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## International Update: FATCA, FBAR, Voluntary Disclosure

As has been previously discussed, the Foreign Account Tax Compliance Act (FATCA) enacted in March 2010 was 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 through other foreign entities (non-financial foreign entities or NFFEs). The legislation implements a new 30-percent withholding tax on "withholdable payments" made to those FFIs and NFFEs that do not comply with certain requirements.

To provide guidance to those subject to FATCA, the IRS issued Notice 2010-60 on August 27, 2010 (the "2010 Notice"), and Notice 2011-34 on April 8, 2011 (the "2011 Notice"). The 2010 Notice provided general information about FATCA and the 2011 Notice provided more detailed guidance, including information on the concepts of "pass-thru payments" and "deemed-compliant FFIs." In recent weeks, IRS officials have attended various meetings of tax professionals to provide more insight about FATCA and to defend the new withholding regime as an important tool in ensuring that U.S. investors do not evade U.S. tax. Officials hinted that the IRS would be considering, for inclusion in future proposed regulations, whether and how to narrow the definition of "pass-thru payments" and how to expand the categories of institutions that may apply to be "deemed-compliant FFIs."

The 2011 Notice provided that a pass-thru payment made to a recalcitrant account holder or a non-participating FFI will be subject to 30-percent withholding 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. Officials have continued to reaffirm the IRS's decision not to treat as a pass-thru payment only that portion of a payment attributable to U.S. source income using a tracing method. Officials described concerns that the tracing method might 1) allow indirect account holders of U.S. assets to avoid U.S. tax, 2) encourage U.S. investors to avoid withholding by using blocker structures to directly invest in an FFI that derives U.S. source income and 3) be impossible to implement given the broad definition of withholdable payments. In addition, officials noted the uncertainty about how to best address partnerships and other pass-thru entities under the FATCA rules with respect to pass-thru payments.

Although officials did not rule out that further guidance on narrow and time-sensitive issues could be forthcoming, the IRS's priority is to issue proposed regulations ahead of the looming effective date (January 1, 2013). In connection with its goal to issue proposed regulations as soon as possible, the IRS is still seeking comments from institutions and practitioners regarding whether to expand the categories of institutions that qualify for the carve-out for deemed-compliant FFIs. As noted in previous advisories, FATCA deems certain FFIs to meet the FFI requirements if they can comply with procedures to prove that they do not have U.S. accounts. The IRS is seeking well thought-out feedback from institutions explaining which additional categories of institutions should be allowed to apply for deemed-complaint status. Officials addressed a common misunderstanding regarding the carve-outs by noting that FFIs seeking deemed-compliant status would have to be concerned with more than direct account holders, given the potential for tax evasion by U.S. investors using FFI blockers. Commenters should be able to explain to the IRS why U.S. investors wouldn't simply evade FATCA withholding by investing in low-risk, deemed-compliant entities.

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## FBAR Filing Deadline Extended for Some

The Report of Foreign Bank and Financial Accounts (FBAR), Form TDF 90-221.1, is used to report a financial interest in, or signature or other authority over, one or more financial accounts in foreign countries if the aggregate value of the accounts exceed \$10,000. FBARs for 2010 are due on June 30, 2011, and must be received by the IRS on or before that date. In Notice 2011-1 (May 31, 2011), as updated on June 6, 2011, the Financial Crimes Enforcement Network announced a one-year extension of this deadline for certain persons who have signature or other authority over a financial account, but no financial interest in such accounts. Specifically, the extension to June 30, 2012, applies to:

- an employee or officer of a regulated entity (as specified in the FBAR regulations) who has signature or other authority over and no financial interest in a foreign financial account of another entity more than 50-percent owned, directly or indirectly, by the regulated entity (a “controlled person”); or
- an employee or officer of a controlled person of a regulated entity who has signature or other authority over and no financial interest in a foreign financial account of the regulated entity or another controlled person of the regulated entity.

All other covered individuals must meet the current June 30, 2011, deadline.

## Extension of 2011 OVDI Deadline/New Opt-Out Program

The 2011 Offshore Voluntary Disclosure Initiative (2011 OVDI) follows the 2009 Offshore Voluntary Disclosure Program (2009 OVDP). The 2011 OVDI applies to U.S. taxpayers who wish to disclose previously unreported foreign financial accounts, entities or income, provided that they come forward and meet all the requirements of the program on or before August 31, 2011. On June 2, 2011, the IRS announced a 90-day deadline extension of the deadline for taxpayers who make a written request for the extension and who have made a good faith attempt to fully comply with the full submission requirements of the program by August 31, 2011 (See 2011 OVDI Frequently Asked Questions and Answers (FAQ) #25).

It was also announced that taxpayers may opt out of the civil settlement part of the 2011 OVDI or the 2009 OVDP if they believe the penalties under those programs are unacceptable or too severe. Taxpayers who elect (an irrevocable election) to opt out will have their cases submitted for full examination under the standard audit process. Taxpayers who opt out run the risk that the IRS will assert greater penalties; however, they will not be treated negatively just because they make the election.

The IRS also added a third category of taxpayer (See FAQ #52) who will qualify for a reduced five percent offshore penalty. The reduced five percent offshore penalty will apply to taxpayers who make a voluntary disclosure, are U.S. citizens residing in foreign countries, have been fully compliant with those tax laws, have \$10,000 or less of U.S. source income per year, and have reported on their individual tax returns that were filed with the resident foreign country any offshore-related taxable income.

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