. In addition, FFIs will be required to report annually the gross amounts of i) dividends, ii) interest, iii) other income, and iv) sale or redemption property proceeds with respect to which the FFI had a custodial-type role that are paid or credited to U.S. accounts.

Interaction with Qualified Intermediary Rules

All FFIs that have qualified intermediary (QI) agreements (including Withholding Foreign Partnerships and Withholding Foreign Trusts) with the IRS will be required to agree to become participating FFIs unless they qualify as deemed compliant FFIs.

Affiliated Groups

The Notice explains rules applicable to the expanded affiliated group requirements of section 1471(e). It provides generally that affiliates must be participating FFIs or deemed-compliant FFIs, must execute an FFI agreement, will be responsible for withholding and due diligence obligations, will have their own FFI EIN, and must apply for status as a participating or deemed-compliant FFI under a coordinated application process under which a lead FFI is designated to act as a central IRS contact, among other responsibilities. The IRS will also provide an option for an FFI group to designate an FFI to assume an oversight role with respect to FFI group compliance and may offer a similar process for certain collective investment entities.

Future Guidance

Proposed regulations and draft FFI agreements are expected to be forthcoming, although the timing of any further guidance is not clear.

International Tax Group

Sam K. Kaywood, Jr.
Co-Chair
404.881.7481

Edward Tanenbaum
Co-Chair
212.210.9425

John F. Baron
704.444.1434

Henry J. Birnkrant
202.239.3319

Robert T. Cole
202.239.3306

James E. Croker, Jr.
202.239.3309

Jasper L. Cummings, Jr.
919.862.2302

Tim L. Fallaw
404.881.7836

Terence J. Greene
404.881.7493

Brian D. Harvel
404.881.4491

Michelle M. Henkel
404.881.7633

L. Andrew Immerman
404.881.7532

Brian E. Lebowitz
202.239.3394

Clay A. Littlefield
704.444.1440

Tola Ozim
212.210.9533

Vivek Patel
404.881.7686

Timothy J. Peadar
404.881.7475

Matthew A. Stevens
202.239.3553

If you would like to receive future issues of Alston & Bird’s *International Tax Advisory*, please forward your contact information to internationaltax.advisory@alston.com. Please put “subscribe” in the subject line.

