Seward & Kissel LLP

May 2, 2013

MEMORANDUM TO OUR INVESTMENT MANAGEMENT CLIENTS AND FRIENDS

FATCA UPDATE: FINAL REGULATIONS AND CAYMAN IGA NEGOTIATIONS

This memorandum is intended to update you on recent developments regarding the application of the Foreign Account Tax Compliance Act ("FATCA") to private investment funds and advise you of the steps you should be taking now to ensure that your organization complies with FATCA when it becomes effective on January 1, 2014.

FATCA requires "foreign financial institutions" ("FFIs"), including non-U.S. private investment funds, to enter into an agreement with the Internal Revenue Service (the "IRS") to (1) conduct due diligence regarding their investors to determine whether or not they have certain types of direct or indirect U.S. investors, (2) report certain information about certain of their direct and indirect U.S. investors, and (3) withhold amounts payable to investors who refuse to provide information to the fund ("recalcitrant accountholders") and other FFIs which do not comply with their obligations under FATCA ("non-compliant FFIs"). If a non-U.S. private investment fund does not enter into an agreement with the IRS (or qualify for the benefits of an Intergovernmental Agreement, as discussed below), it will be subject to a 30% withholding tax on its U.S. source interest and dividends and gross proceeds from the disposition of property which gives rise to U.S. source interest and dividends.

In January, the IRS issued final Treasury Regulations implementing FATCA (the "Final Regulations"). Although the Final Regulations are not radically different from the Proposed Regulations issued in 2012, they do have the following notable changes:

(1) The definition of "foreign financial institution" was expanded to include non-U.S. investment managers and investment advisers;

(2) The Final Regulations permit an entity which has the power to conclude contracts on behalf of an FFI to serve as the sponsoring entity for one or more FFIs. This provision will allow a manager of a fund complex to provide FFI compliance for all of the funds which it manages; and

(3) A foreign trust will be treated as an FFI only if it is professionally managed by a financial institution. As a result, foreign trusts which have individual trustees should not be treated as FFIs. Foreign trusts will likely still be treated as FFIs if they have a trust company that acts as trustee.

In addition, the IRS has announced that FFIs will register under FATCA using an online portal, which is expected to open by July 15, 2013. FFIs must register with the IRS by October 25, 2013 in order to avoid the imposition of withholding taxes beginning on January 1, 2014.

The obligations of an FFI under FATCA may be modified by an Intergovernmental Agreement (an "IGA") between the United States and the FFI's country of organization. An IGA may reduce the burden that an FFI has under FATCA. In March, the Cayman Islands announced that it would enter into negotiations with the U.S. government with regards to entering into a Model 1 IGA. We understand that the British Virgin Islands, Bermuda and Luxembourg are also in negotiations with the United States regarding Model 1 IGAs.

If the Cayman Islands concludes a Model 1 IGA with the U.S. government, then a Cayman Islands fund would not enter into an agreement with the IRS to provide information to the IRS regarding its U.S. investors. Rather, the offshore fund would register with the IRS as a "deemed compliant FFI" and provide information regarding certain of its U.S. investors to the Cayman Islands taxing authorities, which would then automatically exchange the information with the IRS. The due diligence procedures under a Model 1 IGA are similar to those under the FATCA regulations; therefore, a Cayman IGA will <u>not</u> excuse Cayman Islands funds from performing due diligence on their investors to determine whether they have any direct or indirect U.S. investors.

A Cayman IGA should significantly limit the circumstances in which Cayman funds are required to withhold the 30% withholding tax. Under a Model 1 IGA, withholding is not required on a "recalcitrant accountholder" provided that the fund supplies certain information about such investor to its home country taxing authority. However, withholding could still occur if the required information was unavailable about a "recalcitrant accountholder" or if a non-participating FFI were to invest in an offshore fund.

In addition, a Cayman IGA would likely require the IRS to follow a specific procedure prior to treating a Cayman fund as a "non-compliant FFI." Under this procedure, the IRS would be required to address significant non-compliance with FATCA by a Cayman fund through the Cayman Islands taxing authorities rather than by dealing directly with the Cayman fund. The IRS will not be permitted to declare a Cayman fund to be a non-compliant FFI for 18 months after commencing this procedure. However, the IRS will still be permitted to directly contact Cayman funds regarding minor and other administrative errors.

Finally, a Cayman IGA would likely eliminate many of the concerns in the private fund industry about designating a "responsible officer" who is required to make certain certifications regarding FATCA compliance by an offshore fund.

As FATCA will require registration in 2013 and due diligence regarding investors to be completed in 2014 and 2015 (a detailed timeline of FATCA implementation is attached to this memorandum as Exhibit A), managers of offshore funds should begin to prepare for FATCA now, by taking the following steps this year:

(1) Determining the person in your organization who will be responsible for FATCA compliance;

(2) Determining whether FATCA compliance will be handled internally or outsourced (e.g., to an administrator);

(3) Identifying each entity within your organization that is an FFI;

(4) Registering each FFI in your organization with the IRS after the IRS registration portal opens;

(5) Developing and implement new investor subscription procedures for new investors subscribing for fund shares on or after January 1, 2014; and

(6) Reviewing counterparty agreements (e.g., ISDAs and credit agreements) to determine whether any changes are necessary for FATCA.

Additional information regarding the application of FATCA to private investment funds can be found on our website. In particular, our webinar on this topic can be viewed at http://38.88.62.101/fatca/index.html.

We will continue to keep you updated of any new developments regarding FATCA. If you have any questions regarding the application of FATCA to your organization, please contact Jim Cofer (212/574-1688, cofer@sewkis.com), Ron Cima (212/574-1471, cima@sewkis.com) or Dan Murphy (212/574-1210, murphyd@sewkis.com).

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Exhibit A

Important Dates for FATCA

	FATCA REGULATIONS	MODEL 1 IGA
Entering into FFI Agreement	October 25, 2013 for effectiveness as of January 1, 2014	N/A (but registration may be required with IRS as deemed compliant FFI to obtain GIIN)
Identification and Documentation Procedures for Entity Accounts	**New Accounts**[1]—Within 90 days of opening account (or when a withholdable payment is made with respect to the account, if earlier) **Prima Facie FFIs**[2]—Within six months of the effective date of the FFI Agreement (i.e., June 30, 2014) **Pre-Existing Accounts**[3]—Within two years of the effective date of the FFI Agreement (subject to an exception for accounts with a value of less than $250,000[4]) (i.e., December 31, 2015)	**New Accounts**[5]—Upon opening account **Pre-Existing Accounts**[6]—December 31, 2015 (subject to an exception for accounts with a value of less than $250,000[7])

[1] Accounts opened on or after the effective date of the FFI agreement (which will generally be January 1, 2014).

[2] A "Prima Facie FFI" is an entity which either (i) is designated as a qualified intermediary or non-qualified intermediary in the FFI's electronically searchable records or (ii) is presumed or documented to be a foreign entity and has certain NAICS or SIC codes associated with its account in the FFI's electronically searchable information.

[3] A "Pre-Existing Account" is an account that is outstanding on the effective date of the FFI agreement (which will generally be January 1, 2014).

[4] Under this exception, an FFI is not required to perform identification and documentation procedures with respect to a pre-existing entity account the aggregate balance or value of which is $250,000 or less (determined as of the effective date of the FFI agreement) if no holder of such account that has been previously documented by the FFI as a U.S. person for purposes of the other U.S. withholding tax provisions is a "specified U.S. person". This exception shall cease to apply if the account has a balance or value in excess of $1,000,000 at the end of any subsequent calendar year.

[5] Accounts opened on or after January 1, 2014.

[6] A "Pre-Existing Account" is an account that is outstanding on January 1, 2014.

[7] Under this exception, an FFI is not required to perform identification and documentation procedures with respect to a pre-existing entity account the aggregate balance or value of which is $250,000 or less (determined as of January 1, 2014) if no holder of such account that has been previously documented by the FFI as a U.S. person for purposes of the other U.S. withholding tax provisions is a "specified U.S. person". This exception shall cease to apply if the account has a balance or value in excess of $1,000,000 at the end of any subsequent calendar year in which case the FFI has six months after the end of such calendar year to document the account under regular procedures.

Identification and Documentation Procedures for Individual Accounts	**New Accounts**—Within 90 days of opening account (or when a withholdable payment is made with respect to the account, if earlier) **Pre-Existing High-Value Accounts**[8]—Within one year of the effective date of the FFI Agreement **Other Pre-Existing Accounts**—Within two years of the effective date of the FFI Agreement (subject to an exception for accounts with a value of less than $50,000[9])	**New Accounts**—Upon opening account **Pre-Existing High-Value Accounts**[10]—December 31, 2014 **Other Pre-Existing Accounts**—December 31, 2015 (subject to an exception for accounts with a value of less than $50,000[11])
Reporting Information About U.S. Accounts to IRS or FATCA Partner Jurisdiction	March 31, 2015 (with a 90-day extension) for 2013 and 2014 calendar years[12]	FATCA Partner jurisdiction provides information for 2013 and 2014 to IRS by September 30, 2015[13]
Making Responsible Officer Certifications to the IRS	February 29, 2016—initial certification regarding pre-existing accounts and practices and procedures June 30, 2017 and every three years thereafter—regular certification regarding compliance procedures	N/A

[8] A "High-Value Account" is an account that has a balance of more than $1,000,000 on the effective date of the FFI Agreement.
[9] Under this exception, an FFI is not required to perform identification and documentation procedures with respect to a pre-existing individual account the aggregate balance or value of which is $50,000 or less (determined as of the effective date of the FFI agreement). This exception shall cease to apply if the account has a balance or value in excess of $1,000,000 at the end of any subsequent calendar year.
[10] A "High-Value Account" is an account that has a balance of more than $1,000,000 on the January 1, 2014.
[11] Under this exception, an FFI is not required to perform identification and documentation procedures with respect to a pre-existing individual account the aggregate balance or value of which is $50,000 or less (determined as of the effective date of the FFI agreement). This exception shall cease to apply if the account has a balance or value in excess of $1,000,000 at the end of any subsequent calendar year in which case the FFI has six months after the end of such calendar year to document the account under regular procedures.
[12] Special limited reporting rules apply for 2013, 2014 and 2015 calendar years.
[13] This is the deadline for the partner jurisdiction to report to the IRS, but the date for reporting by an FFI in an IGA jurisdiction to its local taxing authority will be set by local legislation and could vary from country to country.

Withholding on Interest and Dividends (paid to non-compliant FFIs)	January 1, 2014	January 1, 2014
Withholding on Gross Proceeds (paid to non-compliant FFIs)	January 1, 2017	January 1, 2017
Withholding on Recalcitrant Account Holders from Offshore Funds (Foreign Pass-Thru Payments)	January 1, 2017	No withholding as long as information is reported to partner jurisdiction