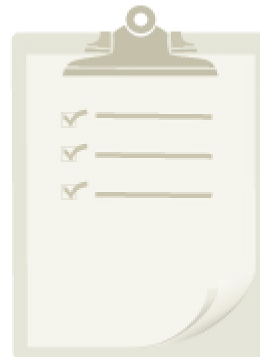
Akin Gump
STRAUSS HAUER & FELD LLP

Tax Alert

July 19, 2017

Key Points



- Recent IRS guidance requires that non-U.S. investment funds currently relying on an FFI agreement for their FATCA compliance must renew such agreement on the IRS website by July 31, 2017, in order to remain compliant.
- Non-U.S. investment funds that are required to renew and fail to do so will be treated as nonparticipating FFIs with retroactive effect as of January 1, 2017, and, accordingly, may incur 30 percent U.S. withholding tax on certain income from U.S. sources

Renewal of U.S. FATCA Registration for Certain Investment Funds by Monday, July 31, 2017

Certain non-U.S. investment funds, including Bermuda funds, which qualify as foreign financial institutions (FFI), must enter into a legal agreement ("FFI agreement") with the U.S. Internal Revenue Service (IRS) to be treated as compliant with the U.S. Foreign Account Tax Compliance Act (FATCA). Following recent IRS guidance, funds that have previously entered into such FFI agreements must renew their agreements by July 31, 2017, to continue to be treated as FATCA-compliant. Renewal means that the relevant FFI agrees to be subject to certain updated FATCA reporting, withholding and certification obligations with effect as of January 1, 2017.

The renewal requirement generally applies to funds that are located in a jurisdiction with a Model 2 intergovernmental agreement (IGA) in effect or treated as such (e.g., Bermuda, Hong Kong and Switzerland), or in a non-IGA jurisdiction (e.g., the Marshall Islands and Russia). The requirement also generally applies to funds that are located in a Model 1 IGA jurisdiction, but that rely on the U.S. Treasury regulations for purposes of their FATCA compliance rather than on the relevant Model 1 IGA otherwise available. Funds that renew their FFI agreements will maintain their existing Global Intermediary Identification Number (GIIN) and remain listed on the IRS website as FATCA-compliant FFIs. Since the number of registrations that will be received by the IRS, and also the processing times, are unclear, sponsors that have not yet renewed the GIINs for their investment funds that are required to renew should apply as soon as possible. Non-U.S. investment funds that are located in a Model 1 IGA jurisdiction (such as the Cayman Islands), and that are permitted to rely on such IGA, do not need to undertake any action (unless the fund is operating a branch outside its IGA jurisdiction, which is generally not expected as a practical matter).

Enacted in 2010, FATCA represents a wide-ranging effort to increase compliance by U.S. taxpayers with U.S. federal tax obligations. In particular, the FATCA regime seeks to compel non-U.S. entities to disclose the existence and identity of certain U.S. taxpayers who directly or indirectly own an interest in such entities. In furtherance of its objective, FATCA imposes a variety of diligence, withholding and reporting requirements on FFIs, which include many master funds, offshore feeders and other investment vehicles commonly utilized by investment funds. FATCA is enforced through a 30 percent withholding tax on payments of certain types of U.S. source investment income made to FFIs and certain other non-U.S. entities, and is expected to apply to payments of certain gross proceeds as of January 1, 2019. Payments potentially subject to FATCA withholding may include income that is otherwise exempt from U.S. federal withholding tax, such as U.S. source portfolio interest, and dividends, interest or royalties with respect to which U.S. treaty benefits are claimed.

FATCA requires FFIs, among other duties, to register with the IRS and obtain a GIIN and, for FFIs located in a Model 2 IGA or non-IGA jurisdiction, to enter into an FFI agreement. FFIs are generally required to certify their FATCA-compliant status to withholding agents by referencing their GIIN on a U.S. withholding tax form (typically, an IRS Form W-8BEN-E or W-8IMY) to avoid incurring FATCA withholding tax. FFIs that are required to renew their FFI agreements and fail to do so by July 31, 2017, will be treated as having terminated their FFI agreements retroactively as of January 1, 2017, and their GIIN will be struck from the IRS list of approved FFIs. Such FFIs will be subject to 30 percent U.S. withholding tax on certain types of U.S. source investment income going forward and, potentially could be exposed to contractual liability vis-à-vis FATCA withholding agents (including prime brokers, custodians, and International Swaps and Derivatives Association counterparties) for the period during which their FFI agreements are retroactively terminated.

Contact Information

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