

July 18, 2011

It's Just a Phase: The "Phased Implementation" of FATCA Under Notice 2011-53

On July 14, 2011, Treasury and the Internal Revenue Service (IRS) released Notice 2011-53 (the Notice), which provides transition rules for implementation of the Foreign Account Tax Compliance Act (FATCA). Although the statutory effective date of the FATCA provisions is January 1, 2013, the transition rules provide for phased implementation of the withholding and reporting requirements imposed by the law. The tables set forth below summarize the phased implementation provided by the Notice.

In general, no withholding will be required under FATCA until January 1, 2014, and even then withholding will be required only with respect to payments that constitute U.S. source fixed or determinable, annual or periodic (FDAP) income. Withholding on gross proceeds from the sale of an asset that produces U.S. source FDAP and passthru payments will not begin until January 1, 2015 (unless a passthru payment includes U.S. source FDAP, in which case the U.S. source FDAP portion of the passthru payment will be subject to withholding on January 1, 2014). Other transition rules are summarized in the tables below.

Although the purpose of the Notice is to provide transition implementation rules, the Notice also provides some substantive guidance as to the application of the rules. For example, certain obligations are grandfathered with respect to the withholding tax requirements under FATCA, and the Notice specifically indicates that legal agreements that produce passthru payments are included in the grandfathering provisions. For insurance companies, this likely means that passthru payments made with respect to qualifying grandfathered policies and annuities should be eligible for the exemption from withholding. (Information reporting still will be required for all grandfathered obligations, however.)

Part III of the Notice announces that proposed regulations will incorporate the guidance provided in Notice 2010-60, as amended and supplemented by Notice 2011-34. The implication is that the procedures provided in that guidance may not be substantially changed in the proposed regulations; consequently, the regulations may not offer a more limited review of account files, as some foreign financial institutions (FFIs) had requested. The implications of this portion of the Notice with respect to requests by the insurance industry to limit electronic searches to policies and annuities with a cash value of \$1 million or more are not clear.

Further guidance on the scope of the private banking procedures and the associated required searches of account holder files is to be provided in regulations. The scope of the current definition of "private banking account" in Notice 2011-34 has been criticized as too broad, and government officials have publicly stated that the definition will be revised.

The Notice also announces that proposed regulations implementing FATCA are expected to be issued by December 31, 2011, with final regulations following in the summer of 2012. Additionally, draft versions of FFI Agreements and reporting forms also are slated to be released in the summer of 2012.

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Execution of FFI Agreements	
Date on which the IRS will begin accepting applications to enter into FFI Agreements	No later than January 1, 2013
Last date to enter into an FFI Agreement to ensure that there is no withholding beginning on January 1, 2014. The effective date of all FFI Agreements entered into before July 1, 2013, will be July 1, 2013. FFI Agreements entered into after July 30, 2013, may not forestall withholding beginning on January 1, 2014.	June 30, 2013
Due Diligence	
<u>New Accounts</u>	<u>Transition Date Under Notice 2011-53</u>
Participating FFIs must implement account opening procedures described in Notice 2010-60 to identify U.S. accounts	On or after the effective date of the FFI Agreement
<u>Pre-Existing Accounts</u>	<u>Transition Date Under Notice 2011-53</u>
Large Private Banking Accounts. Completion of Step 3 (Notice 2011-34) due diligence for private bank accounts with balances or values <i>greater or equal to</i> \$500,000	Within one year of the effective date of the FFI Agreement
Smaller Private Banking Accounts. Completion of private banking procedures for pre-existing private bank accounts with balances or values <i>less than</i> \$500,000	Later of December 31, 2014 <u>or</u> one year after the effective date of the FFI Agreement
All Other Pre-existing Accounts. Completion of due diligence procedures in Notices 2010-60 and 2011-34	Two years after the effective date of the FFI Agreement

Reporting of U.S. Accounts	
<u>New Accounts, Documented U.S. Accounts, and Private Banking Accounts</u>	<u>Transition Date Under 2011-53</u>
<p>Limited Reporting for First Year. This limited reporting also applies to FFIs that elect to report as a U.S. FFI under section 1471(c)(2)</p> <ul style="list-style-type: none"> ▪ Name, address, and U.S. TIN of each U.S. person who is an account holder or, if the account is owned by a U.S.-owned foreign entity, name, address, and U.S. TIN of each substantial U.S. owner; ▪ The account balance as of December 31, 2013, or, for closed accounts, the balance immediately before closure; and ▪ The account number <p>May elect to report under Notice 2011-34 Must report any recalcitrant account holders</p>	Form W-9 received by June 30, 2014, must be reported to IRS by September 30, 2014
<u>Post-2013 Years</u>	
Reporting in accordance with Notice 2011-34 as implemented in future regulations	

Withholding	
<u>Types of Withholdable Payments</u>	<u>Transition Date Under Notice 2011-53</u>
U.S. Source FDAP Payments (e.g., interest, dividends, royalties, rent, etc.)	Payments made on or after January 1, 2014
Gross Proceeds (i.e., gross proceeds from the sale of assets that produce or may produce U.S. source FDAP income)	Payments made on or after January 1, 2015
Passthru Payments (Note that a U.S.-source FDAP payment that also would be a passthru payment is subject to the January 1, 2014, effective date.)	Payments made on or after January 1, 2015

Other	
<u>Expiring QI, WFP, and WFT Agreements</u>	<u>Transition Date Under Notice 2011-53</u>
Original expiration date of December 31, 2012	Automatic extension until December 31, 2013

For additional background to the Notice, our previous commentary concerning FATCA can be accessed using the following links:

- [Spring Is in the Air, and So Is FATCA! Notice 2011-34 Offers Another Dose of Much-Anticipated Guidance](#)
- [Summer's Last Gasp: Notice 2010-60—Preliminary Guidance Under FATCA](#)
- [Reporting, Withholding, and More Reporting: HIRE Act Reporting and Withholding Provisions](#)
- [FATCA Proposed Legislation Enacted as Part of HIRE Act](#)
- [Significant Changes Made to FATCA Legislation as Part of House Passed Extenders Bill](#)
- [Significant Proposed Legislation Would Increase Compliance Costs for U.S. Payors and Impact Worldwide Recipients of U.S. Source Income](#)



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