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February 9, 2012

FATCA Update for Latest Government Guidance

The U.S. Treasury Department (the Treasury) on February 8 released proposed regulations and a related groundbreaking announcement regarding the recently enacted tax legislation called the Foreign Account Tax Compliance Act or FATCA. FATCA's purpose is to flush out the identity of U.S. investors who may be trying to avoid payment of U.S. taxes by investments channeled through offshore accounts with non-U.S. banks or financial institutions. FATCA has caused a great deal of controversy and concern in the financial sector due to the potentially burdensome requirements it may place on non-U.S. banks and financial institutions. A failure to comply with FATCA could subject those entities to a new 30% U.S. withholding tax.

Some of the highlights of the Treasury's latest action are as follows:

- The Treasury Department announced a joint program with the UK, France, Germany, Spain and Italy to address compliance with FATCA. Banks and foreign financial institutions in those countries would be relieved of their FATCA reporting responsibilities with the U.S. Internal Revenue Service (IRS), which their governments would handle. This is an unprecedented move that may be a welcome relief for residents of those countries, but the details of the program are still being developed.

- A delay in some of the effective dates for implementation of FATCA. Previously, the Treasury delayed implementation of FATCA until 2014 (with some added delays for portions of the legislation). Yesterday, the Treasury, among other things, delayed until 2017 FATCA's withholding tax imposed on so-called "pass-through payments" received by financial institutions, which adds some breathing room to work out this very complex provision.

- Expanded scope of deemed compliant foreign financial institutions that are not subject to the extensive reporting burdens otherwise imposed by FATCA. A significant change is that if a fund is regulated under local law, then the fund can be deemed compliant if its distributors meet certain requirements. This shift should allow more funds to meet this status.

- The Treasury confirmed that the FATCA withholding tax is not a final tax, and refunds are available to participating entities as well as entities resident in countries that have an income tax treaty in effect with the United States. The refund element was often overlooked in the discussions of how FATCA would be implemented by the IRS.

- More relaxed guidelines for determining the tax status of a fund's investors. These new rules will allow for greater reliance on information gathered under know-your-customer and/or anti-money laundering rules and avoid the need to comb paperwork retained by a fund.

There are numerous other major changes, which we are reviewing and will report back to you in a more detailed assessment later this month. In that regard, Dechert partner **Michael Hirschfeld** will be chairing a program on FATCA on February 17 in San Diego at the American Bar Association Tax Section meeting. In the interim, please feel free to contact **Michael Hirschfeld** or **Adrienne M. Baker**
in our U.S. offices, **David Gubbay** or **Mark Stapleton** in our London office, or **Angelo Lercara** or **Hans Stamm** in our Munich office with any questions.

For More Information

If you have questions regarding the information in this update, please contact one of the lawyers listed or any Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/tax.

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