Two-Part Series on Cross-Border Transactions:
Part I – Significant Issues in Cross-Border Securities Issuances

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Today’s Speakers

David A. Sakowitz
Corporate Partner
New York
+1 (212) 294-2639
dsakowitz@winston.com

Erick Rivero
Corporate Associate
New York
+1 (212) 294-4649
erivero@winston.com

Soyun Park
Tax Partner
New York
+1 (212) 294-5327
sopark@winston.com
Agenda

• Current Trends in Cross-Border Capital Markets
• The Extraterritorial Reach of SEC Regulations
• Recent Regulatory Developments and Their Impact on International Offerings
• Accounting and Auditing Issues
• The FCPA and Other Anticorruption Statutes
• Recent Tax Developments
Current Trends in Cross-Border Capital Markets

2014 Global Equity Capital Markets Activity

- $890.4 billion raised (v. $796.8 million in 2013)

2014 Global IPOs

- $249 billion raised (v. $165 billion in 2013)

<table>
<thead>
<tr>
<th>Country</th>
<th>% of Total Amount Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2014</td>
</tr>
<tr>
<td>United States</td>
<td>29%</td>
</tr>
<tr>
<td>China</td>
<td>15%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>7%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Region</th>
<th>Amount Raised</th>
<th>Number of Deals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2014</td>
<td>2013</td>
</tr>
<tr>
<td>United States</td>
<td>$56 bn</td>
<td>$57 bn</td>
</tr>
<tr>
<td>EMEA</td>
<td>$76 bn</td>
<td>$38 bn</td>
</tr>
<tr>
<td>Asia-Pacific</td>
<td>$83 bn</td>
<td>$36 bn</td>
</tr>
</tbody>
</table>

Sources: Thomson Reuters, Global Equity Capital Markets Review, Full Year 2014 and Full Year 2013
Current Trends in Cross-Border Capital Markets: First Quarter 2015 Equity Markets

1Q15 Global Equity Capital Markets Activity

- $242.2 billion raised (v. $188.8 million in 1Q14)

<table>
<thead>
<tr>
<th>Country</th>
<th>% of Total Amount Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>34%</td>
</tr>
<tr>
<td>China</td>
<td>13%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>7%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Region</th>
<th>Amount Raised</th>
<th>Number of Deals</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>$4.8 bn</td>
<td>27</td>
</tr>
<tr>
<td>EMEA</td>
<td>$20.5 bn</td>
<td>61</td>
</tr>
<tr>
<td>Asia-Pacific</td>
<td>$11.5 bn</td>
<td>130</td>
</tr>
</tbody>
</table>

Sources: Thomson Reuters, Global Equity Capital Markets Review, First Quarter 2015
Current Trends in Cross-Border Capital Markets: IPOs in the United States

**IPOs in the U.S. (Dollars in Millions)**

<table>
<thead>
<tr>
<th></th>
<th>Non-U.S. Issuers</th>
<th>U.S. Issuers</th>
<th>Total</th>
<th>% Non-U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$5,389.6</td>
<td>$37,482.1</td>
<td>$42,871.7</td>
<td>12.5</td>
</tr>
<tr>
<td>2013</td>
<td>8,046.0</td>
<td>48,814.2</td>
<td>56,860.2</td>
<td>14.2</td>
</tr>
<tr>
<td>2014</td>
<td>37,935.9</td>
<td>49,163.6</td>
<td>87,098.6</td>
<td>43.5*</td>
</tr>
</tbody>
</table>

*18.5% excluding the $21.8 billion Alibaba IPO

**IPOs in the U.S. (Number of Deals)**

<table>
<thead>
<tr>
<th></th>
<th>Non-U.S. Issuers</th>
<th>U.S. Issuers</th>
<th>Total</th>
<th>% Non-U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>23</td>
<td>100</td>
<td>146</td>
<td>15.8</td>
</tr>
<tr>
<td>2013</td>
<td>42</td>
<td>196</td>
<td>238</td>
<td>17.6</td>
</tr>
<tr>
<td>2014</td>
<td>73</td>
<td>231</td>
<td>304</td>
<td>24.0</td>
</tr>
</tbody>
</table>


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Current Trends in Cross-Border Capital Markets: IPOs in the United States

• 2014: Non-U.S. issuers came from 24 countries
  • China: 14 IPOs that raised $25.3 billion ($3.5 billion excluding Alibaba)
  • Israel: 12 IPOs that raised $1.8 billion
  • United Kingdom: 5 IPOs that raised $2.6 billion

• Dual listings
  • IPOs that are listed on both a U.S. and a foreign exchange
  • 2014: 7 dual listings (4 issuers of which were domiciled in Europe)
  • 2013: 11 dual listings


• U.S. Investment Grade Debt Market Highlights
  • IG Debt Issued in Record Amounts
    • 2014: $1.1 trillion issued (2013: $1.0 trillion issued)
  • Increased participation by Chinese Issuers
    • Relaxation of Chinese guaranty restrictions
    • Some of the largest non-U.S. deals were by Chinese companies
      Alibaba ($8 billion)  Bank of China ($6.5 billion)
      Sinopec ($6 billion)   CNOOC ($4 billion)
      State Grid Corp of China ($3.5 billion)  Tencent ($2.5 billion)
      Greenland ($2 billion)
  • 2014: United Kingdom (4%), Canada (4%) and Japan (4%)
  • 2013: Canada (5%), United Kingdom (4%) and Japan (3%)

Sources: Societe Generale, Debt Capital Markets 2014 Review and 2015 Forecast
The Extraterritorial Reach of SEC Regulations
The Extraterritorial Reach of SEC Regulations: The Long Arm of the SEC

• Regulated Conduct

U.S. Issuers → Securities Issued IN the U.S.

Non-U.S. Issuers → Securities Issued OUTSIDE the U.S.

• Applicable U.S. Laws and Regulations
  • Securities Act of 1933 (the "Securities Act")
  • Securities Exchange Act of 1934 (the “Exchange Act”)
  • Related Rules
The Extraterritorial Reach of SEC Regulations: Conflicting Developments

- Extraterritorial Application

<table>
<thead>
<tr>
<th>Date</th>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 2010</td>
<td><em>Morrison v. National Australia Bank</em></td>
<td>Section 10(b) of the Exchange Act and Rule 10b-5 do not apply to securities transactions that take place outside of the United States</td>
</tr>
<tr>
<td>July 2010</td>
<td>Dodd-Frank Wall Street Reform and Consumer Protection Act</td>
<td>Section 929P(b) – Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws</td>
</tr>
<tr>
<td>August 2013</td>
<td><em>SEC v. A Chicago Convention Center, LLC</em></td>
<td>Federal court expresses doubt that Morrison decision is undone by Section 929P(b)</td>
</tr>
<tr>
<td>June 2014</td>
<td>SEC Rulemaking</td>
<td>New Exchange Act Rule 250.1 clarifies the scope of the SEC’s antifraud authority</td>
</tr>
<tr>
<td>August 2014</td>
<td><em>ParkCentral Global Hub Limited v. Porsche Automobile Holdings SE</em></td>
<td>Satisfaction of the <em>Morrison</em> test is necessary but not necessarily sufficient</td>
</tr>
</tbody>
</table>
The Extraterritorial Reach of SEC Regulations: Looking Ahead

• Extraterritorial Application – Unanswered Questions
  • What other facts may a court consider to determine whether a transaction is foreign or domestic in nature?
  • How does the *Morrison* test apply to more complex securities?
  • Is an “economic reality” test viable for purposes of determining whether Section 10(b) should apply?
  • Will the government’s reassertion of authority impact the courts’ analyses?
  • Will global markets react to the trend away from extraterritoriality?

• Extraterritorial Application – Parallel Developments
  • Similar trends in other areas impacted by the Dodd-Frank Act
    • Whistleblower protections
    • Commodities and futures
Regulatory Framework: U.S. and Non-U.S. Rules Applicable to FPIs

- Foreign Private Issuers
  - “Home Country Rules”
- Disclosure Rules
  - Executive compensation
  - Management employment compensation agreements
  - Beneficial ownership
- Corporate Governance Rules
  - NYSE and Nasdaq: Foreign private issuer may follow home country corporate governance standards, subject to some exceptions
- Exempt from some rules
Regulatory Framework for International Securities Transactions

- Forms Applicable to Foreign Private Issuers

<table>
<thead>
<tr>
<th>Form</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>F-1</td>
<td>Primary offerings; seasoned offerings that are not Form F-3 eligible</td>
</tr>
<tr>
<td>F-3</td>
<td>Short form for seasoned offerings</td>
</tr>
<tr>
<td>F-4</td>
<td>Business combinations and exchange offers</td>
</tr>
<tr>
<td>F-6</td>
<td>American Depositary Receipts</td>
</tr>
<tr>
<td>S-8</td>
<td>Securities issued pursuant to employee benefit plans</td>
</tr>
<tr>
<td>20-F</td>
<td>Outstanding securities to be listed on U.S. securities exchanges</td>
</tr>
<tr>
<td>8-A</td>
<td>Short form for securities to be listed on U.S. securities exchanges</td>
</tr>
</tbody>
</table>
Recent Regulatory Developments and Their Impact on International Offerings
Recent Developments: Background on Unregistered Offerings

• Regulation S
  • Offshore transactions and no directed selling efforts
  • 3 Categories
  • Issuer engaging in a Regulation S offering should take appropriate steps to preserve the Safe Harbor

• Rule 144A
  • Safe harbor for resales of securities to Qualified Institutional Buyers
  • Rule 144A-For-Life

• Regulation D
  • Non-exclusive safe harbor from registration available to non-U.S. companies
  • Certain restrictions based on criteria such as sizes offering and types of purchasers
Recent Developments: Unregistered Offerings

- Jumpstart Our Business Startups (JOBS) Act
  - Amended Regulation D to allow for general solicitation and advertising in Rule 506(c) offerings
    - “Reasonable steps to verify” that purchasers are AIs
    - All purchasers are accredited investors, or the issuer reasonably believes that they are, at the time of the sale
    - All requirements of Rules 501 (definitions), 502(a) (integration) and 502(d) (resale restrictions) are met
  - General solicitation permitted in all Rule 144A transactions
- Caution: The use of general solicitation under Rule 506(c)/Rule 144A could be deemed to constitute “directed selling efforts” by the same issuer in connection with a contemporaneous offering under Regulation S
- Created new category of issuer: Emerging Growth Company
Recent Developments: Reasonable Steps to Verify Accredited Investor Status

• **Safe Harbor: Income Test**
  - Review tax returns for 2 most recent years
    - **2014 CDI:** If no tax return is available for the most recent year, written representation that such tax return is not available, specifying the amount of income earned, that such amount income level complies with the rules and that the purchaser has a reasonable expectation of reaching the requisite income level in the current year
    - **2014 CDI:** Foreign tax returns cannot be used to rely on this safe harbor
  - Written representation that the purchaser has a reasonable expectation of reaching the requisite income level in the current year

• **Safe Harbor: Net Worth Test**
  - Assets: Review bank or other statements (dated within the last three months)
  - Liabilities: Review consumer report from nationwide consumer reporting agency (dated within the last three months)
    - **2014 CDI:** Must be a U.S. consumer reporting agency
Recent Developments: Reasonable Steps to Verify Accredited Investor Status

- **Safe Harbor: Third-party** takes reasonable steps to verify and verifies AI status
  - Broker dealer
  - Registered investment adviser
  - Attorney
  - CPA

- **Principles-Based Approach**
  - The nature and the type of accredited investor
  - The amount and type of information that the issuer has about the purchaser
  - The nature of the offering
Recent Developments: Unregistered Offerings and the Internet

- **Offshore offering with no concurrent U.S. offering:**
  - Include a prominent disclaimer on its website making clear that the offer is directed only to countries other than the United States.
  - Implement procedures on issuer’s website that are reasonably designed to guard against sales to U.S. persons.
    - Certification of investor
    - Reject any person who does not certify

- **Offshore offering with concurrent U.S. unregistered offering**
  - Implement the restrictions for an offshore offering above
  - Exclude U.S. persons from the website
  - Ensure that only QIBs or AIs, as applicable, can access the website
  - Password protection
  - Limit website information to description of offshore offering only
Recent Developments: European Markets

• European Union Market Reform
  • Compared with some jurisdictions, capital market financing in Europe is relatively underdeveloped - businesses get approximately 80% of their debt financing from banks and 20% from debt securities*

• Comparative Corporate Bond Issuance Activity

<table>
<thead>
<tr>
<th>Year</th>
<th>European Union</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>€131 bn</td>
<td>$711 bn</td>
</tr>
<tr>
<td>2012</td>
<td>€248 bn</td>
<td>$1,032 bn</td>
</tr>
<tr>
<td>2013</td>
<td>€272 bn</td>
<td>$954 bn</td>
</tr>
<tr>
<td>2014</td>
<td>€293 bn</td>
<td>$930 bn</td>
</tr>
</tbody>
</table>

Recent Developments: European Markets

• European Union Market Reform

• European Commission has proposed establishing a Capital Markets Union
  • Single market for capital for all 28 member states

• European Commission to review the Prospectus Directive
  • Governs the prospectus requirements for offers or admissions of securities on a regulated market in the EU

• Key aims include:
  • Developing a more harmonized European private placement market
  • Limit the circumstances where a prospectus is required
  • Simplifying the information required in a prospectus and limiting the length of a prospectus
Recent Developments: Brazil

• **Brazilian Market Reforms**

  • September 2014: Comissão de Valores Mobiliários (CVM) amended Instruction 476

  • “Restricted efforts” offerings
    • No registration of plan with CVM required
    • Limited number of offerees
    • Only qualified investors can participate
    • Cannot be marketed through road shows or the media.

  • Amendment expands the rule to cover stocks, convertible debt and other types of equity

  • Similar to recent U.S. regulatory developments designed to facilitate access to the capital markets to more participants and also to proposed reforms in the EU
Accounting and Auditing Issues
Accounting and Auditing Issues: IFRS

- **Accounting Standards**
  - U.S. Generally Accepted Accounting Principles ("GAAP") v. International Financial Reporting Standards ("IFRS")
  - U.S. reporting companies must use U.S. GAAP to prepare financial statements
  - Non-U.S. reporting companies may use U.S. GAAP, IFRS issued by the International Accounting Standard Board ("IASB"), non-IASB IFRS or home country GAAP
    - Home country GAAP and non-IASB IFRS require reconciliation to U.S. GAAP
      - Audited financial statements
      - Interim financial statements
Accounting and Auditing Issues: Auditor Oversight

• Public Company Accounting Oversight Board ("PCAOB")
  • Responsible for inspecting non-U.S. auditors to assess compliance with professional auditing standards in connection with audits of public companies
  • No oversight in: Austria, Belgium, China, Cyprus, the Czech Republic, Greece, Hong Kong, Hungary, Ireland, Italy, Luxembourg, Poland and Portugal
  • SEC comments require disclosure of lack of oversight as a risk factor
• PCAOB has been focused on non-U.S.-based auditors
  • Example: Grant Thornton Japan
• Director of Enforcement: “continued growth in the level of enforcement activity involving non-U.S. based auditors”
• SEC brought action against Chinese divisions of the Big Four accounting firms
The Impact of the FCPA and Other Anticorruption Statutes
The FCPA and Other Anticorruption Statutes: Overview

• Foreign Corrupt Practices Act of 1977 ("FCPA")
• Anti-bribery provisions
• Accounting provisions
• SEC and DOJ have enforcement jurisdiction and can impose civil and criminal liability
• Prohibits bribing of:
  • Foreign official
  • Foreign political party
  • An official of a foreign political party
  • A candidate for foreign political office
The FCPA and Other Anticorruption Statutes: Overview of the FCPA

• Non-U.S. Persons Subject to the Anti-Bribery Provisions of the FCPA

<table>
<thead>
<tr>
<th>Non-U.S. Issuers</th>
<th>Non-U.S. Domestic Concerns</th>
<th>While in the Territory of the United States</th>
<th>Non-U.S. Companies</th>
<th>Officers, Directors, Employees, Agents or Stockholders</th>
</tr>
</thead>
</table>
| • Listed on a national securities exchange  
  • Issuers of ADRs  
  • Certain OTC issuers  
  • Issuers of registered public offerings | • U.S. principal place of business  
  • Organized under the laws of a State, territory, possession or commonwealth of the United States | • Non-U.S. companies or persons  
  • Physically located in the United States | Acting as agents or stockholders of issuers or domestic concerns | Non-U.S. persons that are officers, directors, employees, agents or stockholders of an issuer or a domestic concern |

• Companies Subject to the Accounting Provisions of the FCPA
  • Non-U.S. companies and non-U.S. subsidiaries of U.S. companies
The FCPA and Other Anticorruption Statutes: Other Jurisdictions

- **UK Bribery Act 2010**
  - Prohibits bribing another person, being bribed by another person and bribing a “foreign public official”

- **Brazil – Clean Company Act**
  - Effective January 2014
  - Strict and joint and several liability

- **Russia – “The Requirement of Organizations to Take Measures to Prevent Corruption”**
  - More stringent than FCPA
  - Requires anti-corruption compliance programs

- **China – PRC Criminal Code and PRC Anti-Unfair Competition Law**
  - Prohibits bribery of individuals and government officials
  - Civil and criminal penalties
The FCPA and Other Anticorruption Statutes: Enforcement

• Enforcement of the FCPA is a high priority for the SEC

• In 2014, the U.S. government brought 10 enforcement actions against issuers, including Alcoa, Alstom, Avon, Bio-Rad, Bruker Corporation, Dallas Airmotive, Inc. (DAI), Hewlett-Packard, Layne Christensen, Marubeni and Smith & Wesson
  • Average corporate fines and penalties of $156.6 million ($1,566 million aggregate)

• In 2013: 9 enforcement actions

• In 2012: 12 enforcement actions

• 8 or 10 largest recoveries were against non-U.S. companies

• Although mostly large companies, the SEC has advised that it will increase FCPA enforcement review for mid-sized companies
The FCPA and Other Anticorruption Statutes: Transactional Issues

• Underwriter Liability

• Underwriters may fall within the FCPA’s jurisdiction
  • If incorporated in the United States
  • If principal place of business in the United States
  • If required to file reports with the SEC

• Recently, a number of U.S. investment banks have been investigated by the SEC and U.S. Department of Justice for alleged FCPA violations

• March 2015: The SEC brought an enforcement proceeding against Macquarie Capital (USA) Inc. and two of its bankers for failure to adequately respond to information uncovered during due diligence and amend the underwriting materials
  • Macquarie settled for $15 million
  • The individual bankers settled for $212,000 and $35,000, respectively, and temporary bars from the securities industry
The FCPA and Other Anticorruption Statutes: Transactional Issues

• **Due Diligence** - More thorough due diligence, adjusting procedures based on any increased risk of corruption that may exist due to the issuer’s location, industry or other factors
  
  • Request and review documents
  
  • Call(s) with issuer’s management
  
  • Identify countries of operation that may pose higher corruption risks (higher Corruption Perception Index scores) and dig in deeper
  
  • Identify any contacts among political or state actors or entities
  
  • Review the issuer’s:
    
    • anti-corruption compliance programs, including any controls that are in place
    
    • charitable and political contributions and policies
    
    • travel and entertainment expenses
    
    • marketing and expense reimbursements
    
    • books and records
The FCPA and Other Anticorruption Statutes: Transactional Issues

• Representations and Warranties

• Underwriters seek reps from the issuer that it is in compliance with the FCPA and any other applicable anti-bribery laws even if the issuer believes that the FCPA is not applicable to it
  • Given the broad reach of the statute, underwriters may seek a representation that the issuer operates as if the FCPA were applicable
  • Issuers are more comfortable representing their compliance only insofar as the FCPA is applicable to them

• Issuers and Underwriters may negotiate materiality and knowledge qualifiers, as appropriate
  • NOTE: The FCPA does not contain a materiality threshold for violations
Foreign Corrupt Practices Act and Anticorruption Issues: Transactional Issues

Issuer-Friendly

Neither the Company nor, to the Company's knowledge, any other person associated with or acting on behalf of the Company, including, without limitation, any director, officer, agent or employee of the Company or its subsidiaries, has directly or indirectly while acting on behalf of the Company or its subsidiaries (i) used any corporate funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity, (ii) made any unlawful payment to foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns from corporate funds, (iii) violated any provision of the Foreign Corrupt Practices Act of 1977, as amended, or (iv) made any other unlawful payment.

Underwriter-Friendly

Neither the Company nor any of its subsidiaries or controlled affiliates, nor, to the knowledge of the Company, any director, officer, agent, employee or representative of the Company or any of its subsidiaries or controlled affiliates is aware of or has taken any action, directly or indirectly, that would result in a violation by such persons of the Foreign Corrupt Practices Act of 1977, as amended, and the rules and regulations thereunder (the "FCPA"), Section 291 and 291A of the Israeli Penal Law 5733-1973 (the "IPL"), the U.K. Bribery Act 2010, as amended (the "Bribery Act"), or any other applicable law in any applicable jurisdiction that is broadly equivalent to the FCPA or that has as its objective the prevention of corruption, including, without limitation, making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay or authorization of the payment of any money, or other property, gift, promise to give or authorization of the giving of anything of value to any "foreign official" (as such term is defined in the FCPA) or any foreign political party or official thereof or any candidate for foreign political office, in contravention of the FCPA; and the Company, its subsidiaries and its controlled affiliates have conducted their businesses in compliance with the FCPA, the IPL, the Bribery Act and any other applicable law in any applicable jurisdiction that is broadly equivalent to the FCPA or that has as its objective the prevention of corruption and have instituted and maintain policies and procedures designed to ensure, and which are reasonably expected to continue to ensure, continued compliance therewith.
Recent Tax Developments
Recent Tax Developments

• The Foreign Account Tax Compliance Act ("FATCA")
• AM 2013-003: Payments for American Depositary Receipts Programs Are U.S. Source Income, “Other Income” Under Treaties
• Debt Obligation in Registered Form
FATCA Overview

• **Foreign financial institutions (“FFIs”)**:
  - Register with the IRS and obtain a global intermediary identification number (“GIIN”).
  - Identify its U.S. accounts and annually report certain information with respect to such U.S. accounts to the IRS (or if the FFI is resident in an IGA country, to the government of such IGA country).

• **Non-financial foreign entities (“NFFEs”)**
  - Certify as to their status as NFFEs and identify certain substantial U.S. owners or controlling U.S. persons in certain circumstances.

• **30% Withholding Tax on "Withholdable Payments" to Noncompliant Foreign Entities**
  - "Withholdable payments“ includes: (i) any payment of U.S.-source interest (including OID), dividends and other items traditionally subject to withholding; and (ii) any gross proceeds from the sale or disposition of property that can produce U.S.-source interest or dividends.
U.S. Issuer Responsibilities: Overview

• A withholding agent is defined as a person that has control, receipt, custody, disposal or payment of any item of income of a foreign person that is subject to withholding.

• To meet its FATCA obligations, a withholding agent payor must:
  • Identify the payee, following the applicable presumption and standards of knowledge requirements
  • Document the payee's status under FATCA
  • Reliably associate the payment with a withholding certificate or other appropriate documentation
    • Generally this will require the payor to obtain the applicable Form W-8 or other acceptable FATCA self-certification form
  • Comply with reporting requirements
    • Annual reporting with respect to FATCA withholdable payments on Form 1042 and 1042-S
U.S. Issuer Responsibilities: Procedures

• To comply with the requirements applicable to a payor of a FATCA withholdable payment, U.S. issuers should have in place procedures to:
  • Identify FATCA withholdable payments;
  • Obtain the FATCA status of a foreign payee; and
  • Verify the completeness and reliability of withholding certificates received from a payee.
U.S. Issuer Responsibilities: Forms

• From entity payees:
  • Effective January 1, 2015, withholding agents may accept only the newly revised Form W-8BEN-E or Form W-8IMY for certification of the FATCA status of a foreign entity or intermediary.
  • A prior version of the Form W-8BEN received from an entity on or before December 31, 2014 will remain valid until it expires (typically the end of the third calendar year following the year it was provided).

• From individual payees:
  • The February 2014 version of Form W-8BEN must be used for certification of an individual’s FATCA status.
  • A prior version received prior to the February 2014 will be valid until it expires.
Foreign Issuer Responsibilities: Overview

• Foreign issuers (as well as any members of the group of a foreign issuer) that receive FATCA withholdable payments must provide to the payor the appropriate Form W-8 or other acceptable FATCA self-certification form.

• Foreign issuers may also be required to provide similar documentation to any foreign bank or other financial institution where the issuer holds an account or other investment.

• Applicable Form W-8 will require foreign entity to indicate its classification as an FFI or NFFE.

• A corporate group with one or more foreign entities must review the FATCA classification and ensure compliance of each foreign member.
Foreign Issuer Responsibilities: FFIs

• FFIs generally include:
  • Depository institutions
  • Custodial institutions
  • Certain investment entities
  • Certain holding companies or treasury centers
  • Certain insurance companies

• Examples:
  • Banks/brokers/dealers
  • Custodians
  • Hedge funds/mutual funds/private equity funds/similar investment vehicles
  • Securitization vehicles
Foreign Issuer Responsibilities: FFIs

• In order to avoid FATCA withholding, an FFI must certify that it is a “participating FFI” (“PFFI”). In general, to qualify as a PFFI, an FFI must do the following:

  • Register with the IRS to obtain a GIIN.

  • Unless the FFI is resident in a Model 1 IGA jurisdiction, enter into an FFI Agreement with the IRS. Under the FFI Agreement, the FFI must agree to:
    • Identify its U.S. accounts and annually report certain information with respect to such accounts to the IRS, and
    • Withhold a 30% tax on “withholdable payments” and “passthru payments”

  • If the FFI is resident in a Model 1 IGA jurisdiction, it is not required to enter into an FFI Agreement. Instead, it must report analogous information with respect to its U.S. accounts to the government of such jurisdiction, which will share that information with the IRS.
Foreign Issuer Responsibilities: FFIs

• Reporting on U.S. Accounts
  • U.S. Account
    • Financial account held by a specified U.S. person or a U.S.-owned foreign entity
  • Financial Account
    • Depository or custodial account and any equity/debt interest in an FFI, other than interests that are regularly traded on an established securities market
Foreign Issuer Responsibilities: FFIs

• FFI Withholding
  • PFFIs will be required to withhold on “passthru payments” made to recalcitrant accountholders (i.e., accountholders that do not comply with the applicable certification requirements) and nonparticipating FFIs.
  • Passthru payment is defined as a “withholdable payment” or a “foreign passthru payment.”
  • Foreign passthru payments
    • The term “foreign passthru payment” has not yet been defined.
    • Withholding on foreign passthru payments will commence on the later of January 1, 2017 or the date that the term is defined in the Treasury Regulations.
  • The IGAs contain a provision under which the parties agree to develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimizes burden.
Foreign Issuer Responsibilities: NFFEs

• Any foreign entity that is not an FFI is an NFFE.
• The NFFE category is further divided into subcategories for passive NFFEs and excepted NFFEs.
  • A passive NFFE generally is required to report on its Form W-8 certain information with respect to its substantial U.S. owners (generally any U.S. persons with a greater than 10-percent direct or indirect interest).
  • Under the rules in many IGA jurisdiction, a passive NFFEs may be required to report certain information with respect to any controlling persons who are U.S. persons.
• Excepted NFFEs are not subject to these reporting requirements.
Foreign Issuer Responsibilities: NFFEs

• Excepted NFFEs
  • NFFE whose gross income is more than 50 percent non-passive income and whose assets are more than 50 percent assets that produce non-passive income.
    • Passive income generally includes income such as dividends, interest, rents and royalties.
  • A publicly traded NFFE.
  • An NFFE in the same expanded affiliated group as a publicly traded NFFE.
  • Certain start-up companies and companies in liquidation.
  • Certain qualifying holding companies and treasury centers in a non-financial group.
Foreign Issuer Responsibilities: NFFEs

• In general, foreign entities in multinational groups that are not in the financial services industry should qualify as excepted NFFEs and thus should not be required to identify substantial U.S. owners or controlling U.S. persons.

• However, the status of each foreign entity in the group should separately be reviewed under the applicable rules.

• Special attention should be given to:
  • Holding companies,
  • Treasury centers (i.e., financing subsidiaries),
  • Insurance related subsidiaries,
  • Non-U.S. retirement plans, and
  • Any other subsidiaries engaged in financial transactions.
AM 2013-003: Tax Treatment of Payments for American Depositary Receipts Program

- The IRS Office of Chief Counsel published a memorandum (AM 2013-003) that addresses the character and source of payments made by a U.S. depositary institution to, or on behalf of, a foreign corporation in consideration for a grant of the exclusive right to offer American depositary receipts (ADRs) in the U.S., and whether those payments are subject to U.S. withholding tax.

- The IRS concluded that: (i) payments received for such rights are U.S. source FDAP income derived by a foreign corporation and are subject to 30% withholding tax unless reduced by a U.S. income tax treaty; and (ii) for purposes of U.S. income tax treaties, the ADR program payments are characterized as “other income”, not royalties or business profits.

- The memorandum clearly contemplates the elimination of U.S. withholding tax on the ADR program payments under a U.S. income treaty if the treaty gives exclusive taxing jurisdiction over “other income” to the state of residence.

- The specific provisions of the applicable U.S. income tax treaty (in particular, the “other income” Article) must be examined to determine whether and to what extent U.S. withholding tax applies.
Notice 2012-20: Debt Obligation in Registered Form

• Certain obligations that may be considered in bearer form for non-U.S. tax purposes will be considered to be in registered form for U.S. tax purposes if issued through:
  • A dematerialized book entry system; or
  • A clearing system in which such obligation is effectively immobilized.

• An obligation is effectively immobilized if:
  • The only holder of physical global form certificates is a clearing organization (or a custodian or depository acting as an agent of the clearing organization);
  • The physical global form certificates are transferable only to a successor clearing organization subject to the same terms; and
  • The beneficial interests in the underlying obligation are transferable only through a book entry system maintained by the clearing organization (or an agent of the clearing organization).
Questions?

David A. Sakowitz
Corporate Partner
New York
+1 (212) 294-2639
d sakowitz@winston.com

Erick Rivero
Corporate Associate
New York
+1 (212) 294-4649
erivero@winston.com

Soyun Park
Tax Partner
New York
+1 (212) 294-5327
sopark@winston.com
Thank You