Executive Compensation & Benefits    Tax

April 15, 2014

# Deadlines Coming for Multinationals' Retirement Plans and U.S. Taxpayers with Foreign Financial Interests

By James P. Klein and Susan P. Serota

*In 2010, the U.S. enacted a sweeping change in enforcement of its tax laws on foreign financial interests, the Foreign Account Tax Compliance Act (FATCA). The main thrust of the act is to penalize foreign financial institutions (FFIs), including foreign retirement plans, that fail to properly disclose U.S. taxpayers having an interest in the institution's various funds. In addition, the Financial Crimes Enforcement Network (FinCen) has recently replaced Form TD-F-9022.1 with a new Form 114 which must be filed electronically to report a financial interest in or signature authority over a foreign financial account ("FBAR") by U.S. persons if the aggregate value of the person's foreign financial accounts exceeds $10,000 at any time during a calendar year.*

## FATCA REGISTRATION AND FILING

FATCA is having a global impact on compliance with U.S. tax laws. While the underlying rules of U.S. taxation have not changed, FATCA has proven to be extremely effective in bringing many foreign governments into much more serious compliance efforts by adopting either new Tax Information Exchange Agreements with the U.S. or the newly established FATCA Intergovernmental Agreements (IGAs), or both. As we reported in 2012, IRS regulations have confirmed that foreign retirement plans are considered to be foreign financial institutions.

The enforcement mechanism for FATCA is a new 30 percent withholding tax on U.S. source investments of FFIs, including investments of foreign retirement plans. The tax applies not just on dividends, but on the gross proceeds of the plan's U.S. investments and not just on the U.S. taxpayer participant's interest in the plan, but rather on the plan's total U.S. source income. Paying agents will start withholding on July 1, 2014, unless given notice that the recipient foreign retirement plan is in compliance with FATCA.

Funded foreign retirement plans are considered to be FFIs subject to FATCA, with some important exceptions. First, where the sponsoring company is located in a country which has signed and IGA with the U.S., the IGA typically will provide that certain retirement plans are exempt from FATCA. Second, where the retirement plan is not covered by the IGA, it may still be exempt from FATCA compliance under IRS regulations, i.e. including plans covered by tax treaties, plans with broad base participation, certain small plans with fewer than 50 participants and plans that could qualify as a qualified plan under Internal Revenue Code 401(a) if they were organized in the U.S. If a foreign retirement plan is not exempt from FATCA, it must register as a "reporting FFI". The U.S. has opened a special electronic registration portal and has said that unless registration is complete by May 5, 2014 (recently extended by IRS Notice 2014-17 from April 25, 2014), the paying agents will not be informed in time to avoid the first FATCA 30 percent withholdings on July 1, 2014. There is an important exception for FFIs and non-exempt plans in the countries with current IGAs and those that have reached agreements "in substance" with the U.S.: they will not have the 30 percent withholding apply until January 1, 2015, giving them more time to complete registration.

Recently the IRS issued a revised form for filing with tax withholding entities – the W-8BEN-E: This form, released in March 2014, is for entities (not individuals), including retirement plans, to establish their exempt status for the withholding agents. Although the form was released, it is quite complicated, and instructions have not yet been released.

## FBAR NEW FORM

FinCen has required FBAR reporting since the Bank Secrecy Act was enacted in 1970. However, it was not until stiffer penalties for non-filing were added in 2004 and final regulations were issued in 2011 that the spotlight became focused on FBAR reporting. (See our alerts from March 2010 and February 2011.) U.S. retirement plans holding investments in foreign financial accounts for which the plan is the owner of record or has legal title need to be reported. Further, persons who have "signature" authority to control the disposition of the assets in the plan's foreign account by direct communication with the financial institution maintaining the account must also report, although the filing date for such individuals has been postponed until June 30, 2015. (FinCen Notice 2013-1, 12/17/2013). Foreign financial accounts include a bank, securities, brokerage, demand, checking, deposit, time deposit or other financial account in another country, including a commodity futures or option account, an insurance policy with a cash value, an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund. For individuals holding such accounts or having signature authority over such accounts, disclosure is also required on the individual's U.S. tax return. The FBAR filing is due on or before June 30th of the year following the calendar year being reported.

As of April 1, 2014, FBAR filings must be made electronically on new Form 114 through the BSA E-Filing System. Institutions as well as individuals must register. Although the FBAR filing is a long-standing obligation, compliance is expected to be much more strictly enforced now.

FBAR Filings are separate from FACTA filings which apply to an individual's non-U.S. financial accounts if certain minimum monetary thresholds are met and to FFIs requiring reporting of U.S. person's accounts held at their institutions to the Internal Revenue Service (or their local tax authority if a FATCA IGA is in effect). The new FBAR Form 114 must be filed even if the U.S. taxpayer is also filing new Form 8938, relating to specific foreign financial assets, which is filed with the taxpayers income tax return. The IRS has posted a very helpful comparison chart for individual filing requirements.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

James P. Klein (bio)
New York
+1.212.858.1447
james.klein@pillsburylaw.com

Susan P. Serota (bio)
New York
+1.212.858.1125
susan.serota@pillsburylaw.com