Forms W-8BEN and W-9 Compliance in Foreign and U.S. Business Transactions: Are You Ready?
Meeting the Demands of the Substantially Overhauled W-8BEN Under New FATCA Rules

THURSDAY, JULY 10, 1:00-2:50 pm Eastern

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This CLE webinar will provide counsel with guidance necessary to navigate the intricacies of the latest IRS guidance on FATCA compliance. Under U.S. federal tax law, certain payments mean that businesses must request a Form W-8BEN or other W-8 (foreign entities or individuals), or a Form W-9 (U.S. taxpayers), bearing certain information about the payee. Otherwise, the payor may have to withhold tax from the payment.

Compliance in this area became more complex since the IRS recently released Forms W-8 to integrate with FATCA requirements. One of these new forms is a streamlined W-8BEN for individuals, the other a more complex version for business entities with 30 separate parts and eight pages.

With IRS audit activity aggressive in this area, tax professionals must ramp up their knowledge of the evolving Form W-8BEN. Meanwhile, ongoing issues command attention, such as when the forms are required from foreign and U.S. payees and when tax withholding is or isn't required.

Strafford CLE/CPE webinar delegates receive a 20% discount for Prof. William Byrnes’ LexisNexis® Guide to FATCA Compliance by using the order code “FATCA13” when contacting the sales department - http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=prod19190327

Moreover, Congress delegates may receive a further 20% discount on the following other Lexis’ publications by Professor William Byrnes using the order code “DSME”

- Foreign Trade Briefs http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=10250

Professor William Byrnes’ 600 page FATCA compliance manual includes analysis and examples from 50 industry experts, and over two years has become a leading FATCA resource of financial institutions and foreign governments. He is the author of 25 tax books (Lexis, Kluwer Law, and National
Underwriter) and 1,200 journalism media articles that attract 30,000 annual subscribers and 100,000 monthly readers.

William Byrnes was a Senior Manager, then Associate Director of international tax for Coopers and Lybrand. He has been commissioned by a number of governments for tax and education policy initiatives, including most recently a 200 page economic, social, and regulatory impact analysis of the UK’s FATCA regime and previously a 900 page such analysis of the EU Savings Directive.

Last year, the U.S. Department of State’s Bureau of Education and Cultural Affairs, the J. William Fulbright Foreign Scholarship Board and the Council for International Exchange of Scholars, appointed Professor Byrnes to its Specialist Roster for his expertise with comparative tax law. India’s National Board of Accreditation bestowed its 2012 Education Leadership Award recognizing him as a pioneer of distance legal education to bridge national and cultural boundaries.

He is Associate Dean for the International Tax & Financial Services program of Thomas Jefferson in San Diego, California, and previously a professor of law of St. Thomas in Miami, Florida. He may be contacted about his presentation at profbyrnes@gmail.com. Links to powerpoints of his presentations and his articles are available on his blog: http://profwilliambyrnes.com/books/

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1. ANALYSIS OF FORMS W-8BEN, W8BEN-E AND W-8IMY

The Form W-8BEN has been split into two forms. The new 2014 Form W-8BEN (revision date 2014) is for use solely by foreign individuals, whereas the new Form W-8BEN-E is for use by entities for 2014 (revision date 2014) to provide US withholding agents. The newest version of Form W-8BEN-E must be used by all entities that are beneficial owners of a payment, or of another entity that is the beneficial owner.

The IRS released the new 2014 Form W-8BEN-E (2-2014) that coincides with FATCA and QI entity classification reporting requirements, and on April 30, 2014 the IRS followed up with the new Form W-8IMY (read my analysis at “Form W-8IMY”), formally replacing its 2006 predecessor W-8IMY.

Form W-8IMY is submitted generally by a payment recipient (the “filer”) with non-beneficial owner status, i.e. an intermediary. Such intermediary can be a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Form W-8IMY requires a tax identification number. The new Form W-8IMY has 28 parts whereas the previous August 2013 FATCA draft W-8IMY only contained 26. The new 2014 Form W-8IMY is vastly different from the seven-part 2006 predecessor form.

Below is an analysis of how to fill out the 2014 W-8BEN, W-8BEN-E and of W-8IMY. The Form W8BEN instructions >link is here< and the Form W-8BEN-E Instructions link is here. My 600 page Lexis FATCA compliance manual link is here.

2. Analysis of the W-8BEN

Foreign individuals (non-resident aliens – NRAs) must use Form W-8BEN to document their foreign status and claim any applicable treaty benefits for chapter 3 purposes, including a foreign individual that is the single member of an entity that is disregarded for U.S. tax purposes.

The NRA must give the Form W-8BEN to the withholding agent or payer if he/she is the beneficial owner of an amount subject to withholding, or if he/she an account holder of an FFI then to the FFI to document his/her status as a nonresident alien. Note that a sole member of a
“disregarded” entity is considered the beneficial owner of income received by the disregarded entity, and thus the sole member must provide a W-8BEN.

If the income or account is jointly owned by more than one persons, the income or account will be treated by the withholding agent as owned by a foreign person that is a beneficial owner of a payment only if Forms W-8BEN or W-8BEN-E are provided by EVERY owner of the account. If the withholding agent or financial institution receives a Form W-9 from any of the joint owners, then the payment must be treated as made to a U.S. person and the account treated as a U.S. account.

If any information on the Form W-8BEN becomes incorrect because of a change in circumstances, then the NRA must provide within 30 days of the change of circumstances the withholding agent, payer, or FFI with a new W-8BEN. By example, if an NRA has a change of address to an address in the United States, then this change is a change in circumstances that requires contacting the withholding agent or FFI within 30 days. Generally, a change of address within the same foreign country or to another foreign country is not a change in circumstances. However, if Form W-8BEN is used to claim treaty benefits of a country based on a residence in that country and the NRA changes address to outside that country, then it is a change in circumstances requiring notification within 30 days to the withholding agent or FFI.

A NRA (nonresident alien individual) is any individual who is not a citizen or resident alien of the United States. An foreign person (“alien”) meeting either the “green card test” or the “substantial presence test” for the calendar year is a resident alien. Any person not meeting either of these two tests is a nonresident alien individual. Additionally, an alien individual who is a bona fide resident of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa is a nonresident alien individual.

2.1 Taxpayer Identification Numbers
Line 5 requires a taxpayer identification number, which is the US social security number (SSN), or if not eligible to receive a SSN, then an individual taxpayer identification number (ITIN). The SSN may be applied for at www.socialsecurity.gov/online/ss-5.html. An ITIN may be applied for by filing Form W-7 with the IRS. To claim certain treaty benefits, either line 5 must be completed with an SSN or ITIN, or line 6 must include a foreign tax identification number (foreign TIN).

2.2 US Exchange of Tax Information with Foreign Countries
Line 6 of Form W-8BEN requires a foreign tax identifying number (foreign TIN) issued by a foreign jurisdiction of residence when an NRA documents him or herself with respect to a financial account held at a U.S. office of a financial institution. However, if the foreign jurisdiction does not issue TINs or has not provided the NRA a TIN yet, then the NRA must enter a date of birth in line 8.

3. Analysis of W-8BEN-E Form
The W-8BEN-E form has thirty parts that can be catalogued into four sections. The filer’s primary focus will be on Part I. By the way, the draft W-8BEN-E form only had twenty-seven, and the former W8BEN in use since 2006 has just four parts.
Identifying Information and Choice of Classification Part: All filers of the new W-8BEN-E must complete Parts I (Identifying Information and FATCA Classification). Part I of the W-8BEN-E requires general information, the QI status, and the FATCA classification of the filer. Question 4 of Part I requests the QI status. If the filer is a disregarded entity, partnership, simple trust, or grantor trust, and also is claiming benefits under a U.S. tax treaty, then the filer must complete Part III. Part I, Question 5 requests the FATCA classification of the filer, of which the form list thirty-one choices (see analysis below). The classification indicated determines which one of the Parts IV through XXVIII must be completed.

General Certification Part: All filers must complete Part XXIX (General Certification). Part XXIX requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee’s behalf. This part of the final form also contains the following language that does not appear in the current form: “I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.”

FATCA Classification Certification Parts: Completion of the other parts of the form W-8BEN-E will depend upon the Part I, Question 5 FATCA classification of the filer (see list below). The classifications on the newest version Form W-8BEN-E maintain the classification of a Restricted Distributor (previously Part X of the draft form, but in the final form Part XI) (see the Rev. 2013 version of the W-8BEN-E).

Substantial US Owner Part: Note that if the filer is a passive NFFE, it must complete Part XXVI as well as Part XXX if it has substantial U.S. owners. For a Passive NFFE, a specified U.S. person is a substantial U.S. owner if the person has more than a 10 percent beneficial interest in the entity.

3.1 Who Must Provide W-8BEN-E?

A foreign entity must submit a Form W-8BEN-E to the withholding agent if it will receive a FATCA withholdable payment, receive a payment subject to chapter 3 withholding, or if it maintains an account with an FFI.

3.1.1 All Beneficial Owners

Form W-8 BEN-E must be provided by ALL the entities that are beneficial owners of a payment, or of another entity that is the beneficial owner. If the income or account is jointly owned by more than one person, then the income or account will be treated by the withholding agent as owned by a foreign beneficial owner only if Forms W-8BEN or W-8BEN-E are provided by EVERY owner of the account.

3.1.2 Treatment as US Account

If the withholding agent or financial institution receives a Form W-9 from any of the joint owners, then the payment must be treated as made to a U.S. person and the account treated as a U.S. account. An account will be treated as a U.S. account for FATCA by an FFI if any of the account holders is a specified U.S. person or a U.S.-owned foreign entity (unless the account is otherwise excepted from U.S. account status for FATCA purposes).
3.1.3 Hybrids

**Hybrid Entity:** A hybrid entity should give Form W-8BEN-E on its own behalf to a withholding agent only for income for which it is claiming a reduced rate of withholding under an income tax treaty or to document its chapter 4 status for purposes of maintaining an account with an FFI requesting this form (when it is not receiving withholdable payments or payments subject to chapter 3 withholding).

**Reverse Hybrid:** A reverse hybrid entity should give Form W-8BEN-E on its own behalf to a withholding agent only for income for which no treaty benefit is being claimed or to establish its status for chapter 4 purposes (when required).

3.1.4 Who Should Not Use Form W-8BEN-E?

**US Person:** If the filer is a US person (including US citizens, resident aliens, and entities treated as US persons, such as a corporation organized under the law of a state), then submit Form W-9, Request for Taxpayer Identification Number and Certification.

**Foreign Insurance Company:** A foreign insurance company that has made an election under section 953(d) to be treated as a U.S. person should submit Form W-9 to certify its “U.S. status” even if it is an FFI for FATCA purposes. Certain foreign insurance companies issuing annuities or cash value insurance contracts that elect to be treated as a U.S. person for federal tax purposes but are not licensed to do business in the United States are treated as FFIs for purposes of chapter 4. For purposes of providing a withholding agent with documentation for both chapter 3 and chapter 4 purposes, however, such an insurance company is permitted to use Form W-9 to certify its status as a U.S. person.

**NRA:** A nonresident alien individual must submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).

**Disregarded:** A U.S. person that is a single owner of a disregarded entity, and that is not also a hybrid entity claiming treaty benefits, should provide Form W-9. A foreign branch of a U.S. financial institution (other than a branch that operates as a qualified intermediary) that is treated as an FFI under an applicable IGA is permitted to use Form W-9 to certify its status as a U.S. person for chapter 3 and chapter 4 purposes.

But if the single owner is not a U.S. person, is not a branch of an FFI claiming FATCA status, and is not a hybrid entity claiming treaty benefits, it should provide either Form W-8BEN or Form W-8BEN-E as appropriate.

**Intermediary:** Form W-8IMY is submitted generally by a payment recipient with non-beneficial owner status, i.e. an intermediary. Such intermediary can be a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Read my analysis of W-8IMY and its instructions in my June 24th article. An entity treated as a flow-through entity should generally provide Form W-8IMY for chapter 3 or chapter 4 purposes.

3.1.5 Expiration of Form W-8BEN-E.

Generally, a Form W-8BEN-E will remain valid for purposes of both chapters 3 and 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form
incorrect. For example, a Form W-8BEN signed on September 30, 2014 remains valid through December 31, 2017. However, under certain conditions a Form W-8BEN-E will remain in effect indefinitely until a change of circumstances occurs.

3.1.6 Change in Circumstances.

If a change in circumstances makes any information on the Form W-8BEN-E incorrect for purposes of either chapter 3 or chapter 4, then the submitting person must notify the withholding agent or financial institution maintaining the account within 30 days of the change in circumstances and you must file a new Form W-8BEN-E (or other appropriate form as applicable).

3.1.7 Certification

Part XXIX requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee’s behalf. This part of the final form also contains the following language that does not appear in the current form: “I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.”

3.2 Analysis of Part I – Identification of Beneficial Owner

Part I of the W-8BEN-E requires general information, the QI status, and the FATCA classification of the filer.

Question 1. A disregarded entity or branch enters the legal name of the entity that owns the disregarded entity (looking through multiple disregarded entities if applicable) or maintains the branch.

Question 2. A corporation must enter its country of incorporation. Any other type of entity must instead enter the country under whose laws it is created, organized, or governed.

Question 3. A disregarded entity receiving a payment should only enter its name on line 3 if it is receiving a withholdable payment or hold an account with an FFI and

- has registered with the IRS and been assigned a GIIN associated with the legal name of the disregarded entity;
- is a reporting Model 1 FFI or reporting Model 2 FFI; and
- is not a hybrid entity using this form to claim treaty benefits.

If not required to provide the legal name, then a disregarded entity receiving a payment or maintaining an account may instead enter its name on line 10.

Question 4 requests the QI status. If the filer is a disregarded entity, partnership, simple trust, or grantor trust, then the filer must complete Part III if the entity is claiming benefits under a U.S. tax treaty. See new 2014 QI agreement here.

Question 5 requests the FATCA classification of the entity. W-8BEN-E currently lists 31 FATCA classifications of which the entity must check only one box unless otherwise indicated. Completion of the W-8BEN-E other parts depend upon the selection of the FATCA classification.
1. Nonparticipating FFI (including a limited FFI or an FFI related to a Reporting IGA FFI other than a registered deemed-compliant FFI or participating FFI).
2. Participating FFI.
3. Reporting Model 1 FFI.
4. Reporting Model 2 FFI.
5. Registered deemed-compliant FFI (other than a reporting Model 1 FFI or sponsored FFI that has not obtained a GIIN).
6. Sponsored FFI that has not obtained a GIIN. Complete Part IV.
7. Certified deemed-compliant nonregistering local bank. Complete Part V.
8. Certified deemed-compliant FFI with only low-value accounts. Complete Part VI.
9. Certified deemed-compliant sponsored, closely held investment vehicle. Complete Part VII.
10. Certified deemed-compliant limited life debt investment entity. Complete Part VIII.
11. Certified deemed-compliant investment advisors and investment managers. Complete Part IX.
12. Owner-documented FFI. Complete Part X.
13. Restricted distributor. Complete Part XI.
14. Nonreporting IGA FFI (including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA). Complete Part XII.
15. Foreign government, government of a U.S. possession, or foreign central bank of issue. Complete Part XIII.
16. International organization. Complete Part XIV.
17. Exempt retirement plans. Complete Part XV.
18. Entity wholly owned by exempt beneficial owners. Complete Part XVI.
19. Territory financial institution. Complete Part XVII.
20. Nonfinancial group entity. Complete Part XVIII.
21. Excepted nonfinancial start-up company. Complete Part XIX.
22. Excepted nonfinancial entity in liquidation or bankruptcy. Complete Part XX.
23. 501(c) organization. Complete Part XXI.
24. Nonprofit organization. Complete Part XXII.
25. Publicly traded NFFE or NFFE affiliate of a publicly traded corporation. Complete Part XXIII.
26. Excepted territory NFFE. Complete Part XXIV.
27. Active NFFE. Complete Part XXV.
28. Passive NFFE. Complete Part XXVI as well as Part XXX if substantial U.S. owners*.
29. Excepted inter-affiliate FFI. Complete Part XXVII.
30. Direct reporting NFFE.
31. Sponsored direct reporting NFFE. Complete Part XXVIII

*For a Passive NFFE, a specified U.S. person is a substantial U.S. owner if the person has more than a 10 percent beneficial interest in the entity.

3.3 FFIs Covered by an IGA and Related Entities

A reporting IGA FFI resident in, or established under the laws of, a jurisdiction covered by a Model 1 IGA should check “Reporting Model 1 FFI.” A reporting FFI resident in, or established under the laws of, a jurisdiction covered by a Model 2 IGA should check “Reporting Model 2 FFI.”
If the FFI is treated as a registered deemed-compliant FFI under an applicable IGA, it should check “Nonreporting IGA FFI” rather than “registered deemed-compliant FFI” and provide its GIIN in Part XII, line 26.

An FFI that is related to a reporting IGA FFI and that is treated as a nonparticipating FFI in its country of residence should check nonparticipating FFI in line 5. An FFI that is related to a reporting IGA FFI and that is a participating FFI, deemed-compliant FFI, or exempt beneficial owner under the U.S. Treasury regulations or an applicable IGA should check the appropriate box for its chapter 4 status.

3.4 Requirement to Provide a GIIN

If the entity is in the process of registering with the IRS as a participating FFI, registered deemed-compliant FFI, reporting Model 1 FFI, reporting Model 2 FFI, direct reporting NFFE, or sponsored direct reporting NFFE, but has not received a GIIN, it may complete this line by writing “applied for.” However, the person requesting this form must receive and verify the GIIN within 90 days.

For payments made prior to January 1, 2015, a Form W-8BEN-E provided by a reporting Model 1 FFI need not contain a GIIN. For payments made prior to January 1, 2016, a sponsored direct reporting NFFE or sponsored FFI that has not obtained a GIIN must provide the GIIN of its sponsoring entity.

3.5 Part X – Owner-Documented FFI

Line 24a. An owner-documented FFI must check the box to certify that it meets all of the requirements for this status and is providing this form to a U.S. financial institution, participating FFI, reporting Model 1 FFI, or reporting Model 2 FFI that agrees to act as a designated withholding agent with respect to the FFI identified on line 1. Then select either 24b or 24c.

Line 24b. Check this box to certify that the documentation set forth in the certifications has been provided (or will be provided), including the owner reporting statement described in this line 24b, or

Line 24c. Check this box to certify that the auditor’s letter has been provided (or will be provided).

3.6 Part XXI – 501(c) Organization

Only foreign entities that are tax-exempt under section 501 should check the 501(c) organization “Tax-exempt organization” box. Such organizations should use Form W-8BEN-E only if they are claiming a reduced rate of withholding under an income tax treaty or a code exception other than section 501. If claiming an exemption from withholding under code section 501, then it must submit Form W-8EXP to document the exemption and chapter 4 status.

3.7 Part XXII – Non-Profit Organizations Covered by an IGA

A non-profit entity that is established and maintained in a jurisdiction that is treated as having in effect a Model 1 IGA or Model 2 IGA, and that meets the definition of Active NFFE under Annex I of the applicable IGA, should not check a box for its status on line 5.
3.8 Entities Providing Certifications Under an Applicable IGA

In lieu of the certifications contained in Parts IV through XXVIII of Form W-8BEN-E, a reporting Model 1 FFI or reporting Model 2 FFI in certain cases may request alternate certifications to document its account holders pursuant to an applicable IGA or it may otherwise provide an alternate certification to a withholding agent.

A withholding agent that is an FFI may provide a chapter 4 status certification other than as shown in Parts IX through XXVIII in order to satisfy its due diligence requirements under an applicable IGA. In such a case, attach that alternative certification to this Form W-8BEN-E in lieu of completing a certification otherwise required in Parts IV through XXVIII provided that

1) the certification accurately reflects the chapter 4 status or under an applicable IGA; and

2) the withholding agent provides a written statement that it has provided the certification to meet its due diligence requirements as a participating FFI or registered deemed-compliant FFI under an applicable IGA.

An applicable IGA certification may be provided with the W-8BEN-E if determining chapter 4 status under the definitions provided in an applicable IGA and that certification identifies the jurisdiction that is treated as having an IGA in effect and describes the status as an NFFE or FFI in accordance with the applicable IGA.

However, if under an applicable IGA the entity’s status is determined to be an NFFE, it must still determine if it is an excepted NFFE under the FATCA Regulations. Additionally, the entity must comply with the conditions of its status under the law of the IGA jurisdiction.

3.9 W-8BEN-E’s 30 Parts

Part I Identification of Beneficial Owner
Part II Disregarded Entity or Branch Receiving Payment.
Part III Claim of Tax Treaty Benefits (if applicable). (For chapter 3 purposes only)
Part IV Sponsored FFI That Has Not Obtained a GIIN
Part V Certified Deemed-Compliant Nonregistering Local Bank
Part VI Certified Deemed-Compliant FFI with Only Low-Value Accounts
Part VII Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle
Part VIII Certified Deemed-Compliant Limited Life Debt Investment Entity
Part IX Certified Deemed-Compliant Investment Advisors and Investment Managers
Part X Owner-Documented FFI
Part XI Restricted Distributor
Part XII Nonreporting IGA FFI
Part XIII Foreign Government, Government of a U.S. Possession, or Foreign Central Bank of Issue
Part XIV International Organization
Part XV Exempt Retirement Plans
Part XVI Entity Wholly Owned by Exempt Beneficial Owners
Part XVII Territory Financial Institution
Part XVIII Excepted Nonfinancial Group Entity
Part XIX Excepted Nonfinancial Start-Up Company
Part XX Excepted Nonfinancial Entity in Liquidation or Bankruptcy
Part XXI 501(c) Organization
Part XXII Non-Profit Organization
Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation
Part XXIV Excepted Territory NFFE
Part XXV Active NFFE
Part XXVI Passive NFFE
Part XXVII Excepted Inter-Affiliate FFI
Part XXVIII Sponsored Direct Reporting NFFE
Part XXIX Certification
Part XXX Substantial U.S. Owners of Passive NFFE

4. Analysis of the Form W-8IMY

Part I of the W-8-IMY Form adds FATCA classification. Part I of the form requires general information, the Chapter 3 QI status, and the Chapter 4 FATCA classification of the filer.

Question 4 of Part I requests the QI status:

If the filer is a Qualified Intermediary, then the filer must complete Part III Qualified Intermediary. If the filer is a Nonqualified Intermediary, then the filer must complete Part IV Nonqualified Intermediary.

Territory Financial Institutions complete Part V. U.S. Branches complete Part VI. Withholding Foreign Partnership or Withholding Foreign Trusts complete Part VII. Nonwithholding Foreign Partnership, Nonwithholding Foreign Simple Trust, and Nonwithholding foreign grantor trusts must complete Part VIII.

Question 5 requests the FATCA classification of the filer. The classification indicated determines which one of the Parts IX through XXVII must be completed.

Part II of this form is to be completed if the entity is a disregarded entity or a branch receiving payment as an intermediary. Part II only applies to branches of an FFI outside the FFI’s country of residence.

4.1 Statement of General Certification

Part XXVIII requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee’s behalf. Finally, the form contains the following language: “I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.”

4.2 Who Must File W-8IMY?

An entity should provide Form W-8IMY when receiving a reportable amount or withholdable payment on behalf of another person or as a flow-through entity.

A foreign person, or a foreign branch of a U.S. person, to establish that it is a qualified intermediary that is not acting for its own account, to represent that it has provided or will provide a withholding statement, as required, or, if applicable, to represent that it has assumed primary withholding responsibility under chapters 3 and 4 of the Code and/or primary Form 1099 reporting and backup withholding responsibility.
A foreign person to establish that it is a nonqualified intermediary that is not acting for its own account, to certify its chapter 4 status (if required), to certify whether it reports U.S. accounts under chapter 4 (if required), and to indicate, if applicable, that it is using the form to transmit withholding certificates and/or other documentary evidence and has provided, or will provide, a withholding statement, as required. A U.S. person cannot be a nonqualified intermediary.

A U.S. branch that is acting as an intermediary to represent that the income it receives is not effectively connected with the conduct of a trade or business within the United States and either that it is using the form (a) to evidence it is treated as a U.S. person under Regulations section 1.1441-1(b)(2)(iv)(A) with respect to any payments associated with the Form W-8IMY, or (b) to certify to its chapter 4 status and to transmit the documentation of the persons for whom it receives a payment and has provided, or will provide, a withholding statement, as required.

A financial institution incorporated or organized under the laws of a U.S. territory that is acting as an intermediary or is a flow-through entity to represent that it is a financial institution (other than an investment entity that is not also a depository institution, custodial institution, or specified insurance company) and either that it is using the form (a) to evidence it is treated as a U.S. person under Regulations section 1.1441-1(b)(2)(iv)(A) with respect to any payments associated with the Form W-8IMY, or (b) to certify that it is transmitting documentation of the persons for whom it receives a payment and has provided, withholding statement, as required.

A foreign partnership or a foreign simple or grantor trust to establish that it is a withholding foreign partnership or withholding foreign trust under the regulations for sections 1441 and 1442 and to certify its chapter 4 status (if required).

A foreign partnership or a foreign simple or grantor trust to establish that it is a nonwithholding foreign partnership or nonwithholding foreign simple or grantor trust for purposes of sections 1441 and 1442, to certify to its chapter 4 status (if required), and to represent that the income is not effectively connected with a U.S. trade or business, that the form is being used to transmit withholding certificates and/or documentary evidence, and that it has provided or will provide a withholding statement as required.

A foreign partnership or foreign grantor trust to establish that it is an upper-tier foreign partnership or foreign grantor trust for purposes of section 1446 and to represent that the form is being used to transmit withholding certificates and/or documentary evidence and that it has provided, or will provide, a withholding statement, as required.

A flow-through entity (including a foreign reverse hybrid entity) transmitting withholding certificates and/or other documentary evidence to claim treaty benefits on behalf of its owners, to certify its chapter 4 status (if required), and to certify that it has provided, or will provide, a withholding statement, as required.

A nonparticipating FFI acting as an intermediary or that is a flow-through entity using this form to transmit a withholding statement and withholding certificates or other documentation for exempt beneficial owners described in Regulations section 1.1471-6.

A QSL certifying to a withholding agent that it is acting as a QSL with respect to U.S. source substitute dividends received from the withholding agent pursuant to a securities lending transaction (as described in Notice 2010-46).

A foreign intermediary or flow-through entity not receiving withholdable payments or reportable amounts that is holding an account with a participating FFI or registered deemed-
compliant FFI providing this form for purposes of documenting the chapter 4 status of the account holder. However, no withholding statement is required to be provided along with Form W-8IMY if it is being provided by an FFI solely to document such an account when no withholdable payments or reportable amounts are made to the account. Also note that the entity may instead provide Form W-8BEN-E when it is not receiving withholdable payments or reportable amounts to document its status as an account holder.

4.3 Partnership Allocations

Form W-8IMY may be submitted and accepted to satisfy documentation requirements for purposes of withholding on certain partnership allocations to foreign partners under section 1446. Section 1446 generally requires withholding when a partnership is conducting a trade or business in the United States and allocates income effectively connected with that trade or business (ECI) to foreign persons that are partners in the partnership. Section 1446 can also apply when certain income is treated as effectively connected income of the partnership and is so allocated.

4.4 Chapter 3 and Chapter 4 Status Certification

Chapter 3 and Chapter 4 status certification by the filer is required with applicable documentation.

In general, intermediaries and flow-through entities receiving reportable amounts will be required to provide both their chapter 3 status and the chapter 3 status of persons for whom they receive such payments.

An intermediary or flow-through entity receiving a withholdable payment will also be required to provide its chapter 4 status and the chapter 4 status of persons for whom it receives a withholdable payment when required for chapter 4 purposes.

4.5 Parts III – VIII: Chapter 3 Status Certifications

Parts III – VIII of this form address the QI Status of the entity. Part III is to be completed if the entity is a QI, and requires the entity to certify that it is a QI and has provided appropriate documentation. Part IV is to be completed if the entity is a Nonqualified Intermediary (NQI), and requires the entity to certify that it is a NQI not acting for its own account.

Part V is to be completed if the entity is a Territory Financial Institution. Part VI is to be completed by a U.S. branch only if the branch certifies on the form that it is the U.S. branch of a U.S. bank or insurance company, and that the payments made are not effectively connected to a U.S. trade or business. Part VII is to be completed if the entity is a Foreign Withholding Partnership (WP) or a Withholding Foreign Trust (WT). Part VIII is to be completed if the entity is either a Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust.

4.6 Parts III – VIII of this form address the QI Status of the entity.

Part III Qualified Intermediary

Part IV Nonqualified Intermediary

Part V Territory Financial Institution
Part VI Certain U.S. Branches

Part VII Withholding Foreign Partnership (WP) or Withholding Foreign Trust (WT)

Part VIII Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust

Part III is to be completed if the entity is a QI, and requires the entity to certify that it is a QI and has provided appropriate documentation. Part IV is to be completed if the entity is a Nonqualified Intermediary (NQI), and requires the entity to certify that it is a NQI not acting for its own account. Part V is to be completed if the entity is a Territory Financial Institution. Part VI is to be completed by a U.S. branch only if the branch certifies on the form that it is the U.S. branch of a U.S. bank or insurance company, and that the payments made are not effectively connected to a U.S. trade or business. Part VII is to be completed if the entity is a Foreign Withholding Partnership (WP) or a Withholding Foreign Trust (WT). Part VIII is to be completed if the entity is either a Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust.

4.7 Parts IX – XXVI: Chapter 4 Status Certifications

Parts IX – XXVI of this form address the filer certifying the FATCA Status of the entity. These classifications include the new classification of a Restricted Distributor (Part XVI), but do not include the new classification of a Reporting NFFE. Each of these parts begins with a check the box selection of “I certify that …”, followed by the definition components of each classification. These classifications include the new classification of a Restricted Distributor (Part XVI), but do not include the new classification of a Reporting NFFE.

- Part IX Nonparticipating FFI with Exempt Beneficial Owners
- Part X Sponsored FFI That Has Not Obtained a GIIN
- Part XI Owner-Documented FFI
- Part XII Certified Deemed-Compliant Nonregistering Local Bank
- Part XIII Certified Deemed-Compliant FFI with Only Low-Value Accounts
- Part XIV Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle
- Part XV Certified Deemed-Compliant Limited Life Debt Investment Entity
- Part XVI Restricted Distributor
- Part XVII Foreign Central Bank of Issue
- Part XVIII Nonreporting IGA FFI
- Part XIX Exempt Retirement Plans
- Part XX Excepted Nonfinancial Group Entity
- Part XXI Exempted Nonfinancial Start-Up Company
- Part XXII Excepted Nonfinancial Entity in Liquidation or Bankruptcy
- Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation
- Part XXIV Excepted Territory NFFE
Part XXV Active NFFE
Part XXVI Passive NFFE
Part XXVII Sponsored Direct Reporting NFFE

Part IX is not required to be completed unless the filer is a nonparticipating FFI providing documentation on behalf of an exempt beneficial owner (by example, a local qualifying retirement fund).

Part XI – An owner-documented FFI should only complete Form W-8IMY if it is a flow-through entity receiving income allocable to its partners, owners, or beneficiaries. An owner-documented FFI is not permitted to act as an intermediary with respect to a withholdable payment.

Part XVIII – A nonreporting FFI pursuant to an IGA must indicate that it is to be treated as such under an applicable IGA, including an entity treated as a registered deemed-compliant FFI under an applicable IGA. The nonreporting IGA FFI must identify the applicable IGA by entering the name of the jurisdiction that has the applicable IGA in effect with the United States. It must also provide the withholding agent with the class of entity described in Annex II of the IGA applicable to its nonreporting FFI IGA status. If the nonreporting FFI IGA is claimed pursuant to a Model 2 IGA, then the FFI treated as a registered deemed-compliant FFI under that applicable Model 2 IGA must provide a GIIN in the space provided.

If the filer is a sponsored FFI in a Model 1 IGA jurisdiction or other nonreporting FFI in a Model 1 IGA jurisdiction that is required to report an account, it is not currently required to provide a GIIN in this Part. However, a future version of this form may require it to provide a GIIN.

4.8 Entities Providing Certifications Under an Applicable IGA

A withholding agent that is an FFI may provide a chapter 4 status certification other than as shown in Parts IX through XXVII in order to satisfy its due diligence requirements under an applicable IGA. In such a case, attach the alternative certifications to this Form W-8IMY in lieu of completing a certification otherwise required in Parts IX through XXVII provided that the withholding agent:

- determine that the certification accurately reflects the status for chapter 4 purposes or under an applicable IGA; and
- the withholding agent provides a written statement that it has provided the certification to meet its due diligence requirements as a participating FFI or registered deemed-compliant FFI under an applicable IGA.

The filer may also provide with this form an applicable IGA certification if it determines its chapter 4 status under the definitions provided in an applicable IGA and that certification identifies the jurisdiction that is treated as having an IGA in effect and describes the filer status as an NFFE or FFI in accordance with the applicable IGA. However, if the filer determines its status under an applicable IGA as an NFFE, it must still determine if it is an excepted NFFE under the regulations in order to complete this form. Additionally, it is required to comply with the conditions of its chapter 4 status under the law of the IGA jurisdiction if it determines its status under an applicable IGA.
4.9 Entities Providing Alternate Certifications Under Regulations

If the filer qualifies for a chapter 4 status that is not shown in Part I, line 5, of this form, it may attach applicable certifications for such status from any other Form W-8 on which the relevant certifications appear.

For example, if the filer is a certified deemed-compliant investment advisor or investment manager described in Regulations section 1.1471-5(f)(2)(v) that is a flow-through entity, it may instead attach the certifications found in Part IX of Form W-8BEN-E.

If the applicable certifications do not appear on any Form W-8 (if, for example, new regulations provide for an additional chapter 4 status and this form has not been updated) then the filer may provide an attachment certifying that it qualifies for the applicable status described in a particular Regulations section in lieu of checking a box in Part I, line 5. The filer must also include a citation to the applicable provision in the Regulations.

4.10 Final Statement of Certification

Part XXVIII requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee’s behalf. Finally, the form contains the following language: “I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.”

4.11 Expiration of Form W-8IMY

Generally, a Form W-8IMY remains valid until the status of the person whose name is on the certificate is changed in a way relevant to the certificate or there is a change in circumstances that makes the information on the certificate no longer correct. The indefinite validity period does not extend, however, to any other withholding certificates, documentary evidence, or withholding statements associated with the certificate.

4.12 Change in Circumstances.

If a change in circumstances makes any information on the Form W-8IMY (or any documentation or a withholding statement associated with the Form W-8IMY) have submitted incorrect for purposes of chapter 3 or chapter 4 (when relevant), the intermediary must notify the withholding agent within 30 days and file a new Form W-8IMY or provide new documentation or a new withholding statement (as applicable).

The information associated with Form W-8IMY must be updated as often as is necessary to enable the withholding agent to withhold at the appropriate rate on each payment and to report such income.

(See Regulations sections 1.1441-1(e)(4)(ii)(D) for the definition of a change in circumstances for purposes of chapter 3. See Regulations section 1.1471-3(c)(6)(ii)(E) for the definition of a change in circumstances for purposes of chapter 4.)

4.13 Structure of New Form Form W-8IMY

Part I Identification of Entity

Part II Disregarded Entity or Branch Receiving Payment.
Chapter 3 Status Certifications
Part III Qualified Intermediary
Part IV Nonqualified Intermediary
Part V Territory Financial Institution
Part VI Certain U.S. Branches
Part VII Withholding Foreign Partnership (WP) or Withholding Foreign Trust (WT)
Part VIII Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust
Chapter 4 Status Certifications
Part IX Nonparticipating FFI with Exempt Beneficial Owners
Part X Sponsored FFI That Has Not Obtained a GIIN
Part XI Owner-Documented FFI
Part XII Certified Deemed-Compliant Nonregistering Local Bank
Part XIII Certified Deemed-Compliant FFI with Only Low-Value Accounts
Part XIV Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle
Part XV Certified Deemed-Compliant Limited Life Debt Investment Entity
Part XVI Restricted Distributor
Part XVII Foreign Central Bank of Issue
Part XVIII Nonreporting IGA FFI
Part XIX Exempt Retirement Plans
Part XX Exempted Nonfinancial Group Entity
Part XXI Exempted Nonfinancial Start-Up Company
Part XXII Exempted Nonfinancial Entity in Liquidation or Bankruptcy
Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation
Part XXIV Exempted Territory NFFE
Part XXV Active NFFE
Part XXVI Passive NFFE
Part XXVII Sponsored Direct Reporting NFFE

5. ANALYSIS OF FORM 1042 FOR FATCA WITHHOLDING

The IRS has released the Instructions for 2014 Form 1042: Annual Withholding Tax Return for U.S. Source Income of Foreign Persons to correspond to FATCA (Chapter 4 of the Internal Revenue Code).

A withholding agent must use Form 1042 to report the tax withheld on certain income of foreign persons, including nonresident aliens, foreign partnerships, foreign corporations, foreign estates, and foreign trusts, or 2% excise tax due on specified foreign procurement payments.
The IRS has provided the final 2014 version of the Form 1042 at this time for informational purposes in order to provide time for withholding agents and intermediaries to implement the new requirements of FATCA. The 2014 version of the Form 1042 reflects the new FATCA requirements and will be filed by taxpayers in 2015 to report with respect to 2014. See link for the 2013 Form.

5.1 What Changed?

The Form 1042 for 2014 has been modified from the previous Form 1042 primarily for withholding agents to report payments and amounts withheld under FATCA chapter 4 of the Code (chapter 4) in addition to those payments and amounts required to be reported under chapter 3 of the Code (chapter 3).

The 2014 Form 1042:

1. adds lines for reporting of the tax liability under chapters 3 and 4,
2. includes separate chapter 3 and 4 status codes for withholding agents, and
3. provides for a reconciliation of U.S. source fixed or determinable annual or periodical (FDAP) income payments that are withholdable payments for chapter 4 purposes.

Withholding agents that make nonfinancial payments generally will not be affected by the new requirements under chapter 4.

5.2 When is Form 1042 Due?

Form 1042 is a calendar year tax return. The Forms 1042 and 1042-S must be filed by March 15 of the year following the calendar year in which the income subject to reporting was paid. Thus, for the 2014 year, the filing date is Monday, March 16, 2015 (because March 15th is a Sunday).

5.3 Who Must File?

Every withholding agent or intermediary who has control, receipt, custody, disposal or payment of any fixed or determinable, annual or periodic U.S. source income must file an annual return for the preceding calendar year on Form 1042.

A withholding agent or intermediary must file Form 1042 if:

- required to file Form(s) 1042-S (whether or not any tax was withheld or was required to be withheld),
- is a qualified intermediary (QI), withholding foreign partnership (WP), withholding foreign trust (WT), participating foreign financial institution (FFI), or reporting Model 1 FFI making a claim for a collective refund under the respective agreement with the IRS,
- pays gross investment income to foreign private foundations that are subject to tax under section 4948(a), or
- pays any foreign person specified federal procurement payments that are subject to withholding under section 5000C.
6. ANALYSIS OF 1042-S

6.1 Who Must File?
Every withholding agent must file an information return on Form 1042-S to report amounts paid during the preceding calendar year.

However, withholding agents who are individuals are not required to report a payment on Form 1042-S if they are not making the payment as part of their trade or business and no withholding is required to be made on the payment.

For example, an individual making a payment of interest that qualifies for the portfolio interest exception from withholding is not required to report the payment if the portfolio interest is paid on a loan that is not connected to the individual’s trade or business. However, an individual who is a withholding agent paying an amount that actually has been subject to withholding is required to report the payment. Also, an individual paying an amount on which withholding is required must report the payment, whether or not the individual actually withholds.

6.2 Who is a Withholding agent?
A withholding agent is any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding under chapter 3, who can disburse or make payments of an amount subject to withholding, or who makes a withholdable payment under chapter 4.

The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity. The term withholding agent also includes, but is not limited to, a qualified intermediary (QI), a nonqualified intermediary (NQI), a withholding foreign partnership (WP), a withholding foreign trust (WT), a flow-through entity, a U.S. branch, a territory FI, a nominee under section 1446, and an authorized agent. A person may be a withholding agent even if there is no requirement to withhold from a payment or if another person has already withheld the required amount from a payment.

In most cases, the U.S. person who pays (or causes to be paid) the item of U.S. source income to a foreign person (or to its agent) must withhold. However, other persons may be required to withhold. For example, if a payment is made by a QI (whether or not it assumes primary withholding responsibility) and the QI knows that withholding was not done by the person from which it received the payment, then that QI is required to do the appropriate withholding. In addition, withholding must be done by any QI that assumes primary withholding responsibility under chapters 3 and 4, a WP, a WT, a U.S. branch that agrees to be treated as a U.S. person, or an authorized agent.

Finally, if a payment is made by an NQI or a flow-through entity that knows, or has reason to know, that withholding was not done, that NQI or flow-through entity is required to withhold since it also falls within the definition of a withholding agent.

6.3 What’s New for the 2014 Form 1042-S?
The Form 1042-S for 2014 has been modified to accommodate reporting of payments and amounts withheld under FATCA (chapter 4) in addition to those amounts required to be reported under chapter 3. Form 1042-S requires the reporting of an applicable exemption to the extent withholding under chapter 4 does not apply to a payment of U.S. source fixed or determinable
annual or periodical (FDAP) income (including deposit interest) that is reportable on Form 1042-
S.

When a financial institution reports a payment made to its financial account, Form 1042-S also
requires the reporting of additional information about a recipient of the payment, such as the
recipient’s account number, date of birth, and foreign taxpayer identification number, if any.

For withholding agents, intermediaries, flow-through entities, and recipients, Form 1042-S
requires that the chapter 3 status (or classification) and, when the payment reported is a FATCA
withholdable payment, the chapter 4 status be reported on the form according to a code for each
type of income.

For withholding agents that report amounts withheld by another withholding agent, Form 1042-S
requests the name and EIN of the withholding agent that withheld the tax. This information is
optional for 2014.

Electronic filing requirement for financial institutions. Beginning January 1, 2014, financial
institutions that are required to report payments made under chapters 3 or 4 must electronically
file Forms 1042-S (regardless of the number of forms to file).

6.4 Form 1042-S Uses

Use Form 1042-S to:

- report income described under Amounts Subject to Reporting on Form 1042-S, later, and
to report amounts withheld under chapter 3 or chapter 4.
- report specified Federal procurement payments paid to foreign persons that are subject to
withholding.
- report distributions of effectively connected income by a publicly traded partnership or
nominee.

Do not use Form 1042-S to report an item required to be reported on any of the following forms:

- Form W-2 (wages and other compensation made to employees (other than compensation
for dependent personal services for which the beneficial owner is claiming treaty
benefits), including wages in the form of group-term life insurance).
- Form 1099.
- FIRPTA: Dispositions by Foreign Persons of U.S. Real Property Interests, or Form 8805
Foreign Partner’s Information Statement of Section 1446 Withholding Tax.
- Form 8966, FATCA Report. Foreign financial institutions (FFIs) and withholding agents
are required to report on Form 8966 certain account holders and payees. However, an
FFI or withholding agent may also be required to file Form 1042-S to report payments of
U.S. source FDAP income made to such persons and to report tax deducted and withheld,
if any.

6.5 Amounts Subject to Reporting on Form 1042-S

Amounts subject to reporting on Form 1042-S are amounts from U.S. sources paid to foreign
persons (including persons presumed to be foreign) or included in a U.S. payee pool that are
reportable under chapters 3 and 4, even if no amount is deducted and withheld from the payment
because of a treaty or Code exception to taxation or if any amount withheld was repaid to the
payee. Amounts subject to reporting are amounts from sources within the United States that constitute:

(a) fixed or determinable annual or periodical (FDAP) income (including deposit interest);

(b) certain gains from the disposal of timber, coal, or domestic iron ore with a retained economic interest; and

(c) gains relating to contingent payments received from the sale or exchange of patents, copyrights, and similar intangible property.

A payment is also subject to reporting if withholding under chapter 4 is applied (or required to be applied) to the payment. Amounts subject to reporting on Form 1042-S include, but are not limited to, the following amounts to the extent from U.S. sources:

(a) Interest on deposits paid to certain nonresident aliens. Interest described in section 871(i)(2)(A) aggregating $10 or more paid with respect to a deposit if such interest is paid to a nonresident alien individual who is a resident of a country identified, in Revenue Procedure 2012-24 (or a superseding Revenue Procedure) as of December 31, prior to the calendar year in which the interest is paid.

A payor may elect to report interest described above paid to any nonresident alien individual by reporting all such interest. See Revenue Procedure 2012-24 (or a superseding Revenue Procedure) for the current list of countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to exchange information within the meaning of section 6103(k)(4).

(b) Corporate distributions. The entire amount of a corporate distribution (whether actual or deemed) must be reported, regardless of any estimate of the part of the distribution that represents a taxable dividend. Any distribution, however, that is treated as gain from the redemption of stock is not an amount subject to withholding.

(c) Interest. This includes the part of a notional principal contract payment that is characterized as interest.

(d) Rents.

(e) Royalties.

(f) Compensation for independent personal services performed in the United States.

(g) Compensation for personal services performed in the United States (but only if the beneficial owner is claiming treaty benefits).

(h) Annuities.

(i) Pension distributions and other deferred income.

(j) Most gambling winnings.

(k) Cancellation of indebtedness. Effectively connected income (ECI).

(l) Notional principal contract income.

(m) Insurance premiums.
(n) REMIC excess inclusions.
(o) Students, teachers, and researchers. However, amounts that are exempt from tax under section 117 are not subject to reporting.
(p) Amounts paid to foreign governments, foreign controlled banks of issue, and international organizations.
(q) Foreign targeted registered obligations.
(r) Original Issue Discount (OID) from the redemption of an OID obligation.
(s) Certain dispositions of U.S. real property interests.
(t) Other U.S.-source dividend equivalent payments
(u) Guarantee of indebtedness.
(v) Specified Federal procurement payments.

6.6 Amounts That Are Not Subject to Reporting on Form 1042-S

- Interest and OID from short-term obligations.
- Registered obligations targeted to foreign markets. Reporting will be required on interest paid on any registered obligation (regardless of whether targeted to foreign markets) if the registered obligation is issued after December 31, 2015.
- Bearer obligations targeted to foreign markets. Withholding is required on interest paid on any bearer obligations targeted to foreign markets if the obligation is issued after March 18, 2012.
- Notional principal contract payments that are not ECI.
- Accrued interest and OID.
- Certain withholdable payments. Withholdable payments not subject to reporting for chapter 3 purposes (other than bank deposit interest paid to certain nonresident aliens) are not required to be reported if withholding is not applied (or required to be applied) under chapter 4.

6.7 How Are Disregarded Entities Reported?

If a U.S. withholding agent makes a payment to a disregarded entity (other than a limited branch of an FFI) that is not a hybrid entity making a treaty claim, and receives a valid Form W-8BEN-E or W-8ECI from a foreign person that is the single owner of the disregarded entity, the withholding agent must file a Form 1042-S in the name of the foreign single owner. The taxpayer identifying number (TIN) on the Form 1042-S, if required, must be the foreign single owner’s TIN.

Example. WA, a withholding agent, makes a withholdable payment of interest to LLC, a foreign limited liability company that is not an FFI. LLC is wholly-owned by FC, a foreign corporation that is an excepted non-financial foreign entity. LLC is treated as a disregarded entity. WA has a Form W-8BEN-E from FC on which it states that it is the beneficial owner of the income paid to LLC. WA reports the interest payment on Form 1042-S showing FC as the recipient. The result would be the same if LLC was a domestic entity.
6.8 How Are Amounts paid to a NQI or Flow-Through Entity Reported?

If a U.S. withholding agent makes a payment to an NQI or a flow-through entity (other than a nonparticipating FFI) with respect to a withholdable payment, it must complete a separate Form 1042-S for each recipient on whose behalf the NQI or flow-through entity acts as indicated by its withholding statement and the documentation associated with its Form W-8IMY.

Example. WA, a withholding agent, makes a withholdable payment of interest to FFI 1, a reporting model 1 FFI. FFI 1 provides WA with a valid Form W-8IMY with which it associates a withholding statement that allocates 80% of the payment to FFI 2, a participating FFI, and 20% of the payment to a pool of nonparticipating FFIs. FFI 1 also provides WA with FFI 2’s Form W-8IMY with which it associates a withholding statement that allocates 100% of the payment to recalcitrant pool-no U.S. indicia. WA must complete a Form 1042-S for the interest allocated to a pool of nonparticipating FFIs with FFI 1 as the recipient and must complete another Form 1042-S for the interest allocated to a pool of recalcitrant account holders-no U.S. indicia with FFI 2 as the recipient.

7. Treasury’s Notice 2014-33 Grants Temporary Reliefs

Treasury released Notice 2014-33 on May 2. Notice 2014-33 provides aspects of temporary relief for five areas of FATCA compliance:

1. 6 month extension (from July 1, 2014 until December 31, 2014) for characterizing as “pre-existing” the obligations (including accounts) held by an entity

2. soft-enforcement transition period 2014 and 2015 for good-faith actors

3. modification to the “standards of knowledge” for withholding agents under §1.1441-7(b)[1] for accounts documented before July 1, 2014

4. revision to the definition of a “reasonable explanation” of foreign status in §1.1471-3(e)(4)(viii)[2]

5. additional guidance for an FFI (or a branch of an FFI, including a disregarded entity owned by an FFI) that is a member of an expanded affiliated group of FFIs to be treated as a limited FFI or limited branch, including the requirement for a limited FFI to register on the FATCA registration website.

7.1 Six Month Extension To Characterize Entity Accounts As Pre-Existing Obligations

Treasury stated that industry comments indicate that the release dates of the final Forms W-8 (click on the links for analysis of the April 2014 releases of the new W-8IMY and W-8BEN-E) and accompanying instructions present practical problems for both withholding agents and FFIs to implement new account opening procedures beginning on July 1, 2014.

Thus, obligations (including accounts) held by an entity - opened, executed, or issued from July 1, 2014 until December 31, 2014 - may be treated as preexisting obligations by a withholding agent or FFI for purposes of sections 1471 and 1472 (subject to certain modifications described in section IV of Notice 2014-33).

7.2 Transition Period For Enforcement And Administration Of Compliance
The IRS will regard 2014 and 2015 as a transition period for purposes of its enforcement and administration of the due diligence, reporting, and withholding provisions under chapter 4, as well as the provisions under chapters 3 and 61, and section 3406, to the extent these rules were modified by the temporary coordination regulations.

During this transition period, the IRS will take into account the extent of good faith efforts to comply with the requirements of the chapter 4 regulations and the temporary coordination regulations by

- a participating or deemed-compliant FFI,
- direct reporting NFFE,
- sponsoring entity,
- sponsored FFI,
- sponsored direct reporting NFFE, or
- withholding agent.

The IRS will take into account whether a withholding agent has made reasonable efforts during the transition period to modify its account opening practices and procedures to document the chapter 4 status of payees, apply the standards of knowledge provided in chapter 4, and, in the absence of reliable documentation, apply the presumption rules of §1.1471-3(f).

Additionally, for example, the IRS will consider the good faith efforts of a participating FFI, registered deemed-compliant FFI, or limited FFI to identify and facilitate the registration of each other member of its expanded affiliated group as required for purposes of satisfying the expanded affiliated group requirement under §1.1471-4(e)(1).

The IRS will not regard calendar years 2014 and 2015 as a transition period with respect to the requirements of chapters 3 and 61, and section 3406, that were not modified by the temporary coordination regulations. For example, the IRS will not provide transitional relief with respect to its enforcement regarding a withholding agent’s determinations of the character and source of payments for withholding and reporting purposes.

7.3 Modification To The Standards Of Knowledge For Withholding Agents

Treasury intends to amend the temporary coordination regulations to provide that a direct account holder will be considered documented pursuant to the requirements of §1.1441-1(e)(4)(ii)(A) prior to July 1, 2014, without regard to whether the withholding agent obtains renewal documentation for the account holder on or after July 1, 2014. Therefore, a withholding agent that has documented a direct account holder prior to July 1, 2014, is not required to apply the new reason to know standards relating to a U.S. telephone number or U.S. place of birth until the withholding agent is notified of a change in circumstances with respect to the account holder’s foreign status other than renewal documentation or reviews documentation for the account holder that contains a U.S. place of birth.

The temporary coordination regulations also provide a transitional rule to allow a withholding agent that has previously documented the foreign status of a direct account holder for chapters 3 and 61 purposes prior to July 1, 2014, to continue to rely on such documentation without regard to whether the withholding agent has a U.S. telephone number or U.S. place of birth for the account holder. The withholding agent would, however, have reason to know that the documentation is unreliable or incorrect if the withholding agent is notified of a change in circumstances with respect to the account holder’s foreign status or the withholding agent reviews documentation for the account holder that contains a U.S. place of birth.
7.4 Revision Of The Definition Of Reasonable Statement

Commentators have noted that the description of a reasonable explanation of foreign status in the final chapter 4 regulations differs from the description provided in the temporary coordination regulations. Treasury and the IRS intend to amend the final chapter 4 regulations to adopt the description of a reasonable explanation of foreign status provided in the temporary coordination regulations, which permit an individual to provide a reasonable explanation that is not limited to an explanation meeting the requirements of §1.1471-3(e)(4)(viii)(A) through (D).

(viii) Reasonable explanation supporting claim of foreign status. A reasonable explanation supporting a claim of foreign status for an individual means a written statement prepared by the individual (or the individual’s completion of a checklist provided by the withholding agent), stating that the individual meets one of the requirements of paragraphs (e)(4)(viii)(A) through (D).

(A) The individual certifies that he or she—
(1) Is a student at a U.S. educational institution and holds the appropriate visa;
(2) Is a teacher, trainee, or intern at a U.S. educational institution or a participant in an educational or cultural exchange visitor program, and holds the appropriate visa;
(3) Is a foreign individual assigned to a diplomatic post or a position in a consulate, embassy, or international organization in the United States; or
(4) Is a spouse or unmarried child under the age of 21 years of one of the persons described in paragraphs (e)(4)(viii)(A) through (C) of this section;

(B) The individual provides information demonstrating that he or she has not met the substantial presence test set forth in § 301.7701(b)-1(c) of this chapter (for example, a written statement indicating the number of days present in the United States during the 3-year period that includes the current year);

(C) The individual certifies that he or she meets the closer connection exception described in § 301.7701(b)-2, states the country to which the individual has a closer connection, and demonstrates how that closer connection has been established; or

(D) With respect a payment entitled to a reduced rate of tax under a U.S. income tax treaty, the individual certifies that he or she is treated as a resident of a country other than the United States and is not treated as a U.S. resident or U.S. citizen for purposes of that income tax treaty.

7.5 Limited FFIs And Limited Branches

While Treasury stands ready and willing to negotiate IGAs based on the published models, commentators have expressed practical concerns about the status of FFIs and branches of FFIs in jurisdictions that are slow to engage in IGA negotiations and that have legal restrictions impeding their ability to comply with FATCA, including the conditions for limited FFI or limited branch status under the chapter 4 regulations. Specifically, comments have noted that the restrictions imposed by the final chapter 4 regulations on a limited branch or limited FFI on opening any account that it is required to treat as a U.S. account or as held by a nonparticipating FFI hinders the ability of an FFI to agree to the conditions of limited status due, for example, to requirements under local law to provide individual residents with access to banking services or to the business needs of the FFI to secure funding from another FFI in the same jurisdiction with similar impediments to complying with the requirements of FATCA.

Treasury and the IRS intend to amend the final chapter 4 regulations to permit a limited FFI or limited branch to open U.S. accounts for persons resident in the jurisdiction where the limited branch or limited FFI is located, and accounts for nonparticipating FFIs that are resident in that jurisdiction, provided that the limited FFI or limited branch does not solicit U.S. accounts from persons not resident in, or accounts held by nonparticipating FFIs that are not established in, the jurisdiction where the FFI (or branch) is located and the FFI (or branch) is not used by another FFI in its expanded affiliated group to circumvent
the obligations of such other FFI under section 1471. This modification is consistent with the treatment of related entities and branches provided in the model IGAs.

Registration of Limited FFIs

Commentators have also stated that certain jurisdictions are explicitly prohibiting an FFI resident in, or organized under the laws of, the jurisdiction from registering with the IRS and agreeing to any status, including status as a limited FFI, regardless of whether the FFI would otherwise be able to comply with the requirements of limited FFI status.

Treasury and the IRS intend to amend the final chapter 4 regulations to provide that, if an FFI is prohibited under local law from registering as a limited FFI, the prohibition will not prevent the members of its expanded affiliated group from obtaining statuses as participating FFIs or registered deemed-compliant FFIs if the first-mentioned FFI is identified as a limited FFI on the FATCA registration website by a member of the expanded affiliated group that is a U.S. financial institution or an FFI seeking status as a participating FFI (including a reporting Model 2 FFI) or reporting Model 1 FFI.

In order to identify the limited FFI, the member of the expanded affiliated group will be required to register as a Lead FI with respect to the limited FFI and provide the limited FFI’s information in Part II of the FATCA registration website. If the Lead FI is prohibited from identifying the limited FFI by its legal name, it will be sufficient if the Lead FI uses the term “Limited FFI” in place of its name and indicates the FFI’s jurisdiction of residence or organization.

By identifying a limited FFI in the FATCA registration website, the Lead FI is confirming that:

(1) the FFI made a representation to the Lead FI that it will meet the conditions for limited FFI status,

(2) the FFI will notify the Lead FI within 30 days of the date that such FFI ceases to be a limited FFI because it either can no longer comply with the requirements for limited status or failed to comply with these requirements, or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI and will separately register, to the extent required, to obtain its applicable chapter 4 status, and

(3) the Lead FI, if it receives such notification or knows that the limited FFI has not complied with the conditions for limited FFI status or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI will, within 90 days of such notification or acquiring such knowledge, update the information on the FATCA registration website accordingly and will no longer be required to act as a Lead FI for the FFI.

In the case in which the FFI can no longer comply or failed to comply with the requirements of limited FFI status, the Lead FI must delete the FFI from Part II of the FATCA registration website and must maintain a record of the date on which the FFI ceased to be a limited FFI and the circumstances of the limited FFI’s non-compliance that will be available to the IRS upon request.

8. July 1st FATCA FFI List Analysis by Country and by IGA

The registration of 82,994 FFIs (approx. 95%) from the 98 IGA countries (as of July 3, 2014) was only due by December 31. But only 4,318 FFI (5%) registered from the remaining 152 countries and dependencies – these countries’ FFI registration due on this list. Based on these current July 1st figures,
FATCA registration (indicative of compliance) is running at between 15% and 20% of entities subject to registration.

8.1 Why is the Range for Potential FFI Registration so Expansive?

Some industry stakeholders claim the registration compliance may be as low as 10% FFI registration based on the definition of FFI including many underlying trusts entities of trust companies, and strings of passive NFFEs in a complex company structure.

Given the broad definition of financial institution that requires a FATCA GIIN for the W-8BEN-E or other appropriate W-8, such as W-8IMY, the UK HMRC estimated that, even with its IGA and accompanying local regulations, 75,000 UK entities are impacted by FATCA. Yet, only 6,994 have registered from the UK, and only 730 additional FFI since the June 2nd list of 6,264 registrations. Granted that the UK FFI has until October 25th to register pursuant to HMRC announcement (albeit January 1st under the FATCA regulations). If the UK has 75,000 or even just half that entities requiring FFI registration, then extrapolated among other large and sophisticated financial service economies like Japan, China, Germany etc. – clearly, more than 500,000 entities will need to inevitably register. The question is: how many more?

8.2 What is the Definition of Financial Institution?

The definition of ‘financial institution’ is very broad. Thus, entities and firms that may not traditionally (such as a banking enterprise or investment fund) be considered a financial institution are subject to FATCA registration and reporting – such as trust companies, certain insurance companies, holding companies, treasury centers. Moreover, the industry, especially the trust industry, is experiencing some confusion over which entities must register as an FFI, and which do not need to register, or are instead an NFFE.

FFIs are primarily banking and financial institutions, as well as certain investment entities, which are defined by FATCA and separated into three broad categories: (i) primarily traditional banks that accept deposits and perform related banking services in their ordinary course of business, (ii) entities a substantial part of the business of which involves holding financial assets for others, and (iii) entities engaged in the business of investing, reinvesting, and trading in securities, partnership interests, commodities, derivatives, and other passive financial assets.

The first category of FFI describes traditional banks. This FFI is defined as a financial institution that accepts deposits in the ordinary course of a banking or similar business. An entity is engaged in a “banking or similar business” if the entity:

- accepts deposits or similar investments of funds;
- makes personal, mortgage, industrial, or other loans;
- provides credit extension;
- purchases, sells, discounts, or negotiates account receivables, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- issues letters of credit and negotiates drafts drawn on accounts;
- provides trust or fiduciary services;
- finances foreign exchange transactions; or
- enters into, purchases, or disposes of finance leases or leased assets.

The second category of FFI captures “asset holding” companies. This type of FFI holds financial assets for the account of others as a “substantial” portion of its business. An entity is an asset holding company if more than 20 percent of its gross income is from holding financial assets and related financial services during a three-year period ending on December 31 of the year preceding that in which the determination is made (or the period of the entity’s existence, if shorter).
The final category of FFI captures “investment funds”, and is broadly defined. Thus, this category includes certain securitization vehicles, certain pension funds, and can potentially include certain other private structures that hold investments such as trusts and underlying holding companies. This category of FFI is primarily engaged in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including futures or forward contracts or options). An investment entity is primarily engaged in one or more of the following activities:

- trading in money market instruments, foreign currency, foreign exchange, interest rates, index instruments, transferable securities, or commodity futures;
- managing individual or collective portfolios;
- investing, administering or managing funds, money, or financial assets on behalf of others; or
- functioning as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle.

An entity is primarily engaged in these activities if more than 50% of its gross income is from such activities during a three-year period.

**Example of an Investment Advisor.** A Fund Manager is an investment entity that organizes and manages various types of funds including Fund A. Fund A invests primarily in equities. An Investment Advisor (a foreign entity) is hired by the Fund Manager to advise and provide discretionary management of a portion of the financial assets held by Fund A. More than 50% of the Investment Advisor’s gross income was earned for the last three years from providing similar services. The Investment Advisor is an investment entity as described in this section and an FFI as well since it primarily conducts a business of managing financial assets on behalf of clients.

**Example of a Trust managed by a Trust Company.** On January 1, 2013, a Trust (a nongrantor foreign trust) was formed by X (an individual) for the benefit of his or her children. The Trustee (a Trust Company) was appointed by X to act as the Trustee. A Trust Company is an FFI. Under the terms of the Trust Instrument, the Trust Company manages the assets of the Trust as Trustee for the benefit of X’s children. Because the Trust is managed by a FFI (the Trust Company), the Trust is an investment entity, and an FFI.

Trust compliance and FATCA expert Peter Cotorceanu (and Lexis FATCA Compliance Guide author) has raised four interesting issues with the last example, being:

1. Is the “Managed By” test met if some but not all a trust managers are depository institutions, custodial institutions, specified insurance companies, or Type A IEs, e.g., a trust with a commercial trust company serving a co-trustee with an individual?
2. Is the “Managed By” test met if some but not all of a trust’s investments are managed by depository institutions, custodial institutions, specified insurance companies, or IEs, e.g., a trust with one account managed by a bank and other accounts managed by an individual?
3. How is a trust classified if it meets the “Managed By” test for only part of a year, e.g., because a commercial trust company is replaced by an individual as trustee, or a bank is replaced by an individual as asset manager?
4. Does a trust holding, its only asset the share of an underlying company (“UC”), meet the “Managed By” test if the UC’s assets are professionally managed but the trust is not (i.e., the trustee is an individual)?

### 8.4 FATCA FFI Registration by Country and by IGA

(as of July 2nd)

IGAs: 98
Model 1: 85
Non-IGAs: $250 - 98 = 152$ countries for withholding from July 1, 2014

Registered: 87,993 (July 1st) (an increase of approximately 10,000 from 77,353 of June 2nd)  
FFI/branches from 250 countries/jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>July FFI #</th>
<th>IGA Scenario</th>
<th>Signed/Substance</th>
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<td>WEST BANK AND GAZA</td>
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<tr>
<td>Grand Total</td>
<td>87,993</td>
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<td>IRS Registered FFI List (Sum of Registrations)</td>
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<td>4,318</td>
<td>144</td>
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</tr>
<tr>
<td>Total</td>
<td>87,993</td>
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<td>Notes 1, 2 &amp; 3</td>
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<td>94%</td>
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<td>US and US Territories</td>
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<td>6</td>
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<tr>
<td></td>
<td>2%</td>
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</tr>
</tbody>
</table>

There is only 1 jurisdiction with an IGA that has zero registrations: Kosovo, implying that registration is a lead indicator of an IGA being signed.

Note 1

This does not include:


Note 2

This does not include:
Akrotiri, Ashmore and Cartier Islands, Clipperton Island, Coral Sea Islands, Dhekelia, Jan Mayen, Paracel Islands, Spratly Islands, Svalbard

Note 3

WEST BANK AND GAZA is not on the ISO list provided by the IRS. However, the IRS have allowed use of ISO 3166-1 Code “275” on their list of approved FFIs.

FYI: The US Department of State does not recognize the Country of Palestine, much less Gaza and the West Bank. But since the IRS does for purposes of FATCA, these are included for completeness.

Complying with FATCA?

The LexisNexis® Guide to FATCA Compliance (2nd Edition) comprises 34 Chapters by 50 industry experts grouped in three parts: compliance program (Chapters 1–4), analysis of FATCA regulations (Chapters 5–16) and analysis of Intergovernmental Agreements (IGAs) and local law compliance challenges (Chapters 17–34), including intergovernmental agreements as well as the OECD’s TRACE initiative for global automatic information exchange protocols and systems. A free download of the first of the 34 chapters is available at http://www.lexisnexis.com/store/images/samples/9780769853734.pdf

8.5 IGAs

Model 1 IGA – 34 (followed by number of registered FFIs as of July 2nd)

1. Australia (4-28-2014)
2. Belgium (4-23-2014)
3. British Virgin Islands (6-30-2014) ← moved from below list
4. Canada (2-5-2014)
5. Cayman Islands (11-29-2013)
6. Costa Rica (11-26-2013)
7. Denmark (11-19-2012)
8. Estonia (4-11-2014)
9. Finland (3-5-2014)
10. France (11-14-2013)
11. Germany (5-31-2013)
12. Gibraltar (5-8-2014)
14. Hungary (2-4-2014)
15. Honduras (3-31-2014)
16. Ireland (1-23-2013)
17. Isle of Man (12-13-2013)
18. Israel (6-30-2014) ← moved from below list
19. Italy (1-10-2014)
20. Jamaica (5-1-2014)
22. Latvia (6-27-2014):
23. Liechtenstein (5-19-2014)
24. Luxembourg (3-28-2014)
25. Malta (12-16-2013)
27. Mexico (4-9-2014)
29. New Zealand (6-12-2014)
30. Norway (4-15-2013)
31. Slovenia (6-2-2014)
32. South Africa (6-9-2014)
33. Spain (5-14-2013)
34. United Kingdom (9-12-2012)

Jurisdictions that have reached agreements in substance:

Model 1 IGA – 52

1. Algeria (6-30-2014) <– new entry
2. Antigua and Barbuda (6-3-2014)
3. Azerbaijan (5-16-2014)
4. Bahamas (4-17-2014)
5. Bahrain (6-30-2014) < – new entry
7. Belarus (6-6-2014)
8. Brazil (4-2-2014):
9. Bulgaria (4-23-2014)
10. Cabo Verde (6-30-2014) <– new entry
11. China (6-26-2014) <– new entry
12. Colombia (4-23-2014)
13. Croatia (4-2-2014)
14. Curaçao (4-30-2014)
15. Czech Republic (4-2-2014)
16. Cyprus (4-22-2014)
17. Dominica (6-19-2014):
18. Dominican Republic (6-30-2014) <– new entry
19. Georgia (6-12-201)
20. Greenland (6-29-2014) <– new entry
21. Grenada (6-16-2014)
22. Guyana (6-24-2014) <– new entry
23. Haiti (6-30-2014) <– new entry
24. India (4-11-2014)
25. Indonesia (5-4-2014):
26. Kosovo (4-2-2014)
27. Kuwait (5-1-2014)
28. Lithuania (4-2-2014)
29. Malaysia (6-30-2014) <– new entry
30. Montenegro (6-30-2014) <– new entry
31. Panama (5-1-2014)
32. Peru (5-1-2014):
33. Poland (4-2-2014):
34. Portugal (4-2-2014):
35. Qatar (4-2-2014):
36. Romania (4-2-2014):
37. St. Kitts and Nevis (6-4-2014)
38. St. Lucia (6-12-2014):
39. St. Vincent and the Grenadines (6-2-2014)
40. Saudi Arabia (6-24-2014):
41. Serbia (6-30-2014)
42. Seychelles (5-28-2014)
43. Singapore (5-5-2014):
44. Slovak Republic (4-11-2014)
45. South Korea (4-2-2014)
46. Sweden (4-24-2014)
47. Thailand (6-24-2014):
48. Turkey (6-3-2014)
49. Turkmenistan (6-3-2014)
50. Turks and Caicos Islands (5-12-2014): 
51. Ukraine (6-26-2014) < – new entry
52. United Arab Emirates (5-23-2014)

Model 2 IGA – 5

1. Austria (4-29-2014)
2. Bermuda (12-19-2013)
3. Chile (3-5-2014)
4. Japan (6-11-2013)
5. Switzerland (2-14-2013)

Jurisdictions that have reached agreements in substance:

Model 2 IGA – 8

1. Armenia (5-8-2014)
2. Hong Kong (5-9-2014)
3. Iraq (6-30-2014) < – new entry
4. Moldova (6-30-2014) < – new entry
5. Nicaragua (6-30-2014)
6. Paraguay (6-6-2014):
7. San Marino (6-30-2014) < – new entry
8. Taiwan (6-23-2014)

9. **FATCA Corrections Released June 30th – Withholding On 152 Countries Began July 1st**

9.1 What FATCA Withholding Corrections Did the IRS Publish June 30th?

Corrections for Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities: [http://www.ofr.gov/(S(4m13pp0czfmzywl2cfjdpwn))/OFRUpload/OFRData/2014-15465_PI.pdf](http://www.ofr.gov/(S(4m13pp0czfmzywl2cfjdpwn))/OFRUpload/OFRData/2014-15465_PI.pdf)

“As published, the final and temporary regulations contain a number of items that need to be corrected or clarified. Several citations and cross references are corrected. The correcting amendments also include the addition, deletion, or modification of regulatory language to clarify the relevant provisions to meet their intended purposes or for consistency with other related provisions of these regulations. The addition of final regulatory language only includes language that was inadvertently removed in the final and temporary regulations.”

9.2 Are All Systems Go for 30% FATCA Withholding from July 1st?
Yes, FATCA went “live” on Tuesday, July 1 with the 30% withholding on all withholdable payments to nonparticipating FFIs in the 152 non-IGA countries/jurisdictions as of July 1st.

9.3 What Additional FFIs Were Included On The July 1st List?
FFIs that registered by June 3rd. The IRS states the following on its FATCA Registration Portal: “the IRS believes it can ensure registering FFIs that their GIINs will be included on the July 1 IRS FFI List if their registrations are finalized by June 3, 2014.”

(See Notice 2014-17, page 6: “FFIs that finalize their registrations after … June 3 may still be included on the … July 1 IRS FFI List; however, the IRS cannot provide assurance that this will be the case.”)

Most commentators expect a rush of over 300,000 FFI registrations by the end of 2014. Some predict more than a half million entities must still register, based on the UK’s HMRC estimate that 75,000 entities are impacted by FATCA within the United Kingdom (where less than 6,300 are currently registered on the GIIN list). Withholding on IGA jurisdiction non-compliant FFIs only begins January 1st.

9.4 What About FFIs That Registered On June 30th?
The IRS has allowed a 90 day safeguard for FFIs when a GIIN has been applied for but not yet received.

§1.1471-3(e)(3) Participating FFIs and registered deemed-compliant FFIs—(i) In general. … A payee whose registration with the IRS as a participating FFI or a registered deemed-compliant FFI is in process but has not yet received a GIIN may provide a withholding agent with a Form W-8 claiming the chapter 4 status it applied for and writing “applied for” in the box for the GIIN. In such case, the FFI will have 90 calendar days from the date of its claim to provide the withholding agent with its GIIN and the withholding agent will have 90 calendar days from the date it receives the GIIN to verify the accuracy of the GIIN against the published IRS FFI list before it has reason to know that the payee is not a participating FFI or registered deemed-compliant FFI. … (emphasis added).

9.5 When Must FFIs In IGA Countries Register?
Financial institutions (FFIs) in the 90 IGA countries have an extension to register with the IRS in order to obtain a GIIN and thus appear on the IRS’ FATCA compliant list. FATCA 30% withholding for FFIs in these Model 1 IGA countries and jurisdictions only begins January 1, 2015.

See Reg. § 1.1471-3(d)(4)(iv)(A): § 1.1471-3(d)(4)(iv) Exceptions for payments to reporting Model 1 FFIs.— (A) For payments made prior to January 1, 2015, a withholding agent may treat the payee as a reporting Model 1 FFI if it receives a withholding certificate from the payee indicating that the payee is a reporting Model 1 FFI and the country in which the payee is a reporting Model 1 FFI, regardless of whether the certificate contains a GIIN for the payee.

In its January 6, 2014 Announcement 2014-1 (IRB 2014-2), the IRS stated:
Thus, while reporting Model 1 FIs will be able to register and obtain GIINs on or after January 1, 2014, they will not need to register or obtain GIINs until on or about December 22, 2014, to ensure inclusion on the IRS FFI list by January 1, 2015. (emphasis added)

However, at least one IGA country is suggesting an earlier (perhaps more prudent) date than December 22, 2014 for GIIN registration in order to be included on the IRS’ last 2014 FATCA compliant list. The United Kingdom’s Law Society and Institute of Chartered Accountants in May 2014 published combined guidance to members stating:

To ensure that the registration has been processed in time for inclusion on that list the last practical date for registration is 25 October 2014.

3,778 Lead Entities of EAGs among the approximately 88,000 FFI registrations from 250 countries. Haydon Perryman, FATCA Compliance expert of Strevus, and I are undertaking an analysis of this July 1st FATCA FFI list release by country and by IGA, and now by EAG. Haydon has put together the below chart based upon the excel formulae he created. Check out Haydon Perryman’s FATCA blog at http://haydonperryman.wordpress.com/

10. FATCA EAG Definition

The FFI and its branches and affiliates are defined as an “expanded affiliated group” (“EAG”). An entity is a part of an EAG if it is affiliated with a common parent that directly or indirectly owns over 50% of the stock by vote and value of such corporation, or in the case of a partnership or non-corporate entity, owns over 50% by value of the beneficial interest of such partnership or non-corporate entity. [1]

Subject to certain phase-in provisions regarding “Limited Branches” and “Limited Affiliates, discussed below, each FFI that is a member of an EAG must obtain the status of either a PFFI or RDCFFI before any of the other group members are able to obtain the benefit of either such status. Said another way, one bad apple poisons the barrel, and leads to FATCA withholding for all.

Except to the extent that the rules allowing limited branches and limited affiliates apply (described below the chart), each member of an EAG (including all of its branches, units, offices, and divisions) must conduct due diligence on its accounts, enact FATCA policies and procedures, abide by the terms of the FFI-agreement, and close U.S. accounts if the holder fails to provide required disclosure and reporting information.

10.1 EAG Registered by Country and by IGA

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<th>Country</th>
<th>Model 1A IGA</th>
<th>Model 1B IGA</th>
<th>Model 2 IGA</th>
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### 10.2 Limited Branches and Affiliates Exceptions Under Regs

A FFI is, however, allowed to be a PFFI even if one or more of its branches cannot satisfy all of the requirements of an FFI-agreement under important exceptions to the general rule regarding “limited branch” and “limited FFI affiliates”.

An FFI is permitted to obtain “participating FFI” status if one or more of its branches are non-compliant under the “limited branch” exception. The limited branch exception applies to those FFIs that are in a jurisdiction that has applicable law that prohibits the FFI from reporting, closing, or transferring U.S. accounts, or withholding, closing, blocking, or transferring recalcitrant or nonparticipating FFI accounts. In such case, the limited branch is treated as a “nonparticipating FFI” even though it is an affiliated branch of the “participating FFI.” The other branches with “participating FFI” status must withhold on payments to the limited branch. The limited branch must not open U.S. accounts and must identify itself as a “nonparticipating FFI” to withholding agents.

The exception to the EAG requirements for “limited FFI” affiliates is similar to the regulatory scheme for limited branches. Under the relevant transition rule, a “participating FFI” may be permitted to have an
affiliated FFI that is not compliant with FATCA until December 31, 2015 provided that such affiliates are separately identified as a nonparticipating FFI and the PFFI agrees to withhold on payments it makes to, or receives on behalf of, that branch or affiliate and agrees to report (or provide sufficient information to its U.S. withholding agents to allow them to report) payments made to these limited branches and affiliates as required on Forms 8966 or 1042/1042-S.

A Reporting Model IGA FFI may continue to treat branches and affiliates as compliant under the limited branch and limited FFI exceptions even after the expiration of the transitional rule, provided that the branch or affiliate is still unable to comply with FATCA due to restrictions under local law and the Reporting Model FFI continues to comply with its obligations under the IGA with respect to such limited branches or affiliates.

11. Update on Globalization of FATCA (“GATCA”) by Common Reporting Standards (“CRS”)

47 countries and major financial centers on May 6, 2014 committed to automatic exchange of information between their jurisdictions, announced the OECD. All 34 OECD member countries, as well as Argentina, Brazil, China, Colombia, Costa Rica, India, Indonesia, Latvia, Lithuania, Malaysia, Saudi Arabia, Singapore and South Africa endorsed the Declaration on Automatic Exchange of Information in Tax Matters that was released at the May 6-7, 2014 Meeting of the OECD at a Ministerial Level.

G20 governments have mandated the OECD-hosted Global Forum on Transparency and Exchange of Information for Tax Purposes to monitor and review implementation of the standard. More than 60 countries and jurisdictions of the 121 Global Forum members have now committed to early adoption of the standard, and additional members are expected to join this group in the coming months. See the link for Country Peer Reviews and the Global Forum list of ratings chart.

The Declaration commits countries to implement a new single global standard on automatic exchange of information ( “CRS” or “GATCA”). The OECD stated that it will deliver a detailed Commentary on the new standard, as well as technical solutions to implement the actual information exchanges, during a meeting of G20 finance ministers in September 2014. The Declaration contains the following statements:

“2. CONFIRM that automatic exchange of financial account information will further these objectives particularly if the new single global standard, including full transparency on ownership interests, is implemented among all financial centres;

3. ACKNOWLEDGE that information exchanged on the basis of the new single global standard is subject to appropriate safeguards including certain confidentiality requirements and the requirement that information may be used only for the purposes foreseen by the legal instrument pursuant to which it is exchanged;

4. ARE DETERMINED to implement the new single global standard swiftly, on a reciprocal basis. We will translate the standard into domestic law, including to ensure that information on beneficial ownership of legal persons and arrangements is effectively collected and exchanged in accordance with the standard;”

11.1 Common Reporting and Due Diligence Standards (“CRS”)


The CRS calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions. Part I of the report gives an overview of the standard. Part II contains the text of the Model
Competent Authority Agreement (CAA) and the Common Reporting and Due Diligence Standards (CRS) that together make up the standard.

Presenting the new standard back in February 2014, OECD Secretary-General Angel Gurría said: “This is a real game changer. Globalisation of the world’s financial system has made it increasingly simple for people to make, hold and manage investments outside their country of residence. This new standard on automatic exchange of information will ramp up international tax co-operation, putting governments back on a more even footing as they seek to protect the integrity of their tax systems and fight tax evasion.”

11.2 What Are The Main Differences Between The CRS And FATCA?

The CRS consists of a fully reciprocal automatic exchange system from which US specificities have been removed. For instance, it is based on residence and unlike FATCA does not refer to citizenship. Terms, concepts and approaches have been standardized allowing countries to use the system without having to negotiate individual Annexes.

Unlike FATCA the CRS does not provide for thresholds for pre-existing individual accounts, but it includes a residence address test building on the EU savings directive. The CRS also provides for a simplified indicia search for such accounts. Finally, it has special rules dealing with certain investment entities where they are based in jurisdictions that do not participate in the automatic exchange under the standard.

11.3 Single Global Standard For Automatic Exchange (“GATCA”)

Under GATCA jurisdictions obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. Part I of this report gives an overview of the standard. Part II contains the text of the Model Competent Authority Agreement (CAA) and the Common Reporting and Due Diligence Standards (CRS) that together make up the standard.

The Report sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

To prevent taxpayers from circumventing the CRS it is specifically designed with a broad scope across three dimensions:

1. The financial information to be reported with respect to reportable accounts includes all types of investment income (including interest, dividends, income from certain insurance contracts and other similar types of income) but also account balances and sales proceeds from financial assets.
2. The financial institutions that are required to report under the CRS do not only include banks and custodians but also other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies.
3. Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.

The CRS also describes the due diligence procedures that must be followed by financial institutions to identify reportable accounts.
12. EU Council Announces March 2014 Adoption of Expanded EU Savings Directive

On Saturday, March 22, 2014 the EU Council’s General Secretariat announced that it will adopt major amendments to the EU Directive on taxation of savings income. That Monday, March 24, the EU Commission adopted amendments to expand the application of the EU Savings Directive. The amendments address the current loopholes, such as application to trusts, to foundations, and to investment income that is comparable to interest income. By January 2016 each EU State must adopt national legislation enacting the directive within its system, and implement the directive by January 1, 2017. See the EU Commission's Presentation Powerpoint.

12.1 Brief Background on EU Savings Directive

The liberalization of capital markets and the free movement of capital within the EU borders revealed how important it was to establish cooperation with a view to preventing, in the direct taxation area, fraud and evasion linked to cross-border financial investments. The problem with taxpayers moving their investments to Member States which did not impose taxation at source while the taxpayers simultaneously under-reported to their respective State of residence (or not reporting at all) the income earned. The EU Savings Directive was adopted to address this situation, coming into effect in 2005.

The mechanism of the Directive works by imposing an obligation to any paying agent in an EU Member State which makes a payment to an individual resident in the other Member State which is the beneficial owner of the income, to report that payment of interest to the competent tax authorities of the Member State in which the paying agent is established. The competent tax authorities of that (source) State in turn transfer the information collected to the competent tax authority of the residence of the beneficial owner. Based on the information received it is possible for the State of residence of the beneficial owner to verify if the amount is declared for tax purposes and to tax the corresponding income.

12.2 Loopholes Reported in 2008

In his 2004 Report on the Regulatory, Competitive, Economic and Socio-Economic Impact of the European Union Code of Conduct on Business Taxation and Tax Savings Directive to the United Kingdom Foreign and Commonwealth Office and the Overseas Territories of The Virgin Islands (British), Turks & Caicos Islands, Anguilla and Montserrat, Professor William Byrnes undertook an in-depth analysis of the EU Savings Directive identifying several loopholes that would require later amendments for it to achieve its objectives.

The Savings Directive loopholes include:

• Territorial scope: It is limited to intra-community situations in which a paying agent from one Member State pays to an individual resident in another Member State. It does not apply to payments from outside the EU, i.e. when the paying agent is located in a third (non-EU) State or to payments to beneficial owners who reside in third States.

• Personal scope: it does not apply to persons other than individuals, in particular payments made to legal entities. This limitation provides individuals with opportunities to circumvent the Savings Directive by using an interposed legal person or arrangement.

• Material scope: it does not cover other forms of savings like insurance products, pensions, some tailored investment funds, return on derivative contracts, structured products, etc.
These and other loopholes have been formally reported by the European Commission since 2008. The main findings of a report produced by the Commission identified as a major problem lack of “consistent treatment of other comparable situations”. Pursuing this aim of consistency requires that interest payments obtained by an individual through intermediate vehicles are consistently put on an equal footing with interest payments directly received by the individual. This consistency of coverage is required not only to ensure the effectiveness of the Directive, but also compliance with the rules of the internal market and fair competition between comparable financial products and structures.

A proposal was submitted to the Council which aimed at extending the scope of the Directive.

12.3 European Council Announces Amended Savings Directive Adoption in March 2014

On March 22, 2014 the European Council reported in a press release that (emphasis added):

The European Council welcomes the Commission’s report on the state of play of negotiations on savings taxation with European third countries (Switzerland, Liechtenstein, Monaco, Andorra and San Marino) and calls on those countries to commit fully to implementing the new single global standard for automatic exchange of information, developed by the OECD and endorsed by the G20, and to the early adopters initiative.

The European Council calls on the Commission to carry forth the negotiations with those countries swiftly with a view to concluding them by the end of the year, and invites the Commission to report on the state of play at its December meeting. If sufficient progress is not made, the Commission’s report should explore possible options to ensure compliance with the new global standard.

The European Council invites the Council to ensure that, with the adoption of the Directive on Administrative Cooperation by the end of 2014, EU law is fully aligned with the new global standard.

12.4 What About the Withholding Exception for Austria and Luxembourg?

While most Member States adopted the exchange of information regime provided in the 2005 Savings Directive, three Member States with a tradition of bank secrecy—Belgium, Luxembourg and Austria—preferred to adopt, during a transitional period, a withholding tax regime. They were authorized to adopt a withholding tax (now 35%) on interest income that is paid to individual savers resident in other EU Member States. In the meantime Belgium decided to discontinue applying the transitional withholding tax as of 1 January 2010 and exchange information instead.

Therefore, only Luxembourg and Austria are currently entitled to levy a withholding tax. Luxembourg has notified the EU Commission that from next year, January 1, 2015 it will discontinue applying the transitional withholding tax and thus begin automatically exchanging information for applicable accounts from that date.

Thus, only Austria has expressed that it will maintain the withholding tax option. Austria’s finance minister is quoted in April 2013 stating: “All this data exchange will not put one red cent in my tax coffers, .... I want to have the money, not a data cemetery.” However, in light of the Council’s press release on Saturday, this position has probably changed.

The Austria’s Chancellor had also indicated that Austria may begin automatic exchange regarding the interest from savings accounts beginning 2014. Although this statement is different from the Luxembourg commitment towards automatic exchange of information, it would not be surprising that
Austria will soon also endorse this automatic exchange standard within the scope of applying the Savings Directive, in light of FATCA, GATCA, and the Council’s press release.

13. Non Prosecution Agreements (“NPA”) For Banks

13.1 Swisspartners Enters into Non Prosecution Agreement and Turns Over 110 US clients’ account information

The Tax Division of the US Department of Justice (DOJ) and the IRS’ Criminal Investigation (IRS-CI) announced a major victory in their joint campaign “… to identify U.S. tax cheats who have hidden behind phony offshore trusts and foundations,” said Deputy Attorney General Cole in the Friday, May 9, 2014 release by the DOJ’s Office of Public Affairs.

“This office will continue to work aggressively to hold accountable not only those U.S. taxpayers who evade their tax obligations by hiding money overseas, but also those abroad who make such tax evasion possible,” said U.S. Attorney Bharara.

The asset management firm, Swisspartners, entered into a non-prosecution agreement (NPA), the terms of which were verified by signature in a May 8, 2014 DOJ letter attached to the May 9th complaint filed with the New York Southern District. Almost a year ago, the DOJ reported that in July 2013 Liechtensteinische Landesbank AG, a bank based in Vaduz, Liechtenstein that owns 71% of Swisspartners, entered into a non-prosecution agreement and agreed to pay more than $23.8 million stemming from its offshore banking activities, and turned over more than 200 account files of U.S. taxpayers who held undeclared accounts at the bank.

“I am very pleased that we have successfully concluded negotiations with the Swisspartners Group,” said IRS-CI Chief Weber. “In making amends, the Swisspartners Group has turned over 110 account files relating to U.S. taxpayer-clients who maintained undeclared assets overseas….”

Swisspartners Group confessed to assisting U.S. taxpayer-clients in opening and maintaining undeclared foreign bank accounts from in or about 2001 through in or about 2011. The DOJ provided the following factors as the basis of the NPA:

- the Swisspartners Group’s voluntary implementation of various remedial measures beginning in or about May 2008;
- the Swisspartners Group’s voluntary self-reporting in 2012 of its criminal conduct at a time when it was neither a subject nor target of any investigation by the U.S. Department of Justice;
- the Swisspartners Group’s voluntary and extraordinary cooperation, including its voluntary production of account files that include the identities of U.S. taxpayer-clients;
- the Swisspartners Group’s willingness to continue to cooperate to the extent permitted by applicable law;
- the Swisspartners Group’s representation, based on an investigation by outside counsel, the results of which have been shared with the U.S. Attorney’s Office and the Tax Division, that the misconduct under investigation did not, and does not, extend beyond that described in the Statement of Facts; and
- the NPA requires the Swisspartners Group to continue to cooperate with the United States for at least three years from the date of the agreement.

The NPA requires the Swisspartners Group to forfeit $3.5 million to the United States, representing certain fees that it earned by assisting its U.S. taxpayer-clients in opening and maintaining these
undeclared accounts, and to pay $900,000 in restitution to the IRS, representing the approximate amount of unpaid taxes arising from the tax evasion by the Swisspartners Group’s U.S. taxpayer-clients from 2001 to 2011. In the complaint, Swisspartners admitted to:

1. establishing sham corporate entities whereby the clients continued to maintain control of accounts,
2. smuggling cash, in the tens of thousands, without reporting into the US to deliver to its clients, and
3. establishing sham insurance policies with premiums from undeclared sources and in which the clients continued to control the underlying investments.

On its website, Swisspartners states: "swisspartners analyzes your tax and fiscal law situation and provides structuring services at an international level – complementary to the services provided by your tax advisor in your home country." Regarding insurance policies, its website states: "swisspartners designs private-placement insurance contracts that take into account the legal and tax requirements of the countries in which the family members involved have their fiscal domiciles. Not only are our efficiently designed contracts not subject to ongoing taxation in the asset owner’s country of residence, they are also non-taxable in several other countries."

In the DOJ release statements, Deputy Attorney General Cole stated, “Swisspartners avoided criminal charges as a direct result of its decision to self-report its misconduct at a time when it was not even under investigation and its extraordinary cooperation, including its decision to turn over voluntarily the files and identities of U.S. taxpayer clients it helped hide money from the IRS. The case serves as a clear example of the benefits that can be obtained from early and complete cooperation with federal law enforcement.”

13.2 Former Credit Suisse Banker Pleads Guilty

Josef Dörig, 72, plead guilty on April 30 to conspiring to defraud the IRS in connection with his work as the owner of Dorig Partner AG, a trust company in Switzerland.

In a statement of facts filed with the plea agreement, Dörig admitted that between 1997 and 2011, while owning and operating a trust company, he engaged in a wide-ranging conspiracy to aid and assist U.S. customers in evading their income taxes by concealing assets and income in secret bank accounts held in the names of sham entities at Credit Suisse. In 1997, the Credit Suisse subsidiary spun off these sham entities into a trust company, Dorig Partner AG, owned and operated by Dorig, the Justice Department said.

Sentencing is set for Aug. 8th and Dörig faces a statutory maximum sentence of five years in prison.

In the February 21, 2014 Press Release by the US Securities and Exchange Commission (SEC) “Credit Suisse Agrees to Pay $196 Million and Admits Wrongdoing in Providing Unregistered Services to U.S. Clients”, Credit Suisse agreed to pay $196 million and admit wrongdoing to settle the SEC’s charges. According to the SEC’s order instituting settled administrative proceedings, Credit Suisse provided cross-border securities services to thousands of U.S. clients and collected fees totaling approximately $82 million without adhering to the registration provisions of the federal securities laws. Credit Suisse relationship managers traveled to the U.S. to solicit clients, provide investment advice, and induce securities transactions. These relationship managers were not registered to provide brokerage or advisory services, nor were they affiliated with a registered entity. The relationship managers also communicated with clients in the U.S. through overseas e-mails and phone calls.
13.3 Credit Suisse Congressional Hearing and Report

The seven hour hearing of the US Senate’s Permanent Subcommittee on Investigations on tax evasion associated with unreported bank accounts of Americans held about Credit Suisse in February 2014 provides a good background to understand the Justice Department indictment and guilty plea. Below I paraphrase and excerpt many intriguing statements of the hearing.

Based upon its two-year investigation, the Subcommittee reported that Credit Suisse opened Swiss accounts for over 22,000 U.S. customers with assets that, at their peak, totaled roughly $10 billion to $12 billion. The Subcommittee stated that the vast majority of these accounts were hidden from U.S. authorities and that U.S. law enforcement officials have been slow to collect the unpaid taxes or hold accountable the tax evaders and bank involved.

Sen. Carl Levin, D-Mich., the subcommittee chairman said “The Credit Suisse case study shows how a Swiss bank aided and abetted U.S. tax evasion, not only from behind a veil of secrecy in Switzerland, but also on U.S. soil by sending Swiss bankers here to open hidden accounts. In response, the Department of Justice has failed to use the U.S. legal tools that won the UBS case and has instead used treaty requests for U.S. client names, relying on Swiss courts with predictably poor results. It’s time to ramp up the collection of taxes due from tax evaders on the billions of dollars hidden offshore.”

“For too long, international financial institutions like Credit Suisse have profited from their offshore tax haven schemes while depriving the U.S. economy of billions of dollars in tax revenues by facilitating U.S. tax evasion,” said Senator John McCain, ranking member of the subcommittee. “As federal regulators begin to crack down on these banks’ illicit practices, it is imperative that they use every legal tool at their disposal to hold these banks fully accountable for willfully deceiving the U.S. government and seek penalties that will deter similar misconduct in the future.”

13.3.1 Credit Suisse Exit of U.S. Relationships

“Following our decision to prohibit former U.S. clients of UBS from transferring their assets to Credit Suisse, in August 2008, Credit Suisse promptly turned to addressing issues highlighted by the UBS situation. In October 2008, Credit Suisse decided to allow relationships with non-U.S. entities that had U.S. beneficial owners only if they demonstrated U.S. tax compliance. We hired a leading Swiss law firm to review the tax status of U.S. clients that wanted to remain. By the end of the first year of review, all but 135 relationships with assets over $10,000 had been reviewed and resolved.

In April 2009, we extended our review to U.S. resident clients. Credit Suisse transferred virtually all U.S. resident accounts to one of the Bank’s U.S.-registered affiliates, or terminated the relationships. Credit Suisse simply shut down those client relationships that were unwilling to move or that did not meet the $1 million requirement for transfer to the Bank’s U.S.-regulated affiliates. By the end of the first full year of review, 2010, we had reviewed and resolved more than 85% of U.S.-resident relationships with assets over $10,000.

To ensure that the review was comprehensive, we also manually searched for accounts that, although not identified in our systems as U.S.-linked, could possibly have some U.S. connection – for example, a U.S. phone number or address in the paper client file, or a notation of a U.S. birthplace on a foreign passport. Credit Suisse also reviewed the private banking activities of its subsidiaries, including Clariden Leu, which was a nearly wholly owned Credit Suisse subsidiary between 2007 and 2012. Clariden Leu’s review and exit projects paralleled the projects at Credit Suisse.

Credit Suisse also engaged one of the Big Four accounting firms to conduct its own review to assess whether the Bank had effectively identified the account relationships with U.S. links. This firm carefully
analyzed the Bank’s efforts – with an intense line-by-line analysis of account information – and concluded to an extremely high level of confidence that Credit Suisse had identified the complete population of U.S. account relationships. The results of this substantial effort have been presented to the Subcommittee staff.”

13.3.2 Subcommittee “Undeclared Accounts” Methodologies Unreliable, Claims Credit Suisse

“Credit Suisse repeatedly discussed with the Subcommittee staff the fact that it is impossible for us to know the tax status of assets previously held by U.S. clients if those clients did not disclose that information to the Bank. Unfortunately, the Subcommittee has chosen to speculate based on a number of “methodologies,” each of which is problematic and generates results that are, at best, unreliable. The Subcommittee’s need to reference three conflicting “methodologies” is an implicit recognition that accurate estimates of unreported U.S. client assets previously held at Credit Suisse cannot be made based on the actual information available to the Bank and to the Subcommittee.”

13.3.3 8,300 Accounts under $10,000 FBAR Reporting Requirement

“In any event, the Subcommittee assumes that every U.S. client account held abroad was undeclared. As discussed below, that is a demonstrably inappropriate assumption. Moreover, U.S. Treasury Department regulations required U.S. citizens to report foreign accounts only if the balance exceeded $10,000 at some point during the year. While the Subcommittee staff has mentioned 22,000 accounts, more than 8,300 had balances below $10,000 as of December 31, 2008.”

13.3.4 6,400 Accounts for US Expats Residing in Switzerland

“Troublingly, these estimates also lump in categories of accounts where there is every reason to believe that the client had a valid reason for holding a Swiss account. For example, the Subcommittee’s estimates of “undeclared” accounts include approximately 6,400 accounts held by all U.S. expats who would ordinarily have a need for some form of local banking services outside of the U.S. Again, it should not be ignored that most expats resided in Switzerland, and therefore had a particularly valid reason for maintaining a bank near their homes.”

13.3.5 Credit Suisse Assets Under Management

“As to Assets under Management (AuM), it should be noted that our exit projects established that an approximate amount of $5 billion of AuM was reviewed and verified for tax compliance over the years. This number includes AuM transferred to our U.S.-registered entities or closed after tax compliance was established. In addition, approximately $2.25 billion AuM lost its U.S. nexus over the years. Finally, of the accounts that were closed over the years we simply have no basis to assume that all of them were undeclared.”

13.3.6 How Much is A Lot?

It was discussed between the Senators and the representatives of Credit Suisse that the actual amount of AUM compared to Credit Suisse’s AuM was miniscule, and that such AuM contributed less than 1% to Credit Suisse’s profits. However, Senator John McCain, the minority ranking member, told the Credit Suisse representatives that, while small in the context of the bank, amounts of billions and the profits made therefrom, are large amounts to an American taxpayer if made aware of such conduct. While listening to the Senator’s assessment (and agreeing), I wondered why in contrast hundreds of billions of annual deficits up to nearly a trillion deficit, and 15, 17, perhaps 20 trillion of national debt do not seem to phase the same taxpayer referred to?
13.4 What is the Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks?

The Tax Division of the Department of Justice released a statement on December 12, 2013 that strongly encouraged Swiss banks wanting to seek non-prosecution agreements to resolve past cross-border criminal tax violations to submit letters of intent by a Dec. 31, 2013 deadline required by the Program for Non-Prosecution Agreements or Non-Target Letters (the “Program”). The Program was announced on Aug. 29, 2013, in a joint statement signed by Deputy Attorney General James M. Cole and Ambassador Manuel Sager of Switzerland (See the Swiss government’s explanation of the Program). Switzerland’s Financial Market Supervisory Authority (FINMA) had issued a deadline of Monday, December 16, 2013 for a bank to inform it with its intention to apply for the DOJ’s Program.

13.4.1 106 Swiss Banks Enter DOJ’s NPA program

David Voreacos of Bloomberg News reported that Kathryn Keneally, assistant attorney general of the Justice Department’s Tax Division, in her keynote remarks to the American Bar Association Section of Taxation mid-year (January 25, 2014), stated that 106 Swiss banks (of approximately 300 total) filed the requisite letter of intent to join the Program for Non-Prosecution Agreements or Non-Target Letters (the “Program“) by the December 31, 2013 deadline. Renown attorney and Professor Jack Townsend reported on his blog on April 30, 2014 a list of 52 Swiss banks that had publicly announced the intention to submit the letter of intent, as well as each bank’s category for entry: six announced seeking category 4 status, eight for category 3, thirty-eight for category 2.

However, while 106 may be a large jump from a mid-December report by the international service of the Swiss Broadcasting Corporation (“SwissInfo”) that only a few Swiss banks had filed for non prosecution with the DOJ’s program, William R. Davis and Lee A. Sheppard of Tax Analysts’ Worldwide Tax Daily reported that “one private practitioner estimated that some 350 banks holding 40,000 accounts have not come in.” (see “ABA Meeting: Keneally Reports Success With Swiss Bank Program”, Jan. 28, 2014, 2014 WTD 18-3.)

13.4.2 Framework of Swiss Bank NPA Program

The DOJ statement described the framework of the Program for Non-Prosecution Agreements: every Swiss bank not currently under formal criminal investigation concerning offshore activities will be able to provide the cooperation necessary to resolve potential criminal matters with the DOJ. Currently, the department is actively investigating the Swiss-based activities of 14 banks. Those banks, referred to as Category 1 banks in the Program, are expressly excluded from the Program. Category 1 Banks against which the DOJ has initiated a criminal investigation as of 29 August 2013 (date of program publication).

On November 5, 2013 the Tax Division of the DOJ released comments about the Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks. Swiss banks that have committed violations of U.S. tax laws and wished to cooperate and receive a non-prosecution agreement under the Program, known as Category 2 banks, had until Dec. 31, 2013 to submit a letter of intent to join the program, and the category sought.

To be eligible for a non-prosecution agreement, Category 2 banks must meet several requirements, which include agreeing to pay penalties based on the amount held in undeclared U.S. accounts, fully disclosing their cross-border activities, and providing detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest. Providing detailed information regarding other banks that transferred funds into secret accounts or that accepted funds when secret
accounts were closed is also a stipulation for eligibility. The Swiss Federal Department of Finance has released a > model order and guidance note < that will allow Swiss banks to cooperate with the DOJ and fulfill the requirements of the Program.

The DOJ’s November 2013 comments responded to such issues as: (a) Bank-specific issues and issues concerning individuals, (b) Choosing which category among 2, 3, or 4, (c) Qualifications of independent examiner (attorney or accountant), (d) Content of independent examiner report, (e) Information required under the Program – no aggregate account data, (f) Penalty calculation – permitted reductions, (g) Category 4 banks – retroactive application of FATCA Annex II, paragraph II.A.1, and (h) Civil penalties.

13.4.3 Which of Four Categories To File for Non-Prosecution Under?

Regarding which category to file under, the DOJ replied: “Each eligible Swiss bank should carefully analyze whether it is a category 2, 3 or 4 bank. While it may appear more desirable for a bank to attempt to position itself as a category 3 or 4 bank to receive a non-target letter, no non-target letter will be issued to any bank as to which the Department has information of criminal culpability. If the Department learns of criminal conduct by the bank after a non-target letter has been issued, the bank is not protected from prosecution for that conduct. If the bank has hidden or misrepresented its activities to obtain a non-target letter, it is exposed to increased criminal liability.”

SwissInfo reported that Migros Bank selected Program Category 2 because “370 of its 825,000 clients, mostly Swiss citizens residing temporarily in the US or clients with dual nationality”, met the criteria of US taxpayer. Valiant told SwissInfo that “an internal review showed it had never actively sought US clients or visited Americans to drum up business. The bank said less than 0.1% of its clients were American.”

Category 2

Banks against which the DoJ has not initiated a criminal investigation but have reasons to believe that that they have violated US tax law in their dealings with clients are subject to fines of on a flat-rate basis. Set scale of fine rates (%) applied to the untaxed US assets of the bank in question:

1. Existing accounts on 01.08.2008: 20%
2. New accounts opened between 01.08.2008 and 28.02.2009: 30%
3. New accounts after 28.02.2009: 50%

Category 2 banks must delivery of information on cross-border business with US clients, name and function of the employees and third parties concerned, anonymised data on terminated client relationships including statistics as to where the accounts re-domiciled.

Category 3

Banks have no reason to believe that they have violated US tax law in their dealings with clients and that can have this demonstrated by an independent third party. A category 3 bank must provide to the IRS the data on its total US assets under management and confirmation of an effective compliance program in force.

Category 4
Banks are a local business in accordance with the FATCA definition.

13.4.4 Independence of Qualified Attorney or Accountant Examiner

Regarding the requirement of the independence of the qualified attorney or accountant examiner, the DOJ stated that the examiner “is not an advocate, agent, or attorney for the bank, nor is he or she an advocate or agent for the government. He or she must provide a neutral, dispassionate analysis of the bank’s activities. Communications with the independent examiner should not be considered confidential or protected by any privilege or immunity.” The attorney/accountant’s report must be substantive, detailed, and address the requirements set out in the DOJ’s non-prosecution Program. The DOJ stated that “Banks are required to cooperate fully and “come clean” to obtain the protection that is offered under the Program.”

In the ‘bottom line’ words of the DOJ: “Each eligible Swiss bank should carefully weigh the benefits of coming forward, and the risks of not taking this opportunity to be fully forthcoming. A bank that has engaged in or facilitated U.S. tax-related or monetary transaction crimes has a unique opportunity to resolve its criminal liability under the Program. Those that have criminal exposure but fail to come forward or Participate But Are Not Fully Forthcoming Do So At Considerable Risk.”

14. Results Of U.S. Initiatives To Date

14.1 Amount Recovered Thus Far from Non-Compliant Taxpayers

According to the 2013 GAO Reports and the Subcommittee report, the 2008, 2011, and the ongoing 2012 offshore voluntary disclosure initiative (OVDI) have led to 43,000 taxpayers paying back taxes, interest and penalties totaling $6 billion to date, with more expected. In June 2013, the IRS Commissioner John Koskinen disclosed that the ongoing 2012 OVDP has generated an additional 2,000 taxpayer disclosures in that the a total of 45,000 disclosures had been logged, with a collection of $6.5 billion in taxes, interest and penalties.

However, the vast majority of this recovered $6.5 billion is not tax revenue but instead results from the FBAR penalties assessed for not reporting a foreign account. The Taxpayer Advocate found that for noncompliant taxpayers with small accounts, the FBAR and tax penalties reached nearly 600% of the actual tax due! The median offshore penalty was about 381% of the additional tax assessed for taxpayers with median-sized account balances.

14.2 Have These Efforts Substantially Increased Taxpayer Compliance?

The Taxpayer Advocate, replying on State Department statistics, cited that 7.6 million U.S. citizens reside abroad and many more U.S. residents have FBAR filing requirements, yet the IRS received only 807,040 FBAR submissions as recently as 2012. The Taxpayer Advocate noted that in Mexico alone, more than one million U.S. citizens reside, and many Mexican citizens reside in the U.S. (and thus are required to file a FBAR for any Mexican accounts of $10,000 or greater).

Thus, at a current rate well below 10% compliance (because nonresident aliens in the US must file a FBAR on their non-US accounts of $10,000 and over), it appears that all the additional enforcement is producing similar results of the War on Drugs. This is not to say that obtaining a highly level of compliance with the tax law, like compliance with the drug laws and DUI laws, is not a public good in itself – such tax compliance is a public good that the public has chosen, via Congress (and its investigatory hearings), for resource allocation. But like the War on Drugs, there are many potential
strategies to bring about compliance, about which pundits such as law enforcement officials, social libertarians, tax academics, paid lobbyists, and many other stakeholders will continue to debate.

The Senate Subcommittee reported that: “According to the IRS, the current estimated annual U.S. tax gap is $450 billion, which represents the total amount of U.S. taxes owed but not paid on time, despite an overall tax compliance rate among American taxpayers of 83 percent. Contributing to that annual tax gap are offshore tax schemes responsible for lost tax revenues totaling an estimated $150 billion each year.”

To justify the reporting of the number of $150 billion a year of lost tax revenue due to “offshore tax schemes”, the Senate Report primarily cites its own investigatory reports and third party articles that refer to transfer pricing issues. While transfer pricing regulations have been under scrutiny, at least by the Democrats, in the Senate, it is certainly not commonly held by those same Democrats that transfer pricing is illegal or constitutes an “offshore scheme”.

It is proven beyond a doubt by the UBS, Credit Suisse, and other similar investigations, validated by the OVDI disclosures, that some Americans are noncompliant, and that some of those noncompliant Americans would owe tax if disclosing foreign income on their tax returns. There is also no doubt that the total number of noncompliant Americans between 2008 and 2013 was at least 43,000.

There is also no doubt that the tax that would have been collected from them had they been compliant during their time in the wilderness was in fact, relative to the reported figure of $150 billion lost annually, miniscule (somewhere probably between $300 million and $500 million a year for lost tax, with the majority of the $6 billion collected representing FBAR penalties, tax penalties, and interest). To date, of the $150 billion referred to as lost a year to offshore schemes, only approximately .003% (a third of one percent) has been collected – and that assuming the higher number of $500 million a year.

14.3 So what is motivating the Subcommittee then?

Is the Senate searching for a magic bean to grow a money tree that will help cover up the $500 billion annual deficit (that has led to a $17 trillion national debt)? The Subcommittee Report states: “Offshore tax evasion has been an issue of concern … because lost tax revenues contribute to the U.S. annual deficit, which today exceeds $500 billion. Collecting unpaid taxes is one way to reduce the deficit without raising taxes.”

14.4 But Are 90% of Taxpayers with Foreign Accounts are Tax Evaders!

The Taxpayer Advocate, relying on State Department statistics, cited that 7.6 million U.S. citizens reside abroad and many more U.S. residents have FBAR filing requirements, yet the IRS received only 807,040 FBAR submissions as recently as 2012. The Taxpayer Advocate noted that in Mexico alone, more than one million U.S. citizens reside, and many Mexican citizens reside in the U.S. (and thus are required to file a FBAR for any Mexican accounts of $10,000 or greater).

Thus, more than 90% of taxpayers with foreign accounts are NOT compliant with the tax law? 7.6 million Americans abroad, at least 1 million nonresident aliens in the US, and some number of American in the US with foreign accounts equals a number of approximately 10 million taxpayers. But the IRS reports that 87% of American residing taxpayers are compliant? So statistically speaking, having a foreign account is indicative of being a tax evader.

Based on these numbers, being an American living in a foreign country is a leading cause of criminality. What the statistics do not tell is which comes first? A person tends toward criminality and
thus moves to a foreign country or a person moves to a foreign country and then tends toward criminality? Enough facetiousness…

14.5 $100 Million Is Still $100 Million!

However, even if the number is only $1 billion or even $100 million collected a year from the IRS civil and criminal enforcement efforts, while it’s not going to put a dent in a $500 billion deficit, as Senator John McCain told the Credit Suisse representatives at the hearing February 26, it’s still a large amount of money that turns voters heads. As already mentioned above, tax compliance is a highly desirable public good, in the same vein of discouraging “insider trading”.

14.6 The IRS Softens Offshore Voluntary Compliance Program For Some Going Forward, Toughens for Others

On June 3, 2014 the IRS Commissioner John A. Koskinen stated before The U.S. Council For International Business-OOCD International Tax Conference:

“No while the 2012 OVDP and its predecessors have operated successfully, we are currently considering making further program modifications to accomplish even more. We are considering whether our voluntary programs have been too focused on those willfully evading their tax obligations and are not accommodating enough to others who don’t necessarily need protection from criminal prosecution because their compliance failures have been of the non-willful variety. For example, we are well aware that there are many U.S. citizens who have resided abroad for many years, perhaps even the vast majority of their lives. We have been considering whether these individuals should have an opportunity to come into compliance that doesn’t involve the type of penalties that are appropriate for U.S.-resident taxpayers who were willfully hiding their investments overseas. We are also aware that there may be U.S.-resident taxpayers with unreported offshore accounts whose prior non-compliance clearly did not constitute willful tax evasion but who, to date, have not had a clear way of coming into compliance that doesn’t involve the threat of substantial penalties.

We are close to completing our deliberations on these respects and expect that we will soon put forward modifications to the programs currently in place. … We believe that re-striking this balance between enforcement and voluntary compliance is particularly important at this point in time, given that we are nearing July 1, the effective date of FATCA. …”

In announcing the new “Streamlined OVDP Program” later in June, Commissioner Koskinen stated that in 2012 the IRS added the streamlined filing compliance procedures for a limited group of U.S. taxpayers living abroad who were not aware that they were out of compliance. The streamlined process allows this group to catch up on their U.S. filing requirements without paying steep penalties. In this regard, he announced two sets of OVDP changes.

"First, we’re expanding the streamlined procedures to cover a much broader group of U.S. taxpayers we believe are out there who have failed to disclose their foreign accounts but who aren’t willfully evading their tax obligations. To encourage these taxpayers to come forward, we’re expanding the eligibility criteria, eliminating a cap on the amount of tax owed to qualify for the program, and doing away with a questionnaire that applicants were required to complete."

"Second, we will be reshaping the terms for taxpayers to participate in the OVDP. This is designed to cover those whose failure to comply with reporting requirements is considered willful in nature, and who therefore don’t qualify for the streamlined procedures. These changes will help focus this program on people seeking certainty and relief from criminal prosecution. From now on, people who want to participate in this program will have to provide more information than in the past, submit all account statements at the time they apply for the program, and in some cases pay more in penalties than they would have done had they entered this program earlier."
Thus, in the first case, the IRS has removed the $1,500 cap for tax owed to be able to enter the non willful OVDP, and eliminating the submission of the extensive questionnaire.

But in the second case, the penalty will be increased from 27.5% to 50% if the bank that holds (held) the taxpayer's account has come under investigation by the IRS before the taxpayer receives the IRS OVDP clearance letter. The questionnaire will be expanded.

The formal new Streamlined Procedures program has been published as a set of FAQs with relevant links. The 2012 program is as per the below. An analysis of the new 2014 program will be published on this blog June 26, 2014.

14.6.1 Increase to 50% Penalty

Beginning on August 4, 2014 (see Q&A 7.2), any taxpayer who has an undisclosed foreign financial account will be subject to a 50% miscellaneous offshore penalty if, at the time of submitting the preclearance letter to IRS Criminal Investigation, an event has already occurred that constitutes a public disclosure that either

(a) the foreign financial institution where the account is held, or another facilitator who assisted in establishing or maintaining the taxpayer’s offshore arrangement, is or has been under investigation by the IRS or the Department of Justice in connection with accounts that are beneficially owned by a U.S. person;

(b) the foreign financial institution or other facilitator is cooperating with the IRS or the Department of Justice in connection with accounts that are beneficially owned by a U.S. person or

(c) the foreign financial institution or other facilitator has been identified in a court- approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a “John Doe summons”) at the foreign financial institution or have accounts established or maintained by the facilitator.

Examples of a public disclosure include, without limitation: a public filing in a judicial proceeding by any party or judicial officer; or public disclosure by the Department of Justice regarding a Deferred Prosecution Agreement or Non-Prosecution Agreement with a financial institution or other facilitator. A list of foreign financial institutions or facilitators meeting this criteria is available.

14.6.2 Description of the Streamlined Procedure

This streamlined procedure is designed for taxpayers that present a low compliance risk. All submissions will be reviewed, but, as discussed below, the intensity of review will vary according to the level of compliance risk presented by the submission. For those taxpayers presenting low compliance risk, the review will be expedited and the IRS will not assert penalties or pursue follow-up actions. Submissions that present higher compliance risk are not eligible for the streamlined processing procedures and will be subject to a more thorough review and possibly a full examination, which in some cases may include more than three years, in a manner similar to opting out of the Offshore Voluntary Disclosure Program.

Taxpayers utilizing this procedure will be required to file delinquent tax returns, with appropriate related information returns (e.g. Form 3520 or 5471), for the past three years and to file delinquent FBARs for the past six years. Payment for the tax and interest, if applicable, must be remitted along with delinquent tax returns. For a summary of information about federal income tax return and FBAR filing requirements and potential penalties, see IRS Fact Sheet FS-2011-13. (December 2011).

In addition, retroactive relief for failure to timely elect income deferral on certain retirement and savings plans where deferral is permitted by relevant treaty is available through this process. The proper deferral elections with respect to such arrangements must be made with the submission. See instructions below.
14.6.3 Eligibility

This procedure is available for non-resident U.S. taxpayers who have resided outside of the U.S. since January 1, 2009, and who have not filed a U.S. tax return during the same period. These taxpayers must present a low level of compliance risk as described below.

Amended returns submitted through this program will be treated as high risk returns and subject to examination, except for those filed for the sole purpose of submitting late-filed Forms 8891 to seek relief for failure to timely elect deferral of income from certain retirement or savings plans where deferral is permitted by relevant treaty. It should be noted that this relief is also available under the Offshore Voluntary Disclosure Program. See below for the information required to be submitted with such requests. (If you need to file an amended return to correct previously reported or unreported income, deductions, credits, tax etc, you should not use this streamlined procedure. Depending on your circumstances, you may want to consider participating in the Offshore Voluntary Disclosure Program.)

All tax returns submitted under this procedure must have a valid Taxpayer Identification Number (TIN). For U.S. citizens, a TIN is a Social Security Number (SSN). For individuals that are not eligible for an SSN, an Individual Taxpayer Identification Number (ITIN) is a valid TIN. Tax returns filed without a valid SSN or ITIN will not be processed. For those who are ineligible for an SSN, but who do not have an ITIN, a submission may be made through this program if accompanied by a complete ITIN application. For information on obtaining an SSN, see http://www.ssa.gov. For information on obtaining an ITIN, see the ITIN page.

14.6.4 Compliance Risk Determination

The IRS will determine the level of compliance risk presented by the submission based on information provided on the returns filed and based on additional information provided in response to a Questionnaire required as part of the submission. Low risk will be predicated on simple returns with little or no U.S. tax due. Absent any high risk factors, if the submitted returns and application show less than $1,500 in tax due in each of the years, they will be treated as low risk and processed in a streamlined manner.

The risk level may rise if any of the following are present:

- If any of the returns submitted through this program claim a refund;
- If there is material economic activity in the United States;
- If the taxpayer has not declared all of his/her income in his/her country of residence;
- If the taxpayer is under audit or investigation by the IRS;
- If FBAR penalties have been previously assessed against the taxpayer or if the taxpayer has previously received an FBAR warning letter;
- If the taxpayer has a financial interest or authority over a financial account(s) located outside his/her country of residence;
- If the taxpayer has a financial interest in an entity or entities located outside his/her country of residence;
- If there is U.S. source income; or
- If there are indications of sophisticated tax planning or avoidance.

For additional information about what information will be requested to evaluate risk, please see the Questionnaire.

14.6.5 Instructions for Using This Procedure

Taxpayers wishing to use these streamlined procedures must:

1. Submit complete and accurate delinquent tax returns, with appropriate related information returns, for the last three years for which a U.S. tax return is due.
Please note that all delinquent information returns being filed under this procedure should be sent to the address below with the rest of the submission.

2. Include at the top of the first page of each tax return “Streamlined” to indicate that the returns are being submitted under this procedure. This is very important to ensure that your returns get processed through these procedures.

3. Submit payment of all tax due and owing as reflected on the returns and statutory interest due and owing.

For returns determined to be high risk, failure to file and failure to pay penalties may be imposed in accordance with U.S. federal tax laws and FBAR penalties may be imposed in accordance with U.S. law. Reasonable cause statements may be requested during review or examination of the returns determined to be high risk. For a summary of information about federal income tax return and FBAR filing requirements and potential penalties, see IRS Fact Sheet FS-2011-13 (December 2011).

4. Submit copies of filed FBARs for the last six years for which an FBAR is due. (You should file delinquent FBARs according to the FBAR instructions and include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers. Through June 30, 2013, you may file electronically (http://bsaefiling.fincen.treas.gov) or by sending paper forms to Department of Treasury, Post Office Box 32621, Detroit, MI 48232-0621. After June 30, 2013, you must file electronically (http://bsaefiling.fincen.treas.gov.).) If you are unable to file electronically, you may contact FinCEN’s Regulatory Helpline at 1-800-949-2732 or (if calling from outside the United States) 1-703-905-3975 to determine possible alternatives for timely reporting.

NOTE: Taxpayers filing FBARs electronically do not currently have the technological ability to include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers. Until such time that they have the ability, it is not necessary to include the statement. (July 18, 2013)

5. Submit a complete, accurate and signed Questionnaire.

6. If the taxpayer must apply for an ITIN in order to file delinquent returns under this procedure, the application and other documents required for applying for an ITIN must be attached to the the required forms, information and documentation required under this streamlined procedure. See the ITIN page for more.

7. Any taxpayer seeking relief for failure to timely elect deferral of income from certain retirement or savings plans where deferral is permitted by relevant treaty will be required to submit:

a statement requesting an extension of time to make an election to defer income tax and identifying the pertinent treaty provision;

for relevant Canadian plans, a Form 8891 for each tax year and each plan and a description of the type of plan covered by the submission; and

a dated statement signed by the taxpayer under penalties of perjury describing:

the events that led to the failure to make the election,

the events that led to the discovery of the failure, and

if the taxpayer relied on a professional advisor, the nature of the advisor’s engagement and responsibilities.

8. This program has been established for non-resident non-filers. Generally, amended returns will not be accepted in this program. The only amended returns accepted through this program are
those being filed for the sole purpose of submitting late-filed Forms 8891 to seek relief for failure
to timely elect deferral of income from certain retirement or savings plans where deferral is
permitted by relevant treaty. Non-resident taxpayers who have previously filed returns but wish to
request deferral provisions will be required to submit:

an amended return reflecting no adjustments to income deductions, or credits; and

all documents required in item 7 above.

9. The documents listed above must be sent to:

Internal Revenue Service
3651 South I-H 35
Stop 6063 AUSC
Attn: Streamlined
Austin, TX 78741

15. US RECIPROCITY FOR IGA COUNTRIES?

15.1 What About the US’ As a Haven for Foreign Taxpayers?

The US has a highly successful international financial service industry that is important to the US
economy, exemplified by, firstly, the international financial centers such as Miami and New York of over
a half trillion dollars of foreign deposits of high net wealth individuals whom many experts allege are not
tax and exchange control compliant in their home countries. Secondly, over 900,000 Delaware
companies is the second to Hong Kong, and ahead of British Virgin Islands (BVI is actually third in the
world). Thirdly, the US territories’ offshore regimes, like US Virgin Islands, reduce the effective US
corporate and income tax rates below 3.5 percent.

In 2011, 133,297 businesses incorporated in Delaware. Delaware has more corporate entities than people,
reports Leslie Wayne of the New York Times — 945,326 to 897,934. These absentee corporate residents
account for a quarter of Delaware’s total budget, roughly $860 million in taxes and fees in
2011. Moreover, the economic spill over impact for Delaware includes substantial employment and
professional fees to Delaware business participating in the incorporation and advisory industry. Delaware
is just behind China’s Hong Kong in number of annual incorporations and overall incorporations, and
well ahead of the UK’s Virgin Islands (British) both in terms of offshore business and the dollars earned
from that offshore business. The State of Delaware does not maintain a corporate registry of beneficial
owners.

15.2 Treasury Argues Capital Flight Requires FATCA IGAs With Other Countries

Professor Jack Townsend’s Blog wherein he posts a letter from Treasury’s Asst. Secretary for Legislative
Affairs to a Congressman (Bill Posey) wherein Treasury states its authority to create and enter into IGAs
with other nations and their dependencies: http://federaltaxcrimes.blogspot.com/2014/07/irs-letter-to-
congressman-defending-its.html

Treasury’s stated authority is: “Your letter also asks about statutory authority to enter into and implement
the IGAs. The United States relies, among other things, on the following authorities to enter into and
implement the IGAs: 22 USC Section 2656; Internal Revenue Code Sections 1471, 1474(f), 6011, and
6103(k)(4) and Subtitle F, Chapter 61, Subchapter A, Part III, Subpart B (Information Concerning
Transactions with Other Persons).”

Professor Townsend (Houston) includes in the comments to the letter a rebuttal by Professor Allison
Christians (McGill) “None of these sources of law contain any authorization to enter into or implement
the IGAs. It is patently clear that no such authorization has been made by Congress, and that the IGAs
are sole executive agreements entered into by the executive branch on its own under its “plenary executive authority”. As such the agreements are constitutionally suspect because they do not accord with the delineated treaty power set forth in Article II.” See Professor Christians full response at http://taxpol.blogspot.com.au/2014/07/irs-claims-statutory-authority-for.html

The above highlight is interesting enough mind you. But I must point out another aspect of the Treasury justification for IGAs. Treasury states that: “Suspending further negotiation of IGAs would negatively affect the United States’ ability to enforce the provisions of FATCA without the imposition of substantial withholding tax. … This could result in harm to the interests of the United States because it could prompt divestment from U.S. investments by affected financial institutions.” (emphasis added)

15.3 But Treasury Argued Capital Flight Is Not a FATCA Concern Months Earlier

But Treasury argued quite the opposite in its recent, successful defense against the Florida and Texas Bankers Associations in Florida Bankers Assn v Treasury.

Excerpting from the Court decision:

“The IRS admits that it does not know exactly how much money non-resident aliens have deposited in U.S. banks. …

Instead of using exact data, the IRS estimated, based on a mountain of existing information from the Treasury Department, that non-resident alien deposits in U.S. banks amounted to no more than $400 billion. …

… The IRS was unconcerned because it had determined that very little of this money would be affected – namely, because these regulations would not deter any rational actor other than a tax fraud from using U.S. banks.

4. Capital Flight

At the heart of the Bankers Associations’ argument – albeit buried somewhat in their brief – is the contention that the regulations should not have been issued given the negative impact they may have on banks. Plaintiffs claim that the IRS “disregarded” a flood of comments arguing that the new regulations would cause non-residents to withdraw their deposits en masse and thereby trigger substantial and harmful capital flight. The IRS, however, did not ignore those comments; indeed, it dedicated a majority of the preamble to addressing concerns about capital flight.

… As a result of those protections, the Government concluded that the “regulations should not significantly impact the investment and savings decisions of the vast majority of non-residents.”

Plaintiffs raise one additional, related issue: They claim that the IRS ignored the massive capital flight that took place after the Canadian reporting requirements became effective in January 2000. The IRS, by contrast, contends that the alleged Canadian capital flight is a fiction: While the amount of Canadian interest-bearing deposits may have dipped after the reporting requirements were issued, they climbed back up shortly after that.”

See the full article at http://profwilliambyrnes.com/2014/02/25/court-upholds-irs-regulations-for-foreign-taxpayer-interest-reporting-by-us-banks/

15.4 Comments on the tax elasticity of deposits

15.4.1 Tax Elasticity Of Deposits

In the 2002 article International Tax Co-operation and Capital Mobility, prepared for an ECLAC report, from analysing data from the Bank for International Settlements (“BIS”) on international bank deposits, Valpy Fitzgerald found “that non-bank depositors are very sensitive to domestic wealth taxes and interest
reporting, as well as to interest rates, which implies that tax evasion is a determinant of such deposits….” Non-bank depositors are persons that instead invest in alternative international portfolios and financial instruments.

15.4.2 Estimating How Much Latin American Tax Evasion are US Banks Involved With?

Some Miami based commentators, like the renown author Professor Marshall Langer, estimated that at least $300B of capital outflow will occur from the USA pursuant to its exchange of tax information with Brazil and other Latin American countries, like Argentina and Venezuela. Based on their discussions with South Florida real estate firms, information exchange will lead to a withdrawal of Latin American interest in its real estate market.

Note that since we now know that US information collection will not look through company entities as is required by FATCA from FFIs, and because most real estate for estate tax purposes is held via corporate structures, it will not capture information on most real estate investment. Thus, the foreign investment that is excluded from FATCA and reciprocity exchange of information should not re-domicile from the US.

15.4.3 Three Elasticity Benchmarks

Three historical benchmarks regarding the imposition of withholding tax on interest illustrate the immediate and substantial correlation that an increase in tax on interest has on capital flight. The benchmarks are (1) the 1964 US imposition of withholding tax on interest that immediately led to the creation of the London Euro-dollar market; (2) the 1984 US exemption of withholding tax on portfolio interest that immediately led to the capital flight from Latin America of US$300 billion to US banks; and (3) the 1989 German imposition of withholding tax that led to immediate capital flight to Luxembourg and other jurisdictions with banking secrecy. The effect was so substantial that the tax was repealed only four months after imposition.

15.4.4 The Establishment of London as an International Financial Center

The 1999 IMF Report on Offshore Banking concluded that the US experienced immediate and significant capital outflows in 1964 and 1965 resulting from the imposition of a withholding tax on interest. Literature identifies the establishment of London as a global financial centre as a result of the capital flight from the US because of its imposition of Interest Equalisation Tax (IET) of 1964. The take off of the embryonic London eurodollar market resulted from the imposition of the IET. IET made it unattractive for foreign firms to issue bonds in the US. Syndicated bonds issued outside the US rose from US$135 million in 1963 to US$696 million in 1964. In 1964-65, the imposition of withholding tax in Germany, France, and The Netherlands, created the euromark, eurofranc and euroguilder markets respectively.[8]

15.4.5 The Establishment of Miami as an International Financial Center

Conversely, when in 1984 the US enacted an exemption for portfolio interest from withholding tax, Latin America experienced a capital flight of $300 billion to the US. A substantial portion of these funds were derived from Brazil. In fact, some pundits have suggested that Miami as a financial center resulted not from the billions generated from the laundering of drug proceeds which had a tendency to flow outward, but from the hundreds of billions generated from Latin inward capital, nearly all unreported to the governments of origination.
15.4.6 The Establishment of Luxembourg as an International Financial Center

In January of 1989, West Germany imposed a 10% withholding tax on savings and investments. In April it was repealed, effective July 1st, because the immediate cost to German Banks had already reached DM1.1 billion. The capital flight was so substantial that it caused a decrease in the value of the Deutsche mark, thereby increasing inflation and forcing up interest rates. According to the Financial Times, uncertainty about application of the tax, coupled with the stock crash in 1987, had caused a number of foreign investment houses to slow down or postpone their investment plans in Germany. A substantial amount of capital went to Luxembourg, as well as Switzerland and Lichtenstein.

15.4.7 Switzerland’s Fisc May Come Out Ahead

Perhaps ironically given the nature of the UBS situation currently unfolding, a Trade Based Money Laundering study by three prominent economists and AML experts focused also on measuring tax evasion uncovered that overvalued Swiss imports and undervalued Swiss exports resulted in capital outflows from Switzerland to the United States in the amount of $31 billion within a five year time span of 1995-2000. That is, pursuant to this transfer pricing study, the Swiss federal and cantonal revenue authorities are a substantial loser to capital flight to the USA. The comparable impact of the lost tax revenue to the much smaller nation of Switzerland upon this transfer pricing tax avoidance (and perhaps trade-based money laundering) may be significantly greater than that of the USA from its lost revenue on UBS account holders. Certainly, both competent authorities will have plenty of work on their hands addressing the vast amount of information that needs to be exchanged to stop the bleeding from both countries’ fiscs.