

Foreign Account Tax Compliance Act: IRS Notice 2011-53

Introduction

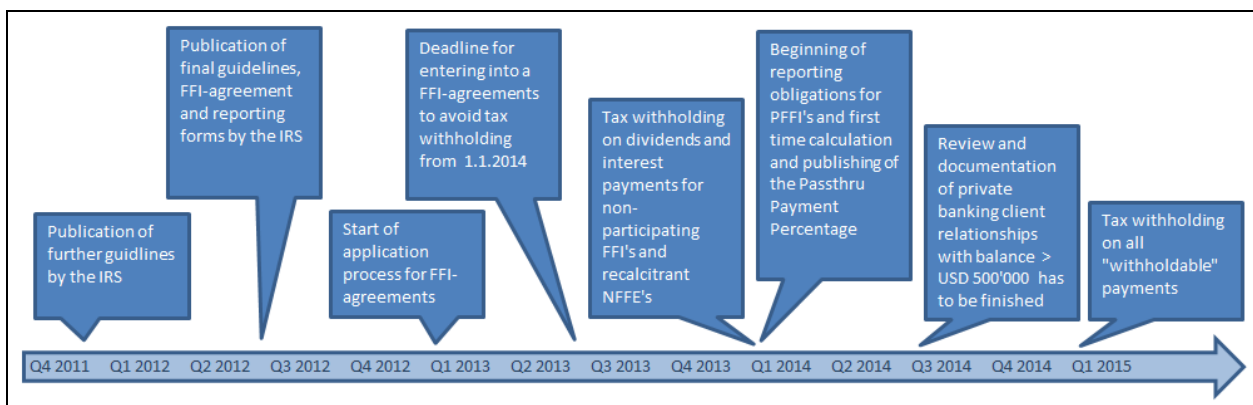
In July 2011 the US Treasury and the IRS have published notice 2011-53. It is the third notice that provides guidance about the FATCA-rules and their implementation. In this newsletter we will provide an overview of the main topics of notice 2011-53 and focus on the changes in the implementation timeline.

Contents of IRS Notice 2011-53

The IRS Notice 2011-53 focuses mainly on the timeline for the implementation of FATCA. The most important deadlines are:

- On July 1st 2013 all FFI-agreements entered into before this date will come into force. All agreements concluded later will come into force immediately and the deadlines will start to run on that day of the conclusion of the agreement.
- The IRS will begin to accept applications for FFI-agreements on January 1st 2013. The application process will be managed electronically. An FFI will have to enter into an agreement with the IRS until June 30th 2013, in order to ensure that the FFI can be identified by withholding agents as a „Participating FFI“ (called „PFFI“ in the following) in sufficient time and thus avoid tax withholding starting on January 1st 2014.
- The deadlines for the review of the existing client relationships by the PFFI's have been realigned. All private banking client relationships with a balance of more than USD 500'000 at the effective date of the FFI-agreement, for example, will have to be reviewed and documented until December 31st 2014 or within 1 year after the FFI-agreement comes into force (the latter of the two dates will be applied).
- The reporting obligations of the PFFI's towards the IRS will begin to run in 2014.
- Tax withholding on dividend- and interest income from US-sources for non-participating FFI's and recalcitrant „Non Financial Foreign Entities“ (called „NFFE“ in the following) has to be conducted starting from January 1st 2014. From January 1st 2015 onwards tax has to be withheld on all „withholdable“ payments.
- The PFFI has to calculate and publish the „Passthru Payment Percentage“ (called „PPP“ in the following) for the first time in the first quarter of 2014 at the latest.
- Additional instructions and rules for the implementation of FATCA will be published by the IRS until December 31st 2011. The publication of the final FATCA-regulations is planned for the summer of 2012. At that point of time also the final versions of the FFI-agreement and the reporting forms will be published.

In the following overview the most important deadlines are displayed:



Appraisal

The IRS Notice 2011-53 brings more clarity about the implementation periods and deadlines. While it does not contain any significant material news, the defined deadlines show a certain degree of concession of the IRS towards the PFFI's. The PFFI's are given more time to review the existing client relationships for example. The phasing of the various deadlines represents an important enhancement. The implementation of the regulations in respect to the „Passthru Payments“ has been postponed by the IRS. It seems that the IRS has accepted the view that the regulation of this complex area will be very time-consuming and difficult to implement within the original time-frame. Various, mainly technical aspects of the introduction of FATCA remain unclear. For example, the IRS will potentially not provide a standard FFI-agreement. The IRS has communicated that it will not conclusively define all items of a FFI-agreement. The PFFI's are invited to clarify open points in the agreement with own proposals in negotiations with the IRS. This implies that the negotiations with the IRS have to be started at an early point of time, to make sure to meet the deadline of June 30th 2013 for entering into a FFI-agreement and thus avoiding the risk of tax withholding as of January 1st 2014. In this respect it also remains unclear whether and how such withheld tax amounts could be reclaimed when the FFI enters into a FFI-agreement at a later point in time.

Success factors when implementing FATCA

The various requirements and challenges – given the still very tight implementation schedule – ask for keeping in mind a number of key factors for a successful FATCA-implementation:

- Phasing of the implementation project: execute tasks where the FATCA-regulations are already defined early (e.g.: review of the existing client relationships). Activities in areas such as “Passthru Payments” should be postponed.
- Maintain flexibility: developing or enhancing the systems and processes needed for FATCA in such a way that future regulations and changes can be implemented easily and in a timely manner.
- Client identification process: the review of the existing client relationships and the process for handling new client relationships should be started and implemented as soon as possible. In addition a concept for the periodical reviews should be designed.
- Calculation of costs: Differentiate between the costs directly attributable to FATCA and the costs that would have been caused by the need to improve the data quality at some future point in time anyway.

The combination of tax-, business- and IT-know-how enables Banking Concepts to support financial institutions implementing regulatory requirements such as FATCA and to offer real added value.

The next FATCA newsletter will be published in early 2012.

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