Dear Reader,

When it comes to taxes, which way is the wind blowing, and what do we in Switzerland need to keep an eye out for to ensure that our company does not end up in heavy seas? In this Tax Newsletter we take a closer look at a number of tax pitfalls with particular focus on the amended German anti-treaty shopping rules: these amendments clearly restrict the rights of Swiss shareholders of German corporations regardless of whether they are based on an EU directive or a DTA.

We also focus on the most recent withholding tax agreement between Switzerland and Austria: here it is important to know that there are differences compared to the older agreements on withholding tax with Germany and Great Britain. And finally we report on the double taxation agreement between Switzerland and Argentina that has run aground: the Argentinian government unilaterally terminated the agreement with effect from mid-January.

You will also discover more about the recognition of deducted losses in company mergers. We report on the draft version of a new German Federal Ministry of Finance circular that is intended to mitigate the strict “obligatory” rules of the sales tax implementing regulation with a particular focus on entry certificates. We also provide information about the latest developments in relation to VAT and their temporal application since publication of the Sector Information Sheet.
Another issue featured in our newsletter concerns the Agreement on the Free Movement of Persons between Switzerland and the EU, particularly the immigration safety valve decided upon in relation to the EU-8 Member States.

A final, more personal word: on 1 July 2012 I will be changing career within Ernst & Young. Dr. Philip Robinson will be taking over from me.

I hope you find this Newsletter an informative read.

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Amended German anti-treaty shopping rule poses risk to Swiss shareholders in German companies

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The anti-treaty shopping rule set out in section 50d (3) of the German Income Tax Act (Einkommensteuergesetz) “ESTG” has proved to be a major stumbling block in German international tax law, especially in the German-Swiss context. The rule restricts the right of foreign companies to claim any withholding tax relief, abatement or refund under an EU directive (Parent-Subsidiary Directive or Interest and Royalties Directive) or DTA. For example, Germany normally imposes withholding tax at a rate of 26.375% on dividends paid to foreign shareholders, unless the recipient of the dividend is in possession of a withholding tax exemption certificate at the time of payment. However, exemption certificates will only be issued in respect of dividend payments to Swiss companies under the Germany-Switzerland DTA, for example, provided that both the requirements of the DTA and the conditions stipulated in the German anti-treaty shopping rule (section 50d (3) ESTG) are met.

The anti-treaty shopping rule, which could be described as a fairly innocuous anti-abuse provision prior to the 2007 assessment period, was significantly tightened under the German Annual Tax Act 2007, which has meant that this provision has also had an adverse impact on entities not previously suspected of abuse. The tighter rule has attracted criticism, culminating in a formal request from the European Commission. The new rule took effect on 1 January 2012: (IP/10/298, ref. 2007/4435).

The new provision subsequently amended (IP/10/298, ref. 2007/4435). The new provision subsequently adopted came into force on 1 January 2012, with a guidance note on implementation from the German Federal Ministry of Finance (“MoF Guidance”) following shortly thereafter on 24 January 2012.

The German anti-treaty shopping rule - two levels and two tests
The rule operates at two levels: individual eligibility for tax relief and objective eligibility for tax relief. There are two tests for determining objective eligibility. At the level of individual eligibility, the issue to be determined is whether the shareholders of any foreign intermediate holding company receiving dividends from the German company and deemed to have inadequate “business substance” would also be entitled to the same level of relief under a Directive or DTA if they held their shares directly in the German company. If individual (indirect) eligibility for relief is deemed to apply, there is no need to proceed to the second level assessment.

The second level assessment involves determining whether there is an objective eligibility for tax relief. For the assessment periods 2007 through 2011, the following criteria were used to assess an entity’s objective eligibility:

1. There must be no business or other bona fide (i.e. non-tax) reasons for the interposition of the foreign entity in relation to such revenues, or
2. The foreign entity does not engage in general commerce through a business establishment that is appropriately organized for its business purposes.

Both the “active income” and “business purpose” tests under the old rule are preserved in the new rule, although it is no longer a requirement for both tests to be satisfied simultaneously. The business purpose test only comes into play if the entity does not meet the active income test. In addition, the 10% threshold for gross revenues which are generated from the entity’s own business activities has been eliminated from the active income test. Under the active income test, withholding tax relief is only available if and to the extent that gross revenues, as a proportion of total revenues, are generated from the entity’s own business activities.

Active income test
Foreign entities will be eligible for relief to the extent that the gross revenues earned in the financial year in question are generated from their own business activities. This also includes gross revenues generated by an entity, which have a functional link to the entity’s own business activities as well as interest income earned by an entity, where the interest income has accrued from investments of profits from the entity which qualify for relief. Dividends and other income (e.g. interest and royalties) from subsidiaries qualify as gross revenues generated from the entity’s own business activities.

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“Own business activities” are defined as activities that exceed the mere management of assets and require involvement in general business transactions (“genuine business activities”). The foreign entity must be actively engaged in its ordinary business activities in the local market on a consistent and long-term basis. The supply of services to one or more group companies will be sufficient for this purpose, provided that a separate fee is charged for the services on arm’s length terms. Merely acquiring holdings, holding share capital, or holding and managing assets do not qualify as “own business activities”. Instead, an entity must acquire substantial holdings for the purpose of carrying out management functions in relation to entities in which it holds an interest (active management). Exercising management functions solely in relation to a single subsidiary (passive management) is not sufficient. The degree of influence over the subsidiary rather than the size of the shareholding is determinative.

Management functions are carried out by making management decisions. Management decisions are deemed to be long-term decisions of fundamental importance, which are relevant to the continued existence of the holding company (actively managed company), as distinct from short-term, non-strategic decisions related to specific implementation issues. Merely carrying out isolated business functions, e.g. managing licenses and/or granting loans, are not sufficient to qualify as active management. Verbal management decisions that have not been properly documented do not provide adequate evidence of the existence of a management function. The outsourcing of key business operations, e.g. to law firms or management companies, is deemed to be “harmful”.

Business purpose test
Where the foreign entity engages in general commerce through a business establishment that is appropriately organized for its business purposes, it will qualify for relief to the extent that any revenues not resulting from its own business activities are generated in an area of business that warrants the interposition of the foreign entity for business or other bona fide reasons. A business purpose will be deemed to exist for example, if the intention is for the foreign entity to commence trading on its own account, and there is clear evidence of such activities.

A business purpose is not deemed to be present, for example, if the primary purpose of the foreign entity is to safeguard domestic assets in times of crisis, or the entity is to be used for the purpose of future succession arrangements or restructuring the retirement assets of the shareholders. Other bona fide reasons may include, for example, legal, political or even religious purposes. Reasons attributable to circumstances within the group, such as coordination, organization, establishing customer relations, costs, local preferences and general corporate setups do not qualify as business or other bona fide reasons for these purposes. Unfortunately, both the Act and the MoF Guidance are silent as to what other situations will qualify or be disqualified as a business reason, resulting in legal uncertainty for the taxpayers concerned.

New apportionment rule
The new rule has essentially had no impact on the key attributes of the two tests. The main change involves the substitution of an apportionment rule for the former “reclassification rule” (10% threshold) referred to above. While any relief available under a DTA or EU directive was either granted in full or denied altogether under the old rule, the implications of the new rule are that relief will now be granted on a pro rata basis. According to the MoF Guidance, the percentage of relief (unless there is any additional individual entitlement to relief) will solely be based on the ratio of all “own business” and other “non-harmful” gross revenues generated by the foreign entity for the financial year in question relative to the entity’s total gross revenues for the same period. Instead of the former “all-or-nothing” 10% principle, revenues are now apportioned between “good” and “bad” income.
Conflict with Swiss "holding company privilege"?
The MoF Guidance defines the term “management holding company” very narrowly, stipulating that management decisions must be taken of a long-term nature that are of fundamental importance to the holding company concerned. These criteria may be a significant stumbling block in practice, as they are diametrically opposed to the current trend for group companies to operate under decentralized management structures. It will therefore be necessary in practice to assess in respect of each Swiss holding company whether these functions are actually performed by its appropriately qualified staff.

At first glance it would appear that the basic criteria allowing entities to benefit from the Swiss cantonal holding company rules conflict with the German anti-treaty shopping rules.

The crucial consideration is whether the “business activity” or “permitted secondary activities” allowed under the Swiss holding company rules constitute “own business activities” under the German rules.

Although the Swiss rules essentially preclude any business activity, including in particular any form of a trade on an industrial or commercial basis in Switzerland as a producer or supplier of goods, intellectual property or services, certain “secondary activities” are permitted, provided they are incidental or relate to the company’s main objectives, for example providing intra-group services, or performing group management or financing functions for affiliated companies. At the end of the day, the major stumbling block for Swiss holding entities in relation to the German anti-treaty shopping rule is probably not so much the Swiss holding company rules themselves as the actual business “substance” of such entities. This applies in particular to financing holding companies which do not employ expert staff or supply intra-group services.

FAQs and action required
In recent weeks, the German Federal Central Tax Office has started to distribute FAQs in German and English, which have been amended in line with the new rule. The Federal Central Tax Office or the relevant tax authorities have been reviewing the information provided in the FAQs in light of the new rule. However, taxpayers should not wait until the tax authorities send out the FAQs and reach a decision. Taxpayers have a duty to disclose their situation if as a result of the new legal rules they no longer qualify for full or partial relief. In particular, where a taxpayer only marginally exceeded the 10% hurdle in the past, it will be necessary to reassess whether there are sufficient business reasons for any “harmful” income. Any tax exemption certificate previously issued will cease to have any legal effect once the criteria stipulated in the Act (active income test, business purpose test) have ceased to apply. Accordingly, any existing tax exemption certificates should be reviewed prior to any distributions of profits of German companies.

The withholding tax agreements with the UK and Austria

On 13 April 2012, Switzerland signed its third agreement with an EU Member State on withholding tax at source. The agreement, with Austria, followed the agreements signed with Germany and the UK on 21 September and 6 October 2011 respectively. Although the agreements with the UK and Austria are largely similar to that with Germany, there are a number of significant differences, and the purpose of this article is to briefly highlight them.

Overview
As with the agreement on withholding tax with Germany, the agreements with the UK and Austria aim to facilitate the taxation of the assets or investment income of British and Austrian clients of Swiss banks without infringing their privacy. The tax on these is paid to the Swiss Federal Tax Administration, which then forwards the total tax raised to the countries in which the clients reside. As a result, their tax liability is discharged in full and without penalties. Part I of the agreements provides for retroactive taxation by way of an anonymous one-off payment of the amount of tax due on existing assets or of voluntary disclosure after which individuals will be taxed retroactively by the authorities to which they are subject. Part II of the agreements sets down norms for the taxation of future investment income and capital gains by way of a tax at source.

Retroactive taxation of existing assets
Where the bank client opts for anonymous settlement by way of a one-off tax payment, the agreement with the UK provides – depending on the volume of the assets in question – for a tax rate between 21% and 34%, or, in special cases, of up to 41%. This is in line with the agreement with Germany. However, the agreement with Austria provides for a rate ranging from 15% to 30%, with 38% applying in special cases.

All three agreements provide for the application of the minimum tax rate where it is to be assumed that it is only investment income that has not been taxed. The maximum tax rate becomes applicable where the account balances have increased very considerably over time, thus giving rise to the assumption that tax on the capital itself has been evaded. Where the maximum rate is already applicable and the taxpayer has particularly substantial assets, the maximum rate can be exceeded (up to a maximum of 41% in the cases of Germany and the UK and of 38% for Austria). The option of making a one-off payment of back tax is available to taxpayers who were domiciled in one of the states party to the agreements on 31 December 2010.
and at that time held assets in a Swiss bank. The account in question must also, according to the terms of the agreements with Germany and the UK, still be in existence on 31 May 2013, or, according to that with Austria, on 1 January 2013.

Where taxpayers remove their assets from Switzerland before 1 January 2013 or 31 May 2013, the Swiss authorities will inform their counterparts in the other countries of the ten countries that are the destinations for most assets (and indicate the number of persons who have done so).

UK taxpayers can regularize their past situations not only by means of individual retrospective taxation in the UK itself or by way of an anonymous payment under the withholding tax agreement, but also by availing themselves of a third option, provided for by the 11 August 2009 agreement between the UK and Liechtenstein, in the shape of the “Liechtenstein Disclosure Facility”, which enables them to declare present worldwide assets. This can be a more satisfactory solution for individual UK taxpayers than payment of back tax in the UK or under the withholding tax agreement.

Finally, Swiss banks are required, under the agreements with Germany and the UK, to make an advance payment on the future tax income that will be received, which will be repaid only if a sufficient amount of tax is forthcoming from their clients. No such advance payment is required under the agreement with Austria.

**Tax at source to be levied by Swiss banks in future**

Once the agreements have entered into force, taxpayers in the relevant countries will be able to open or maintain Swiss bank accounts only if they pay tax at source anonymously on the income they have generated or inform their tax authorities of their accounts’ existence. The tax rates applied correspond to those of the states of residence, namely 26.375% on investment income and 35% on interest income for German taxpayers, between 27% and 48%, depending on the type of income, for their UK counterparts, and 25% on investment income and 35% on interest income for persons liable to tax in Austria.

Inheritance tax rates also follow those applied in the country of origin, with a rate of 50% for Germany and of 40% for the UK. No such rule is required for Austria, where no tax is levied on inheritances.

**What happens next?**

The plan is that all three agreements should enter into force with effect from 1 January 2013. However, they first need to be ratified by the parliaments of the states concerned. In neither Austria nor the UK (unlike in Germany) is there much political opposition to the agreements, and it is assumed that the British and Austrians will approve them.

Although the Swiss parliament approved all three agreements at the end of May 2012, they may still be subject to a referendum. In the same parliamentary session, the National Council - the upper house of the Swiss parliament - voted to reject the draft implementation law, the “International Withholding Tax Act” (Gesetz über die internationale Quellenbesteuerung), which must therefore be reworked to remove the points to which the National Council objects before it can be approved.
Unilateral termination of the double tax treaty between Switzerland and Argentina

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Switzerland and Argentina signed a double tax treaty in Buenos Aires on the taxation of income and wealth on 23 April 1997. However, it was never formally ratified by Argentina but has been applied provisionally since 1 January 2001. Now the Argentine government has unilaterally decided to no longer apply this treaty with effect from 16 January 2012.

Overview
Argentina is an important trading partner of Switzerland with numerous Swiss companies having business connections and investments there. In addition to the avoidance of double taxation, the aforementioned treaty ensures also a certain level of protection, e.g. against discrimination. It also guarantees that Swiss companies do not suffer any tax-related competitive disadvantages compared to other industrial countries.

However, as already mentioned, the double tax treaty was only ratified by the Swiss Federal Council, but not by the Argentine parliament. Therefore the treaty did never come into effect. Nevertheless, when the protocol to this treaty was signed on 23 November 2000, Switzerland managed to agree with Argentina that the treaty would be applied provisionally as of 1 January 2001.

As requested by the Argentine authorities, a protocol regarding the treatment of royalties under the treaty (removal of zero rate) was signed on 7 August 2006. This protocol was supposed to ensure that the double tax treaty would come into effect or at least continue to be applied on a provisional basis. Despite these efforts, the treaty was again not ratified by Argentina.

Unilateral “termination” by Argentina
According to Argentina’s official gazette of 31 January 2012, the Argentine government informed the Swiss ambassador in Argentina on 16 January 2012 that the double tax treaty with Switzerland would no longer be applied provisionally.

The wording of the communication indicates that the application of the treaty would cease with immediate effect, i.e. from 16 January 2012.

The Argentine government’s communication also indicates that the treaty between the Argentine and the Swiss governments on the avoidance of double taxation of corporate income derived from air and shipping transport of 13 January 1950 that was suspended through article 25 cipher 3 of the double tax treaty, would remain suspended.

Finally, the Argentine government’s communication proposed starting negotiations on a tax treaty for exchanging information as per the OECD model convention and a treaty on the exchange of information on customs duties to improve cooperation between the tax and customs authorities.

The double tax treaty between Switzerland and Argentina is one of the most advantageous treaties for foreign investors compared to other double tax treaties that Argentina has signed. For instance, it gives investors based in Switzerland full exemption from wealth tax plus reduced withholding tax rates on dividend, license and interest payments.

No official position by Switzerland
However, it should be noted that the Swiss government or the Swiss Federal Tax Administration, respectively, has not yet published an official statement to the Argentine government’s notification. However, apparently negotiations regarding a new double tax treaty containing provisions on the exchange of information in accordance with the OECD standard are already in progress between the authorities. The Swiss authorities seem to be confident that the negotiations can soon be completed successfully. It is also unclear whether the Argentine tax authorities would actually deny the provisional application of the treaty dated 23 April 1997 or generally what the notice period regarding the termination of the treaty is. According to article 26, the termination of the treaty is subject to a notice period of 6 months and can only be terminated to the end of a calendar year. Thus, the Swiss understanding is that the earliest termination would be possible as per 31 December 2012. As the Swiss Federal Tax Administration has so far not published an official statement, it can be assumed that the Swiss Federal Tax Administration is currently still applying the treaty.

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Recognition of deducted losses in company mergers

In Switzerland, companies can normally carry forward their losses for seven years (art. 67 para. 1 DBG; art. 25 para. 2 StHG). The question often arises as to whether the acquired company’s losses can be transferred to the acquiring company. Merging companies are normally active businesses, so loss transfers are acceptable from a tax perspective. But what is the situation if one of the companies is already in liquidation? In its judgment of 4 January 2012 (2C_351/2011), the Federal Supreme Court dealt with a merger of sister companies, one of which was already in liquidation (art. 5 para. 1 Merger Act) and also had reported losses. At dispute was whether the acquiring sister company was able to charge the losses adopted upon merger against its profits. The court of lower instance found it problematical that the acquired sister company had been practically liquidated prior to the merger. Despite this, the Federal Supreme Court found it permissible and upheld a number of key principles in the process. Below are the most important of these considerations.

The transfer of assets and liabilities during a merger has been regulated by the Merger Act (FusG) since 1 July 2004. However, as this only falls under civil law, the question is whether the absorbed company’s taxes can be borne by the acquiring one, and should be dealt with expressly under tax law (art. 54 para. 3 DBG). Under the aforementioned law, the acquiring company has to take over the absorbed entity’s taxes, as the latter disappears without liquidation, i.e. is absorbed into the acquiring company. The absorbed company’s tax factors must be continued by the acquiring company, as the latter must pay tax on its own operating results as well as on those of the legal entity it has acquired from the takeover date.

The Swiss Federal Act on Direct Federal Tax (DBG), notably art. 67, contains no special provisions on the takeover of loss carryforwards when two companies merge. The Federal Supreme Court’s view is that the positive and negative results must be taken into account when tax factors are adopted in order to guarantee consistent continuity of assessment. This means that the rule contained in art. 67 DBG, which states that losses from the seven business years prior to the tax period may be deducted from net profit for the relevant tax period (art. 79 DBG), provided these have not yet been accounted for (art. 67 para. 1 DBG), can also be applied to the deduction of loss carryforwards of a tax-neutral absorbed company by the acquiring company. A merger is tax-neutral under art. 61 para. 1 DBG if there is a tax liability in Switzerland and the figures previously relevant for income tax are adopted. The requirement for continuing the business no longer applies.

Consequently, when two limited companies merge, the acquiring company can usually claim the absorbed company’s losses for tax purposes, provided that the conditions under art. 61 para. 1 DBG have been met.

As loss carryforwards are associated with the company, a certain level of business continuity is required during the company restructuring. Now however, under art. 5 para. 1 FusG, a company in liquidation may also take part in a merger as an absorbed company. As a result, loss offsetting cannot be ruled out if fixed assets are sold in advance; in fact, restructuring does not have to be justified in practical terms or from a business perspective. But it should be emphasized that merely creating loss offsetting potential is not regarded as a qualifying reason. Under art. 5 para. 1 FusG therefore, the requirement for acquisition and continuation has no great significance. The status of the liquidation and existence of a still functioning business at the acquired company at the time of the merger are not critical criteria. In other words, the Federal Supreme Court is calling for a dynamic perspective rather than a statistical and purely accounting one. Goodwill and other intangible figures that cannot be capitalized are crucial in assessing whether restructuring took place for business reasons. It should also be borne in mind that in some circumstances, the merger eliminates a significant competitor, giving the acquiring company a stronger market position. If the acquiring company subsequently posts significant rises in turnover, this is a further sign that the restructuring had a reasonable business justification.

As with other rights being exercised, the adoption of losses is subject to the prohibition of abusive practices under art. 2 para. 2 of the Swiss Civil Code (ZGB). Adopting losses is specifically ruled out according to the FTA’s circular nr. 5 of June 1, 2004 if tax evasion or trading in shell companies is involved. However, there was no check for this prohibition of abusive practices in the present case, as the Federal Supreme Court’s view was that the merger of sister companies took place for business reasons anyway and was therefore not unlawful.

Consequently, for the recognition of deducted losses when companies are absorbed, a check should always be made as to whether practical or business reasons were crucial for the merger and whether unlawful action can be ruled out. It should be emphasized that according to the Federal Supreme Court, it is not prejudicial for tax-planning aspects to have a bearing on the corporate restructuring. The Federal Supreme Court’s central argument is that the legal provision calls for a dynamic (assessment of intangible assets that cannot be capitalized) rather than a statistical and purely accounting perspective. As the wording of art. 24 para. 3 Tax Harmonization Act (StHG) and art. 61 para. 1 DBG and of many cantonal restructuring standards is identical, the Federal Supreme Court’s dynamic perspective will certainly also be applied in cantonal practice.
Cross-border services are growing in importance, as global companies call for local support and management for their foreign subsidiaries and global customers. This mainly involves the short-term deployment of international, internal experts and specialists who are sent all around the world on business trips, becoming international business travelers known as accidental expatriates. Such deployments abroad mean that the accidental expatriates and their employers run the risk of short-term secondments not complying with local laws, mainly those on foreigners, tax and social security.

Immigration
Immigration is generally when people move from one country to another on a permanent basis or for a limited period, either for personal or professional reasons. In doing so, not only are country borders crossed, but also borders relating to employment and residency law.

As mentioned at the beginning, international companies today offer their services on a cross-border basis, for which they deploy their accidental expatriates all around the world. In turn, the countries in which the secondments take place try to protect the local employment market as well as their own workforce from excessive immigration. As a result, most countries have drawn up legal guidelines that cover the deployment of international business travelers and the related authorizations. The process of obtaining entry and work permits is often long and drawn-out, making it incompatible with short-term deployments and business trips of accidental expatriates. This is an obstacle for flexible international secondments, as business travelers often do not have the right work permit or business visa to be able to carry out their work in the country of deployment. Contrary to the widespread assumption, a tourist or visitors’ visa, for instance, does not generally allow the holder to work abroad. In most cases, this type of travel permit only allows a person to stay for the purposes of a business meeting but not for employment. Breaching local laws can have criminal consequences for the accidental expatriate and the employer domestically and abroad. Accidental expatriates are therefore advised to keep a travel calendar containing detailed information on how long they have stayed and worked in a particular country.

Tax and social security
Tax and social security laws vary enormously from country to country. Added to this is the fact that not all countries have signed double taxation and/or social security agreements with each other. In many cases, these country-specific variations make it difficult to coordinate a secondment abroad, as tax and social security consequences are often complicated for the employer or accidental expatriate. It would be advisable to check the legal situation in the country of secondment first, but this is often difficult to do well in advance, as accidental expatriates are deployed abroad on a relatively short-notice basis. Consequently, there is a risk that local laws will be breached which can lead to additional payments, penalties, fines or reputational damage.

Depending on the nature and duration of the international business trip and overseas secondment as well as other individual circumstances, various tax and social security obligations may arise on the very first working day. Double taxation agreements often give accidental expatriates the opportunity to apply to the tax authorities for tax exemption in the country of deployment. The responsible social security bodies generally provide certificates on the applicable legal provisions (depending on nationality, e.g. pre-printed form A1, E 101, certificate of coverage) on exemption from social security requirements, but only if there is a social security agreement.

In conclusion, the deployment of accidental expatriates requires careful planning, not only in terms of authorization but also from a tax and social security perspective, as high costs and reputational damage could be incurred if rules are not followed.
Germany: new changes to the changes to the documentation of intra-Community supplies

A new draft interpretative letter (BMF-Schreiben) of the German Federal Ministry of Finance on documentary and accounting evidence for intra-Community supplies has been issued. It is intended to soften the impact of the stringent compulsory provisions of the VAT Implementation Ordinance which provides that the confirmation of arrival is the only possible evidence.

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Intra-Community supplies within the meaning of Sec. 6a UStG ["Umsatzsteuergesetz": German VAT Act] in which items from Germany are delivered to another EU member state are only VAT exempt if compliance with the requirements are demonstrated in the supplier’s accounting records as well as the delivery documents. The requirements of the UStDV ["Umsatzsteuergesetz-Durchführungsverordnung": German VAT Implementation Ordinance] were tightened with effect as of 1 January 2012 to the extent that the confirmation of arrival or entry certificate ("Gelangensbestätigung") is the only possible evidence of an intra-Community supply.

This confirmation of arrival requires that the recipient confirms the place and time of delivery and signs the document (if it has not been sent in digital form). According to the UStDV, other substantiating documents, such as delivery or consignment notes, are no longer valid. At present, parties may still invoke a safe harbor which provides that the tax authorities shall still accept substantiating documents under the legal provisions applicable until 31 December 2011. As things stand, a change of the UStDV itself is to be expected. The safe harbor rule may be applied until the time the changes to the UStDV are set in force. At present, the authorities plan to have an amended version of the UStDV set in force as of 1 January 2013. This would mean that the safe harbor rule would still be valid until 31 December 2012.

Significant changes to the new draft interpretative letter of the German Federal Ministry of Finance (selected excerpts)

After abundant criticism, the German Federal Ministry of Finance (Bundesministerium der Finanzen [BMF]) has now revised its original draft interpretative letter from December 2011. Below, we have summarized a selection of key revisions of the preceding draft from December 2011:

Other substantiating documents permitted in addition to the confirmation of arrival

The most significant revision of the draft had already taken shape as a result of the existing decisions of the European Court of Justice (ECJ) and the German Federal Finance Court (Bundesfinanzhof [BFH]): if the requirements of the intra-Community supply cannot be proven by means of a confirmation of arrival pursuant to the UStDV, other means of proof, especially other substantiating documents, may be considered. The fact that the UStDV itself is not a substantive legal component of Sec. 6a UStG, which governs intra-Community supplies, indicates that such alternative substantiating documents will continue to be valid even after the tightening of the UStDV provisions from 1 January 2012. The UStDV is not in a position to limit this provision by means of an additional requirement, that is, that VAT exemption will only be granted upon production of a confirmation of arrival. In its revised draft, the Federal Ministry of Finance thus correctly refrains from classifying the other substantiating documents as exceptions to the confirmation of arrival rule.

Simplification of the digital transfer of the confirmation of arrival

In the preceding draft of its interpretative letter, the German Federal Ministry of Finance already considered the digital transfer of the confirmation of arrival as permissible, thereby also waiving the requirement of a signature by the recipient. However, the supplier should guarantee the origin, integrity of the content and the legibility of the electronically transferred confirmation of arrival. These requirements would have necessitated an internal checking process within the meaning of Sec. 14 (1) UStG such as the one set up for invoices received in electronic form.

According to the revised draft interpretative letter of the German Federal Ministry of Finance, the confirmation by the recipient “only” has to provide some indication that it stems from the latter’s sphere of control. The recipient may confirm receipt of the goods in any technically implementable electronic form, for instance, by mouse click.

Even though this simplification should be welcomed considering the ease and speed of handling it allows, a continued measure of caution is necessary. The supplier must ensure that the confirmation includes all the required information, especially the full address of the recipient and the place and time of delivery, in particular if the recipient confirms by means of a simple click of a button. The recipient is likely to be responsible for entering the time of delivery or at least confirming that the delivery was made on the date of the confirmation by means of a timely mouse click.

Care should also be taken to comply with the Principles Concerning Data Access...
and the Auditability of Digital Documents (GDPdU) as is the case with all tax related data that is transferred or created digitally. After receipt, the electronic confirmation of arrival must also be stored in electronic and unaltered form.

**Batch confirmation**

As in the past, the tax authorities regard the summary of confirmations into batches (Sammelbestätigung) as permissible if several separate deliveries are made to the same recipient. The new draft specifies the issue by providing that the batch confirmations may comprise the deliveries for a month but no more than a quarter. We recommend selecting the period on the basis of whether you file your advance VAT return (Umsatzsteuervoranmeldung) on a monthly or calendar quarter basis.

**Simplification in specific cases**

Irrespective of whether, as explained above, other documentary evidence is admissible in addition to a confirmation of arrival, the tax authorities mention which alternative documentation it requires in specific cases:

For dispatch deliveries, a dispatch voucher is sufficient:

- However, it must contain certain specified information
- The voucher must indicate that the recipient has confirmed receipt of the item and the date of such receipt

The voucher is thus a de facto confirmation of arrival that does not require the signature of the recipient but includes some other form of confirmation of receipt. Envisaged are for instance CMR freight bills which must, however, contain all the information necessary.

If the item is transported by an independent courier service, the requirements for proving an intra Community supply are met if the following documents are available:

- A written order (containing certain specified information)
- A record of the acceptance and delivery of the item (tracing protocol) prepared by the courier
- Proof of payment of the delivery

If the item is transported by a postal operator, the following documentation is sufficient to prove delivery instead of a confirmation of receipt:

- The certificate of posting for shipments by mail (containing certain specified information)
- Any other records and documents prepared by the company (such as the invoice, delivery note or the payment receipt) which indicates a link to the information in the certificate of posting

**Outlook**

The new draft of the German Federal Ministry of Finance may be subject to further revision. It will once again be submitted to chambers of tax advisors and business associations for comment until the middle of April. A final version of the interpretative letter of the German Federal Ministry of Finance could therefore hardly be expected before May 2012. It is unclear whether the safe harbor rule will be extended beyond 30 June 2012. Discussions are currently centering on 31 December 2012. Considering the current status, it is still unlikely that the confirmation of receipt will be completely abolished by an amendment of the UStDV and that the legal situation will revert to the conditions prevailing until 31 December 2011.

**How Ernst & Young can support you**

Even if the financial authorities are expected to accept other forms of evidence in addition to the confirmation of receipt on the basis of current court rulings, it is evident that the confirmation of receipt will remain compulsory in accordance with the UStDV. Working with alternative documentary evidence means taking the well known risk that these documents will either be accepted or rejected by the tax authorities in each specific case. Consequently, the use of the confirmation of receipt may offer the advantage of increased legal certainty regarding the VAT exemption of each intra Community supply. It should be taken into account that the electronic confirmation of receipt in particular may be a practical and speedy means of furnishing proof. This makes the confirmation of receipt not just a curse but also a potential blessing.

Your contacts at Ernst & Young are ready to assist you in weighing up, initiating and implementing your next steps in connection with the new UStDV requirements.
Sales/services in the European Union

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**Tax risks of invalid VAT-identification numbers**

The regulations for the use of VAT-ID numbers

Based of article 17 on the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax each Member State shall store in an electronic system the following information:

- Data on the identity, activity, legal form and address of persons to whom it has issued a VAT identification number, as well as the date on which that number was issued or became invalid.

The tax authorities of each Member State shall ensure that persons involved in the intra-Community supply of goods or of services, are allowed to obtain, for the purposes of such transactions, confirmation by electronic means of the validity of the VAT identification number of any specified person as well as the name and address.

Each Member State shall provide confirmation by electronic means of the name and address of the person to whom the VAT identification number has been issued.

The EU provides a interface to check VAT-ID’s

Since early 2010, the European Commission provides an mass data interface to companies for the confirmation of VAT numbers (VIES - VAT Information and Exchange System). Through this interface, it is now possible for companies registered in the European Union to verify the validity of their client’s VAT-ID numbers in connection with the name and address through a mass data process. To date, only single queries were made possible by a manual entry of data on the website of the European Commission. These electronic interfaces can also be used with stand-alone queries of national tax authorities. The German tax administration demands from the companies registered in Germany to perform a so-called “qualified confirmation” of the identification number, the name and address through the website of the Federal Tax Office.

**Formal checks of VAT-ID’s during tax audits**

In reviewing the submitted recapitulative statement by the local tax administration is merely a formal verification of the reported VAT-ID numbers based on the reporting period. An examination of the address data will be made only by requesting additional information through the local tax office or by inspecting the data in the ERP system through a tax field audit.

In the case the tax authorities disposing a VAT-review of intra-community supplies to customers in the EU, it can be performed by an external audit by the requirement of the relevant customer and shipping information with a test and review software quickly and easily. For this requires the auditor of one file containing the customer data (VAT-ID number, name, legal form and location) and an additional listing of intra-Community transactions carried out during the audited period.

By comparing the stored identification information of customers and information about the period of validity of VAT identification numbers, the auditors are able to prepare an evaluation of all transactions, which have been performed to a customer with - according to the VIES database - correct recipient data, or at the date of shipment or services the identification number was already invalid. By using an audit software tax inspectors are able to quantify the transactions liable of VAT accurately. In this case it will not be necessary to perform projections.

**Steps to build up an internal VAT-ID testing**

For this reason, all companies registered for VAT purposes in a Member State of the European Union performing intra-Community supplies and / or services, should carry out a check of the VAT identification numbers.

For performing internal VAT-ID checks, the following project steps have proven to be useful:

- Examination of all VAT identification numbers with regard to validity and correctness of address information.
- Simulation of a digital VAT audit of all intra-community transactions on the basis of the obtained test results of the ID-numbers checks for a predefined period (e.g. for every calendar year having not yet been audited by the tax authorities and therefore containing a potential risk of a subsequent tax burden). A simulation implies the following advantages:
  - Qualification of the specific tax risks for the company in the registered EU countries
  - Creation of a prioritized list of customer master data, which identifies high sales volumes and inactive customers
  - Based on the identified priority listing all customers with invalid or incorrect data should be contacted for clarification.
- A separate data sheet should be created with the costumer data stored in VIES.

A storage of these datasets in the company’s ERP system is usually not recommended, because the fiscal data in comparison with the actual costumer’s data often differ significantly (e.g. when the address of a fiscal representative has been stored in the VIES database instead of the costumer’s address). The VAT-relevant records are thus confirmable used exclusively for the VIES queries.

If the customer’s VIES-data have been adjusted successfully, it should have been decided in which frequency the data shall be re-examined. By legal form changes or the change of the costumer’s name an identification number may become invalid. Furthermore, a workflow should be created how to ensure first time checks and to handle new customer entries in the data sheet.

Finally, the steps and results, and decisions for further treatment of the data should be documented, so that in case of a tax audit the checks can be documented accordingly.
Digital audits will increase for VAT in Europe
Through the intensive use of information technologies tax administrations of the EU Member States plan to audit tax compliance regulations. In particular, IT-based inspections in the field of value-added tax by the Member States will increase because of the formal rules of the VAT which can be monitored digitally between Member States, e.g. European-wide comparison of data sourced from the VAT returns and EC sales listings.

VAT in the financial sector – FTA issues final practice statement

On 5 April 2012, the Swiss Federal Tax Administration (FTA) published the final version of its brochure "VAT Info 14, Financial Sector" (VAT Info 14) and the related list of services. The brochure takes effect on the date of publication. In addition to a number of minor amendments, the FTA has substantially changed the qualification of "brokerage services". VAT Info 14 also explains the time at which the changes may be applied.

1 Brokerage services in the financial sector
The FTA published a number of draft versions of VAT Info 14 prior to issuing the final version. No further changes have been made to the second draft, which was published on 1 November 2011. However, the final version sets out various changes to applicable FTA practice under earlier VAT legislation, which have been the subject of much debate within the industry. One significant change is that the term brokerage has been substantially redefined.

1.1 Definition of brokerage
The FTA now defines brokerage as an activity carried out by an intermediary which consists in arranging a contract involving money and capital transactions without being a party to that contract and without the broker having any self-interest in the terms of the contract. The deal brokered must differ from the obligations typically entered into by the parties to the contract and relate to specific sales transactions.

Some of the key elements of the definition of brokerage are taken verbatim from the criteria laid down by the European Court of Justice (ECJ) in the CSC case. However, it is clear from the comments and examples provided in the final version of VAT Info 14 that the FTA’s interpretation of brokerage differs from that of the ECJ, as evidenced primarily by the way it defines the self-interest of the broker. Where a financial institution makes agreed financial payments to a broker, which it is required to pass on under Article 400 (1) of the Swiss Code of Obligations, the FTA will always presume that the broker has a self-interest in the transaction concerned.

It remains to be seen what approach the FTA will take to determining whether the broker has a self-interest in individual cases. However, in general, the questions arise as to whether the requirement under civil law to pass on payments under agency arrangements is appropriate for determining the broker’s self-interest, and thus the extent to which supplies of services are VAT exempt without credit or taxable. As a result, the only way at the moment to obtain absolute certainty as to the correct classification for tax purposes is to seek advice from the FTA on a case-by-case basis.

1.2 Definition of brokerage services
Narrowing the previously broader definition of brokerage by focusing on the legal duty to pass on financial payments means that any intermediary fees paid to asset managers will be deemed to be taxable in line with established practice under the old VAT Act. This narrower definition, which was not included in the first draft, is potentially advantageous to financial intermediaries, in particular, in terms of the input VAT pro rata that may be claimed. Where there is no duty to pass on arrangement fees, as described above,

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1 See also Henzen/Stöckli in EY Tax News March 2012, p. 16: “VAT Info no. 14: Finance Sector – Summary of Most Important Changes”.

2 In the CSC case dated 13 December 2001, C-235/00, the ECJ laid down specific guidelines, which have been reaffirmed in subsequent judgments.
the crucial factor in determining whether a supply is taxable will be whether the underlying transaction is VAT exempt without credit or taxable.

It is likely that this departure from the earlier practice will merely require adjustments in isolated instances, for example, in relation to banks that act in the capacity of intermediary or consumer loan brokers who solely engage in credit brokerage. More importantly, however, even the expected minor adjustments will require taxpayers to review their contractual arrangements with regard to any brokerage activities in order to ensure that their VAT classification still applies. Any such review will be complicated by the unclear classification criteria and the fact that in practice brokerage services are seldom supplied in isolation, but usually in combination with a range of different services.

1.3. Avoiding legal uncertainty
In order to ensure that brokerage services supplied by asset managers are treated as VAT exempt without credit, it is possible to set up remuneration models that would preclude any conflict between the third party interests the asset manager is required to safeguard and the asset manager’s own interests in terms of the levels of remuneration payable. Among others, there are two possible methods for avoiding such conflicts of interest. The first method is to agree a remuneration scheme that does not create a systematic conflict of interest, for example, by paying remuneration on a non-transaction basis. The second method is for clients to waive their right to payments in favor of the asset manager. However, this second option is explicitly ruled out in VAT Info 14, which states that there will be a presumption that the broker is under a duty to pass on payments and therefore has a self-interest in the transaction irrespective of whether clients have waived their right to payments, or such payments have actually been passed on.

2. Commencement of new practice
According to the introductory notes, VAT Info 14 will essentially apply with retrospective effect from 1 January 2010. This would make it difficult to determine if brokerage services are taxable, especially as it is often impracticable to make the required retrospective amendments to contracts or invoices.

As stated in VAT Info 20, Zeitliche Wirkung von Praxisfestlegung (Determining when practice rules should be applied), it is essential to define whether the wording of the new VAT Act or “merely” FTA practice has changed for the purpose of determining the time at which the new practice applies. The use of the term “brokerage” in the new VAT Act is identical to that in Article 18 (19) (a) to (e) of the old VAT Act.

In response to an inquiry, the FTA has confirmed that the change to the classification of brokerage services does not constitute a change in the wording of the Act, but a change in practice. Accordingly, in line with VAT Info 20, where the new practice has a more restrictive effect for taxpayers, this will apply from the start of the following semester, in which the practice statement was issued, i.e. from 1 July 2012. Where the effect is more favorable, taxpayers have the option to apply the practice with retrospective effect from 1 January 2010.

3. Conclusion
The publication by the FTA of the final version of the long awaited practice statement in relation to the financial sector is to be welcomed. It is also encouraging to note that the FTA views this merely as a change in practice – insofar as it constitutes a departure from earlier practice, which will generally have ex nunc effect.

In terms of the treatment of brokerage services, the focus on the legal obligation to pass on payments has further limited the effects of the narrower definition of “brokerage” as compared to the previous definition. However, this development offers some potential for tax optimization, for example when calculating the reverse charge and therefore input tax, to the extent that any purchase of supplies from outside Switzerland is now deemed to be tax exempt rather than taxable as in the past. It is now essential for affected taxpayers operating in the financial sector to review their contractual arrangements and revenues in light of the new practice and – if any adjustments are required – to determine the timing of any change to the VAT classification of their supplies.

1 Federal Supreme Court dated 27 September 2002, 4C.125/2002), finding 3.1: the Federal Supreme Court will infer a conflict of interest in relation to retrocessions, because they are paid to agents in consideration of the performance of specific acts of management.
Agreement on Free Movement of Persons
Switzerland-EU: Invocation of the Safeguard
Clause with respect to the EU-8 Member States

Human Capital Alert - April 27, 2012

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At its meeting of April 18, 2012, the Federal Council has decided to invoke the safeguard clause provided for in the Agreement between Switzerland and the EU on the free movement of persons, applying it to the EU-8 Member States. As of 1 May 2012, category B residence permits granted to citizens of these countries will be subject to quotas.

Furthermore, the Federal Council has decided to examine additional measures in the domain of accompanying measures and on the issue of integration.1

Please note that this change concerns nationals of Poland, Hungary, Slovakia, Czech Republic, Latvia, Lithuania, Estonia and Slovenia being locally employed in Switzerland. The number of quotas for long-term B-permits for these nationals amounts to 2’180 and the introduction of these quotas shall be valid for one year as of 1 May 2012 and shall then be re-examined.

Background
Ever since quotas were abolished on 1 May 2011, citizens of the Central and East-European EU-8 Member States have enjoyed unrestricted free movement rights if disposing of local Swiss employment agreements. The safeguard clause foreseen in the Agreement on the free Movement of Persons (AFM) allows Switzerland to unilaterally re-introduce quotas for persons from the EU-8 countries up until the year 2014 provided that in a given year the number of residence permits and/or short-term residence permits for job seekers from the EU/EFTA States exceeds the average of the previous three years by at least 10%.

In the case of the category B residence permits granted to citizens of the EU-8 being locally employed in Switzerland, the conditions for the re-imposition of quotas were fulfilled over the period running from May 2011 through April 2012, although not for short-term residence permits (category L permits). A quota of 2’180 category B permits, as provided for in the AFM, is to be imposed beginning on 1 May 2012 and is to remain in force for a year. Before the end of this 12-month period, the Federal Council is to make a new assessment of the situation and to decide whether or not to extend the imposition of quotas up until 31 May 2014. Past this date, unrestricted freedom of movement will apply to all citizens of the EU-25/EFTA States.

In weighing its interests, the Federal Council took into account the fact that the free movement of persons provides a good number of advantages to the Swiss economy. During the recession, immigration from the EU countries had a positive impact on consumer spending and construction investments, thereby leveraging the Swiss economy. More than 1.1 million citizens from the EU are living in Switzerland. Together with cross-border workers, they make a crucial contribution to the Swiss economy and to the creation and preservation of jobs.

Over the past months, however, the Federal Council has noticed that the complexity of the immigration theme necessitates a debate on measures in the domains of the job market (including accompanying measures) and integration, and that such a discussion must unfold taking into full account the considerations of economic policy.

In invoking the safeguard clause, the Federal Council is seeking to apply one of the means at its disposal to control the immigration flow into Switzerland. Nonetheless, the Federal Council also realizes that this instrument can only exert a short-term effect and that other, long-term measures are needed.

Along these same lines, the Federal Council has commissioned the Federal Department of Economic Affairs (FDJA) to develop concrete proposals to resolve the issue of non-compliance of subcontractors with minimum wage regulations and minimum working conditions. In addition, the Federal Council has mandated the Federal Department of Justice and Police (FDJP) and the FDEA to examine the possibility of having workers from all of the EU/EFTA States report their wages upon entry into Switzerland to take up employment, when completing the formalities of registration with the authorities.

Both of these assignments are in keeping with the spirit of the proposals made in the Economic Affairs and Taxation committees of the Council of States and the National Council within the frame of consultations on the adaptation of the Federal Act on accompanying measures.

In terms of fostering integration, the Federal Council has mandated the FDJP to examine whether an additional increase in the contribution of the Confederation is advisable in the light of the creation and preservation of jobs.

1 http://www.epjd.admin.ch/content/epjd/en/home/dokumentation/mi/2012/2012-04-181.html
2 EU-8: Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, the Czech Republic.
3 According to the AFM, residence permits of category B are granted to persons who possess an employment contract in Switzerland that is valid for more than a year or for an unlimited period, and to individuals who are self-employed. Short term residence permits of category L are granted to foreign workers whose employment contract is valid for up to one year. Since 1 May 2011, i.e., ever since the introduction of the unrestricted free movement of persons with respect to the EU-8 States, a total of some 6,000 B residence permits have been granted to workers from the eight East-European States. In the three previous years, on the other hand, an average of 2,075 permits had been granted per year. This means that the threshold number of B residents permits needed to invoke the protective clause was equal to 2,283 permits.
of immigration from the EU/EFTA space. Such an enhancement by the Confederation in the fostering of integration could unfold within the framework conditions that the Federal Council and the cantonal governments agreed to last year. Beginning in 2014, fostering of integration is to take place by means of cantonal integration programmes which are fine-tuned to the given situation of the individual canton and to the specific type of immigration.

**Administrative challenges**

As of May 1, 2012 B residence permits granted to citizens of EU-8 Member States are not only subject to quotas but it will also be checked more stringently if the relevant conditions (only qualified workers and respecting minimal wage restrictions) apply. Thereby, the quotas will be granted by the officials on a quarterly basis and be applicable to the “first come first served” principal.

**IRS issues proposed FATCA regulations**

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Treasury and the IRS on 8 February issued long-awaited proposed regulations under the Foreign Account Tax Compliance Act (FATCA) provisions. On the whole, the proposed regulations are generally a positive development because they provide more certainty with respect to the government’s overall approach and with respect to key baseline definitional issues. The new regulations also provide a more practical and risk-based approach than was indicated in prior guidance regarding timelines, income thresholds, and due diligence requirements.

The proposed regulations address many, but not all, of the major items requiring further clarification following the three prior notices issued on FATCA. They also reflect the government’s considerable attention to comments it has received from affected financial institutions, foreign governments and other stakeholders on the magnitude of the burdens associated with the various elements of FATCA. The proposed rules incorporate approaches that aim to reduce the compliance burden while maintaining the policy objective of improved information reporting on US taxpayers with assets invested in non-US jurisdictions.

The proposed regulations reflect significant modifications or elaborations in several key areas that are critical to foreign financial institutions (FFIs) and to US financial institutions, which are no longer referred to as “USFIs,” but rather as part of the larger population of “withholding agents.”

The account identification requirements in the proposed rules incorporate substantial changes that are consistent with the extensive comments the government received. For pre-existing accounts, the proposed regulations include enhanced de minimis exceptions, eliminate the controversial “private banking” rules proposed in IRS Notice 2011-34, and generally allow an FFI to rely on an electronic review of its records for pre-existing accounts with a balance or value of $1 million or less.

For new accounts, the proposed regulations reflect a greater reliance on documentation gathered for other purposes. These rules reflect an intention to minimize the circumstances in which FFIs would need to go back to account holders for additional documentation or modify account opening procedures on a going-forward basis.

The proposed regulations also extend qualification as a grandfathered obligation (which is not subject to FATCA withholding) to obligations outstanding on 1 January 2013. The proposed regulations also expand the categories of FFIs that will be deemed compliant with FATCA’s requirements. Overall, the proposed
regulations provide greater flexibility in the treatment of FFIs in an affiliated group so that barriers to compliance by one affiliate will not taint the whole FFI group.

The proposed regulations reflect a phase-in of dates for FATCA reporting requirements applicable to FFIs as follows:

- The identity of US account holders must be reported starting in 2014 (for the 2013 calendar year);
- Information about income on US accounts must be reported starting in 2016 (for the 2015 calendar year); and
- Full information on US accounts, including information about gross proceeds, must be reported starting in 2017 (for the 2016 calendar year).

In addition, the FATCA withholding rules for FFIs will not apply to certain payments made before 1 January 2015, except for payments made to payees with certain indicia that they might in fact be FFIs (prima facie FFIs).

However, non-financial foreign entities remain subject to potential FATCA withholding on US-source fixed or determinable income paid by USFIs beginning 1 January 2014, and on gross proceeds beginning 1 January 2015. Furthermore, US financial institutions must still begin to look at new, nonresident alien entity accounts differently, starting 1 January 2013.

In general, for US withholding agents that are not FFIs, the proposed regulations contain a demarcation line of 1 January 2013, for distinguishing between “new” and “pre-existing” accounts. Withholding agents must generally consider all documentation obtained for know-your-customer/anti-money laundering (KYC/AML) purposes from an account holder for new accounts when determining the account holder’s status for FATCA purposes.

US withholding agents will be required to withhold on payments of US-source FDAP income paid to new accounts held by nonparticipating and presumed FFIs (i.e., entity account holders for which appropriate FATCA certifications have not been received) and pre-existing prima facie FFI accounts starting 1 January 2014, and on gross proceeds paid to nonparticipating and presumed FFIs starting 1 January 2015. While participating FFIs have a phase-in period for reporting under FATCA, US withholding agents that are not FFIs will apparently be required to begin reporting information about substantial US owners of nonfinancial foreign entities as early as 15 March 2014, for the calendar year 2013, on a form yet to be published.