

Financial Institutions Eye FATCA Compliance – New US IRS Guidance

The Foreign Account Tax Compliance Act (FATCA) was enacted in March 2010 as the revenue offset provision for other legislation. Its effects are considerably far reaching, and FATCA will potentially affect all “foreign financial institutions” (FFIs), including non-US banks, various investment funds, securitization vehicles, retirement plans and others.

An FFI will be subject to a 30% withholding on all US-source income (including interest, principal, dividends and sale proceeds) unless the FFI agrees with the US Internal Revenue Service (IRS) to accept complex reporting, due diligence and withholding tax obligations with respect to its direct and indirect US account-holders. The formal FFI Agreement with the IRS will require an FFI to withhold a 30% US tax from its payments to any other FFI that is “non-compliant” – i.e., has not itself signed an agreement with the IRS or generally any foreign person that cannot represent it is not a US person and does not have any US owners. Certain types and categories of foreign persons are exempt or could be “deemed compliant” from making such representations. This “pass-through withholding” obligation applies regardless of whether the paying FFI, the recipient FFI or the payment itself has any connection with the US.

Much anticipated Proposed Regulations to implement most aspects of the FATCA compliance and reporting provisions were published earlier this month. These regulations attempted to respond to a number of comments submitted to the IRS regarding several IRS Notices concerning FATCA published over the past two years. The IRS has invited comments on the proposed regulations to be submitted by 30 April 2012, and a hearing on these regulations has been scheduled for 15 May 2012. Although the proposed regulations appear to reduce the compliance burdens imposed on FFIs, substantial obligations remain, especially for foreign accounts with balances or values that exceed US\$1 million. The full compliance date for pass-through obligations has been further extended to 1 January 2017.

Amidst concerns that European banks and other financial institutions might not be able to comply with FATCA without contravening local law requirements, the governments of the US, France, Germany, Italy, Spain and the UK have concurrently published a joint statement affirming their commitment to establish an intergovernmental approach to address the FATCA reporting obligations. Instead of reporting information to the IRS directly, FFIs could report to their own governments, which would then report the information to the IRS. This intergovernmental reporting is expected to be a “two-way street.” The IRS in return will start to report US financial accounts owned by residents of the countries participating in these exchanges. At this time, other unnamed countries have expressed interest in participating in similar arrangements. There is even speculation that an agreement for all EU members could be reached.

In the meantime the countdown for the commencement of FATCA has already begun. The initial FFI Agreements are scheduled to commence on 1 January 2013 with the initial withholding and reporting requirements commencing on 1 January 2014 – or in the case of pass-through payments, 1 January 2017. While these dates may seem distant, all FFIs and US persons who make payments to FFIs should start to take preparatory steps to be in a position to comply with the regime when it goes into effect.



For more information on FATCA and best practice procedures to satisfy its complicated compliance, reporting and withholding requirements, as well as for updates on regulatory and legislative developments, please contact your principal Squire Sanders lawyer or one of the lawyers from the following practice groups:

- [Taxation & Benefits](#)
- [Corporate Transactions, Finance & Governance](#)
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In addition, if interested foreign persons or industry groups wish to submit written comments on the proposed regulations by the April 30th deadline or wish to discuss legislative efforts to modify FATCA, please contact us as soon as possible.