January 28, 2014

FATCA Is Now in Effect - All Foreign Trusts Must Take Action

Against widespread speculation that the IRS might provide an additional delay to the Foreign Account Tax Compliance Act's (FATCA) withholding provisions by extending FATCA deadlines, FATCA withholding is confirmed to go into effect on July 1. Broadly, FATCA requires foreign entities to identify, document and report their U.S. account holders to the IRS or else face a 30 percent withholding tax applicable to certain U.S.-source payments made to the foreign entity. Under FATCA, each foreign entity is classified as either a Foreign Financial Institution (FFI) or a Nonfinancial Foreign Entity (NFFE). The classification determines the foreign entity's reporting, due diligence and withholding obligations with respect to its U.S. account holders.?

Any FFI that is not exempt or deemed compliant must register with the IRS via an online portal by April 25 and obtain a global intermediary identification number (GIIN) to avoid withholding on post-June 30 payments of certain U.S.-source income.??

All foreign trusts, foreign trustees and underlying foreign holding companies must act now to determine their FATCA classification. It is not at all uncommon for the foreign trustee, foreign trust and underlying foreign holding company each to be created in a different jurisdiction, and the presence or absence of an intergovernmental agreement (IGA) with that jurisdiction can further complicate matters. There are currently two types of IGAs, Model 1 and Model 2, and both modify the obligations of FFIs in the jurisdictions that have them.

Either registration as an FFI or self-certification as an NFFE may be required for (i) the trust; (ii) the trustee; and (iii) any underlying holding company. However, a foreign entity will be exempt from registration if it is a certified deemed-compliant FFI, such as a sponsored investment entity, a sponsored closely held investment vehicle or an owner-documented FFI, in each case by agreeing to have another entity do the FATCA reporting on its behalf.?

These rules are complicated and replete with conditions and exceptions. Day Pitney is actively advising trustees regarding their ongoing compliance requirements and those for their foreign trusts and underlying holding companies. Please contact us if you have any questions.