

## FAQ on FATCA overview

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## Identification and classification

### What am I searching for?

Under the proposed regulations, FFIs are required to review their existing individual customer data for indicia of US status which includes:

- Prior identification of an account holder as a US person
- A US birthplace
- A US address
- A US telephone number
- Standing instructions to transfer funds to an account maintained in the US
- An "in care of" address or a "hold mail" address that is the sole address with respect to the client
- A power of attorney or signatory authority granted to a person with a US address. The draft regulations have provided some relief provisions which will be welcomed by the banking industry.

### Which pre-existing accounts will I need to search?

FFIs are required to perform electronic searches of their pre-existing accounts.

For individual accounts not already identified as US, the regulations contain a de-minimis threshold of 50,000 \$, and a 250,000 \$ threshold for certain cash value insurance contracts. The exception ceases to apply if the account balance exceeds 1,000,000 \$ at the end of any calendar year.

The draft regulations also replace the requirements for private banking accounts by limiting the need for manual paper searches to high value accounts with balances over 1,000,000 \$.

Furthermore, the draft regulations include relief provisions whereby pre-existing entity accounts with account balances of 250,000 \$ or less are exempt from review until the account balance exceeds 1,000,000 \$ at the end of any calendar year.

## Remediation

### Where do I have to look for information on pre-existing accounts?

You will need to search electronic information on pre-existing accounts maintained or executed by the withholding agent as of 1 January 2013 or executed by the FFI prior to the date that the participating FFI agreement becomes effective.

### Where do I have to look for information on pre-existing high value accounts?

As part of the enhanced review, the FFI needs to identify high-value accounts for which a relationship manager has actual knowledge that the account holder is a US Person.

Where the relationship manager is unsure of account holder origin (other high value accounts), an additional enhanced review of current customer mater file and certain documents is required.

## **What do I need to obtain if I find US indicia on either type of account?**

If individuals are US persons, the participating FFI is required to obtain from the account holder a Form W-9, and a valid and effective waiver, if necessary.

If other US indicia is found, existing documentation should first be reviewed to confirm status before further documentary enquiries are necessary. Different documentation is required depending on the type of US indicia discovered.

## **Reporting**

### **What will I need to report under FATCA?**

As per previous guidance, FFI's that enter into an FFI agreement with the IRS will need to report the following information on their US accounts:

- The name, address, account number and TIN of each account holder which is a specified US Person or, in the case of Passive entity accounts, the substantial US owners;
- The account balance or value at year-end; and
- Gross dividends, interest and other income paid or credited to the account (timing will be determined in the FFI agreement).
- The aggregate number and aggregate value of account held by recalcitrant account holders at the end of the calendar year grouped as those that have US indicia, those that do not and those that are dormant.

The following additional reporting is also required:

- Reportable payments paid to a recipient (regardless of whether withholding occurred) on a Form 1042-S (or other form as prescribed by the IRS) with a copy filed with the IRS and another copy mailed to the payment recipient
- For calendar years 2015 and 2016, the aggregate amount of foreign passthru payments made to each non-participating FFI.

Provisions included that allows ability to report in the currency of the account in lieu of US dollars.

### **When will I need to report this information?**

For reporting with respect to calendar year 2013 and 2014, participating FFIs are required to report only name, address, TIN, account number and account balance with respect to US accounts (as well as data on recalcitrant accounts).

For the calendar year 2015, in addition to the aforementioned information, income associated with US accounts must be reported in 2016.

For the calendar year 2016, full reporting, including information on the gross proceeds from broker transactions, will be required in 2017.

## **Withholding**

### **What are withholdable payments and when will withholding begin?**

The definition of withholdable payments includes any payment of US source fixed, determinable, annual, periodic (FDAP) income and any gross proceeds from the sale of any property of a type which can produce interest and dividends that are US source FDAP income.

Participating FFIs are still required to withhold on US sourced payments made to non-participating FFIs beginning on 1 January 2014.

### **What has happened with the passthru payment rules?**

Previously, participating FFIs required to withhold on all passthru payments (including payments not directly attributable to a US source, which is now defined as "foreign passthru payments") made to non-participating FFIs beginning on 1 January 2015.

The proposed regulations postpone withholding on foreign passthru payments until 1 January 2017, but also require participating FFIs to nonetheless report annually the aggregate amount of payments made to non-participating FFIs in 2015 and 2016.

This delay is to allow time for significant systems updates and appears to be in response to a high volume of representations made addressing the practical difficulties with calculating and tracking the passthru payment percentage.

The draft regulations also provide scope for individual governments to develop practical alternatives to withholding where that jurisdiction has entered an agreement to facilitate FATCA implementation.

## **Agreements**

### **How are the affiliated group rules impacted?**

Each FFI in an expanded affiliated group must agree to be a participating FFI or be deemed compliant.

Due to laws in many countries preventing full compliance with FATCA, a two-year transition period was established, until 1 January 2016 to fully implement this requirement.

During this period, an FFI affiliate or branch in a jurisdiction that prohibits withholding or reporting as these rules require will not prevent other FFIs in the same group from entering into FFI agreements, as long as the other FFIs agree to perform due diligence to identify US accounts and meet other requirements.

### **What is the format of the agreement?**

The Treasury Department and the IRS intend to publish a draft model FFI agreement in Q1 2012.

A final model FFI agreement is scheduled to be published in the autumn of 2012.

### **When do I apply and how?**

The IRS has proposed that participating FFIs or deemed-compliant FFIs can register online with the IRS before 30 June 2013 to avoid withholding from 1 January 2014. The system is expected to be available by the end of 2012.

However, a joint statement released from the US, France, Germany, Italy, Spain and the UK indicates that an approach is potentially envisaged whereby FFIs report to their domestic authorities and governments then share that information with the IRS.

## **How have the deemed compliance rules been changed?**

The FATCA rules provide an important exception to the regime in that certain FFIs will be "deemed" to meet the reporting requirement if they are of low risk of US tax evasion - previous notices have set out some guidance in this area.

As indicated in previous notices, the draft regulations expand the definition of deemed compliant FFI and further define specific deemed compliant categories, However the new categories are still limited in scope.

## **What are the additional categories of deemed compliant?**

The proposed regulations introduce two subcategories of deemed compliant FFIs: registered and certified deemed compliant FFIs.

Institutions that qualify as registered deemed compliant FFIs must certify to the IRS that it meets the requirements of the applicable deemed compliant category, agrees to the conditions for deemed compliant status, and will renew its certification every three years (or earlier if there is a change of circumstance).

Registered deemed compliant FFIs include local FFIs, non-reporting members of participating FFI groups, qualified collective investment vehicles and restricted funds.

Institutions that qualify as certified deemed compliant FFIs are not required to register with the IRS, but each will certify to the withholding agent that it meets the requirements on a Form W-8 or acceptable substitute.

The certified categories of deemed compliant FFIs include non-registering local banks, retirement plans, non-profit organisations, certain owner-documented FFIs, and FFIs with only low-value accounts.

## **Take on processes**

### **Do I need to change my KYC processes?**

The proposed regulations generally do not require an FFI to make significant modifications to the information collected on customer intake, other than with respect to account holders identified as FFIs, as passive entities, or as having US indicia.

However, a participating FFI is also required to review all information collected with respect to the opening or maintenance of each account, including documentation collected as part of the participating FFI's account opening procedures and documentation collected for other regulatory purposes to determine if an account holder has US indicia (for example, if an account holder provides a passport as part of the participating FFI's account opening procedures, you are required to review the passport to check for a US place of birth).

## Governance

### **Who will ensure that businesses are not avoiding FATCA obligations?**

Previous notices introduced the requirement for a Chief Compliance Officer (CCO) which has been replaced by the responsible officer in the draft regulations.

The responsible officer must certify to the IRS within one year of the effective date of its agreement that the participating FFI:

- Has completed the review of all high-value accounts; and
- To the best of the responsible officer's knowledge, after conducting a reasonable inquiry, the participating FFI did not have any formal or informal practices or produces in place from 6 August 2011 up to the date of the certification to assist account holders in the avoidance of FATCA.
- Additionally, a responsible officer of the participating FFI must certify to the IRS within two years of the effective date of its FFI agreement that it has completed the account identification procedures and documentation requirements for all pre-existing financial accounts or, if it has not obtained the required documentation, treats the account in accordance with the requirements of the FFI agreement (a draft is scheduled to be released in Q1 2012).

The responsible officer of the participating FFI must provide periodic certifications to the IRS that the FFI is complying with its obligations under the FFI agreement.

However, the FFI agreement will not require that the participating FFI arrange for periodic external audits.