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International Tax

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Treasury provides new guidance on foreign account tax compliance ("FATCA")

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On 8 April 2011, Treasury and the Internal Revenue Service (IRS) issued Notice 2011-34, supplementing, and in some cases superseding, Notice 2010-60, last summer's initial explanation of the future regulations they intend to publish under new chapter 4 (§§1471-1474)[1] of the Internal Revenue Code (also commonly referred to as the foreign account tax compliance act, or "FATCA").[2]

Highlights of Notice 2011-34 include:

- Identification of U.S. accounts. Notice 2011-34 completely re-writes the Notice 2010-60 procedures that a "participating" foreign financial institution (FFI) must use to identify the "U.S. accounts" among its preexisting individual accounts; Notice 2011-34 focuses on the accounts of the FFI's "private banking" customers and accounts with balances or values of USD 500,000 or more.
- Certification of pre-effective-date company policies. An FFI's Chief Compliance Officer (or other senior officer) will be required to certify to the IRS that, between the date Notice 2011-34 was published and the effective date of the FFI's FFI Agreement, "FFI management personnel did not engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding the identification of their accounts as U.S. accounts under the procedures described" in Notice 2011-34.
- Passthru payment computation. The method is specified for calculating the precise amount that will be treated as a "passthru payment" (on which an FFI generally must withhold tax) when a participating FFI pays a recalcitrant account holder or non-participating FFI; and provision is made for the publication of individual FFIs' "passthru payment percentages."

[1] Unless expressly stated otherwise in this document, all references to the "Code" are to the Internal Revenue Code of 1986 and the regulations thereunder as amended.

[2] For a discussion of Notice 2010-60, see "United States Tax Alert - Foreign Account Tax Compliance: Initial Guidance Issued on Chapter 4 (Code §§1471-1474)," dated 30 August 2010; and "News Analysis: A Look at Initial FATCA Guidance," 11 Tax Notes Int'l 820 (13 September 2010), Tax Analysts Doc 2010-19386.

- New deemed-compliant FFI categories. Three new categories of "deemed-compliant FFIs" are announced (in addition to the one announced in Notice 2010-60): Certain banks or other FFIs that serve entirely local customers, and certain funds directly held solely in the names of participating or deemed-compliant FFIs or §1471(f) entities (i.e. entities deemed by the Treasury Secretary to pose a low risk of tax evasion).
- Exceptions from FATCA for foreign retirement plans. A promise is made that guidance will be forthcoming, in addition to that in Notice 2010-60, on retirement plans or accounts that will be treated as §1471(f) entities.
- U.S. account information that must be reported to the IRS.
    - Relaxation of the requirements in Notice 2010-60, governing a participating FFI's reports to the IRS on the balances in its U.S. accounts, is announced.
    - Guidance is provided on what a participating FFI must report to the IRS in order to satisfy the requirement that it report on gross receipts and withdrawals or payments made to and from U.S. accounts.
- Coordination with IRS-taxpayer agreements under chapter 3. A requirement is announced that qualified intermediaries, foreign withholding partnerships, and foreign withholding trusts must also become participating FFIs (unless they are deemed-compliant FFIs).
- Group consistency and centralization. A requirement is announced that, if one FFI in an expanded affiliated group of FFIs is to be a participating FFI, then all FFIs in the group must be participating FFIs, and rules are described for the centralization of certain chapter 4 responsibilities, including contact with the IRS, in a single FFI member (or in some cases multiple members) of the group.
- Database on participating and deemed-compliant FFIs. The IRS intends to maintain a database that will permit FFIs and other withholding agents to confirm whether a particular FFI is a participating or deemed-compliant FFI.

This alert summarizes Notice 2011-34 and provides some preliminary observations on its significance.

I. New procedures for testing preexisting individual accounts

Background

Perhaps the most detailed guidance in Notice 2010-60 was Section III.B, which implemented §1471(b)(1)(A) and (B): the requirements that an FFI enter into an agreement with the IRS (an "FFI Agreement," the entry into which causes the FFI to be a "participating FFI") under which the participating FFI agrees to obtain "such information as is necessary" to determine which of the accounts maintained by the FFI are "U.S. accounts," and to comply with "such verification and due diligence procedures as the Secretary may require" to identify those of its accounts that are U.S. accounts.[3]

[3] The term "U.S. account" means any financial account that is held by one or more "specified United States persons" or "United States owned foreign entities," and includes depository and custodial accounts and any equity or debt instrument in an FFI that is not regularly traded on an established securities market.

Section III.B of Notice 2010-60 set forth four separate information gathering, verification and diligence procedures:

(1) For accounts in existence before the effective date of the FFI Agreement where the account holder is an individual ("preexisting individual accounts"), which procedures appeared in section III.B.2.a;

(2) For preexisting accounts where the account holder is an entity ("preexisting entity accounts");

(3) For accounts opened by individuals after the effective date of the FFI Agreement ("new individual accounts"); and

(4) For accounts opened by entities after the effective date of the FFI Agreement ("new entity accounts").

The Notice 2010-60 rules for preexisting accounts tended to require *less* proof of account holders' non-U.S. status than the rules for new accounts. Even so, subjecting preexisting accounts to verification procedures in some ways raises *more* difficult business and compliance issues than the treatment of new accounts: if the FFI did not obtain proof of non-U.S. status at the time an account was opened, and save it until the time when the FFI applied for participating FFI status, it may be hard to motivate the account holder to provide such proof at a later date.

Overview of new rules

Notice 2011-34 affects the rules on preexisting accounts in several ways. First, it clarifies that an FFI Agreement will be effective on the *later of* (i) the date that the agreement is executed, or (ii) the effective date of the legislation that added chapter 4 to the Code (generally payments made after 31 December 2012).[4] Thus, in every case, an account opened before 2013 would appear to be a "preexisting account."

Second, Notice 2011-34 does away entirely with the text of Notice 2010-60 on testing preexisting *individual* accounts for possible U.S. account status (section III.B.2.a), and replaces it with entirely new text (at least 13 out of the 2011 notice's 46 pages). The new text lays out six steps:

(1) Documented U.S. accounts,
(2) Accounts of USD 50,000 or less,
(3) Private banking accounts,
(4) Accounts with U.S. indicia,
(5) Accounts of USD 500,000 or more, and
(6) Annual retesting.

While the new U.S. account identification procedures seem more practically manageable than those originally announced in Notice 2010-60, Notice 2011-34 adds a requirement for a senior officer of the FFI to certify procedural compliance to the IRS. An FFI's chief compliance officer or another equivalent-level officer (the "responsible officer") must certify to the IRS when the FFI has completed the

[4]Chapter 4 was added to the Code by §501 of the Hiring Incentives to Restore Employment Act (the "HIRE Act"), Pub. L. No. 111-147 (30 March 2010). Subsection (d) ("Effective Date") of §501 of the HIRE Act provides that chapter 4 is generally effective for payments made after 2012. Chapter 4, however, does not require any amount to be deducted or withheld from any payment under any "obligation" outstanding on 18 March 2012, or from the gross proceeds from any disposition of such an obligation. See HIRE Act §501(d)(2).

procedures described above for its preexisting individual accounts.[5] As part of these certifications, the responsible officer will be required to certify that, between the publication date of Notice 2011-34 and the effective date of the FFI's FFI Agreement, *FFI management personnel did not engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts under the procedure referred to above.* The responsible officer will further be required to certify that *the FFI had written policies and procedures in place as of the effective date of the FFI's FFI Agreement prohibiting its employees from advising U.S. account holders on how to avoid having their U.S. accounts identified.*

Steps 1 and 2

Steps 1 and 2 provide two elective ways to remove less-than-USD 50,000 accounts from the identification and verification procedures. First, in step 1 the FFI generally treats as U.S. accounts all accounts whose holders have already been documented as U.S. persons for other U.S. tax purposes, except that the FFI may treat, or elect not to treat, a *depository* account as a non-U.S. account if its balance on the calendar year-end preceding the effective date of the FFI Agreement does not exceed USD 50,000. Second, in step 2 the FFI may treat, or elect not to treat, *any* account as a non-U.S. account if its balance or value on the calendar year-end preceding the effective date of the FFI Agreement does not exceed USD 50,000. The use of the year-end balance is in contrast to Notice 2010-60's use of the average of the month-end balances or values during the calendar year preceding the effective date of the FFI Agreement.

Step 3 – Private banking accounts

Step 3 is a stringent set of requirements imposed on the FFI's "private banking accounts" and "private banking relationship managers" generally to be fully implemented within a year of the effective date of the FFI Agreement. Moreover, under step 3, an FFI's due date for reporting U.S. accounts and information regarding recalcitrant account holders will be the designated reporting date (to be prescribed) following the close of the first full year covered by the FFI's FFI Agreement. Among other things, the FFI must ensure that all of the FFI's private relationship managers create and retain lists of all existing clients whose accounts are U.S. accounts, non-U.S. accounts or recalcitrant accounts. The FFI must also ensure that all written requests and responses related to the search for U.S. accounts among its private banking accounts are retained by the FFI for 10 years.

Treasury and the IRS also are considering adopting the private banking test in step 3 for *new* accounts that are private banking accounts.

Defining "private banking"

Notice 2011-34 provides definitions of "private banking" for purposes of step 3.

A "private banking account" is any account maintained or serviced by an FFI's "private banking department" or any account maintained or serviced as part of a "private banking relationship," including any account held by any entity, nominee or other person to the extent the account is associated with the private banking relationship with an individual client.

[5] The responsible officer will certify the FFI's completion of Steps 1 through 3 within one year after the effective date of the FFI's FFI Agreement, and will certify the FFI's completion of Step 4 and Step 5 within two years after the effective date of the agreement.

A "private banking department" is any department, unit, division, or similar part of an FFI that meets *any one* or more of the following criteria:

- It is referred to by the FFI as a private banking, wealth management or similar department;
- It focuses on servicing accounts and investments of individual clients (or their families) whose accounts with the FFI or whose income, earnings or assets exceed certain thresholds, or who are otherwise identified as high-net worth individuals (or families), as determined under an FFI's own policies and procedures;
- It is considered a private banking department under the anti-money laundering or know-your-customer requirements to which the FFI is subject; *or*
- Some or all of its employees, under any of an FFI's formal or informal procedures or other guidelines for its personnel: (i) ordinarily provide personalized services to individual clients (or their families), such as banking, investment advisory, trust and fiduciary, estate planning, philanthropic or other services not generally provided to account holders; or (ii) gather information about individual clients' personal, professional and financial histories in addition to the information ordinarily gathered with respect to the FFI's retail customers.

A "private banking relationship" exists when one or more officers or other employees of the FFI are assigned by the FFI to provide services such as those described in item (i) above, or to gather information about a client (or the client's family) of the type described in item (ii) above, regardless of whether the assigned individual is employed within the FFI's private banking department.

A "private banking relationship manager" is an officer or other employee of the FFI who: (i) is assigned responsibility for specific account holders on an ongoing basis; (ii) advises account holders regarding their banking, investment, trust and fiduciary, estate planning or philanthropic needs; and (iii) recommends, makes referrals to, or arranges for the provision of, financial products, services or other assistance by internal or external providers to meet those needs.

The Treasury and IRS seek comments whether preexisting individual accounts (including private placement insurance) of other FFIs, and in particular insurance companies, should also be subject to procedures similar to those set forth in the notice for private banking accounts.

Step 4 – Accounts with U.S. indicia

Step 4 imposes a requirement that the FFI comb the *electronically searchable information* it maintains that is associated with accounts not identified as U.S. accounts in step 1, non-U.S. accounts in step 2, or private banking accounts in step 3. Notice 2011-34 clarifies that "electronically searchable information" is information an FFI maintains in its tax reporting files, or customer master files or similar files, that is stored in the form of an electronic database "against which standard queries in programming languages, such as Structure Query Language, may be used." Mere storage in an image retrieval system ("such as .pdf files or scanned documents") does *not* make information "electronically searchable."

If such a search surfaces any of the U.S. indicia listed in Notice 2010-60 (except that under Notice 2011-34, the fact that a P.O. address is the sole address on file

for an account is no longer one of the indicia of potential U.S. status), the FFI has one year from the effective date of its FFI Agreement to request required additional documentation, and the account holders have two years from that effective date to provide the requested material or be classified as recalcitrant account holders.

Step 5 – Accounts of USD 500,000 or more ("high value accounts")

If an account is not identified as a U.S. account in step 1, a non-U.S. account in step 2, private banking account in step 3 or an account with U.S. indicia in step 4, then if it is a "high value account" – meaning that it had a balance or value of USD 500,000 as of the end of the year preceding the effective date of the FFI Agreement – "the FFI must perform a diligent review of the account files associated with the account." If the files contain any of the U.S. indicia, the FFI has two years from the FFI Agreement's effective date to obtain the same documentation that would be required in step 4 upon the discovery of such U.S. indicia; failure to obtain such documentation by that date will cause the holder of the account to be classified as a recalcitrant account holder.

Step 6 – Annual retesting for high value account status

Annually, beginning in the third year following the effective date of an FFI Agreement, if a preexisting individual account was not a "high value account" under the above definition, but *would* be a high value account if tested on the last day of the preceding year, the FFI will be required to apply step 5 to the account – i.e. "perform a diligent review of the account files associated with the account." Holders of these newly-high value accounts must be treated as recalcitrant if they have not provided the required documentation by the end of the year.

II. The "passthru payment percentage" – Quantifying the extent to which FFI payments are "attributable to" passthru payments

Section 1471(b)(1)(D) requires a participating FFI to agree with the IRS that it will deduct and withhold a tax equal to 30% of any "passthru payment" to a recalcitrant account holder or non-participating FFI.[6] The term "passthru payment" includes two categories, one clearly defined – "withholdable payments"[7] – and one only vaguely defined by statute: any "other payment *to the extent attributable to* a withholdable payment."

Notice 2011-34 provides initial guidance on the exact extent to which a payment other than a withholdable payment will be treated as "attributable to" a withholdable payment. Essentially, the notice adopts a fungible formulary approach (with certain exceptions) in which the portion of a nonwithholdable payment that is treated as attributable to a withholdable payment generally equals the amount of the nonwithholdable payment multiplied by a fraction called the "passthru payment percentage" (or PP%) associated with the payor FFI (or in certain instances another FFI). Notice 2011-34 requires each participating FFI

[6] Alternatively an FFI may make an election under §1471(b)(3) to have withholding applied to so much of such payment as is allocable to accounts held by recalcitrant account holders or non-participating FFIs.

[7] The term "withholdable payment" is generally defined in §1473(1)(A) to include any payment of interest (including any original issue discount), dividends, rent, salaries, wages, premiums, annuities, compensation, remuneration, or periodical gains, profits, and income, if that income is from sources within the United States; and any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States.

and deemed-compliant FFI to either publish (e.g. on a website or database readily searchable by the public) its own PP%, or else be *deemed* to have a PP% of 100%.[8] An FFI that is not a participating or deemed-compliant FFI will be presumed to have a PP% of 0%.

Computing the PP%

The PP% is generally the sum of FFI's "U.S. assets" held on each of the last four quarterly testing dates divided by the sum of the FFI's total assets held on those dates.

Assets are included in the computation at their gross values (unreduced by liabilities) shown on the FFI's financial statements for reporting to its interest holders. Off-balance sheet assets and positions may be included under future guidance. Assets held as custodian, broker, nominee or agent for the account holder do not count in computing the PP%.[9] Assets must be translated into a single currency, which need not be the U.S. dollar.

U.S. assets are defined as any asset that can give rise to a passthru payment, plus stock or debt in a U.S. domestic corporation. Stock or debt in a non-financial foreign entity (an "NFFE") is treated solely as a non-U.S. asset.[10] An interest in another FFI is treated as a U.S. asset in proportion to the other FFI's PP%. The government intends to provide anti-abuse rules to deal with any FFI that engages in a pattern of transferring U.S. assets before a quarterly testing date, and reacquiring them after the testing date, with the intent of manipulating its PP%.

> *Observation* – Guarantees and specified equity notional principal contracts held for investment may give rise to U.S. source FDAP income, yet one or both might not appear on the balance sheet of the reporting entity if not otherwise subjected to mark-to-market treatment under §475. Future guidance would have to be issued before an FFI would need to include these notional values in its U.S. assets.

Quarterly testing dates are generally either the last redemption date of the quarter, or the last business day of a quarter (in the case of an FFI that does not redeem ownership interests at least quarterly). For the first three quarters after an FFI Agreement's effective date, the FFI can elect to use an average of an initial testing date (a single date in the six months preceding the FFI Agreement's effective date) and the quarterly testing dates falling in those quarters.

III. New categories of deemed-compliant FFIs

Section II.B.3 of Notice 2010-60 announced one type of deemed-compliant FFI: certain investment funds where the withholding agent identifies each individual, specified U.S. person, and excepted NFFE that has a direct or indirect interest in the FFI, and certain other requirements are met. Section III of Notice 2011-34 announces at least three new categories of deemed-compliant FFI, and suggests that a fourth, fifth, and/or sixth new category may be announced in future guidance.

[8] If a deemed-compliant FFI publishes its PP%, it must certify to the IRS every three years the accuracy of its published PP%.

[9] Custodial payments are determined by reference to the PP% of the issuer and not the PP% of the FFI making the payment in custody.

[10] Grandfathered obligations (i.e. those outstanding on 18 March 2012 and thus are exempt from withholding) are not treated as U.S. assets.

Local banks not part of a group with foreign operations

An FFI will be deemed compliant if it, and each of its expanded affiliated group members,[11] meets five requirements designed to identify single-country local foreign banks. They must all be organized, and be licensed and regulated as banks or similar deposit-taking organizations, under the laws of a single country. They must operate solely within that country, solicit account holders solely within that country, and implement policies and procedures to ensure that they do not open or maintain accounts for nonresidents, non-participating FFIs or NFFEs (other than "excepted NFFEs," as defined in Notice 2010-60 (see also §1472(c)(1)) organized and operating in the same country).

Local FFI member of a group that includes a participating FFI

An FFI that has only local operations and does not solicit account holders from outside its country of organization may also be deemed compliant if its expanded affiliated group includes a participating FFI. To qualify under this rule, the local FFI must implement the preexisting account and customer identification procedures required of participating FFIs to identify U.S. accounts, accounts of non-participating FFIs, and accounts of NFFEs other than local excepted NFFEs. It must also agree that if it finds such accounts, it will transfer them to its participating FFI affiliate, close them, or enter into its own FFI Agreement.

Collective investment vehicles held by participating and deemed-compliant FFIs

An investment fund will be treated as a deemed-compliant FFI if: (1) all holders of direct interests in the fund are participating FFIs or deemed-compliant FFIs holding on behalf of other investors, or low-risk-of-tax-evasion entities under §1471(f); (2) the fund prohibits the subscription for or acquisition of any interests in the fund by any other type of person; and (3) the fund certifies that, if it calculates and publishes any PP%, it will follow Section II of Notice 2011-34.

Foreign retirement plans

The government is considering the comments it has received on the provision of Notice 2010-60 that treats a limited category of foreign retirement plans as entities that give rise to a low risk of tax evasion under §1471(f). Notice 2011-34 announces no specific expansion, but does state that Treasury and IRS do intend to provide further guidance on the types of plans that may qualify for such treatment. It also provides that they intend to issue further guidance on foreign retirement plans or accounts that may be classified as deemed-compliant FFIs.

Other possible categories of deemed-compliant FFIs

The treatment as deemed-compliant FFIs of exchange-traded funds, or other entities the interests in which are regularly traded on an established securities market, remains under consideration by the government. Also under consideration is the treatment of a fund as deemed-compliant if:

(i) All direct interest holders in the fund are participating FFIs, USFIs, deemed-compliant FFIs, entities described in §1471(f), or non-participating FFIs acting

[11] An expanded affiliated group (EAG) is an affiliated group as defined in §1504(a), except that "more than 50 percent" is substituted for "at least 80 percent" in each place it appears, and paragraphs (2) and (3) of §1504(b) are disregarded. A partnership or any other entity (other than a corporation) shall be treated as a member of an EAG if the entity is controlled (within the meaning of §954(d)(3)) by members of the EAG. See §1471(e)(2).

as distributors;

(ii) Distribution or similar agreements prohibit sales of interests to specified U.S. persons, NFFEs other than excepted NFFEs, and non-participating FFIs holding for their own account;

(iii) Each distributor agrees to enforce the sales prohibitions described in (ii) above; and

(iv) The fund satisfies other requirements and meets other criteria relevant to the purposes of chapter 4.

IV. Reporting to the IRS on U.S. accounts at participating FFIs

Among other things, with respect to each U.S. account maintained by a participating FFI, the FFI must agree to report annually to the IRS:

- The account balance or value, determined at such time and in such manner as the Secretary may provide; and,
- Except as provided by the Secretary, the gross receipts and gross withdrawals or payments from the account (determined for such period and in such manner as the Secretary may provide).

Section VI.B of Notice 2010-60 provided guidance on account balance or value, but no guidance on reporting receipts, withdrawals or payments. Notice 2011-34 fills the latter gap, and rescinds the guidance that was given on account balance or value, replacing it with new guidance.

Account balance or value

FFI account balance or value reporting will be determined by reference to amounts as of a single testing date, namely, the year-end balance or value as determined for purposes of reporting to the account holder or, in the case of an investment entity FFI, as determined for the purpose that requires the most frequent determination of value. The rule in Notice 2010-60, which required reporting to the IRS of the highest balance or value in the year's monthly or quarterly reports by the FFI to the holder, will not appear in the regulations.

Receipts, withdrawals and payments

An FFI must annually report the following with respect to a U.S. account that is a depository or custodial account:

- Gross dividends paid or credited to the account;
- Gross interest paid or credited to the account;
- Other income paid or credited to the account; and
- Gross proceeds from the sale or redemption of property credited to the account with respect to which the FFI acted as custodian, broker, nominee or agent for the account holder.

In the case of a U.S. account that is an equity or debt interest in the FFI, the FFI must report the gross amount of distributions, interest, and similar amounts credited during the year; and each redemption payment made during the year.

If an account is closed or transferred in its entirety during the year, the FFI must report the amounts paid or credited to the account for the year as of the date of transfer or closure, and report the amount or value withdrawn or transferred as a gross withdrawal.

FFIs that are not U.S. payors under Treas. Reg. §1.6049-5(c)(5),[12] and that report as required above on a U.S. account, will not be required to report basis information under §6045(g) for the account.

The amount and character of items may be determined under the same principles the FFI uses to report information to its resident account holders in the jurisdiction where the FFI (or its branch) is located. If there is no local tax reporting of any of these amounts, then the amounts must be determined in the same manner as is used for reporting to the account holder or, if there is neither type of reporting, then either in accordance with any reasonable method consistent with the accounting principles applied by the FFI, or with U.S. federal tax principles.

Other matters

If a participating FFI retains copies of statements sent to account holders of U.S. accounts in the ordinary course of its business, it must agree to retain them for five years and provide them to the IRS upon request. A participating FFI will have to identify the branch that maintains the U.S. account being reported. FFIs may elect separate branch reporting. The election will be part of the participating FFI application process.

V. Coordination of chapters 3 and 4

As mentioned in the introduction to this alert, FFIs that are qualified intermediaries (or "QIs") under the chapter 3 withholding rules (§§1441-1461) will be required to consent to become participating FFIs unless they are deemed-compliant FFIs, and the same will be required of foreign withholding partnerships and foreign withholding trusts.

> Observation. Notice 2010-46 permitted existing QIs to treat their existing agreements as automatically amended to accommodate "qualified securities lender" elective status as provided by the notice. Notice 2011-34, in contrast, does not contain a deemed amendment procedure and apparently contemplates that all QI agreements will be formally amended to coordinate the joint administration of chapter 3 and chapter 4 by all QIs.

As far as can be predicted today, FFI Agreements for existing QIs that intend to remain QIs may well need to be effective on 1 January 2013. A draft FFI Agreement is pending and is expected to be released to the public in advance of that date. Unless a specific future statement is made by Treasury and the IRS, no inference can safely be drawn that an existing QI that is also an FFI need not have an FFI Agreement effective by that date.

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[12] Treas. Reg. §1.6049-5(c)(5)(i) defines a "U.S. payor" as (A) a U.S. person described in §7701(a)(30) (including foreign branches or offices of such U.S. person); (B) the U.S. government, any State government or political subdivision thereof (or any agency or instrumentality of the foregoing); (C) a controlled foreign corporation; (D) a foreign partnership if, at any time during its tax year, one or more partners are U.S. persons who, in the aggregate, hold more than 50% of the income or capital interest, or the partnership is engaged in trade or business in the United States; (E) a foreign person if 50% or more of its gross income was effectively connected with a trade or business in the United States for the three-year period ending with the close of its taxable year preceding the collection or payment; or (F) a U.S. branch of a foreign bank or a foreign insurance company described in Treas. Reg. §1.1441-1(b)(2)(iv).

VI. Participating FFI requirements for expanded affiliated groups of FFIs

Consistency rule

Each FFI affiliate in an expanded affiliated group will be required to be either a participating FFI or a deemed-compliant FFI. No exceptions are yet permitted to include a non-participating, non-deemed-compliant FFI affiliate in an FFI Group.

Centralized administration of chapter 4 within an FFI group

An FFI Group will designate a "lead FFI" to execute the agreement for all participating FFIs and certifications for deemed-compliant FFIs. (The government is interested in comments on permitting U.S. shareholders of CFCs that are FFIs to serve as "lead FFIs.")

The lead FFI must remain a central "point of contact" for execution of the agreements and certifications for each FFI affiliate and for any affiliate that is not an FFI. The lead FFI may appoint another FFI affiliate to serve as a point of contact (a "POC FFI") for particular members (e.g. for FFIs that have a common line of business).

"Compliance FFIs" may be appointed among FFI affiliates to assume an oversight role for compliance across the FFI Group. This approach appears to be intended to promote efficiencies where an FFI Group's tax and compliance administration is centralized.

Permitting common asset managers or agents of collective investment vehicles (funds) to execute a single FFI Agreement also is under consideration under limited conditions where the asset manager or agent is able to monitor each fund's compliance with its FFI Agreement through legal agreements with the funds.

VII. Conclusion

Notice 2011-34 indicates that the government has made significant progress in its thinking since the HIRE Act was enacted, and taxpayers began submitting comments on the issues raised by the statute, as well as the many issues on which comments were specifically invited by Notice 2010-60. Notice 2011-34 adds new issues to the list of those that the government is considering and requests comments from the public. The deadline for written comments on Notice 2011-34 is June 7, 2011, which is only slightly more than 18 months ahead of the general effective date of chapter 4. The notice should serve as a reminder that the time for FFIs to act in preparation for 1 January 2013 is now.

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