

MEMO# 26932

January 18, 2013

Final FATCA Regulations Highlights

[26932]

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TO: TAX MEMBERS No. 7-13

INTERNATIONAL MEMBERS No. 8-13

INTERNATIONAL OPERATIONS ADVISORY COMMITTEE No. 3-13

TRANSFER AGENT ADVISORY COMMITTEE No. 12-13

BROKER/DEALER ADVISORY COMMITTEE No. 6-13

ICI GLOBAL MEMBERS RE: FINAL FATCA REGULATIONS HIGHLIGHTS

The final regulations that were released on January 17 [\[1\]](#) to implement the Foreign Account Tax Compliance Act ("FATCA") [\[2\]](#) address many of the concerns raised by ICI and ICI Global in our comment letters. [\[3\]](#) A detailed analysis of these regulations will be distributed next week. Highlights of the final regulations include the following:

- Expanded Fund Eligibility for Deemed Compliant Status. The final regulations expand the availability of deemed complaint status for funds. Specifically, the regulations create a new deemed compliant category for "sponsored investment entities" and modify the "qualified collective investment vehicle ("CIV")" and "restricted fund" deemed compliant categories.
 - Sponsored Investment Entities. The regulations effectively adopt our centralized compliance proposal by permitting a fund sponsor to undertake the FATCA compliance obligations on behalf of the funds it manages (which then qualify as deemed compliant sponsored investment entities).
 - Qualified CIVs. The regulations: (1) allow retirement plans and nonprofit organizations to invest without causing the fund to fail qualified CIV status; (2) allow a privately-held U.S. fund sponsor to put seed money into a foreign fund (as a publicly-held U.S. fund sponsor could under the proposed regulations) for a three-year period; (3) define "regulated" by reference to the fund or the fund sponsor; and (4) permit qualified CIV status, subject to certain restrictions, for a fund that had issued bearer shares.
 - Restricted Funds. The regulations provide the same "regulated" definition and bearer share rules for restricted funds that are provided for qualified CIVs. In addition, if a distributor loses its status as a qualified distributor, the shares held by the (now) disqualified distributor can be transferred to another distributor (rather than redeemed).
- Expanded Deemed Compliant Status for Certain Retirement Accounts. The final regulations expand the scope of retirement funds that are considered exempt beneficial owners and combine the deemed compliant category for retirement funds

with the exempt beneficial owner category. Among other things:

- retirement plans that are entitled to treaty relief, and investment funds created exclusively for retirement funds, qualify as exempt beneficial owners; and
- the earned income limit in the proposed regulations is eliminated for certain purposes.
- Coordination with Intergovernmental Agreements (IGAs). The final regulations reflect the changes made to FATCA compliance under the IGAs that the U.S. has negotiated with several countries. Among other things, the final regulations add “investment entities” to the types of foreign financial institutions subject to FATCA, and add definitions for “Reporting Model 1 FFIs” and “Nonreporting IGA FFIs.”
- Registration Procedures Developed. The final regulations describe a FATCA Registration Portal that will be available prior to July 15, 2013 that foreign financial institutions (FFIs) will use to acquire their FATCA compliance number – a “Global Intermediary Identification Number” (“GIIN”).
- Timelines Phased in for Due Diligence, Reporting and Withholding and Aligned with the IGAs. The final regulations extended the compliance timelines to allow FFIs time to develop necessary systems. Specifically,
 - Due Diligence
 - All accounts maintained by an FFI prior to January 1, 2014, are treated as preexisting accounts.
 - Participating FFIs and withholding agents have until December 31, 2015, to document account holders and payees that are not prima facie FFIs.
 - Reporting
 - Participating FFIs are to file the first information reports with respect to the 2013 and 2014 calendar years not later than March 31, 2015.
 - Withholding
 - No withholding on foreign passthru payments or gross proceeds from sales or dispositions of property will be required prior to January 1, 2017.
 - Grandfathered Obligations
 - All obligations outstanding on January 1, 2014, and any associated collateral are exempted from withholding.
 - Obligations (and associated collateral) that may give rise to withholdable payments through future regulations under section 871(m) (relating to dividend equivalent payments) or to foreign passthru payments under the foreign passthru payment rules are grandfathered if the obligations are outstanding at any point prior to six months after the implementing regulations for such payments are published.
- Account Opening and Documentation Procedures Simplified. Major changes include those permitting:
 - The use of substitute forms, including forms prepared in a foreign language (so long as IRS is provided with an English-language translation upon request);
 - Reliance on pre-FATCA W-8s and other documentation in certain circumstances;
 - Withholding certificates to be relied upon if minor errors are remedied by supplemental information already on file;
 - Documentation to remain valid indefinitely for certain low-risk categories of payees;
 - Use of the “eyeball test” for identifying certain U.S. exempt recipients;
 - Electronic transmission of documentation, including withholding certificates;
 - FFIs to undertake collective refund filings on behalf of investors;
 - A withholding agent generally may rely on:
 - the same documentation for all accounts owned by a payee.

- documentation provided by a third-party data provider;
- certifications regarding a payee's FATCA status that is provided by an introducing broker that is a qualified intermediary or participating FFI; and
- Transfer agents generally are permitted to rely on documentation collected by a fund or a certification that the fund has collected the appropriate documentation.
- New Forms. Treasury and the IRS must release significant additional guidance including:
 - A FATCA Revenue Procedure containing the terms of the FFI agreements; and
 - A number of new and revised IRS forms, including revised Forms W-8BEN, W-8BEN-E, 1042, and 1042-S, and a new Form 8966, "FATCA Report."

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endnotes

[1] See Institute [Memorandum # 26906](#), dated January 17, 2013.

[2] See Institute [Memorandum # 24186](#), dated March 17, 2010.

[3] See Institute [Memoranda # 26602](#), dated October 23, 2012; [# 26113](#), dated April 30, 2012; [# 26096](#), dated April 30, 2012; and [# 25267](#), dated June 9, 2011.