

FATCA Compliance and Implementation for FFIs: Mastering the Complexities Before the July 1 Deadline

THURSDAY, MARCH 20, 2014, 1:00-2:50pm Eastern

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FATCA Compliance and Implementation for FFIs

March 20, 2014

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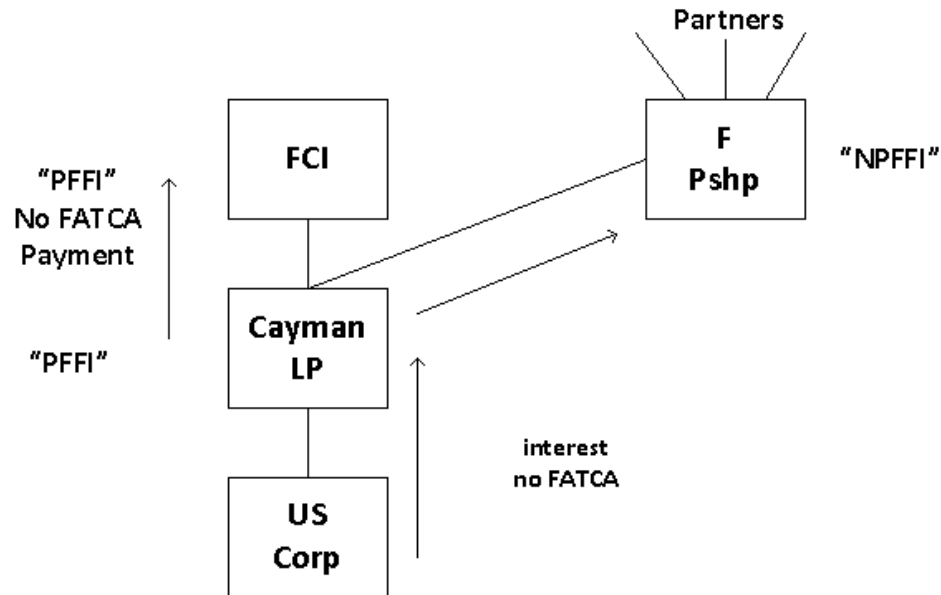
Overview of FATCA: Brief History

- FATCA (Foreign Account Tax Compliance Act) added a new Chapter 4 to the Code and was enacted as part of the Hiring Incentives to Restore Employment (“HIRE”) Act in March 2010
 - Addresses US tax non-compliance by providing transparency with respect to assets and investments held offshore
 - Intended to provide increased reporting, not collect tax, but the “hammer” is a new 30% withholding tax

FATCA Impact

- Who is impacted?
 - All payors (including foreign payors) of “withholdable payments” made to any foreign entities
 - Withholding agents (anyone in the stream of payment) are liable for tax imposed under these provisions
 - All foreign entities, regardless of whether they have US owners, that have U.S. source income or hold U.S. stock or securities
 - Two categories of foreign entities
 - Foreign Financial institutions (FFI)
 - Non-Financial Foreign Entities (NFFE)
 - Note that for withholding agents direct payments to individuals are not implicated

Example of FATCA Impact



- Us Corp pays interest to Cayman LP. Assume Cayman LP is FFI
- If Cayman LP does not enter into agreement with IRS, US Corp needs to withhold 30%
- If Cayman LP is a PFFI, it
 - withholds on "passthu payments" to non participatory FFIs and
 - reports US owners

Key Definitions: Foreign Financial Institutions

- What are FFIs? A foreign entity that:
 - Accepts deposits in the ordinary course of a banking or similar business such as retail banks;
 - Is engaged in the business of holding financial assets for the account of others such as investment banks; or
 - Is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or derivatives in the above, such as mutual funds, hedge funds, private equity funds, and securitization vehicles.

Key Definitions: Withholdable Payments

- What are withholdable payments?
 - A withholdable payment is any payment of a type ordinarily subject to withholding tax (e.g., FDAP), including interest, dividends, rents, premiums, annuities from sources within the United States
 - Also includes any gross proceeds from the sale of any property that could produce interest or dividends from sources within the United States
 - Normally such gains are not subject to US income or withholding tax in the case of a foreign seller not engaged in a US business

Key Definitions: Grandfathered Obligations

- Payments made with respect to “grandfathered obligations” are not subject to FATCA
 - “Obligation” includes any legal agreement that produces or could produce withholdable payments other than any instrument treated as equity for U.S. tax purposes or any legal agreement that lacks a definitive expiration or term

Key Definitions: “PFFI” – Participating FFI

- To avoid the 30% withholding an FFI must:
 - Enter an agreement with the IRS to comply with certain requirements
 - Under the agreement, a PFFI will be required to:
 - Obtain information on all account holders to determine which accounts are U.S. accounts
 - Comply with required due diligence/verification procedures and certify completion of such procedures
 - Report information on U.S. accounts
 - Deduct and withhold a 30% tax on any “passthru payment” to recalcitrant account holders or other FFIs that are not PFFIs or deemed compliance FFIs
 - Comply with IRS information requests
 - Attempt to obtain a waiver of applicable bank secrecy or other information disclosure limitations or close the U.S. account
 - Qualified intermediaries, withholding foreign partnerships and withholding foreign trusts will have to become PFFIs to their agreements

Key Definitions: Deemed Compliant FFI

- FFIs can avoid 30% withholding if they are a deemed compliant FFI
- Two types: Registered and Certified
- Registered deemed certified FFIs are still required to meet certain requirements including performing due diligence to identify and eliminate U.S. accounts and registering with IRS
- Certified deemed compliant FFIs are required to certify status to the withholding agent

Key Definitions: Passthru Payments

- What are Passthru Payments?
 - The passthru payment concept will “taint” foreign-to-foreign payments to the extent the payment is attributable to a “withholdable payment”.
 - Extends the reach of FATCA beyond U.S. territorial limits
 - Certain passthru payments include payments made between two foreign persons
 - Definition: Any withholdable payment or other payment to the extent attributable to a withholdable payment

Key Provisions in the Regs.

- Proposed Regulations released February 8, 2012
- Modeled on similar underpinnings to the Chapter 3 withholding tax rules
 - Certification based system to claim exception to withholding with exceptions for offshore obligations
- Where to start the analysis depends on whether taxpayer is withholding agent or payee
 - Withholding agent would start with definition of “withholdable payment.” (Prop. Reg §1.1473-1),
 - Payee has to start analysis of FFI/NFFE and ability to comply with certifications needed to avoid withholding

Key Provisions in the Regs.

- The regulations require withholding on withholdable payments made to a “payee that is an NPFFI”. Prop. Reg §1.1471-2(a).
- The term “payee” is defined in Prop. Reg §1.1471-3(a) and is not always intuitive
- The Chapter 4 regulations are inextricably linked with the QI, WP and WT regimes

FFI Agreement

- 1/1/16
 - Lose PFFI status if have limited branches (i.e., branches that aren't PFFIs or deemed compliant FFIs)
 - Lose QI status if can't meet PFFI requirements

Timeline

- Withholding
 - 1/1/15 - withholding begins for gross proceeds with respect to sales or dispositions made on or after that date
 - 1/1/17 - withholding on passthru payments (other than withholdable payments) will not begin earlier than this date
- Reporting
 - 9/30/14 - Report identifying information and account balance or value for US accounts and recalcitrant account holders begins
 - 1/1/15 - TIN Matching before reporting would not be required before this date
 - 3/15/15 - Annual reporting (Forms 1042 and 1042-S) for Ch 4 reportable amounts begins
- Miscellaneous
 - 1/1/14 - Conforming changes to Ch 3 and Ch 61 anticipated to be made

Key Provisions in the Regs.

- Final Regulations issued on 1/17/2013
- Preamble: IRS & Treasury used a 'risk-based approach' in crafting Final Regs.
 - E.g., low-value accounts have reduced obligations; entities to be treated as FFIs and deemed FFIs
- Still complex (>500 pps.)

Key Provisions in the Regs.

- Key Changes:
 - Extension of Grandfathering Provisions to 1/1/2014
 - Withholding on Gross Proceeds Postponed until 1/1/2017
 - Also Important: Model 2 IGA and Key Differences between Model 2 IGA and the Final Regs.
 - Benefits for countries covered by Model 1 IGA

Key Provisions in the Regs.

- FFI Agreement Terms
 - FATCA compliance program that each FFI will be required to implement
 - Certain compliance failures will result in default; ways that default may be remedied
 - What an FFI must do if non-U.S. law would prevent its reporting compliance
 - Rev. Proc. forthcoming on FFI Agreements

Key Provisions in the Regs.

- Key Definition: Who is a Financial Institution?
 - Can include “investment entity”
 - This means that funds will be treated as FIs under the Final Regs.
 - Non-professionally managed, non-U.S. entities will likely NOT be treated as FFIs (but passive NFFEs)

Key Provisions in the Regs.

- Key Definitions: FFIs
 - Excepted from the definition of FFIs are:
 - Holding companies within an affiliated group;
 - Entities that provide treasury services; and
 - Captive finance companies
 - Except:
 - Where the expanded affiliate group including one of these entities is a financial group or;
 - Where the entity is formed by a private equity group

Key Provisions in the Regs.

- Key Definition: Deemed-Compliant FFIs
 - Guidance on deemed-compliant FFIs, including:
 - Restricted funds;
 - Small, local banks;
 - Credit cards that accept deposits;
 - Debt-investment entities
 - Final Regs. expand the scope of entities that will be considered deemed-compliant FFIs
 - Sponsored Investment Entities
 - Qualified Collective Investment Vehicles

Key Provisions in the Regs.

- Key Definitions: Withholdable Payments
 - Exceptions:
 - U.S. source FDAP income with respect to an “offshore obligation” made prior to 1/1/2017, unless made by a person acting as an intermediary
 - Excluded nonfinancial payments
 - Some gains attributable from the sale of property are not a payment of U.S. source FDAP income

Key Provisions in the Regs.

- Key Definitions: Grandfathered Obligations
 - Includes an obligation that is outstanding on 1/1/2014
 - These obligations are:
 - Any obligation that can produce a “foreign passthru payment” but not a withholdable payment that is outstanding on the date that is six months after the final regulations defining “foreign passthru payments” are published;

Key Provisions in the Regs.

- Any obligation that can give rise to withholdable payments solely because the obligation gives rise to a “dividend equivalent amount” that is outstanding on the date that is six months after final regulations are published;
- Any obligation to make a payment with respect to any collateral posted to secure an obligation that is itself a “grandfathered obligation”
- Grandfathered obligations will also include a revolving credit facility, provided that the agreement as of its issue date fixes the material terms under which the credit will be provided

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2013 Guidance: Forms 1042 & 1042S

- Draft Forms 1042 & 1042S
- Chapter 3 and chapter 4 status code fields
- Global Intermediary Identification Number (GIIN) fields
- Foreign tax identification number fields for withholding agents and any intermediaries or flow-through entities;
- A field for the recipient's date of birth
- A field for tax assumed by withholding agent in box 9. The use of this field is unclear;
- Key deletions
 - Draft instructions released in November 2013

2013 Guidance: W-8BEN & W-9

- W-8BEN: The updated draft adds (i) a date of birth field and (ii) language in the “Certification” section requiring the signatory to agree to submit a new form within thirty days of any change that would make any certification on the form incorrect.
- W-9: The new form adds two new fields; one to indicate the type of entity that is exempt from back-up withholding and the other to indicate the type of entity that is exempt from FATCA withholding.
 - 8/1/2013: New Instructions for Requestor of Form W-9
 - 8/30/2013: Final W-9 Released

2013 Guidance: Form 8966

- Participating foreign financial institutions (PFFIs), and some U.S. withholding agents, are required to report information on certain U.S. accounts and recalcitrant accounts on the Form 8966.
- The first Form 8966 reporting deadline is March 31, 2015 with respect to accounts maintained in 2014.
- Five sections in new Form 8966
- Filing details

2013 Guidance: Technical Corrections

- 9/10/2013: Technical corrections become effective
 - Updated Regulations to come...

Key FATCA Dates: 2014

- 4/25/14: Last day for FFIs to register on FFI Registration Portal to appear on June 2, 2014 IRS FFI List
- 6/24/14: IRS expected to publish first IRS FFI List
- 6/30/14: Effective date of FFI Agreements if signed by June 30, 2014

Key FATCA Dates: 2014

- 7/1/2014: FATCA's **Red Letter Day!**
- Requirement to implement new account onboarding procedures for U.S. Withholding Agents, Participating FFIs, and Registered Deemed-Compliant FFIs
- FATCA withholding on Fixed, Determinable, Annual, Periodical (FDAP) income payments to non-participating FFIs, non-compliant NFFEs, and recalcitrant account holders begins
- Last date for obligations to be outstanding to qualify as grandfathered obligations and exempt from FATCA withholding (still subject to reporting)
- 12/31/14: U.S. Withholding Agents, Participating FFIs, and Registered Deemed-Compliant FFIs must document preexisting entity accounts identified as Prima Facie FFIs. If the FFI signed an agreement after July 1, 2014, the deadline is six months from the effective date of the FFI agreement

Key FATCA Dates: 2015

- 3/15/15: Form 1042-S reporting on withholdable income payments begins (with respect to the 2014 calendar year)
- 3/31/15: USWAs begin Form 8966 U.S. Owner reporting
- 3/31/15: FFIs begin Form 8966 U.S. Account information and balance reporting (with respect to the 2014 calendar year)
- 3/31/15: FFIs begin Form 8966 recalcitrant account reporting (with respect to the 2014 calendar year)
- 6/30/15: Participating FFIs must document preexisting high value individual accounts by June 30, 2015. If the FFI signed an agreement after July 1, 2014, the deadline is one year from the effective date of the FFI agreement

Key FATCA Dates: 2016

- **1/1/2016:** Deadline for limited FFIs or limited branches (due to local regulations prohibiting FATCA compliance) to become participating FFIs and avoid other participating FFIs within the expanded affiliated group from losing their participating FFI status
- **3/15/2016:** FFI begin temporary Form 1042-S aggregate reporting on payments made to non-participating FFIs (with respect to 2015 calendar year)
- **3/31/2016:** Form 8966 reporting on U.S. Account income by participating FFIs begins in addition to account information and balance (with respect to the 2015 calendar year)

Key FATCA Dates: 2016

- **6/30/2016:** U.S. Withholding Agents, Participating FFIs, and Registered Deemed-Compliant FFIs must document preexisting entity accounts not identified as Prima Facie FFIs. If the FFI signed an agreement after July 1, 2014, the deadline is two years from the effective date of the FFI agreement
- **6/30/2016:** Participating FFIs must document all remaining preexisting non-high value individual accounts by June 30, 2016. If the FFI signed an agreement after July 1, 2014, the deadline is two years from the effective date of the FFI agreement

Key FATCA Dates: 2017

- **1/1/2017:** FATCA withholding on gross proceeds payments to non-participating FFIs and recalcitrant payees begins
- **1/1/2017: (Was 1/1/2015)** Withholding on foreign pass-thru payments begins not before January 1, 2017
- **3/15/2017:** Last year for FFI temporary Form 1042-S aggregate reporting on payments made to non-participating FFIs (with respect to 2016 calendar year)
- **3/15/2017:** Form 8966 reporting on U.S. Account gross proceeds by participating FFIs begins in addition to account information, balance, and income (with respect to the 2016 calendar year)

Key FATCA Dates: 2018

- 3/15/2018: Form 1042-S reporting on gross proceed payments begins (with respect to the 2017 calendar year)

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FATCA

Revised IGAs, February 2014 Regulations, and New
Forms

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Intergovernmental Agreements (IGAs)

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- Process for complying with FATCA may be further streamlined for FFIs residents in jurisdictions with which US enters into an IGA.
- IGAs are entered under authority of tax treaties and TIEAs.
- Designed to facilitate implementation of FATCA and obviate legal impediments that FFIs in treaty/TIEA countries might otherwise face.
- A complete list of countries with which an IGA is in effect is maintained by the Treasury Office of Tax Policy and available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>, which also includes links to Model agreements as well as signed IGAs.

Two Flavors – Model 1 and Model 2

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- All IGAs conform to models published in 2012.
- Model 1 – bilateral – FFI provides info to tax authorities of IGA country, which then provides to US under automatic exchange of information.
 - Some Model 1 IGAs are reciprocal (Model 1A), which include a commitment for the US to provide similar information – collected under US information reporting requirements - to IGA partner country.
- Model 2 – IGA partner waives domestic restrictions that might prevent FFI from reporting directly to the IRS. FFIs report information directly to the IRS. IGA partner directs FFIs to enter into FFI Agreements in accordance with final Regs. Reg rules are modified by IGA provisions.

Model 2 IGA – Annex I – Due Diligence Obligations

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- Can elect these procedures instead of requirements set out in Regs. (elect by “clearly defined group of accounts” –such as by lines of business).
 - Once election is made, must apply in subsequent years.
- Certain pre-existing accounts which are not required to be reviewed, identified or reported:
 - Individual accounts with balance \leq \$50,000 as of June 30, 2014;
 - Individual cash balance life insurance / annuity, balance \leq \$250,000;
 - Life insurance / annuity product that can't legally be sold to US persons;
 - “Depository account” with balance \leq \$50,000.
- Review of individual accounts not required if PFFI has previously obtained documentation in order to meet obligations under qualified intermediary, withholding foreign partnership, withholding foreign trust, or to fulfill obligations under Chapter 61.

IGA Review Procedures for Lower Value Preexisting Individual Accounts

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- Accounts \leq \$250,000 (or life insurance/annuity \leq \$1 million)
- Electronic Records Search:
 - US citizen or resident, or US birthplace;
 - Current US mailing address or phone number;
 - Standing instructions to transfer funds to a US account;
 - Power of Attorney or signatory authority granted to US person.
- If electronic records search turns up no indicia, nothing further required unless account becomes high value.
- If electronic records search turns up indicia, then account must be treated as US account unless FFI follows procedures in IGA to determine that individual is not likely a US person.
 - Both self-certification (W-8) and documentary evidence (gov't docs) required.
- The review process for these accounts must be completed by June 30, 2016.

IGA Review Procedures for High Value Preexisting Individual Accounts

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- Electronic Records Search PLUS (if electronic records are not complete);
- Paper Record Search, including master file and all of following within last five years;
- The most recent documentary evidence collected with respect to the account;
- The most recent account opening contract or documentation;
- The most recent documentation obtained by the Reporting [FATCA Partner] Financial Institution pursuant to AML/KYC Procedures or for other regulatory purposes;
- Any power of attorney or signature authority forms currently in effect;
- Any standing instructions to transfer funds currently in effect; and
- Inquiry of Relationship Manager with actual knowledge.
- If discover indicia, follow procedures to determine if actual US person.
- Review must be completed by June 30, 2015 (or within 6 months of the end of the year in which account becomes a “high value” account).

IGA – Procedures for New Individual Accounts

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- No need to review or report if value \leq \$50,000 (including insurance products).
- If required to review, obtain self- certification (can use W-9) and verify reasonableness of this by reviewing materials associated with account opening and any KYC/AML review.
- If change in circumstances (FFI knows that something amiss), must collect new certification.
- If new certification can't be obtained, FFI must treat account as non-consenting US account.

IGA - Preexisting Entity Accounts

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- What accounts are subject to review?
 - if balance > \$250,000 on June 30, 2014;
 - If balance > \$1 million at the end of 2015 or any subsequent calendar year.
- What accounts are reported?
 - Entities that are “specified US persons;”
 - Non-participating financial institutions; and
 - Passive NFEs with one or more “control person” who are US persons.
- US Person? US place of organization/incorporation, or US address.
- Financial Institution? Review files. Consult GIIN directory.
- If non-US financial institution is “not participating,” subject to aggregate reporting, unless:
 - Self certification that “deemed compliant” or “exempt beneficial owner,” or
 - Listed on GIIN list.

IGA - Non Financial Foreign Entities (NFFEs)

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- If account is not held by a financial institution, an FFI must determine:
 - Whether account has “controlling person(s);”
 - May rely on AML/KYC Procedures.
 - Whether the account holder is a “Passive NFFE;” and
 - Rely on W-8 or W-9, or other information (including publicly available information) to determine whether has “active” status
 - Whether any controlling person is a US citizen/resident.
 - Can rely on AML/KYC if balance < \$1 million; Self-certification required if balance > \$1 million

Active vs. Passive NFFE

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- “Active” if meet any one of the following criteria
 - Less than 50 percent of the NFFE's gross income for the preceding calendar year (or other appropriate reporting period) is passive income and less than 50 percent of the assets for same period are assets held for the production of passive income;
 - The stock of the NFFE is regularly traded on an established securities market or the NFFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market;
 - The NFFE is organized in a U.S. Territory and all of the owners of the payee are bona fide residents of that U.S. Territory;
 - The NFFE is a government (other than the U.S. government), a political subdivision of such government (which, for the avoidance of doubt, includes a state, province, county, or municipality), or a public body performing a function of such government or a political subdivision thereof, a government of a U.S. Territory, an international organization, a non-U.S. central bank of issue, or an Entity wholly owned by one or more of the foregoing;
 - Substantially all of the activities of the NFFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution (not including funds that hold selves out to public as investment funds);
 - The NFFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFFE shall not qualify for this exception after the date that is 24 months after the date of the initial organization of the NFFE;
 - The NFFE was not a Financial Institution in the past five years, and is in the process of liquidating its assets or is reorganizing with the intent to continue or recommence operations in a business other than that of a Financial Institution;
 - The NFFE primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution;
 - The NFFE is an "excepted NFFE" as described in relevant U.S. Treasury Regulations; or
 - The NFFE essentially meets the standards to be an exempt org if organized in the US.

IGA - Special Rules re: Determining Account Balances

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- **Aggregation of Individual Accounts.** For purposes of determining the aggregate balance or value of Financial Accounts held by an individual, a Reporting [FATCA Partner] Financial Institution is required to aggregate all Financial Accounts maintained by the Reporting [FATCA Partner] Financial Institution, or by a Related Entity, but only to the extent that the Reporting [FATCA Partner] Financial Institution's computerized systems link the Financial Accounts by reference to a data element such as client number or taxpayer identification number, and allow account balances or values to be aggregated. Each holder of a jointly held Financial Account shall be attributed the entire balance or value of the jointly held Financial Account for purposes of applying the aggregation requirements described in this paragraph 1.
- **Aggregation of Entity Accounts.** For purposes of determining the aggregate balance or value of Financial Accounts held by an Entity, a Reporting [FATCA Partner] Financial Institution is required to take into account all Financial Accounts that are maintained by the Reporting [FATCA Partner] Financial Institution, or by a Related Entity, but only to the extent that the Reporting [FATCA Partner] Financial Institution's computerized systems link the Financial Accounts by reference to a data element such as client number or taxpayer identification number, and allow account balances or values to be aggregated.
- **Special Aggregation Rule Applicable to Relationship Managers.** For purposes of determining the aggregate balance or value of Financial Accounts held by a person to determine whether a Financial Account is a High Value Account, a Reporting [FATCA Partner] Financial Institution is also required, in the case of any Financial Accounts that a relationship manager knows, or has reason to know, are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person, to aggregate all such accounts.
- **Currency Translation Rule.** For purposes of determining the balance or value of Financial Accounts denominated in a currency other than the U.S. dollar, a Reporting [FATCA Partner] Financial Institution must convert the U.S. dollar threshold amounts described in this Annex I into such currency using a published spot rate determined as of the last day of the calendar year preceding the year in which the Reporting [FATCA Partner] Financial Institution is determining the balance or value.

Entities - Timing of Review and New Accounts

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- If subject to review ($>$ \$250,000 on June 30, 2014), review must be completed by June 30, 2016.
- If becomes subject to review, because exceeds \$1 million by end of 2015 or subsequent year, must be reviewed within 6 months of year end.
- Need not review accounts (including credit card and revolving credit accounts) if procedures in place to stop balance from exceeding \$50,000.
- Other new accounts, FFI must determine:
 - GIIN, Active NFFE, Nonparticipating FI status;
 - Use certification and account info to determine status, reporting requirements.

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IGA – Model 2 Annex II – Exempt Beneficial Owners

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- Exempt Beneficial Owners other than funds – government entities, international organizations and central banks (and any pension fund set up for employees of these institutions).
- Investment Vehicles Owned Entirely by Exempt Beneficial Owners.
- Broad Participation Retirement Plans. A fund established in [FATCA Partner] to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries that are current or former employees, provided that the fund:
 - Does not have a single beneficiary with a right to more than five percent of the fund's assets;
 - Is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in [FATCA Partner]; and
 - Satisfies at least one of the following requirements:
 - The fund is generally exempt from tax in [FATCA Partner] on investment income due to its status as a retirement or pension plan;
 - The fund receives at least 50 percent of its total contributions from the sponsoring employer(s);
 - Distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death, or penalties apply to distributions or withdrawals made before such specified events; or
 - Contributions by employees to the fund are limited by reference to earned income of the employee or may not exceed \$50,000 annually.
- Narrow Participation Retirement Fund. A fund established in [FATCA Partner] to provide retirement, disability, or death benefits to beneficiaries that are current or former employees, provided that:
 - The fund has fewer than 50 participants;
 - The fund is sponsored by one or more employers that are not Investment Entities or Passive NFFEs;
 - The employee and employer contributions to the fund are limited by reference to earned income and compensation of the employee;
 - Participants that are not residents of [FATCA Partner] are not entitled to more than 20 percent of the fund's assets; and
 - The fund is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in [FATCA Partner].

IGA Model 2 Annex II - Deemed Compliant FFIs (Small and Limited Scope Financial Institutions)

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- Registered Financial Institutions with a local client base (98% within partner or EU if applicable) and policies to prevent US persons from investing. Still must review for “US person” and “Passive NFFE with US controlling persons.”
- Local Banks:
 - Less than \$175 million in assets (\$500 million including related entities).
- Financial Institution with only low value accounts:
 - Less than \$50 million in assets, no accounts > \$50,000;
 - Not “investment entity.”
- Registered Qualified Credit Card Issuer:
 - Only financial institution because payments may exceed balances on cards;
 - Policies in place to keep from owing customers > \$50,000.

IGA Model 2 Annex II - Deemed Compliant FFIs (Investment Entities)

- **Trustee-Documented Trust.** A trust established under the laws of [FATCA Partner] to the extent that the *trustee* of the trust is a *Reporting U.S. Financial Institution, Reporting Model 1 FFI, or Participating FFI* and reports all information required to be reported pursuant to the Agreement with respect to all U.S. Accounts of the trust. Such a trust is a Non-Reporting [FATCA Partner] Financial Institution treated as a certified deemed-compliant FFI for purposes of section 1471 of the U.S. Internal Revenue Code.
- **Registered Sponsored Investment Entity and Controlled Foreign Corporation.** A Financial Institution, which is either an Investment Entity, which has agreed to act as a sponsoring entity, or a CFC owned by a Reporting US Financial Institution which is not a QI withholding foreign partnership or withholding foreign trust, and which complies with the following requirements:
 - The sponsoring entity is authorized to act on behalf of the Financial Institution (such as a fund manager, trustee, corporate director, or managing partner) to fulfill the requirements of an FFI Agreement;
 - The sponsoring entity has registered as a sponsoring entity with the IRS on the IRS FATCA registration website;
 - Prior to December 31, 2015, the sponsoring entity has registered the Financial Institution with the IRS;
 - The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting [FATCA Partner] Financial Institution;
 - The sponsoring entity identifies the Financial Institution and includes the Financial Institution's GIIN in all reporting completed on the Financial Institution's behalf; and
 - The sponsoring entity has not had its status as a sponsor revoked.
- **Sponsored, Closely Held Investment Vehicle.** A [FATCA Partner] Financial Institution that is a Financial Institution solely because it is an Investment Entity and is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust, provided:
 - The sponsoring entity is a *Reporting U.S. Financial Institution, Reporting Model 1 FFI, or Participating FFI*, is authorized to act on behalf of the Financial Institution (such as a professional manager, trustee, or managing partner), and agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting [FATCA Partner] Financial Institution;
 - The Financial Institution does not hold itself out as an investment vehicle for unrelated parties;
 - Twenty or fewer individuals own all of the debt interests and Equity Interests in the Financial Institution (disregarding debt interests owned by Participating FFIs and deemed-compliant FFIs and Equity Interests owned by an Entity if that Entity owns 100 percent of the Equity Interests in the Financial Institution and is itself a sponsored Financial Institution);
 - The sponsoring entity has registered as a sponsoring entity with the IRS on the FATCA registration website; has agreed to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements and retains documentation collected with respect to the Financial Institution for a period of six years; and
 - The sponsoring entity has not had its status as a sponsor revoked.
- **Investment Advisors and Investment Managers.** An Investment Entity established in [FATCA Partner] that is a Financial Institution solely because it (1) *renders investment advice to, and acts on behalf of, or (2) manages portfolios for, and acts on behalf of, a customer* for the purposes of investing, managing, or administering funds deposited in the name of the customer with a Financial Institution other than a Nonparticipating Financial Institution. Such an Investment Entity is a Non-Reporting [FATCA Partner] Financial Institution treated as a certified deemed-compliant FFI for purposes of section 1471 of the U.S. Internal Revenue Code.
- **Collective Investment Vehicle.** An Investment Entity established in [FATCA Partner] that is regulated as a collective investment vehicle, provided that *all of the interests in the collective investment vehicle* (including debt interests in excess of \$50,000) *are held by or through one or more exempt beneficial owners, Active NFFE, U.S. Persons that are not Specified U.S. Persons, or Financial Institutions that are not Nonparticipating Financial Institutions.*

IGA Model 2 Annex II – Accounts Not Taken Into Account

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- Retirement Accounts (some limitations - \$50,000 annual or \$1 million lifetime);
- Special purpose savings accounts (limitations on withdrawals or penalties if withdraw and not use for designated purpose);
- Term life insurance;
- Accounts held by an estate; and
- Escrow accounts.
 - All accounts established by court order; and
 - Accounts for asset purchases, *provided* the accounts do not have investment features associated with them.

General Relationship between Regs and IGAs

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- Final Regs drafted to accommodate wide variety of IGAs.
- Generally attempted to make Final Regs consistent with IGAs.
- Differences between Final Regs and IGAs:
 - In determining FFI/NFFE status, IGAs test commonly owned DEs or branches separately, but Regs lump together and make determination at “regarded entity” level; and
 - Definition of “investment entity.” IGAs state that the definition “shall be interpreted in a manner consistent with similar language set forth in the definition of ‘financial institution’ in the FATF.” (KYC-AML)
 - Under FATF definition, a self-managed fund would qualify, though not included under Regs.
 - Under Regs, managed family trusts and managed passive investment companies are generally FFIs, but Passive NFEEs under IGAs.
 - NFEEs - “substantial ownership” (Regs 10%) vs. ”controlling persons” (IGA follows FATF – ordinarily 25% but falls to 10% for high risk customers).

February 2014 Reg Package –Coordination of FATCA with other reporting/withholding regimes

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- Rules for identifying payees – documentation requirements for withholding agents and FFIs under FATCA differed from corresponding requirement under Chapter 3 (U.S. source income paid to non-US persons).
- Regs attempt to effect coordination of withholding requirements. Removes possible overlap of FATCA, Chapter 3, and section 3406.
- Coordination of Chapter 61 and FATCA Information Reporting:
 - Election for FFIs to report on US account holders on Forms 1099 (not 8966)
 - Note: not available for FFIs under Model 1 IGAs who report to home government;
 - No 1099 requirement for “presumed” (but not known) US non-exempt recipient for whom there is FATCA reporting;
 - No Chapter 61 information reporting by stock transfer agents or paying agents on distributions from PFICs if reported under FATCA; and
 - Excepted or passive NFFEs that are flow through entities are not treated as recipients (allows consistent Chapter 3 and 4 treatment).

February 2014 Regulations Package – Key Amendments 1

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- Accommodation of direct reporting to the IRS, rather than to withholding agents, by certain entities (NFFEs and sponsored NFFEs) regarding their substantial U.S. owners;
- Allowed foreign captive insurance companies with 953(d) election in place to avoid foreign treatment, *provided* licensed to do business in at least one state;
- Allow certain foreign life insurance policies with the ability to substitute an insured to be grandfathered (at least until substitution right invoked);
- If grandfathered obligation, no obligation on withholding agent to determine whether there has been a material change in status. Adopts an actual knowledge standard;
- Withholding agents can accept electronic self certifications (W-8);
- Withholding agents and PFFIs must take subsequently gathered AML/KYC info (gathered for non-tax purposes) into account if inconsistent with Chapter 4 status
- Treatment of certain special-purpose debt securitization vehicles;
- Provides clarification in the treatment of disregarded entities - the term “branch” in the regulations includes disregarded entities;

February 2014 Regulations Package – Key Amendments 2

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- Grantor trusts now treated as account holders. Such trust must provide documentation of chapter 4 status as FFI or NFFE;
- Entities only providing advice and not holding assets as custodian or broker are no longer treated as “holding financial assets for others;”
- Revised definition of an expanded affiliated group (EAG):
 - Allows inclusion of exempt beneficial owner within group;
 - Modifies income test for entities in existence for less than 3 years;
 - In determining assets held for production of passive income, excludes transactions between group members;
 - Allows EAG to include “holding company” organized as trust or partnership;
- To determine “active” NFFE status, may use non-calendar fiscal years;
- Transitional rules for collateral arrangements prior to 2017. Industry practice was to commingle collateral from all counterparties in a single account – difficult to identify collateral to a particular counterparty;
- In applying attribution rules under 267 to determine if a person is a substantial (10%) owner, person to whom interest attributed must start with some ownership;
- Starting in 2015, withholding agents must prepare separate forms 1042-S for each type of income/payment for a single recipient.

“FATCA Compliant” Forms

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- Form W-8 Series Updates:
 - New Form W-8BENs
 - Form W-8BEN for individuals – instructions released
 - Form W-8BEN-E for entities – still waiting for instructions;
 - Form W-8EXP (Exempt);
 - Form W-8IMY (Intermediaries);
 - Form W-8ECI.
- Form W-9
- Form 1042
- Form 1042-S
 - Include information on type of payment (grandfathered payment is an option); and
 - Chapter 4 status code – 48 options!
- Draft Instructions for Form 1042 released, provides a great deal of guidance.

Tea Leaves – What forms are forthcoming in 2014?

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- **Announcement 2014-1**
 - IRS will issue additional FATCA compliant forms (QI, WP & WT Agreements) in early 2014.
 - Forms that expired at the end of 2013 are automatically extended until June 30, 2014.
- **More IGAs to be signed (20 in negotiations?).**
- **June 2, 2014: 1st list of GIINS to be published.**
- **More corrections to the regulations?**
 - Verification requirements for sponsoring entities.
 - FFI Agreement to be revised to reflect FFI permitted to elect backup withholding under section 3406, rather than withhold under chapter 4, if it complies with information reporting under chapter 61 and section 3406.