

As of 14 July 2011, the U.S. Tax Authority, the Internal Revenue Service (IRS) issued a new notice related to the regulations coming soon on U.S. withholding and reporting requirements.

## Ready, set, FATCA! - New FATCA Notice (2011-53) has been issued regarding the U.S. withholding and reporting requirements

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### Background

Having enacted the Foreign Account Tax Compliance Act (FATCA) signed by Barack Obama on 18 March 2010, a 30% US withholding tax will apply to gross proceeds from the sale of US stocks and securities and certain other "withholding payments" (dividends, interest, royalties, rents) paid to any Foreign Financial Institution (FFI).

The withholding and reporting requirements under the FATCA will not apply to the institution that has entered into an FFI Agreement with the U.S. tax authority, the IRS committing the FFI to certain documentation, verification, due diligence, withholding and reporting obligations (participating FFI).

The withholding and reporting requirements under the FATCA also apply to any Non-Financial Foreign Entity (NFFE) unless the NFFE identifies each "substantial US owner" that owns a direct or indirect interest in it or certifies that it has no such substantial US owner.

The details of the provisions under the FATCA are described in the notices issued by IRS. The notices indicate that the proposed FATCA rules will be finalised and are likely to be issued by the summer of 2012. After the first two notices (2010-60 and 2011-34), the third notice, Notice 2011-53 issued on 14 July 2011 provides further details of the provision compared to the earlier issued notices and defines several deadlines to make the fulfilment of tax liability unambiguous.

The aim to publicize interim deadlines is to secure the smooth introduction of the legislation, which is in line with the clear purpose of the IRS to ensure enough time

to the implementation for the new tax liability related to the FFIs and withholding agents.

### The deadlines published in Notice 2011-53:

Based on the Notice, the withholding on U.S. source fixed, determinable, annual or periodical (FDAP) income will **begin on 1 January 2014**, however withholding on passthru payments and gross proceeds from the disposition of securities that could produce U.S. source interest and dividends will be effective **from 1 January 2015**.

The Notice provides that an FFI can register through electronic submission process at the IRS in order to be identified as participating FFI **no later than 1 January 2013**, otherwise 30% US withholding tax has to be deducted on the US-source incomes. The Notice appoints a date for entering Agreement between the IRS and FFI (FFI Agreement), on which basis FFI Agreement entered into prior to 1 July 2013, will be effective 1 July 2013, whereas for FFI Agreement entered into on or after 1 July 2013, the effective date will be the date that the Agreement was entered into.

The regulation differentiates between new and pre-existing accounts from tax administration obligations perspective. The pre-existing private banking accounts were bifurcated into two categories: (1) the private banking accounts with a balance greater than or equal to USD 500,000, i.e. "high-risk accounts". With respect to high-risk accounts, the participating FFI must complete the client identification procedures based on the indicia of U.S. status **within a year** of the effective date of its FFI Agreement.

Whereas, in the case of (2) pre-existing private banking accounts with a balance of less than USD 500,000, the private banking account identification procedures must be completed **until 31 December 2014**, or the date that is one year after the effective date of its FFI Agreement.

For all other pre-existing account, the participating FFI must complete the client identification procedures **within two years** of the effective date of its FFI Agreement.

The Notice defers and simplifies the reporting requirements relating to 2013, in which year the regulations will be effective, with respect to the participating FFIs. With respect to any account for which a participating FFI has received a Form W-9 from an account holder or from a substantial U.S. owner of a NFFE **by 30 June 2014**, the participating FFI generally must report to the IRS **by 30 September 2014**:

- the name, address, and taxpayer identification number of such person;
- the 31 December 2013 account balance (or the account balance immediately prior to account closure if the account is closed after the effective date of the FFI Agreement); and
- the account number.

In case a participating FFI is not able to report the required information related to the account, the FFI must report the account as recalcitrant.

The newly issued Notice provides that all qualified intermediary (QI) agreements, withholding foreign partnership, and withholding foreign trust agreements of FFIs will be extended **until 31 December 2013**.

In addition, any FFI that enters into an FFI Agreement prior to 31 December 2013 will be considered to have renewed its respective QI agreement, withholding foreign partnership agreement, or withholding foreign trust agreement.

As the Notice missed to disclose information related to NFFEs, on 25 July 2011, the IRS re-issued Notice-53 to clarify that the amendments described above also apply to withholdable payments made to all NFFEs.

FATCA regulations are of high relevance, taking into attention the fact that the EU also deals with the FATCA related issues.

The Hungarian Presidency of the Council of the European Union together with the European Commission sent a letter to the IRS in which they invited the IRS to engage in a dialogue to discuss how to achieve the FATCA's objectives in the most effective, however cost-effective and corporate-friendly way. This initiation will hopefully contribute to the future simplification of the currently rather complex regulations.

In the following appendix, we compare the guidance published in Notice 2011-53 with the guidance in Notice 2010-60 and Notice 2011-34.

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If you have any questions regarding the new US withholding and reporting regulations, please contact Dr. Janos Kelemen (phone: +36 1 461 9310, email: [janos.kelemen@hu.pwc.com](mailto:janos.kelemen@hu.pwc.com)) or Rita Koncsos (phone: +36 1 461 9377, email: [rita.koncsos@hu.pwc.com](mailto:rita.koncsos@hu.pwc.com)), or your usual relationship partner.

## Guidance to the FATCA regulation changed in recent months

### Entering Into an FFI<sup>1</sup> Agreement

The IRS prolonged the deadline of entering into agreement of the FFI and IRS by half year.

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

FFI were expected to enter into FFI agreements prior to 1 January 2013, and any such agreement entered into prior to that date would have a 1 January 2013 effective date.

FFIs are expected to enter into FFI agreement prior to 1 July 2013, and any such agreement entered into prior to that date will have a 1 July 2013 effective date.

### PFFI<sup>2</sup> Due Diligence - New Accounts

With reference to the due diligence procedure of new accounts, no changes were made.

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

An FFI was required to put in place the account opening procedures described in Notice 2010-60, as implemented in regulations, to identify U.S. accounts opened after the effective date of the FFI's agreement with the IRS.

No change.

### PFFI Due Diligence - Pre-existing Private Banking Accounts

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

Diligent search of paper and electronic account files required to be conducted, and any required documentation requested and obtained within one year of the effective date of the FFI's agreement with the IRS.

For private banking accounts with a value of USD 500,000 or higher on the effective date of the FFI agreement, the due diligence rules and timeline remain the same.

For private banking accounts with a value of less than USD 500,000, the FFI must complete the private banking procedures by the later of 31 December 2014, or within one year of the effective date of the FFI agreement.

<sup>1</sup> FFI - Foreign Financial Institution

<sup>2</sup> PFFI - Participating FFI

### PFFI Due Diligence - Pre-existing Accounts other than Private Banking Accounts

With reference to the due diligence of pre-existing accounts for non-private accounts, no changes were made.

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

The participating FFI must complete the due diligence procedures within two years of the effective date of the FFI agreement.

No change.

### Withholding

The Notice provided new deadlines to each type of income with respect to withholding obligations.

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

Withholding could apply to new accounts as early as 1 January 2013.

Withholding is applicable to U.S. source FDAP<sup>3</sup> income beginning on 1 January 2014.

Withholding is applicable to gross proceeds and passthru payments beginning on 1 January 2015.

### Reporting

The Notice defers and simplifies the reporting requirements related to 2013. However, full reporting requirements will be applicable from 2014.

#### Prior guidance

(Notice 2010-60 és 2011-34)

Notice 2011-53

Full FATCA reporting with respect to U.S. persons and recalcitrant account holders would have been required in early 2014 with respect to calendar year 2013.

If the account was closed after the effective date of the FFI's FFI agreement, the balance reported is equal to the balance of such account immediately before closure.

Reporting with respect to 2013 is deferred until 30 September 2014, and applies to those U.S. persons that are documented as of 30 June 2014.

The information to be reported has been simplified to include the name, address, tax identification number, 31 December 2013 account balance, and the account number.

Full FATCA reporting applies to accounts for 2014 and beyond.

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<sup>3</sup> FDAP income - fixed or determinable, annual or periodical income