

US

Morrison & Foerster

Countdown to March 18 2012

Despite this summer's extension of the Foreign Account Tax Compliance Act (Fatca) withholding rules (scheduled to be phased-in over 2014 and 2015), Fatca's next effective date (March 18 2012) will continue to greatly impact global financial transactions.

While the IRS and Treasury have indicated Fatca regulations will be issued before the end of 2011, only time will tell whether such regulations help ease the transition. Until any guidance is in fact issued, March 18 2012 continues to be an extremely significant date. As the clock continues to tick, there are a few items that one should be mindful of.

First, section 871(m) of the Internal Revenue Code treats a "dividend equivalent payment" as a US-source dividend. The term "dividend equivalent" includes a payment made under a "specified notional principal contract" that is either directly or indirectly contingent on or determined by reference to a US-source dividend.

A specified notional principal contract is any notional principal contract if (i) in connection with entering into the contract, any long party (the party entitled to receive the dividend related payment) transfers the underlying security; (ii) in connection with the termination of the contract, any short party (any party that is not a long party) transfers the underlying securities to any long party; (iii) the underlying security is not readily tradable on an established securities market; (iv) in connection with entering into the contract, any short party to the contract posts the underlying security as collateral; or (v) the Treasury identifies the contract as a specified notional principal contract. In addition, unless the Treasury determines that a notional principal contract is of a type that does not have the potential for tax avoidance, any notional principal contract pursuant to which payments are made after March 18 2012 will be a specified notional principal contract.

Secondly, Fatca provided that the new Code section 1471 and 1472 withholding tax on "withholdable payments" applies only with respect to payments on "obligations" issued after March 18 2012.

Even though withholding will not take immediate effect, obligations issued after that date will ultimately be subject to Code section 1471 and 1472 withholding.

Finally, March 18 2012 marks the end of the practice whereby US issuers (and controlled foreign corporations) can sell bearer bonds to foreign investors.

Thomas A Humphreys, Remmelt A Reigersman and Jared B Goldberger

Contacts:

1290 Avenue of the Americas
New York, NY 10104-0050
United States

Tel: +1 212 468 8000

Fax: +1 212 468 7900

Web: www.mofo.com