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Practice Update

Internal Revenue Service Issues FATCA Final Regulations

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On January 17, 2013, the IRS released final regulations for the Foreign Account Tax Compliance Act (FATCA) to be effective on January 28, 2013. Enacted by Congress in 2010, FATCA targets non-compliant U.S. taxpayers using foreign accounts and requires foreign financial institutions (FFIs) to report information and withhold on some payments to FFIs and other foreign entities. The final regulations adopt and modify the proposed regulations that had been released in February 2012.

The preamble to the final regulations states that a FATCA Registration Portal will be created, and that it will be the primary means for financial institutions to interact with the IRS to complete and maintain their FATCA-related registrations, agreements and certifications. It should be accessible by July 15, 2013.

The IRS will begin issuing a Global Intermediary Identification Number (GIIN) to participating FFIs and deemed-compliant FFIs by October 15, 2013. FFIs will use their GIINs to satisfy reporting requirements and to identify their status to withholding agents. The IRS expects to post its initial list of participating FFIs and registered deemed-

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compliant FFIs on December 2, 2013, and to update the list on a monthly basis.

One key factor of the final regulations is their interaction with the FATCA intergovernmental agreements (IGAs). The final regulations align the effective date for FFI agreements with the date set forth in the IGAs, December 31, 2013. The final regulations also change the definition of FFI by deferring to the IGA determination of whether a resident entity described in the applicable IGA is an FFI. The definition of exempt beneficial owner is expanded to include any entity identified as an exempt beneficial owner under an IGA. By harmonizing the final regulations with the IGAs, the Treasury hopes to counter the costs and burdens associated with implementing FATCA.

The final regulations delivered the long-awaited substantive requirements for FFI agreements. Additionally, the final regulations define an event of default under an FFI agreement and procedures for remedying a default, allow participating FFIs to file collective refund claims on behalf of certain account holders and payees for amounts withheld, and provide procedural requirements if a participating FFI is legally prohibited from reporting or withholding as required under an FFI agreement. The IRS has indicated that it will publish a revenue procedure providing the terms of an FFI agreement that will coordinate the final regulations, the withholding requirements of chapter 3, and the provisions of any applicable IGA.

Also included in the final regulations are various modifications of the scope of FATCA. The final regulations expand the grandfather rules, specifically the exemption from withholding of all obligations outstanding on January 1, 2014. Also expanded by the final regulations are the categories of deemed compliant FFIs that do not need to enter into FFI agreements with the IRS and the types of documentary evidence upon which withholding agents may rely to identify payees for whom

payments must be withheld. The Treasury added a $50,000 exception for cash value insurance contracts in response to requests for additional exceptions for low-value accounts. The final regulations also clarify the types of financial accounts subject to FATCA and the persons that qualify as account holders.

Finally, the final regulations phase in the timelines for due diligence, reporting, and withholding that the IRS had released in Announcement 2012-42. As an overview, withholding agents are required to withhold only for withholdable payments made after December 31, 2013. Withholding requirements on gross proceeds and foreign passthru payments are suspended until January 1, 2017.

In order to implement FATCA reporting, the IRS will revise existing forms and issue new forms, including new Form 8966 “FATCA Report.” Final versions of the revised and new forms are expected by late 2013 or early 2014.

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