

Duties of a “Responsible Officer” Under FATCA

By Allen J. Littman and Sarah K. Ma, BakerHostetler, Washington, D.C.

The April 2014 deadline is quickly approaching for foreign financial institutions to register with the U.S. Internal Revenue Service (“IRS”) under the Foreign Account Tax Compliance Act (“FATCA”) in order to be publicly identified as initially compliant. A diligent foreign financial institution that expects to be FATCA compliant, either as a participating foreign financial institution (“FFI”) under FATCA (or FFI under an intergovernmental agreement) is required under FATCA to select a person to run its FATCA compliance program. It is a critical decision that should be made carefully and prior to registering for FATCA. Who may be chosen for this role and what are his or her responsibilities?

Who may be a responsible officer?

A participating FFI is required to appoint a “responsible officer” to oversee its compliance with the FFI agreement that it is required to execute. The responsible officer is an officer of any participating FFI in the participating FFI’s expanded affiliated group, [1] who has sufficient authority to fulfill the requirements of the FATCA regulations and the FFI agreement, including the required duties and certifications described below. If the FFI is part of a consolidated compliance program, the responsible officer must be an officer of the compliance financial institution (“compliance FI”).

General responsibilities

In general, the responsible officer is required to establish a compliance program that includes policies, procedures and processes sufficient to comply with the FATCA rules. The responsible officer may designate persons to help accomplish these tasks. The responsible officer (or a designee) must periodically review the sufficiency of the FFI’s compliance program and its compliance with the FFI agreement, and these reviews must be considered in making the required periodic certifications described below. There are two types of certifications required: a periodic certification of compliance, and a certification regarding completion of due diligence procedures. The responsible officer must personally make these certifications to the IRS.

Periodic certification of compliance

On or before July 1 of the calendar year following the certification period, the responsible officer is required provide a certification to the IRS. The first certification period begins on the effective date of the FFI agreement and ends at the close of the third full calendar year following the effective date of the FFI agreement. [2] Each subsequent certification period is the three calendar year period following the previous certification period, unless the FFI agreement provides for a different period.

At that time, the responsible officer must make one of the following two certifications, described in more detail below:

1. That the participating FFI maintains effective internal controls, or
2. If the participating FFI has identified an event of default or has failed to remediate any material failures as of the date of the certification (“qualified certification”).

Certification of effective internal controls

For a valid certification of effective internal controls, the responsible officer must make the following statements relevant to the certification period:

- The responsible officer (or designee) has established a compliance program that is in effect as of the date of the certification and that has been subjected to the review as described under the regulations;
- There are no material failures for the certification period, or, if there have been, appropriate actions were taken to remediate such failures and to prevent such failures from reoccurring; and
- If there has been any failure to withhold, deposit, or report any amount under the requirements of the FFI agreement, the FFI has corrected such failure by paying any taxes due (including interest and penalties) and by filing the appropriate return (or amended return).

Qualified Certification

If the responsible officer has identified an event of default ^[3] (as defined in the regulations), or a material failure ^[4] that the participating FFI has not corrected as of the date of the certification, the responsible officer must make a qualified certification by certifying to the following statements:

- The responsible officer (or designee) has identified an event of default, or the responsible officer has determined that as of the date of the certification, there are one or more material failures with respect to the participating FFI's compliance with the FFI agreement and that appropriate actions will be taken to prevent such failures from reoccurring;
- With respect to any failure to withhold, deposit, or report any amount under the requirements of the FFI agreement, the FFI will correct such failure by paying any taxes due (including interest and penalties) and filing the appropriate return (or amended return); and
- The responsible officer (or designee) will respond to any notice of default (if applicable) or will provide to the IRS upon request a description of each material failure and a written plan to correct each such failure.

Certification of completion of due diligence procedures

The responsible officer must separately certify to the IRS that the participating FFI is compliant with the due diligence identification procedures for preexisting accounts. Generally this certification must be made no later than 60 days following two years after the effective date of FFI agreement. ^[5]

As part of this certification, the responsible officer must certify that the following statements are true:

- The participating FFI has completed the required review of all high-value accounts and treats any account holder of an account for which the participating FFI has not retained a record of any required documentation as a recalcitrant account holder;
- The participating FFI has completed the account identification procedures and documentation requirements for all other preexisting accounts or, if it has not retained a record of the required documentation, treats such account according to the applicable rules;
- To the best of the responsible officer's knowledge after conducting a reasonable inquiry, the participating FFI did not have any formal or informal practices or procedures ^[6] in place from August 6, 2011, through the date of that certification to assist account holders in the avoidance of FATCA.

If the responsible officer is unable to make any of these certifications, the responsible officer must make a qualified certification to the IRS stating that such certification cannot be made and that corrective action will be taken by the responsible officer.

Responding to additional IRS inquiries

Based on the information reporting forms and tax returns, if the IRS suspects that the participating FFI is not substantially complying with the requirements of an FFI agreement, the IRS can request the responsible officer (or designee) to verify the participating FFI's compliance with the FFI agreement, or the performance of specified review procedures by a person (including an external auditor or third party consultant) that the IRS identifies as competent to perform such procedures.

Conclusion

With the April 25 and June 30, 2014 deadlines looming ^[7], every FFI intending to be compliant with FATCA should select an appropriate responsible officer who will be responsible to both the FFI and the IRS for FATCA compliance, including the creation and maintenance of the documentation underlying the various compliance certifications required under FATCA. Because the rules regarding the underlying FATCA compliance are detailed and complex, it will continue to be crucial for participating FFIs and responsible officers to seek the advice of a U.S. tax advisor who is proficient in the FATCA rules.

^[1] In general, the “expanded affiliated group” includes each company in a chain of ownership that is directly or indirectly owned by a common parent company through control of over 50 percent of both share vote and value at each step by another company in the chain.

^[2] The effective date for an FFI completing its registration on or before June 30, 2014 is June 30, 2014. Thus, the first certification would be required by December 31, 2017.

^[3] An “event of default” occurs if a participating FFI fails to perform material obligations required with respect to the due diligence, withholding, or reporting requirements of the FFI agreement or if the IRS determines that the participating FFI has failed to substantially comply with the requirements of the FFI agreement. The regulations also contain a list of certain specific events of default.

^[4] A material failure is generally defined as a failure of the participating FFI to fulfill the requirements of the FFI agreement if the failure was (i) the result of a deliberate action on the part of one or more employees of the participating FFI (its agent, sponsor, or compliance FI) to avoid the requirements of the FFI agreement, or (ii) an error attributable to a failure of the participating FFI to implement sufficient internal controls.

^[5] For FFI’s that timely register, the last date for this certification is August 29, 2014.

^[6] The FATCA rules provide specific rules as to what types of practices or procedures would be considered those that assist account holders in the avoidance of FATCA.

^[7] Although June 30, 2014 is the initial deadline for registration and entering into the FFI Agreement, registrations finalized after April 25, 2014 will not be included on the initial publicly available list of FATCA compliant FFIs that will be electronically posted on June 2, 2014.

For More Information

For more information about the Foreign Account Tax Compliance Act, or if you have questions about how this legislation may impact your business, please contact any of the following BakerHostetler attorneys:

Allen J. Littman
alittman@bakerlaw.com
202.861.1686

Sarah K. Ma
sma@bakerlaw.com
202.861.1585

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