The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 24517

August 30, 2010

IRS Notice Requesting Comments on Foreign Account Information Reporting and Withholding to Implement "FATCA" Legislation

[24517]

August 30, 2010

TO: TAX MEMBERS No. 27-10
INTERNATIONAL MEMBERS No. 18-10 RE: IRS NOTICE REQUESTING COMMENTS ON FOREIGN ACCOUNT INFORMATION REPORTING AND WITHHOLDING TO IMPLEMENT "FATCA" LEGISLATION

The Internal Revenue Service has issued the attached notice (Notice 2010-60) regarding the information reporting and withholding provisions under Chapter 4 of the Internal Revenue Code ("Code") [1] that were enacted in March 2010 as part of the Hiring Incentives to Restore Employment ("HIRE") Act. [2] The HIRE Act's Chapter 4 reporting and withholding provisions apply generally to payments made after December 31, 2012.

The Notice describes the Chapter 4 reporting and withholding rules, announces how certain aspects of the new law will be applied, suggests possible answers to certain questions, and requests specific comments on both broad and narrow issues. Comments in response to the Notice are requested by November 1, 2010.

Scope and Exceptions

The types of foreign financial institutions ("FFIs") treated as in the "business of investing," according to the Notice, generally include investment vehicles such as mutual funds, hedge funds, private equity and venture capital funds, other managed funds, and commodity pools. For purposes of Chapter 4 withholding, this use of the term "business" is different than how the term "trade or business" is used in the Code.

The Notice describes various types of entities that are exempt from Chapter 4 as well as

classes of persons posing a low risk of tax evasion. The IRS anticipates that certain foreign retirement funds will be identified as posing a low risk of tax evasion. [3] Comments are requested on how the retirement account exception should be applied and whether it should be expanded to other categories of foreign employee benefit or deferred compensation plans. Comments also are requested on the treatment of other foreign entities, such as foreign charitable organizations, that may fall within the definition of an FFI. Suggestions also are requested for defining and identifying specific classes of foreign entities that should be: (1) excluded from the definition of FFI; (2) deemed to meet the requirements imposed on an entity that enters into an agreement with the IRS (the "FFI Agreement"); or (3) identified as posing a low risk of tax evasion.

Determining Investor Status

The Notice discusses in great detail: (1) the steps that FFIs will need to take to collect information regarding the U.S. or foreign status of individuals and entities; and (2) an FFI's ability to rely upon existing documentation or its need to seek additional verification of status – for both pre-existing accounts and new accounts.

To illustrate the documentation requirements, consider the steps that must be taken for preexisting individual accounts; these accounts are defined as accounts in existence on the date that the FFI enters into its FFI Agreement with IRS. Specifically, an FFI must take steps including the following to determine whether preexisting individual accounts are to be treated as U.S. accounts, accounts of recalcitrant account holders, or other accounts:

1. If an account holder already is documented as a U.S. person for other U.S. tax purposes, the person shall be treated as a specified U.S. person and the person's financial accounts will be treated as U.S. accounts.
2. An account shall be treated as an account other than a U.S. account if the electronically searchable information maintained by the FFI and associated with the account (e.g., customer information kept for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements) does not include any of the following indicia of potential U.S. status:
    - identification of any account holder as a U.S. resident or U.S. citizen;
    - a U.S. address associated with an account holder of the account (whether a residence address or a correspondence address);
    - a U.S. place of birth for an account holder of the account;
    - an "in care of" address, a "hold mail" address, or a P.O. address that is the sole address on file with respect to the account holder;
    - a power of attorney or signatory authority granted to a person with a U.S. address; or
    - standing instructions to transfer funds to an account maintained in the U.S., or directions received from a U.S. address.
3. For all accounts identified in the preceding step as containing indicia of potential U.S. status, the FFI will be required to obtain additional documentation based upon the criteria above that provide indicia of potential U.S. status. In certain cases, official IRS Form W-9 or W-8BEN will be required. In other cases, documentary evidence such as non-U.S. passport or other similar evidence of non-U.S. citizenship will establish that a person is not a U.S. person.

The Notice also provides time periods by which particular steps must be taken. Within one year of the effective date of the FFI's FFI Agreement, an FFI will be required to complete the

above steps. Any individual account holder who has not provided appropriate documentation within one year after the request will be classified as a recalcitrant account holder. A participating FFI may rely upon documentation maintained in an accountholder's files to satisfy the above procedures and would be required to obtain additional documentation only where the necessary documentation had not been collected already.

Within two years of the effective date of the FFI's FFI Agreement, additional steps will be required for all preexisting individual accounts with an average monthly balance exceeding $1 million. Specifically all such accounts that were treated as other than U.S. accounts will be subject to additional procedures to determine whether the accounts should continue to be treated as other than U.S. accounts. These additional procedures are not required if the participating FFI has collected, reviewed, and maintained documentation sufficient to establish the U.S. or non-U.S. status of such accounts and such status is reflected in electronically searchable information maintained by the FFI and associated with the account.

Within five years of the effective date of the FFI's FFI Agreement, additional steps to establish and document U.S. or non-U.S. status will be required for all preexisting individual accounts. Future guidance also will prescribe circumstances under which some of these procedures will be reapplied for accounts that are treated as other than U.S. accounts and that have an average monthly balance exceeding $50,000.

The Notice provides that a participating FFI must retain copies of all IRS Forms W-9 or W-8BEN. A participating FFI will be deemed to have maintained other documentation if the FFI retains a copy of the documentary evidence collected and reviewed, noting the type of document, any identification number contained on the document, the place of issuance, and the date of issuance and expiration date, if any.

In addition, the Notice states that participating FFIs (as well as other withholding agents) will be required to identify other FFIs as: (1) participating FFIs; (2) deemed-compliant FFIs; or (3) non-participating FFIs. To facilitate this process, the IRS contemplates issuing employer identification numbers ("EINs") to participating FFIs ("FFI EINs") and that these FFIs will use their FFI EINs to identify themselves to withholding agents.

Information Reporting

The IRS' preliminary views regarding the manner and type of information reporting that FFIs must provide to IRS annually with respect to their U.S. accounts under an FFI agreement also are discussed. The IRS is developing a new form for reporting this information that will be filed electronically. Guidance coordinating the Chapter 4 reporting rules with other U.S. tax reporting rules will be issued.

The Notice discusses a process for eliminating duplicative reporting – such as could occur if a foreign mutual fund (that is a participating FFI) issues shares that are treated as a financial account subject to reporting and such shares are held on behalf of a specified U.S. person by a custodian (that also is a participating FFI). The IRS believes it is preferable, where possible, for reporting to be performed by the FFI that is in a direct payment relationship with the account holder.

Other Areas For Which Comments Requested

Specific comments are requested on several broad topics. One such topic – effective verification procedures – is described by IRS as crucial to ensuring Chapter 4 compliance. The Notice recognizes, however, that compliance gains associated with implementation of verification procedures must be balanced against the costs such procedures would impose on FFIs. Among other things, IRS requests comments about procedures performed by public accountants or other auditors when conducting anti-money-laundering ("AML") or know your customer ("KYC") audits or similar engagements.

Another broad topic involves "passthru payments" and whether a payment is "attributable to" a withholdable payment. Comments are requested as to methods that a participating FFI could use to determine whether payments it makes are attributable to withholdable payments, including any associated information reporting that may be necessary, and which take into account the administrative burden imposed by any such approach.

Finally, IRS requests comments regarding FFIs, such as foreign collective investment vehicles, which may be subject to restrictions prohibiting U.S. account holders. Specifically, IRS requests comments on the following:

(1) specific information about the applicable laws and regulations that may result in an investment vehicle's determination to prohibit sales of its interests to U.S. persons;

(2) the categories of investment vehicles that may be covered by such laws and regulations;

(3) examples of the distribution or similar agreements that prohibit sales of interests to U.S. persons;

(4) information regarding the legally binding nature of such prohibitions and the penalties applicable to a violation of such prohibitions;

(5) the extent to which the AML/KYC laws used to enforce such a prohibition would apply in identifying U.S. persons (as defined for U.S. tax purposes) that may invest in such vehicles, directly or through ownership in one or more other entities;

(6) the extent to which purchases of interests by non-participating FFIs would be treated as unsuitable investments and the extent to which and mechanisms by which non-participating FFIs could be prohibited from purchasing such interests; and

(7) approaches that would allow Treasury and the IRS to verify or otherwise ensure compliance with such prohibitions.

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Attachment

endnotes

[1] These "Chapter 4" provisions often are referred to as the "FATCA" provisions because

they first were introduced in a stand-alone bill called the Foreign Account Tax Compliance Act.

[2] See Institute Memorandum (24186) to Tax Members No. 7-10 and International Members No. 5-10, dated March 17, 2010.

[3] Specifically, a low risk of tax evasion is expected to be present if the retirement plan: (1) qualifies as a retirement plan under the law of the country in which it is established; (2) is sponsored by a foreign employer; and (3) does not allow U.S. participants or beneficiaries other than employees who worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued.

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