

## U.S. FATCA REFERENCE GUIDE FOR THE PRIVATE INVESTMENT INDUSTRY



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### U.S. FATCA: WHAT IS REQUIRED AND HOW DOES IT AFFECT THE PRIVATE INVESTMENT INDUSTRY?

Under the Foreign Account Tax Compliance Act (**FATCA**), foreign financial institutions (**FFIs**) and certain other non-financial foreign entities must report on the foreign assets held by their U.S. account holders on certain types of cross-border payments or risk being subject to a 30% withholding tax penalty. FACTA was enacted in the U.S. to deter tax evasion and non-compliance with U.S. tax rules by U.S. persons investing in or through offshore entities.

Notably certain FFI investment entities such as **private equity funds, hedge funds and similar investment vehicles** (including any feeder or master fund investment vehicle) are required to complete *identification of investor accounts* in order to identify U.S. account holders and to report them to the IRS. Reporting may also include investment funds with no U.S. investors to *document their FATCA statuses*.

FFIs that do not comply with these FACTA

requirements are subject to a **30% withholding tax penalty** on certain U.S.-sourced investment income they receive from U.S. funds or underlying U.S. portfolio companies.

### WHAT DO U.S. PRIVATE INVESTMENT FUNDS NEED TO KNOW?

If they are unable to document such entities for purposes of FATCA, U.S. private investment funds and other types of U.S. withholding agents, including U.S. investment funds, are required to withhold 30% on certain payments subject to U.S. withholding tax.<sup>1</sup> This includes dividends, interest, royalties and certain proceeds from the disposition of property made to foreign entities. A U.S. financial institution may register as a lead financial institution to manage the FATCA registration process for members of its “Expanded Affiliated Group” of FFIs (for example, members of a feeder and master fund structure).

<sup>1</sup>U.S. withholding tax may also apply under a different tax regime and may be reduced or eliminated under U.S. statute or an applicable income tax treaty.

## WHAT DO FOREIGN PRIVATE INVESTMENT FUNDS NEED TO KNOW?

To avoid the 30% withholding charge under FATCA, FFI's may register with the IRS and agree to report certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. owners, and provide documentation<sup>2</sup> about the fund and its investors to a U.S. withholding agent (see above).

Offshore funds with U.S. investments are generally required to complete due diligence procedures and provide documentation of their investors to be FATCA-compliant.

The FATCA regulations exempt many categories of FFI's from the requirement to register and report, including certain small, local financial institutions and certain retirement entities.

It is important to confirm whether the investment vehicle is a FFI and, if so, which type since that will dictate its reporting obligations. An FFI's country of domicile may enter into an Intergovernmental Agreement (IGA) with the U.S. government, which could change an FFI's FATCA classification or reporting obligations in comparison to the U.S. Treasury regulations.

In general, documentation must be provided in advance of a withholdable payment. Foreign private investment funds need to be agile and should regularly maintain their investor FATCA documentation.

<sup>2</sup>For example, Form W-8 used by individuals and businesses to verify their country of residence for tax purposes and to certify their status and classification for FATCA purposes.

If you have questions about the FATCA regime how it may apply to your client operating in the private investment industry, please contact us.

## WEAVER CAN ASSIST INVESTMENT FUNDS WITH FATCA REPORTING AND ANALYSIS

We offer complete FATCA services for all parts of a fund structure wherever it is organized. This service offering complements existing services Weaver provides and displays our firm as a full service provider to the private investment fund industry.

Our services include:

- ▶ Analyzing fund and organization structure to determine entity FATCA classification and reporting responsibilities
- ▶ Confirming whether FFI-classified entities are required to register with the IRS and assisting with that process
- ▶ Advising on new investor onboarding procedures, reviewing subscription documents to confirm adherence to FATCA guidelines, and reviewing investor withholding certificates to ensure completeness and validity
- ▶ Determining which cross-border payments to foreign persons may be subject to U.S. withholding tax, FATCA reporting and evaluation of opportunities to reduce that liability exposure
- ▶ Preparing or reviewing FATCA documentation, including W-8 forms and intermediary withholding statements for submission to U.S. investment funds or withholding agents
- ▶ Determining FATCA withholding and reporting obligations among a FFI's various categories of investors
- ▶ Coordinating with our global membership firms that can support with local country reporting standards applicable to financial institutions that may also be required to report information under the Common Reporting Standard (CRS) regime developed by the Organization for Economic Cooperation and Developments (OECD).

