ALERTS

Change in the IRS Approach to the Registration of Disregarded Entities Under FATCA

May 2, 2014

Existing Treasury Regulations

In a previous *Alert* dated April 8, 2014, we described certain registration and compliance requirements for hedge funds under the U.S. Foreign Account Tax Compliance Act ("FATCA").

U.S. Treasury Regulations issued under FATCA provide that a disregarded entity ("DRE") generally does not need to register with the IRS. However, if a DRE and its sole owner are located in different jurisdictions, such as a Cayman Islands "master fund" owning a Luxembourg SPV that is a DRE, the master fund would list the SPV on its own registration as its branch and thereby obtain a GIIN[1] for itself and a GIIN for the SPV.

New IRS Position

On May 1, 2014, the IRS published in an FAQ that a DRE located in a Model 1 IGA[2] jurisdiction whose laws disregard U.S. tax classification elections ("check-the-box elections") should instead register with the IRS and not be listed as a branch of its sole owner. According to the FAQ, if, for example, the forthcoming Luxembourg FATCA-related rules disregard check-the-box elections, then the Luxembourg SPV described above would register on its own and not be listed as a branch of the Cayman Islands master fund.

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Steps to Take Where the DRE is Located in a Different Jurisdiction from Its Parent

- **If you have not yet registered such DRE**: It may be prudent to wait for the issuance of relevant guidance and, therefore, until such time: (i) not register the DRE; and (ii) not have the parent register the DRE as a branch.
- **If you have already registered such DRE**: You do not need to take any remedial action at this time but should review relevant local guidance when issued.
- **If you intend to register such DRE prior to the issuance of local rules:** We believe that registering such DRE on its own and not as a branch of its sole owner is the approach more likely to hold up, given the FAQ and the likelihood that most jurisdictions will disregard check-the-box elections.[3] However, future guidance from the relevant Model 1 IGA jurisdictions might require amending such registrations if the applicable local FATCA rules respect check-the-box elections.

Resources

The FAQ can be found on the IRS website.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] Global Intermediary Identification Number.

[2] Intergovernmental Agreement.

[3] To date, the U.K. regulations ignore check-the-box elections, as does the proposed guidance issued by the Crown Dependencies. Most other Model 1 IGA jurisdictions have not yet issued guidance.

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