

# FATCA Frequently Asked Questions (FAQs)



# FAQs

## 1. What is FATCA?

FATCA stands for the Foreign Account Tax Compliance Act. It colloquially refers to provisions included in the Hiring Incentives to Restore Employment Act signed into law on March 18, 2010 and effective January 1, 2013 (although, as explained in more detail below, withholding does not start at the earliest until January 1, 2014). It adds a new chapter to the Internal Revenue Code (Chapter 4) aimed at addressing perceived tax abuse by U.S. persons through the use of offshore accounts. The new rules require foreign financial institutions (FFI's) to provide the Internal Revenue Service (IRS) with information on certain U.S. persons invested in accounts outside of the U.S. and for certain non-U.S. entities to provide information about any U.S. owners.

## 2. When is withholding going to start?

FATCA withholding begins for fixed or determinable annual or periodical (FDAP) payments made on or after January 1, 2014. FATCA withholding for FDAP and gross proceeds will begin January 1, 2015. Passthru payments will become subject to FATCA withholding no earlier than January 1, 2015.

## 3. Who is impacted by FATCA?

Any entity making a payment of U.S. source income must consider whether it is subject to FATCA. FATCA may apply to both financial and non-financial operating companies. Due to this breadth, FATCA impacts virtually all non-U.S. entities, directly or indirectly, receiving most types of U.S. source income, including gross proceeds from the sale or disposition of U.S. property which can produce interest or dividends.

U.S. entities, both financial and non-financial, that make payments of most types of U.S. source income to non-U.S. persons will also be impacted as they may now be required to withhold a 30% tax on that income paid to a non-U.S. person under FATCA. This will require the U.S. entities to maintain documentation on those non-U.S. persons and also track how those persons are classified under FATCA.

## 4. What is an FFI?

An FFI is a foreign financial institution, which is any non-U.S. entity that:

- Accepts deposits in the ordinary course of a banking or similar business,
- As a substantial portion of its business, holds financial assets for the account of others, or
- Is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.

Generally non-U.S. entities such as banks, broker/dealers, insurance companies, hedge funds, securitization vehicles, and private equity funds will be considered FFIs. There is currently no *de minimis* threshold for investment vehicles and insurance companies.

## 5. What is an FFI Agreement?

In general, an FFI will enter into an agreement (referred to as “FFI Agreement”) with the U.S. Department of Treasury (U.S. Treasury) by which the FFI can avoid FATCA withholding on payments it receives (and become a participating FFI). Generally, an FFI Agreement requires a determination of which accounts are “United States accounts” (a defined term), compliance with verification and due diligence procedures, annual reporting on those United States accounts to the U.S. Treasury (see below), compliance with additional IRS reporting requests, and withholding 30% where applicable (e.g., recalcitrant account holders, nonparticipating FFIs, electing FFIs, etc.).

FFI’s that enter into an FFI agreement with the IRS will need to report the following information on their U.S. accounts:

- The name, address, and Taxpayer Identification Number (TIN) of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner of such entity
- The account number
- The account balance or value at year end (to be confirmed by Regulations);
- Gross dividends, interest and other income paid or credited to the account (timing will be determined in the FFI agreement).

Alternatively, an FFI may make an election to provide full IRS Form 1099 reporting on each account holder that is a specified United States person or United States owned foreign entity as if the holder of the account were a natural person and citizen of the United States.

Reporting of gross receipts and gross withdrawals or payments from U.S. accounts will not be required for the first year of reporting (2013). However, an FFI will be required to report as a recalcitrant account holder any US Account holder identified by June 30, 2014 for which the FFI is not able to report the information required under Section 1471(c)(1) (for instance due to failure to obtain a waiver from the account holder).

## 6. When should an FFI enter into an FFI Agreement?

As explained in Notice 2011-53, an FFI that enters into an FFI Agreement by June 30, 2013 will be identified as a participating FFI and thus avoid FATCA withholding that will begin January 1, 2014. FFIs that enter FFI Agreements after June 30, 2013 but before January 1, 2014 will be considered participating FFIs for 2014, however they may be subject to FATCA withholding due the lack of time to identify them as participating FFIs before FATCA withholding begins on January 1, 2014. The effective date for FFI Agreements entered before July 1, 2013 will be July 1, 2013 and any FFI Agreement entered after June 30, 2013 will be the date the FFI enters the FFI Agreement.

## 7. Is FATCA definitely happening?

Yes, FATCA has been signed into law. Guidance in the form of notices and/or regulations from the U.S. Treasury will further clarify the reporting requirements and are expected to be finalized by the summer of 2012.

## 8. Will the FATCA effective date be delayed?

The January 1, 2013 effective date is statutorily mandated and thus it would take an act of Congress to change it. However, on July 14, 2011 the IRS released Notice 2011-53 (published

in Internal Revenue Bulletin 2011-32 on August 8, 2011) which provided long-awaited transitional relief for significant obligations under FATCA. The IRS stated in the accompanying news release that using a phased implementation takes into account concerns raised in comments to Notice 2010-60 and Notice 2011-34 and the IRS' desire to provide a workable timeline for FATCA implementation.

#### **9. Why worry about FATCA now?**

Although FATCA does not become effective until January 1, 2013, companies need to start thinking about it **now**. The systems implementation process will take some time, in some cases 18 to 24 months. An initial pilot analysis should be done so budgets are formulated appropriately. Deloitte has become a leader in this analysis.

#### **10. What can I do now to begin to prepare?**

There are several tasks that you should consider doing now to prepare your business for FATCA.

- Identify who within your organization is going to take responsibility for the initiative;
- Put together a steering committee that includes all of the impacted businesses and functions;
- Undertake an assessment to help identify the relative impact of the legislation on the organization and the budget needed to address steps necessary to comply.

#### **11. When will I need to be prepared?**

New account due diligence procedures generally must be in place from the effective date of the FFI Agreement. The due diligence procedure of Section 1.A.2 of Notice 2011-34 for pre-existing private banking accounts with a value of at least \$500,000 will need to be performed within one year from the effective date of the FFI Agreement and for pre-existing private banking accounts of a lower value by the later of December 31, 2014 or the first year anniversary of the FFI Agreement. For all other pre-existing accounts due diligence procedures must be performed within two years of the effective date of the FFI Agreement.

#### **12. Will there be special exceptions for certain countries... or can countries negotiate special terms with U.S. Treasury?**

As of now, U.S. Treasury has not indicated special exceptions would be provided.

#### **13. My country already has a tax treaty with the U.S. Does that mean we are exempted from FATCA? If not, how do these regimes work together?**

The fact that a country has entered into a double taxation relief treaty or an exchange of information treaty with the U.S. Government does not exempt individuals or entities located in that jurisdiction from having to comply with the FATCA provisions. Individuals or entities must be in compliance with the FATCA provisions for them or their clients to be entitled to treaty benefits. Exchange of Information treaties are used when the governments are seeking information about specific taxpayers.

#### **14. I have only a few U.S. account holders. If I close their accounts, will I be exempt from FATCA?**

At this point in time, the application of the FATCA rules is not driven by whether an FFI actually has U.S. clients (again, the rules are more focused on non-U.S. entities receiving certain types of U.S. source income and gross proceeds from the sale or disposition of U.S. property which

can produce US source interest or dividends). Therefore, closing such accounts will not exempt you from FATCA.

### 15. What is considered indicia of U.S. status?

Notice 2011-34 lists six indicia of U.S. status:

- U.S. citizenship or lawful permanent resident (green card) status;
- A U.S. birthplace;
- A U.S. residence address or a U.S. correspondence address (including a U.S. P.O. box);
- Standing instructions to transfer funds to an account maintained in the United States, or directions regularly received from a U.S. address;
- An “in care of” address or a “hold mail” address that is the sole address with respect to the client; or
- A power of attorney or signatory authority granted to a person with a U.S. address.

Having one of these indicia does not mean that the account is owned by a U.S. person, only that it must be given closer scrutiny.

### 16. What documentation must an FFI collect if it has an account with indicia of U.S. status

Notice 2011-34 provides details of the required documentation associated with each indicia of U.S. status:

U.S. Indicia	Documentation Required
<b>U.S. citizenship or lawful permanent resident</b>	Obtain W-9
<b>U.S. birth place</b>	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>and</b></li> <li>2. Non-U.S. passport or similar documentation establishing foreign citizenship; <b>and</b></li> <li>3. Written explanation regarding U.S. citizenship</li> </ol>
<b>U.S. address</b> (residence, correspondence, or P.O. Box)	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>and</b></li> <li>2. Non-U.S. passport or similar documentation establishing foreign citizenship</li> </ol>
<b>Instructions to transfer funds to U.S. accounts or directions regularly received from a U.S. address</b>	<ol style="list-style-type: none"> <li>1. Request W-9 or W-8BEN; <b>and</b></li> <li>2. Documentary evidence establishing non-U.S. status</li> </ol>
<b>Only address on file is “in care of” or “hold mail” or U.S. P.O. Box</b> <i>Notice 2011-34 excludes foreign PO Box as US indicia</i>	Request W-9, W-8BEN; <b>or</b> Documentary evidence establishing non-U.S. status
<b>Power of Attorney or signatory authority granted to person with U.S. address</b>	Request W-9, W-8BEN; <b>or</b> Documentary evidence establishing non-U.S. status

## **17. What types of payments are subject to FATCA?**

FATCA provisions apply to “withholdable” payments. “Withholdable payments” are defined as:

- Any payment of interest (including any portfolio interest and original issue discount), dividends, rents, royalties, salaries, wages, annuities, licensing fees and other FDAP income, gains, and profits, if such payment is from sources within the United States.
- Any gross proceeds from the sale or disposition of U.S. property of a type that can produce interest or dividends
  - Interest paid by foreign branches of U.S. banks

Income effectively connected with a United States business is generally exempt from withholding under FATCA.

Certain “passthru” payments will also be subject to FATCA – a passthru payment generally includes any portion of a payment that is not a withholdable payment multiplied by the entity’s so called “passthru payment percentage”. Notice 2011-34 introduces the concept of the passthru payment percentage and provides details and examples of its calculation and application within the FATCA framework.

## **18. How do you determine what the passthru payment percentage is?**

The FFI’s passthru payment percentage will be determined by dividing the sum of the FFI’s U.S. assets (as defined in Notice 2011-34) held on each of the last four quarterly testing dates, by the sum of the FFI’s total assets (also defined in Notice 2011-34) held on those dates. FFIs will determine their passthru payment percentages as of each quarterly testing date; however note that Notice 2011-34 also provides FFIs with the option of using an alternative method for the first year of the FFI agreement. In Notice 2011-53, the IRS noted that the obligation to calculate any passthru percentage will not begin before the first calendar quarter of 2014.

## **19. Are foreign exchange transactions subject to FATCA?**

We do not believe that withholdable payments will include foreign exchange (FX) payments. Although gain on such contracts is generally reported as gross proceeds, the FATCA rules appear to only apply to proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States. This could be changed by regulations.

## **20. Are remittances subject to FATCA (i.e. someone in U.S. sends money to a family member in my country)?**

No, the mere transfer of money from someone in the U.S. to someone in a foreign country will not trigger FATCA withholding. However, money transferred into, and income earned in, a U.S. account may be subject to the FATCA reporting requirements. Further, instructions to transfer money to an account within the U.S. is one of the indicia of U.S. status.

## **21. How is FATCA withholding different from the withholding currently done by U.S. financial institutions (USFIs)?**

Although FATCA withholding is at 30%, it applies to different types of income than the current U.S. withholding regime and it applies regardless of statutory or treaty exemptions or reductions.

## **22. Do I have to renew my Qualified Intermediary (QI) agreement expiring in 2012 while becoming compliant with FATCA?**

Notice 2011-53 provides an automatic extension until December 31, 2013 for all QI agreements, withholding foreign partnership agreements and withholding foreign trust agreements of entities qualifying as FFIs that expire on December 31, 2012. Any FFI that enters into an FFI agreement on or before December 31, 2013 will be considered to have renewed its QI agreements, withholding foreign partnership agreements and withholding foreign trust agreement.

**23. I deal with only a small number of wealthy families, all of whom I know personally. Can I avoid asking them for additional documentation?**

That will depend on what type of documentation your clients have as well as what U.S. Treasury ultimately requires under the withholding rules.

**24. If we shift all our direct investments and those of our clients out of the U.S., we will not have to worry about FATCA, right?**

If a non-U.S. entity does not, directly or indirectly, invest in any U.S. securities, receive any FDAP income, or receive any bank deposit interest from foreign branches of U.S. banks, then it will not be subject to FATCA withholding. The non-U.S. entity will need to monitor income sources and investments to make sure that no U.S. sourced investments are maintained, thus subjecting it to the FATCA requirements.

If you receive U.S. source income from any indirect sources, then you will have income, or gross proceeds, subject to 30% withholding. Due to the potential risk and withholding exposure, there is also the possibility that certain large financial institutions may not do business with entities that are not FATCA compliant.

**25. My country has privacy or secrecy laws that prohibit sharing customer information with the U.S. government. What am I expected to do?**

The FATCA rules require that you ask any U.S. customer to waive their rights under the privacy or secrecy rules so that you can report their information to the U.S. Government. If they refuse to provide this waiver then you are required to close the account.

**26. I do not have any business with the U.S. Will there be an impact if I elect not to sign the FATCA agreement?**

Whether you are impacted by the FATCA rules is not driven by whether you have a business in the U.S.. It is solely determined by whether you receive any “withholdable” payments.

**27. Will U.S. Treasury or IRS publish a list of U.S. persons?**

No, U.S. Treasury will not publish a list of U.S. persons.

**28. Are any governments intervening with U.S. Treasury to provide carve outs or other exceptions to the rules?**

We are aware that U.S. Treasury is speaking with several other foreign countries about the implementation of the FATCA rules. However, at this time it is impossible to know the impact of such discussions.

**29. Are any other countries planning to adopt a similar regime?**

We are hearing that several other countries are looking at requirements similar to FATCA.

**30. What is the definition of a U.S. source payment?**

U.S. source income is income that arises from sources within the U.S. The source of income is determined based on the type of income. The source of compensation income is where the services giving rise to the income were performed. The source of certain income, such as dividends and interest, is based on residence of the payer. The source of income from property is based on where the property is used. Significant additional rules apply.

**31. If a joint account is held by a U.S. person and a non-U.S. person, is it considered 50% U.S. or 100% U.S.? Does it make a difference if they are not U.S. residents?**

A joint account which has one U.S. owner is treated as a U.S. account and the entire account is subject to reporting as a U.S. person.

**32. Is bank deposit interest, which is exempt under tax treaties, subject to withholding under FATCA?**

Yes. Bank deposit interest, including interest paid by a non-U.S. branch of a U.S. bank is a withholdable payment under the FATCA rules.

**33. Are all gross proceeds subject to withholding under FATCA, or only those related to the sale of stocks and bonds?**

No. Only gross proceeds from the sale or disposition of U.S. property of a type that can produce interest or dividends are subject to withholding under the FATCA rules.

**34. What types of insurance are covered by FATCA? If we do not sell these types, are we still required to sign an FFI Agreement?**

Currently, most insurance companies are subject to FATCA. U.S. Treasury has confirmed in preliminary guidance that non-U.S. insurance companies are FFIs. The U.S. Treasury has also indicated that they only intend to carve out those insurance companies that issue contracts with no cash value such as term life and property and casualty policies. Annuity payments and proceeds from life insurance contracts received by non-U.S. persons from a policy or contract issued by a U.S. insurer, or its foreign branch, are currently treated as FDAP and considered "withholdable payments" under FATCA.

**35. For a U.S. account holder, am I supposed to report to the IRS only its U.S. income and proceeds or also income and proceeds from non-U.S. assets?**

The latter. You are required to report world-wide income and proceeds received by specified U.S. persons.

**36. My clients are all companies (no individuals). Does that make my job easier?**

Unlikely. Withholdable payments made to non-U.S. individuals are not subject to FATCA withholding. Again, however, withholdable payments (*i.e.*, U.S. source FDAP income and gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States) made to a non-participating FFI or certain other non-U.S. entities may be subject to withholding under FATCA.

**37. Our group owns a United States Financial Institution (USFI). What is their responsibility under FATCA? How is our responsibility in our local country changed because of this ownership?**

A USFI will be required to follow certain documentation procedures to determine how to classify entities that hold preexisting financial accounts to which it makes withholdable payments. A USFI must also determine how to treat new entity accounts using procedures similar to those for



existing entity accounts, but must use all information it collects (not just “electronically searchable information”). Any local country responsibility should not change as a result of having a USFI in the structure.

**38. If we were to change our corporate structure so the USFI becomes the parent, would this change our responsibility in the local country?**

It is unlikely that changing your corporate structure so the USFI becomes the parent would change any local country responsibility. If fact, in Notice 2010-60 U.S. Treasury indicated that FFIs that are also controlled foreign corporations (CFCs) (certain non-U.S. entities ultimately controlled by a U.S. parent or shareholder) will be subject to FATCA (meaning that they must become participating FFIs to avoid withholding under chapter 4) *even though* they may already be subject to documentation and reporting.

**39. We have some non-U.S. clients who will not give us the documentation needed for FATCA. For example, in the smaller towns we have customers who do not have a passport or drivers license. It seems that under FATCA they will be classified as “recalcitrant” and subjected to withholding. Is there a process to exclude these people from the documentation requirement?**

No. Generally, any account holder whose account is at least \$50,000 that does not comply with reasonable requests for information necessary to determine whether its account is a United States account will be a “recalcitrant account holder” and will be subject to 30% withholding on withholdable payments and gross proceeds from the sale or disposition of U.S. assets which can produce interest or dividends.

**40. How many recalcitrant account holders can we have without losing our FFI Agreement?**

It is not clear. To date, the IRS and U.S. Treasury have said that they will “consider terminating” FFI agreements due to the number of recalcitrant account holders remaining after a reasonable period of time.

**41. We have operations in several countries. For aggregating account balances to meet the \$50,000 minimum for an accountholder, should we look at one branch, one country, one legal entity, etc.?**

Notice 2011-34 requires FFIs to aggregate account balances across all entities within the FFI's expanded affiliated group.

**42. We have separate companies for banking, brokerage, and insurance. If the same investor has brokerage, insurance, and banking relationships with different members of our group, must we aggregate across all these relationships to meet the de minimis rule or should we aggregate his bank accounts separately from his brokerage accounts, etc.?**

Similar to the above, FFIs will be required to aggregate balances irrespective of relationship type – in this instance the FFI would be required to aggregate bank accounts, brokerage accounts and insurance policies with cash values.

**43. Our operation is technically an FFI under the FATCA rules but we only have one customer, which is an affiliated company. Can we request an exemption? If not, is there any relief under the rules?**

The FATCA rules do provide an important exception to the regime in that certain FFIs will be “deemed” to meet the reporting requirements if the FFI a) complies with prescribed procedures to ensure that the FFI does not maintain United States accounts; and b) meets prescribed requirements with respect to accounts of other FFIs held by the FFI.

#### 44. What types of entities are deemed compliant?

In Notice 2010-60 Treasury and the IRS outlined their intention to issue regulations that will identify certain types of entities as excluded from the definition of an FFI, or deemed compliant. Such entities include:

- Certain holding companies for subsidiaries engaged in a non financial business;
- Foreign “start-up” entities that invest capital into assets with the intention of operating a non-financial institution business (exclusion valid for first 24 months of organization);
- Non-financial entities that are liquidating or emerging from reorganization or bankruptcy;
- Hedging/financing centers of a non-financial group (must provide financing services solely to members of its expanded affiliated group);
- Insurance companies selling insurance products without cash value;
- Entities with certain identified owners; and
- Certain financial institutions organized in U.S. Territories

Notice 2011-34 also identifies three additional categories of deemed compliant FFIs, broadly:

- Local banks that do not solicit account holders outside their country of organization and implement procedures to ensure that they do not open or maintain accounts for non residents, non-participating FFIs or non-expected NFFEs;
- Local FFI members of Participating FFI Groups; and
- Certain investment vehicles that only have participating FFIs as direct interest holders and certify that any passthru payment percentages are calculated and published in accordance with Notice 2011-34

#### 45. How do you obtain deemed compliant status?

Notice 2011-34 describes the process for obtaining deemed compliant status. Eligible FFIs must apply to the IRS for deemed-compliant status, obtain an FFI identification number (FFI-EIN) and certify every three years to the IRS that it meets the requirements for such treatment.

#### 46. Are other FFIs planning to use the \$50,000 *de minimis* rule?

We understand that a number of FFIs are *not* going to use the \$50,000 *de minimis* exception due to difficulties in changing multiple systems to calculate the value of its depository accounts.

#### 47. Are other FFIs planning to sign an agreement with U.S. Treasury?

We expect that the vast majority of the approximately 250,000 FFIs around the world will enter into an FFI Agreement and thus become participating FFIs.

#### 48. Are other FFIs planning to close the accounts of U.S. persons?

FATCA provides that an FFI should close an account holder's account if the holder of the account fails to provide the FFI with a waiver of any foreign law that would prevent the FFI from collecting the required FATCA documentation. To date, the IRS and U.S. Treasury have only issued guidance on *reporting* of accounts that have not provided the required FATCA documentation.

#### 49. Is there any exception to the requirement that all members of an affiliated group must sign FATCA agreements? For example, can the parent sign for the entire group?

The way the rules are written, each FFI in an affiliated group will need to enter into a separate FFI Agreement with the IRS.

However, Notice 2011-34 has indicated that the Regulations will provide that affiliated groups must appoint a lead FFI to coordinate the application process, subject to certain reporting requirements with regards to each participating FFI within the group.

**50. Local law does not allow me to collect taxes for a foreign government. If the U.S. expects me to make FATCA withholding on a recalcitrant account holder, what can I do?**

An FFI can make an election to have the withholding agent (or another FFI making the payment) do the withholding on payments allocable to accounts held by recalcitrant account holders or FFIs which do not have a valid FFI agreement in place. If an FFI makes this election, it will need to provide the withholding agent with the information required for the withholding agent to determine the appropriate amount to withhold. Additionally, the FFI will need to waive any right under any U.S. tax treaty with respect to any amount withheld.

**51. Once withholding occurs under FATCA, how can my client or I recover it? Is there a defined process?**

With certain significant exceptions noted below, amounts withheld on withholdable payments made to FFIs or Non-Financial Foreign Entities (NFFEs) are refundable to the beneficial owner of such payments to the extent that such amounts would otherwise be refundable under a treaty pursuant to the current nonresident withholding tax rules (Chapter 3). If the beneficial owner is an FFI, the FFI is only entitled to a credit or refund to the extent that it is entitled to a reduced rate of withholding under an applicable double income tax treaty, irrespective of whether the payment would not otherwise have been subject to U.S. withholding tax. Further, no credit or refund will be allowed to a beneficial owner that is an NFFE unless the entity provides U.S. Treasury with the information necessary to determine whether it is a "United States owned foreign entity" and identifies its "substantial United States owners."

**52. Is the denial of a credit of refund in the circumstances described in question 51 tantamount to FATCA overriding the double tax treaty my country has with the U.S.?**

It appears that U.S. Treasury believes that taxes withheld under FATCA are consistent with its authority to administer credit and refund procedures under existing income tax treaties. For example, pursuant to this authority the U.S. may require withholding at the relevant statutory rate at the time of payment and allow treaty country residents to obtain treaty benefits through a refund process.

**53. I am not set up for Form 1099 reporting. What is the reporting regime and can I push responsibility for reporting to my U.S. custodian or correspondent? Conversely, can my FFI account holders push responsibility to me?**

Form 1099 reporting is part of the information reporting regime applicable to most U.S. banks. To date, the rules do not specifically allow an FFI to push its reporting responsibilities to its U.S. custodian or correspondent.

**54. Is there any reporting on non-U.S. accounts? For example, will I report withholding on recalcitrant account holders?**

There is no FATCA requirement to report on non-U.S. accounts. However, Notice 2010-60 indicates that the IRS and U.S. Treasury intend to issue guidance that a participating FFI will need to report the number and aggregate value of financial accounts held by recalcitrant account holders (which may include non-U.S. account holders) and the number and aggregate value of financial accounts held by related or unrelated nonparticipating FFIs.

**55. Does FATCA withholding apply only to U.S. source income and proceeds?**

FATCA withholding only applies to withholdable payments, which are defined as certain income and gross proceeds from “sources within the United States”.

**56. If I know a customer is a U.S. person, can I apply the *de minimis* rule?**

Yes. Any depository account that qualifies for the *de minimis* exception will not be treated as a U.S. account (*i.e.*, will not be subject to FATCA reporting).

**57. When will the final rules be issued?**

In Notice 2011-53 the IRS said it anticipates publishing proposed regulations by December 31, 2011, and final regulations in the summer of 2012. In addition, IRS and Treasury anticipate issuing draft FATCA reporting forms in conjunction with the proposed guidance and final forms to be published for use in the summer of 2012.

**58. What additional information must I collect?**

It is expected that the information that will need to be collected will be outlined in forthcoming regulations. In the meantime, Notices 2010-60 and 2011-34 require that an FFI electronically search its records for indicia of U.S. status for existing individual accounts. Indicia of U.S. status includes: (i) identification of any account holder as a U.S. resident or U.S. citizen; (ii) a U.S. address associated with an account holder of the account (whether a residence address, a correspondence address, or a P.O. box address); (iii) a U.S. place of birth for an account holder of the account; (iv) an “in care of” address or a “hold mail” address that is the sole address on file with respect to the account holder; (v) a power of attorney or signatory authority granted to a person with a U.S. address; or (vi) standing instructions to transfer funds to an account maintained in the U.S., or directions received from a U.S. address. FFIs and USFIs will also need to analyze electronically searchable information to determine whether the preexisting entity accounts belong to another foreign financial institution or a non-financial foreign entity. FFIs and USFIs will need to undertake similar procedures on new accounts using all information collected (not just “electronically searchable information”).

**59. How can I make withholding deposits? What is the mechanism and frequency?**

Deposits should be made using the Electronic Federal Tax Payment System (EFTPS). The frequency of such deposits has not been determined at this time.

**60. Some of my account holders are other FFIs, including specialized small banks which only lend to local farmers and clearly do not have any U.S. clients or investments. Since they have no U.S. source income, they would never be subject to withholding even if they were “recalcitrant.” If they elect not to sign an agreement with Treasury, am I expected to close their accounts?**

No, the requirement to close accounts is for secrecy countries where the account holder refuses to waive their right to secrecy. However, in Notice 2010-60 Treasury did indicate that a participating FFI cannot have “too many recalcitrant account holders for too long” of a period of time. It is not clear how this rule will be applied.

**61. Some of our U.S. account holders are asking what they should do before the new law becomes effective on 1/1/2013. Can you offer any general advice?**

We would recommend that they contact their tax advisor with respect to questions regarding the application of these provisions.

**62. If a partnership has one U.S. person with 25% ownership and 3 foreign persons with 75%, how would dividend income be reported?**

If the U.S. person is revealed as a substantial U.S. owner, then that is the only owner who will be reported to the U.S. Government. The non-U.S. persons will not be subject to FATCA reporting or withholding. However, if the U.S. person is recalcitrant then all U.S. source withholdable payments will be subjected to 30% withholding.

**63. I read that a trust is considered an FFI but can this be true for an account set up by a parent in trust for their child? In this case who is documented, the grantor or grantee? Does it matter if the trust is irrevocable?**

Such a trust would generally be a FFI. However, Notice 2010-60 provides that small family trusts settled and funded by a single person for the sole benefit of his or her children may be “deemed compliant” provided the Withholding Agent identifies each individual, specified person, or excepted NFFE that has direct or indirect ownership in the entity; obtains the documentation that it would be required to obtain if such person were a new account holder of the Withholding Agent; and reports any specified U.S. person.

**64. What happens if a country does not permit its banks to follow the FATCA rules?**

Absent an act of the U.S. Congress exempting certain countries from FATCA, withholdable payments to an FFI that does not participate will be subjected to 30% withholding.

***How can I get more information from Deloitte?***

You can visit the Deloitte FATCA website at [www.deloitte.com](http://www.deloitte.com) or contact any of the following individuals

# FATCA leadership

## For more information, please contact:

**Denise Hintzke**  
Global U.S. FATCA Leader  
+1 212 436 4792  
[dhintzke@deloitte.com](mailto:dhintzke@deloitte.com)

**Anne Mericle**  
Global FATCA Project Management  
Office Manager  
+1 212 436 3908  
[americle@deloitte.com](mailto:americle@deloitte.com)

### Americas

**John Rieger**  
National Tax Managing Partner, FSI  
+1 212 436 6934  
[jrieger@deloitte.com](mailto:jrieger@deloitte.com)

**Karen Irwin**  
FATCA Leader, Canada  
+ 1 416 601 6522  
[kirwin@deloitte.com](mailto:kirwin@deloitte.com)

**James Dockeray**  
FATCA Leader, CBC  
+1 441 299 1399  
[james.dockeray@deloitte.bm](mailto:james.dockeray@deloitte.bm)

**Oscar Ortiz**  
FATCA Leader, LATCO  
+52 55 5080 6513 x6513  
[oortiz@deloittemx.com](mailto:oortiz@deloittemx.com)

### Europe, Middle East & Africa

**Chris Tragheim**  
FATCA Leader, EMEA  
+ 44 20 7303 2848  
[ctragheim@deloitte.com](mailto:ctragheim@deloitte.com)

**Jim Calvin**  
FATCA Leader, Asia-Pacific  
+1 212 410 4422  
[jcalvin@deloitte.com](mailto:jcalvin@deloitte.com)

**Hiromi Ikuta**  
FATCA Leader, Japan  
+036 213 1164  
[hiikuta@deloitte.com](mailto:hiikuta@deloitte.com)

### FAS

**Michael Shepard**  
FATCA FAS Leader, U.S.  
+1 215 299 5260  
[msh Shepard@deloitte.com](mailto:msh Shepard@deloitte.com)

### ERS

**Greg Thomas**  
FATCA ERS Leader, U.S.  
+1 415 783 5211  
[grethomas@deloitte.com](mailto:grethomas@deloitte.com)

**Mike Wade**  
FATCA ERS Leader, U.S.  
+1 804 697 1537  
[miwade@deloitte.com](mailto:miwade@deloitte.com)

### Consulting

**John Kocjan**  
FATCA Consulting Leader, U.S.  
+1 212 618 4181  
[jkocjan@deloitte.com](mailto:jkocjan@deloitte.com)



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