

## Alert

### New Proposed Tax Regulations on FATCA Withholding and Reporting

April 25, 2012

The Internal Revenue Service (the "IRS") released proposed regulations for sections 1471 through 1474 ("FATCA") of the U.S. Internal Revenue Code of 1986, as amended (the "Code"). These proposed regulations affect both onshore (i.e., U.S.) and offshore (i.e., non-U.S.) investment funds. While additional guidance is expected in the coming months, investment managers should already begin the FATCA compliance process by identifying their investors and counterparties as discussed further below.

FATCA mandates certain information reporting and withholding procedures in order to ensure that U.S. persons invested in foreign entities are reported to the IRS. Generally, FATCA requires withholding agents to withhold 30 percent on "withholdable payments" and "passthru payments" made to foreign financial institutions ("FFIs") or to non-financial foreign entities ("NFFEs"), unless certain information reporting requirements are met.

"Withholdable payments" are currently defined as payments of U.S. source fixed or determinable annual or periodic income, which includes U.S. source interest or dividend income ("FDAP income"), and any gross proceeds from the sale or other disposition of any property that produces U.S. source interest or dividend income. "Passthru payments" are defined as payments that are withholdable payments or foreign passthru payments. The IRS has not defined "foreign passthru payments."

Withholdable payments generally include FDAP income allocated to the partners of entities that are treated as partnerships for U.S. tax purposes. For purposes of FATCA, it appears irrelevant whether the partnership physically distributes or pays such FDAP income to its partners. Withholdable payments also include certain receipts of gross proceeds by such entities.

#### **Funds as Financial Institutions**

Financial institutions, for FATCA purposes, include entities that are engaged primarily in the business of investing, reinvesting or trading in securities, commodities, partnership interests, swaps and derivatives thereon and certain other financial contracts. Therefore, investment funds would generally be treated as financial institutions under FATCA.

#### **Offshore Funds as FFIs**

In order to avoid being subject to FATCA withholding in respect of payments by counterparties, FFIs must enter into agreements with the IRS in which such FFIs ("participating FFIs") agree to implement due diligence and verification procedures for determining whether any of their account holders are U.S. persons or U.S.-owned foreign entities, report certain information about such accounts to the IRS and withhold on payments to accounts that fail to provide the necessary information and other FFIs that do not comply with FATCA.

Online registration for offshore funds seeking participating FFI status begins no later than Jan. 1, 2013, and for funds who have entered into such agreements by June 30, 2013, such FFI Agreements will take effect on July 1, 2013.

### **Onshore Funds as Withholding Agents**

Onshore funds are withholding agents for purposes of FATCA withholding in respect of foreign entities (e.g., investors and contractual counterparties) who do not comply with the applicable information reporting requirements.<sup>1</sup> Just like offshore funds, onshore funds must establish procedures by which they can identify the U.S. or foreign status of their investors and counterparties to ascertain any potential withholding obligations. Onshore funds must withhold on payments to foreign payees that do not provide the information necessary to avoid such withholding and must file information returns on withholdable payments and passthru payments.

### **Compliance Procedures and Appointing a Responsible Officer**

Under the proposed regulations, participating FFIs must adopt written due diligence policies and procedures for identifying and documenting account holders, withholding and reporting as required under the FFI Agreement. Participating FFIs must periodically review their compliance with the provisions of the FFI Agreement and appoint a responsible officer who must certify their compliance to the IRS.

A responsible officer of the participating FFI must certify to the IRS within one year of the effective date of its FFI agreement that (i) the participating FFI has reviewed all of its high-value accounts<sup>2</sup> that were in existence prior to the effective date of the FFI Agreement and (ii) to the best of the responsible officer's knowledge, the participating FFI did not have any formal or informal practices or procedures in place from Aug. 6, 2011 through the date of the certification to assist account holders in the avoidance of FATCA withholding and reporting. Additionally, the responsible officer must certify to the IRS within two years of the FFI Agreement's effective date that it has completed the account identification procedures and documentation requirements for all financial accounts that are preexisting obligations or, if it has not obtained the documentation required to be obtained with respect to an account, that it treats such account in accordance with the requirements of its FFI Agreement.

In the absence of direct guidance, it appears likely that an offshore fund's board of directors would appoint the investment manager as the responsible person for FATCA compliance and the investment manager would establish its internal FATCA compliance procedures, including appointing a responsible person to provide for the relevant certifications and disclosures.

### **The FFI Agreement**

The proposed regulations include the general provisions intended to be included in the FFI Agreement. The IRS intends to circulate a draft model FFI Agreement in the first half of 2012. The FFI Agreement will require the following provisions (among others):

*Withholding:* Participating FFIs must agree to act as withholding agents and must withhold 30 percent on passthru payments to recalcitrant account holders (unless exempted by an IRS-foreign government agreement) and nonparticipating FFIs.

*Identification and Documentation Procedures:* Participating FFIs must perform due diligence for identifying and documenting account holders. Determining an account holder's status requires the collection of an account holder's valid withholding certificate (W-8BEN, W-8ECI, W-8EXP, W-8IMY or W-9). Forms W-8IMY must include the intermediary's FFI-EIN (or QI/WP/WT-EIN).

Participating FFIs must retain originals or photocopies of the documentation needed to determine an account holder's status generally for six calendar years (subject to extension by the IRS) for preexisting accounts. The retention period for new accounts is unspecified.

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<sup>1</sup> "Withholding agent" is broadly defined as any person, U.S. or foreign, that has control, receipt, custody, disposal or payment of a withholdable payment.

<sup>2</sup> A "high-value account" is an account with a value or balance in excess of \$1,000,000.

*Annual Reporting:* Participating FFIs must annually report certain information to the IRS. As mentioned below, the proposed regulations phase in the full reporting requirements.

- For Accounts Held by Specified U.S. Persons:<sup>3</sup> Participating FFIs must report the name, address<sup>4</sup> and TIN of each specified U.S. person account holder; the account number, and account balance or value; the payments made with respect to the account during the calendar year; and such information required to be reported on the IRS form for this reporting. There is no minimum amount or percentage of the FFI that a specified U.S. person account holder must own in order for such person to be subject to reporting.
- For Accounts Held by U.S.-owned NFFEs: Participating FFIs must report the name, address and TIN (if any) of the U.S.-owned foreign entity; the name, address and TIN of each substantial U.S. owner<sup>5</sup> of such entity; the account number, and account balance or value; and the payments made with respect to the account during the calendar year.
- For Recalcitrant Account Holders: Participating FFIs must report separately the number of active accounts and aggregate values of such accounts belonging to recalcitrant account holders<sup>6</sup> for each of (i) those accounts with U.S. Indicia<sup>7</sup> and (ii) those accounts without U.S. Indicia.

The annual reporting form must be filed by March 31, but the IRS will grant an automatic 90-day extension (and a discretionary additional 90-day extension) if the participating FFI files Form 8809 requesting such extension.

*Foreign Law Waiver:* When the law of the foreign jurisdiction in which the account is held prohibits (but for a waiver) the reporting required by the FFI Agreement, participating FFIs must either obtain a valid waiver from its U.S. account holders, or close the account if they do not obtain a waiver within a reasonable amount of time.

*Verification Procedures:* As described above, participating FFIs must adopt written due diligence policies and procedures for identifying and documenting account holders, withholding and reporting as required under the FFI Agreement. The IRS may audit (through an external auditor) participating FFIs to determine compliance, if disclosures in these periodic reports raise concerns for the IRS.

**Phasing-In FATCA — Important Effective Dates:** The proposed regulations phase in FATCA's requirements:

- Information Reporting for Offshore Funds that are Participating FFIs:
  - Beginning in 2014 and 2015 (for calendar years 2013 and 2014), participating FFIs are required to report only the name, address, TIN, account number and account balance of U.S. accounts.

<sup>3</sup> "Specified U.S. Person" means any U.S. person other than a publicly traded corporation; any corporation that is a member of the same expanded affiliated group as a publicly traded corporation; any 501(a) tax exempt organization or an individual retirement plan; the U.S. or any wholly-owned agency or instrumentality thereof; any State, the District of Columbia, any possession of the U.S., any political subdivision of any of the foregoing, or any wholly-owned agency or instrumentality of any one or more of the foregoing; any bank; any REIT; any RIC or any entity registered with the SEC under the Investment Company Act of 1940; any common trust fund; any tax exempt trust under section 664(c) or described in section 4947(a)(1); a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the U.S. or any State; and a broker.

<sup>4</sup> The address to be reported is the residence address or, if none is associated with the account, the mailing address.

<sup>5</sup> "Substantial U.S. owners" means certain U.S. persons with at least a 10 percent ownership interest in the NFFE.

<sup>6</sup> "Recalcitrant account holder" means any account holder (with few exceptions) of an account maintained by a participating FFI if such account holder is not an FFI and the account holder (i) fails to comply with requests by the participating FFI for the documentation or information required for determining the U.S. or foreign status of such account; (ii) fails to provide a valid Form W-9 upon request from the participating FFI or fails to provide a correct name and TIN combination upon request from the participating FFI when the participating FFI has received notice from the IRS indicating that the name and TIN combination reported by the participating FFI for the account holder is incorrect; or (iii) if foreign law would prevent reporting by the participating FFI with respect to such account, the account holder (or substantial U.S. owner of an account holder that is an NFFE) fails to provide a valid and effective waiver of such law to permit such reporting.

<sup>7</sup> "U.S. Indicia" is defined subsequently at footnote 9.

- Beginning in 2016 (for calendar year 2015), in addition to the above information, participating FFIs must report payments associated with U.S. accounts, other than payments of gross proceeds from the sale or redemption of property with respect to which the participating FFI served as custodian or agent for the account holder.
- Beginning in 2017 (for calendar year 2016), full reporting takes effect.
- Information Reporting for U.S. Financial Institutions/Withholding Agents/Onshore Funds:
  - While U.S. financial institutions can voluntarily perform due diligence on their preexisting account holders currently, for accounts opened after Jan. 1, 2013, U.S. financial institutions must perform due diligence to determine new account holders' U.S. or foreign status. Even though diligence does not need to be performed for preexisting accounts, if after Jan. 1, 2013 a financial institution reviews a preexisting account holder's documentation, that financial institution must perform due diligence to determine the account holder's U.S. or foreign status.<sup>8</sup>
  - Beginning March 15, 2014, U.S. financial institutions, as withholding agents, must report for the 2013 calendar year on the substantial U.S. owners of NFFE account holders, the name of each NFFE that is owned by a substantial U.S. owner and the name of each substantial U.S. owner, each such owner's TIN and mailing address, and any other information that the IRS may require.
  - Beginning March 15, 2015, U.S. financial institutions, as withholding agents, must also report information required on Form 1042 and 1042-S (U.S. source FDAP income) for the 2014 calendar year.
  - Beginning March 15, 2016, Form 1042-S will also require U.S. financial institutions, as withholding agents, to report gross proceeds for the 2015 calendar year.
  - The proposed regulations do not exempt items from reporting merely because they are also reported on a Schedule K-1.
- Withholding by Participating FFIs:
  - Beginning on Jan. 1, 2014, participating FFIs must generally withhold on withholdable payments of U.S. source FDAP income paid to recalcitrant account holders or nonparticipating FFIs.
  - Beginning on Jan. 1, 2015, participating FFIs must also generally withhold on withholdable payments of gross proceeds from the sale of property that produces U.S. source interest or dividend income paid to recalcitrant account holders or nonparticipating FFIs.
- Withholding by U.S. Funds:
  - Beginning on Jan. 1, 2014, U.S. persons, as withholding agents, must generally withhold on withholdable payments of U.S. source FDAP income paid to nonparticipating FFIs.
  - Beginning on Jan. 1, 2015, U.S. persons, as withholding agents, must also generally withhold on withholdable payments of gross proceeds from the sale of property that produces U.S. source interest and dividend income paid to nonparticipating FFIs.
- Special Withholding and Reporting on Passthru Payments:
  - Beginning on Jan. 1, 2014, participating FFIs will be required to withhold on passthru payments that are also withholdable payments, as opposed to foreign passthru payments. Participating FFIs, however, must report annually on Form 1042-S the aggregate amount of foreign passthru payments of FDAP-type income (and other financial payments yet to be determined by the IRS) paid to each nonparticipating FFI for the 2015 and 2016 calendar years.
  - Withholding on foreign passthru payments will not begin before Jan. 1, 2017, and the IRS will provide for this in future guidance.

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<sup>8</sup> Diligence must be performed for accounts opened on or after Jan. 1, 2013, because for such accounts the proposed regulations treat withholding agents as having reason to know that an account holder's status is unreliable if any information contained in its account opening or other files contradicts the account holder's claimed U.S. or foreign status.

- Grandfathered Obligations:
  - Obligations “outstanding on January 1, 2013” are grandfathered. Payments on, and gross proceeds from, the disposition of such grandfathered obligations are not subject to FATCA withholding. An obligation is “outstanding on January 1, 2013” if, for a debt obligation, the issue date precedes Jan. 1, 2013, or, for all other obligations, the binding agreement was executed before Jan. 1, 2013. Note that any material modification of an outstanding obligation causes the obligation to be treated as newly issued/executed as of the modification date. Any material modification after Jan. 1, 2013 will result in the loss of an obligation’s grandfathered status.

### **Validly Identifying and Documenting Account Holders**

A significant amount of FATCA groundwork for investment managers can already be done today by validly identifying fund investors and fund counterparties as individuals or entities and as U.S. or non-U.S. This identification process can be done with the helpful guidance contained in the proposed regulations on the types of documentation for different accounts and account holders on which participating FFIs and withholding agents may rely as sufficient to determine the U.S. or foreign status of account holders. In general, participating FFIs and withholding agents may rely on documentary evidence that reasonably establishes a person’s identity, unless they have reason to know that the information provided is incorrect or misleading.

In the absence of proper documentation, certain helpful presumptions apply in determining whether an account holder or payee is a U.S. or foreign person.

- Account holders and payees are presumed to be entities, unless something indicates that they are individuals (such as the name of the account is that of an individual).
- Payments are presumed made to U.S. persons, unless any of the following applies (in which case, payments are presumed made to foreign persons):
  - The withholding agent or participating FFI treats the payee as an entity and (i) has actual knowledge that the EIN of the payee begins with “98;” (ii) mails communications to the payee to an address in a foreign country; (iii) knows the payee’s telephone number to be outside the U.S.; or (iv) the payee’s name indicates that it is a per se foreign corporation.
  - The payee is a certain type of exempt recipient.
  - The payment is made outside of the U.S. with respect to an offshore obligation, and the withholding agent does not know or have reason to know that the payee is a U.S. person.
- Foreign entities whose FATCA status is undetermined are presumed nonparticipating FFIs.
- Payments are presumed made to an intermediary if documentation or facts and circumstances indicate that the person who receives the payment is a bank, broker, custodian, intermediary, or other agent and the withholding agent has no knowledge that the person receives the payment for its own account. If the intermediary is treated as foreign, then the payment is presumed made to a foreign intermediary that is a nonparticipating FFI.
- If a withholding agent or participating FFI, making a payment to joint payees, lacks valid documentation from each payee but all of the joint payees appear to be individuals, then the payment is presumed made to an unidentified U.S. person. If any joint payee does not appear, by its name and other information contained in the account file, to be an individual, then the entire payment will be treated as made to a nonparticipating FFI. However, if one of the joint payees provides a valid Form W-9, the payment is treated as made to that payee.

The proposed regulations make an important distinction between pre-existing accounts and new accounts (see Tables I and II that follow). Investment managers will generally be constrained by existing subscription agreements and fund documents in respect of existing investors but are expected to have greater flexibility in requiring new investors to adhere to FATCA requirements.

## Documentation and Inspection of Specific Types of Accounts

TABLE I PREEXISTING ACCOUNTS

Individual Accounts	
<b>U.S. Accounts</b>	If a participating FFI has previously determined that an individual account holder is a U.S. person for other U.S. withholding purposes, such account is treated as a U.S. account.
<b>Accounts at or Below \$50,000</b>	Individual accounts with a balance or value at or below \$50,000 <b>as of the effective date of the FFI Agreement</b> are exempt from review, unless the participating FFI elects otherwise.
<b>Offshore Obligations Above \$50,000 and up to \$1,000,000</b>	Accounts that are offshore obligations with a balance or value above \$50,000 but not above \$1,000,000 <b>as of the effective date of the FFI Agreement</b> are subject only to review of electronically searchable data for indicia of U.S. status. <sup>9</sup> No further search is required unless U.S. Indicia are found through the electronic search.
<b>High-Value Accounts (Accounts Exceeding \$1,000,000)</b>	Accounts exceeding \$1,000,000 <b>as of the effective date of the FFI Agreement or at the end of any subsequent calendar year</b> are considered high value accounts and require documentation to determine their U.S. or foreign status. These accounts are subject to review of electronic and non-electronic files for U.S. Indicia, including inquiry into actual knowledge of any relationship manager associated with the account. Review of non-electronic files is limited to the current customer files and certain other documents, and is required only to the extent that the electronically searchable files lack sufficient information about the account holder. AML/KYC diligence alone is insufficient.
<b>Participating FFIs must perform due diligence and obtain documentation from preexisting individual accounts within two years of the date of its FFI Agreement, or within one year for high value accounts.</b>	
Entity Accounts	
<b>Accounts at or Below \$250,000</b>	Entity accounts with balances at or below \$250,000 <b>as of the effective date of the FFI Agreement</b> and no holder of the account has been documented previously by the FFI as a U.S. person are exempt from review until the account balance exceeds \$1,000,000.
<b>Accounts Exceeding \$250,000</b>	For entity accounts with balances exceeding \$250,000 <b>as of the effective date of the FFI Agreement</b> , FFIs can generally rely on AML/KYC records and other existing account information to determine the entity's status.
<b>Accounts of Passive NFFEs<sup>10</sup> Above \$250,000 and up to \$1,000,000</b>	For preexisting accounts of passive investment entities with account balances at or below \$1,000,000 <b>as of the effective date of the FFI Agreement</b> , FFIs may generally rely on information collected for AML/KYC due diligence purposes.

<sup>9</sup> "U.S. Indicia" include: identification of an account holder as a U.S. citizen or resident; U.S. place of birth; U.S. address; U.S. telephone number; standing instructions to transfer funds to a U.S. maintained account; and power of attorney or signatory authority in a person with a U.S. address; or a U.S. "in-care-of" or "hold mail" address that is the sole address the FFI has identified for the account holder.

<sup>10</sup> Passive NFFEs are NFFEs whose stock is not publicly traded and is not part of an expanded affiliated group of an NFFE whose stock is publicly traded.

<b>Accounts of Passive NFFEs exceeding \$1,000,000</b>	Participating FFIs must obtain information regarding all substantial U.S. owners or a certification that the entity does not have substantial U.S. owners.
<b>Participating FFIs must perform the requisite identification procedures and obtain the appropriate documentation (usually a Form W-8 or W-9) within one year of the effective date of their FFI Agreement for any account holder that is a “prima facie FFI”<sup>11</sup> and within two years of the effective date of their FFI Agreement for all other entity accounts.</b>	

**TABLE II NEW ACCOUNTS**

<b>Individual Accounts</b>	
<b>Required Documentation</b>	Participating FFIs must obtain a Form W-8 or W-9 from individual account holders. However, for an individual account that is an offshore obligation, a W-8 is unnecessary if the participating FFI obtains documentary evidence sufficient to determine the individual’s foreign status (e.g., certificate of residence, valid ID issued by a foreign government).
<b>Inspection of Documentation</b>	<b>Participating FFIs must inspect all documentation received from individual account holders (at opening the account and for other regulatory purposes) for U.S. Indicia.</b> However, FFIs are not required to make significant changes to their account opening procedures unless U.S. Indicia are found.
<b>If any of the U.S. Indicia is Found, Participating FFIs Must Obtain the Following Information:</b>	<ul style="list-style-type: none"> <li>• If the individual is identified as a U.S. person, a valid Form W-9 and waiver of foreign law disclosure limitations;</li> <li>• If the individual has a U.S. place of birth, a valid Form W-9 and waiver of foreign law disclosure limitations, or a Form W-8BEN and a non-U.S. passport or government-issued ID evidencing citizenship in another country; accompanied by a Certificate of Loss of U.S. nationality, explanation of individual’s renunciation of U.S. citizenship, or the reason for not obtaining U.S. citizenship at birth;</li> <li>• If the individual has a U.S. (mailing) address or telephone number in the U.S., a valid Form W-9 and waiver of foreign law disclosure limitations, or a Form W-8BEN and a non-U.S. passport or government-issued ID evidencing citizenship in another country;</li> <li>• If the account has standing instructions to transfer funds to a U.S. maintained account, a valid Form W-9 and waiver of foreign law disclosure limitations, or a Form W-8BEN and government-issued documentation of foreign person status;</li> <li>• If the individual has granted a power of attorney or signatory authority to a U.S. person or a U.S. “in-care-of” or “hold mail” address, a valid Form W-9 and waiver of foreign law disclosure limitations, or a Form W-8 and government-issued documentation of foreign person status.</li> </ul>

<sup>11</sup> “Prima facie FFI” means a payee where the payee is (1) designated as a qualified intermediary or a nonqualified intermediary or (2) presumed or documented as a foreign entity and a standardized industry code indicates that the payee is a financial institution.

## Entity Accounts

<b>Required Documentation and Inspection of Documentation</b>	Participating FFIs must obtain a valid Form W-8 or W-9, or other suitable documentary evidence, for new entity accounts in order to identify the entity's status as a U.S. person, a participating FFI, a nonparticipating FFI, or an NFFE. If a passive NFFE, the documentation must also provide sufficient information needed to determine if the entity has any substantial U.S. owners.
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### Special Entities with Reduced Compliance Burdens

In response to public comments, the IRS has included certain categories of "Deemed-Compliant FFIs."

*Deemed-Compliant FFIs:* Deemed-Compliant FFIs are treated as having entered into an FFI Agreement and thus have a reduced compliance burden. Deemed-Compliant FFIs include (1) Registered Deemed-Compliant FFIs, (2) Certified Deemed-Compliant FFIs and (3) owner-documented FFIs.

- Registered Deemed-Compliant FFIs must (a) have its CCO or an equivalent person certify to the IRS that the FFI has satisfied all of the requirements for the type of Deemed-Compliant FFI claimed by the FFI as of the date the FFI registers as a Deemed-Compliant FFI; (b) obtain from the IRS a confirmation of its registration as a Deemed-Compliant FFI and an FFI-EIN; (c) agree that if it chooses to publish a passthrough payment percentage, it will do so in accordance with certain procedures; (d) renew its certification every three years; and (e) agree to notify the IRS if there is a change in circumstances which would make the FFI ineligible for the deemed-compliant status for which it registered.

Registered Deemed-Compliant FFIs include the following FFIs:

- Qualified collective investment vehicles:
    - Investment funds regulated by their country of organization and considered FFIs solely because they are engaged primarily in the business of investing, reinvesting, or trading in securities, commodities, interests and contracts;
    - Each debtholder above \$50,000, equityholder or other financial interest holder in the vehicles is a participating FFI, a Registered Deemed-Compliant FFI, or certain categories of persons exempt from FATCA withholding;<sup>12</sup> and
    - If part of an expanded affiliated group, all other FFIs in the group must be either participating FFIs or Registered Deemed-Compliant FFIs.
  - Certain restricted funds regulated as investment funds by their country of organization (which itself is FATF-compliant) where their distribution agreements prohibit sales of debt or equity to U.S. persons, nonparticipating FFIs or passive NFFEs with substantial U.S. owners.
  - Any FFI that is deemed compliant because of an agreement between the U.S. government and a foreign government.<sup>13</sup>
- Certified Deemed-Compliant FFIs include certain retirement funds and certain non-profit organizations.

<sup>12</sup> The categories of exempt U.S. persons include corporations whose stock is regularly traded on established securities markets or corporations within the same expanded affiliated group as such regularly traded corporations; 501(a) tax exempt organizations or "individual retirement plans;" the U.S. or any wholly owned agency or instrumentality thereof; any U.S. state or possession, political subdivision thereof, or wholly-owned agency or instrumentality thereof; banks; REITs; RICs or entities registered under the Investment Company Act of 1940; common trust funds; certain tax exempt trusts; U.S.-registered dealers in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options); and brokers. See, by contrast, the definition of Specified U.S. Person *supra*, note 3.

<sup>13</sup> Concurrent with the proposed regulations, the U.S. promulgated a joint statement with France, Germany, Italy, Spain, and the U.K. acknowledging a general commitment to combating tax evasion and cross-border knowledge sharing. Through such intergovernmental cooperation, the FATCA partner country would assume a portion of the reporting obligations, thereby relieving FFIs from entering into FFI Agreements. Instead the FFIs would report to their country's government and that foreign government would report to the IRS.



3. Owner-documented FFIs are deemed compliant only with respect to payments received by, or accounts held with, withholding agents that agree to undertake additional due diligence and reporting necessary to deem the owner-documented FFI compliant. Owner-documented FFIs are not deemed compliant when acting as intermediaries.

As a practical matter, the requirements for deemed compliant status — specifically, those involving qualified collective investment vehicles or restricted funds — are not particularly helpful for the typical non-U.S. investment fund entity whose interests may be held by both individuals and entities and whose distribution is not as strictly limited as the proposed regulations require. It would appear that most non-U.S. investment funds would likely end up being participating FFIs entering into FFI Agreements.

Further guidance is expected in the coming months.

If you have any questions concerning this *Alert*, please contact your tax attorney at Schulte Roth & Zabel.

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