

--FATCA--

What Hedge Fund Managers Need To Do Now

March 2014

Most hedge fund managers, understandably, have held off doing heavy lifting regarding FATCA in anticipation of guidance to be issued and forms to be finalized (and possibly holding out hope that FATCA would be delayed for another 6 months or even repealed).

At this point, hedge fund managers that manage offshore funds need to take several actions and should be aware of certain timelines. This newsletter briefly summarizes what managers need to do now.

REGISTRATION

On or before April 25, 2014, fund managers should register their offshore funds and offshore master funds with the IRS and obtain Global Intermediary Identification Numbers (“GIINs”). Simply stated, (i) in side-by-side funds, just the offshore fund needs to register, (ii) in master feeder structures, the offshore feeder and the master fund each needs to register, and (iii) in a mini-master where the offshore feeder invests in the domestic fund, just the offshore feeder needs to register. In a master feeder structure where the offshore feeder owns more than 50% of the master fund, the offshore feeder should register as the lead of an expanded affiliated group and the master fund would register as a member of the expanded affiliated group.

For more complex fund structures, a more detailed review would be necessary. Where the funds have significant ownership of foreign entities, a more detailed analysis of how FATCA would apply would also be necessary.

Obtaining a GIIN by April 25, 2014, will allow a fund to avoid withholding under FATCA. Cayman Islands entities could potentially wait until later and possibly not need to obtain one but it is preferable and easier just to obtain one by April 25th. Funds should register online on the IRS's website. Registration itself is a fairly easy process.



DESIGNATING A FATCA RESPONSIBLE OFFICER (“FRO”)

In order to register, a fund needs to designate a person as its FRO. This designation should generally be done by a board resolution for the fund. There is no one right person for this position. Different persons have been designated for this position, including CCOs, CFOs, etc.

AGREEMENTS WITH ADMINISTRATORS

Most fund managers are amending their agreement with their administrators or entering into an addendum thereto whereby the administrator will gather certain information regarding the investors in the funds in order to determine how they are categorized for FATCA purposes. This is something that managers should be doing now, although there is not a deadline for this.

OBTAINING NEW W-9S AND W-8S FROM INVESTORS

Final W-9s have been issued by the IRS but not all W-8 forms have been finalized. When these forms are all finalized (which is anticipated to be in the near term), new W-9s and new W-8s should generally be obtained from all investors in offshore and domestic funds. The final forms will include information regarding status of investors under FATCA.

FFI AGREEMENT

In lieu of entering into foreign financial institution (“FFI”) agreements with the IRS, most funds will enter into similar agreements with the Cayman Islands. Prototypes for those agreements have not yet been issued. Also, enabling legislation in the Cayman Islands has not yet been enacted.

DOCUMENTATION

Compliance Manual. Generally, we would recommend inserting a short description of FATCA and compliance procedures in a manager’s compliance manual.

Subscription Agreement. Most subscription agreements have probably been updated to state that investors will generally be required to provide certain information in order to avoid withholding under FATCA. Fund managers should make sure that their subscription agreements have been updated.

Offering Memoranda. Offering memoranda should include a description of FATCA as a risk factor and generally a more detailed explanation in the tax section if the risk factor is not detailed. Standalone domestic funds should just have a very short FATCA risk factor. Offshore funds would have a more detailed description of FATCA.

Resolutions. As stated above, a resolution should be adopted designating an applicable person as the FRO.



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