



The road ahead:

# An in-depth analysis of the final FATCA regulations

Global Financial Services Industry



# Table of Contents

1) Overview and history of FATCA .....	3
a) The continued evolution of intergovernmental agreements.....	3
b) The time is now.....	4
2) Withholdable payments under FATCA .....	5
a) Withholdable payments .....	5
b) Exceptions to withholding .....	6
3) Entity classification .....	9
a) U.S. withholding agent definition .....	9
b) Expanded affiliated group concept .....	9
c) FFI definition.....	10
i) Depository institution .....	10
ii) Custodial institution .....	11
iii) Investment entity .....	11
iv) Specified insurance company .....	12
v) Holding company or treasury center .....	12
vi) Entities excluded from the FFI definition .....	13
vii) Deemed-compliant FFIs and exempt beneficial owners .....	15
d) Non-financial foreign entity .....	19
i) Excepted NFFEs .....	20
ii) Active NFFEs .....	20
iii) Passive NFFEs.....	20
4) U.S. withholding agent requirements.....	21
a) Documentation and due diligence .....	21
i) Identifying the payee .....	21
ii) Documentation to establish a payee's FATCA status .....	22
iii) Due diligence and standards of knowledge to validate FATCA classifications .....	27
iv) Presumption rules .....	30
v) Change in circumstances .....	31
vi) Record retention.....	31
b) Withholding requirements.....	32
i) Obligations to withhold and deposit.....	32
ii) Elections to be withheld on.....	32
c) Reporting .....	33
d) Use of agents for reporting and withholding obligations.....	33
5) Foreign financial institutions requirements .....	33

- a) FFI Agreement Overview and Expanded Affiliated Group Registration Requirement ..... 33
  - i) Limited branches and limited FFIs ..... 34
- b) Requirements under the FFI agreement ..... 34
  - i) Definition of a financial account..... 34
  - ii) Documentation and due diligence ..... 36
  - iii) Withholding..... 45
  - iv) Reporting..... 46
- 6) Administrative ..... 47
  - a) FATCA registration portal ..... 47
  - b) Responsible officer and FFI compliance program ..... 48
  - c) FFI enforcement: Compliance verification and event of default ..... 49
  - d) Refunds ..... 51
- 7) Appendix..... 52
  - a) Acronyms..... 52
  - b) Glossary ..... 53

## 1) Overview and history of FATCA

On Thursday, January 17, 2013, the U.S. Treasury Department and the Internal Revenue Service (IRS) released the long-awaited final regulations for the Foreign Account Tax Compliance Act (FATCA). FATCA, codified as Chapter 4 of the Internal Revenue Code, represents the Treasury Department's efforts to prevent U.S. taxpayers who hold financial assets in non-U.S. financial institutions (foreign financial institutions or FFIs) and other offshore vehicles from avoiding their U.S. tax obligations.

Originally codified as part of the Hiring Incentives to Restore Employment Act of 2010, these final regulations complete a series of interim guidance issued by the Treasury Department and the IRS, including a series of IRS notices, the proposed regulations released on February 8, 2012, and Announcement 2012-42 released in October 2012. Over time, Treasury and the IRS solicited and received numerous comments and met extensively with industry stakeholders to develop a streamlined implementation approach to FATCA. The result is the framework for a global information reporting regime.

The intent behind the law is for foreign financial institutions (FFIs) to identify and report U.S. persons that hold assets abroad to the IRS, and for certain non-financial foreign entities (NFFEs) to identify their substantial U.S. owners. In order to comply with the rules, FFIs are required to enter into an FFI agreement with the U.S. Treasury or comply with intergovernmental agreements (IGAs) entered into by their local jurisdictions. U.S. withholding agents (USWAs) must document all of their relationships with foreign entities in order to assist with the enforcement of the rules. Failure to enter into an agreement or provide required documentation will result in the imposition of a 30% withholding tax on certain payments made to such customers and counter-parties. Failure to impose the requisite withholding under FATCA requirements could result in significant financial exposure.

### a) The continued evolution of intergovernmental agreements

First initiated to remove compliance impediments posed by privacy laws, the IGA model is likely to mature into a global information reporting framework. The final regulations introduce the Global Intermediary Identification Number (GIIN) and place great emphasis on the relationship of the regulations with the two forms of IGAs (Model 1 and Model 2). In particular, the final regulations make clear that FFIs in Model 1 IGA jurisdictions will be governed by the laws enacted in their own countries while those in Model 2 IGA jurisdictions will follow the final regulations. However, the final regulations do leave open the opportunity for foreign governments to negotiate for the inclusion of terms that would allow entities within their jurisdiction to follow more beneficial requirements in the final regulations. The final regulations' emphasis on IGAs may signify Treasury's realization that IGAs — and not the final regulations — may be the path forward to achieve FATCA's goal and establish a global information reporting framework.

It is important to note, however, that while the IGAs offer solutions around local privacy laws and other legal considerations, they do not necessarily reduce the effort needed to comply with due diligence requirements and their practical management across multiple jurisdictions. They also may create administration challenges for institutions with diverse footprints. Further complicating compliance efforts is the "favored nation clause" that enables the agreements to be changed based upon future agreements that may be seen as providing more desirable terms. This creates a "moving target" of compliance requirements as the IGAs change.

## b) The time is now...

Organizations now have less than a year to prepare for the first wave of compliance milestones starting January 1, 2014. These milestones will include onboarding, withholding on income payments, identifying grandfathered obligations and entering into an FFI Agreement or registering, as required by the effective date.

### Final FATCA Regulations Timeline

FATCA Compliance Action Items		2013			2014			2015			2016			2017			2018		
General Compliance	GIIN registration deadline for 2012 List			◆	Oct 25														
	Grandfathered obligation cutoff			◆	Dec 31														
	Effective date of FFI Agreement for FFIs receiving a GIIN prior to December 31, 2013			◆	Dec 31														
	Transition period for affiliated group rule										◆	Jan 1							
New / Preexisting Accounts	USWA begin new account onboarding			◆	Jan 1														
	USWA complete preexisting accounts					◆	Jun 30 - Prima facie FFIs			◆	Dec 31 - All other entity accounts								
	FFI begin new account onboarding			◆	Jan 1														
	FFI complete preexisting accounts					◆	Jun 30 - Prima facie FFIs	◆	Dec 31 - High Value Individuals	◆	Dec 31 - All other accounts								
Withholding	Begin income withholding (excludes certain offshore payments of U.S. source income)			◆	Jan 1														
	Begin offshore U.S. source income payment withholding												◆	Jan 1					
	Begin gross proceeds withholding												◆	Jan 1					
	Begin foreign -passthru payments withholding												◆	Jan 1					
Reporting	FFI begin U.S. Account information and balance reporting *							◆	Mar 31										
	FFI begin U.S. Account income reporting*									◆	Mar 31								
	FFI begin U.S. Account gross proceeds reporting*											◆	Mar 31						
	FFI aggregate reporting on NPFFI payments (only for 2015 and 2016)**										◆	Mar 15	◆	Mar 15					
	USWA begin U.S. Owner reporting*							◆	Mar 31										
	Begin reporting on withholdable income payments **							◆	Mar 15										
	Begin reporting on gross proceeds **																	◆	Mar 15

◆ Final FATCA regulations

\*Form 8966 \*\*Form 1042-S

## 2) Withholdable payments under FATCA

FATCA implements a 30 percent withholding tax on certain payments if the documentation requirements are not met or for failure to enter into an FFI agreement. The withholding tax is applied to those payments that are defined as withholdable payments and that are generally made after December 31, 2013. However, withholding is not required in all circumstances. For example, withholding is not required if a withholding agent can reliably associate the otherwise withholdable payment to documentation from a payee that is exempt from withholding or when the payment is made with respect to a grandfathered obligation (defined below). Furthermore, some beneficial owners of payments and certain categories of NFFEs are exempt from FATCA withholding.

### a) Withholdable payments

FATCA regulations define withholdable payments as “[a]ny payment of U.S. source FDAP<sup>1</sup> income; and [f]or any sales or other dispositions occurring after December 31, 2016, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income.”<sup>2</sup> Per the final regulations, the timeline to begin withholding is January 1, 2014 for U.S. source FDAP income and January 1, 2017 for offshore U.S. source income, gross proceeds and foreign passthru payments.

FDAP income includes items such as compensation, dividends, interest, OID, pensions and annuities, rents and royalties. The term U.S. source means that the payment must be derived from sources within the United States. The withholding applies to the gross amount of the income payment (not reduced by any offsets or deductions). If a withholding agent is unable to determine the payment source at the time of payment, final FATCA regulations require the payment to be treated as U.S. source income.<sup>3</sup>

In addition, FATCA disallows many of the withholding exceptions regarding U.S. source FDAP income that are expressly granted in other Internal Revenue Code sections. For example, a payment of U.S. source portfolio interest or bank deposit interest, both exempt from withholding under Chapter 3, are treated as withholdable payments for FATCA purposes. The final regulations also apply a special rule for interest paid by a foreign branch of a domestic bank. While such interest is treated as non-U.S. source income for other sections of the Internal Revenue Code, for FATCA purposes, it is treated as U.S. source FDAP income. The final regulations do exclude certain payments from the definition of a withholdable payment and thus withholding (e.g., payments of effectively connected income and interest on certain short-term obligations). These exceptions are discussed in more detail below.

Gross proceeds is the amount received from the “sale, exchange, or disposition of property... that requires recognition of gain or loss under Section 1001I4, determined without regard to whether the owner of such property is subject to U.S. federal income tax with respect to such sale, exchange, or disposition.”<sup>5</sup> Gross proceeds withholding will apply to all property that is disposed of after December 31, 2016, except proceeds from the sale of a grandfathered obligation (where the obligation was outstanding on January 1, 2014 and was disposed of after December 31, 2016).<sup>6</sup>

---

<sup>1</sup> Fixed, determinable, annual, or periodic income includes any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income.

<sup>2</sup> Treas. Reg. §§1.1473-1(a)(1)(i) and 1.1473-1(a)(1)(ii).

<sup>3</sup> Treas. Reg. §1.1471-2(a)(5).

<sup>4</sup> “Except as otherwise provided in this subtitle, the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.” 26 USC § 1001(c).

<sup>5</sup> Treas. Reg. § 1.1473-1(a)(3).

<sup>6</sup> Treas. Reg. § 1.1471-2(b)(1).

Final FATCA regulations provide that gross proceeds are considered paid to the payee when either the payee's account is credited or the payee is entitled to the funds. If gross proceeds are paid directly to a financial institution or other entity acting as an intermediary, the date the proceeds will be subject to withholding is when the financial institution or intermediary otherwise credits the sale to the payee's account or the payee becomes entitled to the proceeds.<sup>7</sup> It is worth noting that gross proceeds can result in U.S. withholding tax under FATCA even though an FFI or NFFE has a loss on the sale or exchange. To illustrate, if an FFI purchases U.S. stock for \$100, the stock depreciates to \$50, and then a non-compliant FFI sells the stock for \$50 the result is that the FFI will have a \$15 U.S. withholding tax.<sup>8</sup>

After the release of the proposed regulations regarding the application of gross proceeds withholding to clearing organizations, the IRS modified its position. These organizations will now be allowed to determine gross proceeds withholding based on the net amount paid or credited to a member's account under the settlement procedures. This is because clearing organizations pay or credit a member's account with the net amount of sales or dispositions that occur during a given period. Additionally, the final regulations also modify the definition of gross proceeds to exclude proceeds from transactions not subject to recognition under Section 1058.<sup>9</sup> As the withholding on gross proceeds has been delayed until January 1, 2017<sup>10</sup>, the definition of a recipient of a payment of other than U.S. source FDAP income has been reserved by the IRS.

The treatment of foreign passthru payments (FPPs) remains uncertain as the IRS has reserved its opinion on this topic in the final FATCA regulations. However, pursuant to the legislation and earlier guidance, a payment will constitute an FPP to the extent that it is "attributable to" a withholdable payment. This may include a portion of interest paid by a foreign bank on its depository accounts or a partial distribution a foreign financial corporation makes to its shareholders. Withholding on FPPs is aimed at preventing an FFI from helping U.S. persons avoid U.S. tax by using blockers and making indirect investments in U.S. assets.

## **b) Exceptions to withholding**

While FATCA implements a 30 percent withholding tax on some payments if certain requirements are not met, certain payments will be exempt from withholding. Grandfathered obligations, certain short term obligations, effectively connected income (ECI), excluded non-financial payments, gross proceeds from the sale of excluded property, fractional shares and offshore payments of U.S. FDAP income prior to 2017 are all types of exempt payments.

Responding to comments received, the IRS expanded exempt payments in the final FATCA regulations. For example, the final regulations expanded the definition of a grandfathered obligation to "[a]ny obligation outstanding on January 1, 2014". This represents a one year extension from the proposed regulations' date, which provides additional time to facilitate market transition and address implementation issues. The IRS also received comments to the proposed regulations that requested modifications to the scope of grandfathered obligations to facilitate the future issuance of guidance under Section 871(m). To address, the IRS has expanded the definition to include "[a]ny agreement that gives rise to a withholdable payment solely because the obligation is treated as giving rise to a dividend equivalent pursuant to Section 871(m)<sup>11</sup> ..., provided that the obligation is executed on or before the date that is six months after the date on which obligations of its type are first treated as

---

<sup>7</sup> Treas. Reg. § 1.1473-1(a)(3)(iii)(A).

<sup>8</sup> See generally 1.1473-1(a)(3)(i)(A).

<sup>9</sup> "Pursuant to an agreement which meets ... [certain] requirements, no gain or loss shall be recognized on the exchange of such securities by the taxpayer for an obligation under such agreement, or on the exchange of rights under such agreement by that taxpayer for securities identical to the securities transferred by that taxpayer." 26 USC § 1058(a).

<sup>10</sup> Treas. Reg. § 1.1473-1(a)(1)(ii).

<sup>11</sup> "For purposes of Subsection (a), Sections 881 and 4948 (a), and Chapters 3 and 4, a dividend equivalent shall be treated as a dividend from sources within the United States." 26 USC § 871(m).

giving rise to dividend equivalents.” Finally, the final regulations expand the definition of a grandfathered obligation to include any agreement requiring a second party to make a payment with respect to collateral posted to secure a grandfathered obligation. This applies even though collateral itself is not a grandfathered obligation.

Another expanded exemption under the final FATCA regulations’ definition of grandfathered obligations is “[a]ny agreement requiring a secured party to make a payment with respect to, or to repay, collateral posted to secure a grandfathered obligation.”<sup>12</sup> While requirements to make a payment with respect to collateral posted to secure a grandfathered obligation is also exempt, pooled collateral will have to be allocated between grandfathered and non-grandfathered obligations. For purposes of determining the grandfathered date for FPPs, the final regulations include any obligation that is executed within six months beginning after the regulations defining an FPP are published in the Federal Register.<sup>13</sup>

In the grandfathered obligation context, the term obligation means any legally binding agreement, including but not limited to bonds, guaranteed investment certificates, term deposits, lines of credit, revolving credit facilities, derivatives under ISDA master agreements, life insurance contracts that are entirely payable no later than the date of death of the insured, and immediate annuities. The term obligation does not include any legal agreement that is treated as equity for U.S. tax purposes, any legal agreement that lacks a stated expiration, a brokerage or similar agreement or a master agreement.<sup>14</sup>

It is important to note that any material modification of an existing obligation will result in the obligation being treated as executed (or, in the case of a debt obligation, newly issued) as of the effective date of the modification. Generally, a modification will be considered a material modification if the legal rights or obligations that are altered and the degree to which they are altered are economically significant.<sup>15</sup> Therefore, if an instrument that would otherwise qualify as a grandfathered obligation is materially modified after January 1, 2014, it will be treated as a newly issued instrument or executed.<sup>16</sup>

Certain short-term obligations will also be exempt from withholding under FATCA. The final regulations define these obligations as “[a] payment of interest or original issue discount on short-term obligations...”<sup>17</sup> which are defined in Section 871(g)(1)(B)(i).<sup>18</sup> It is worth noting that the 183-day threshold found in Section 871 is different than the one-year threshold found in Section 1283.<sup>19</sup>

Effectively connected income (ECI) that is exempt from FATCA withholding is defined as “[a]ny payment to the extent it gives rise to an item of income that is taken into account under Section 871(b)(1)<sup>20</sup> or 882(a)(1)<sup>21</sup> for the taxable year.” Therefore, any payment to the extent it gives rise to income that is (or is deemed to be) effectively connected with the conduct of a trade or business in the United States and is included in the beneficial owner’s gross income for the taxable year will not

---

<sup>12</sup> Treas. Reg. § 1.1471-2(b)(2)(i)(A).

<sup>13</sup> Treas. Reg. § 1.1471-2(b)(2)(ii)(B).

<sup>14</sup> Treas. Reg. § 1.1471-2(b)(2)(ii)(B).

<sup>15</sup> Treas. Reg. § 1.1001-3(e)(1).

<sup>16</sup> Treas. Reg. § 1.1471-2(b)(2)(ii)(B)(iv).

<sup>17</sup> Treas. Reg. § 1.1473-1(a)(4)(i).

<sup>18</sup> “Certain short-term obligations [are] [a]ny obligation[s] payable 183 days or less from the date of original issue (without regard to the period held by the taxpayer).” 26 USC § 871(g)(1)(B)(i).

<sup>19</sup> “The term “short-term obligation” means any bond, debenture, note, certificate, or other evidence of indebtedness which has a fixed maturity date not more than 1 year from the date of issue.” 26 USC § 1283(a)(1)(A).

<sup>20</sup> “A nonresident alien individual engaged in trade or business within the United States during the taxable year shall be taxable as provided in section 1 or 55 on his taxable income which is effectively connected with the conduct of a trade or business within the United States.” 26 USC § 871(b)(1).

<sup>21</sup> “A foreign corporation engaged in trade or business within the United States during the taxable year shall be taxable as provided in Section 11, 55, 59A, or 1201 (a) on its taxable income which is effectively connected with the conduct of a trade or business within the United States.” 26 USC § 882(a)(1).

be considered a withholdable payment. The IRS has released a draft Form W-8ECI for foreign persons to claim that their income is effectively connected with the conduct of a trade or business in the United States.

The IRS responded to comments received regarding treatment of ECI in the proposed regulations. The commenters requested that the final FATCA regulations incorporate the Chapter 3 rules permitting withholding agents to presume that payments made to U.S. branches of certain banks and insurance companies are payments of income that is effectively connected with the conduct of a trade or business within the United States. The IRS responded in the final regulations by permitting this presumption so long as the withholding agent obtains a GIIN that confirms that the FFI is a participating FFI or a registered deemed-compliant FFI. The EIN for the U.S. branch must also be collected so that the withholding agent can properly report the payment. It is anticipated that conforming changes will be made to the presumption rule in Chapter 3 to provide consistency with the rule set forth in Chapter 4.

Additionally, payments subject to withholding under Sections 1445 or 1446<sup>22</sup> will not be subject to withholding under Chapter 4.

The final regulations clarify and expand the ordinary course of business payments exception to withholdable payments found in the proposed regulations. Commenters requested that the definition of ordinary course of business payments be modified by striking the word “nonfinancial”. This word may create ambiguity as to whether services provided to a financial institution that are accounts payable type expenses are ordinary course of business payments. Commenters also noted that the ordinary course of business exception imposed significant administrative burdens given the volume of cross-border payments that had to be identified and classified. In response, the IRS replaced the ordinary course of business exception with a more comprehensive exception for excluded non-financial payments including “services (including wages and other forms of employee compensation), the use of property office and equipment leases, software licenses, transportation, freight, gambling winnings, awards, prizes, scholarships and interest on outstanding accounts payable arising from the acquisition of goods of services”.<sup>23</sup> The revised exception provides greater certainty by explicitly describing payments that are excluded from the definition of withholdable payments and by providing a list of withholdable payments. However, many payments are expressly considered withholdable payments.<sup>24</sup>

Gross proceeds from the sale of excluded property are not treated as withholdable payments. For purposes of this exclusion, excluded property is defined as amounts received from the sale or other dispositions of any property that can produce U.S. FDAP income if all such U.S. source FDAP income would be excluded from the definition of withholdable payment under...<sup>25</sup> the short-term, the ECI exception and the non-financial payments exception. For example, gross proceeds from the sale of a short term obligation described in 871(g)(1)(B)(i) is not a withholdable payment. Likewise, the sale of fractional shares is also exempt from FATCA withholding.<sup>26</sup> Fractional shares do not

---

22 “If a partnership has effectively connected taxable income for any taxable year, and any portion of such income is allocable under Section 704 to a foreign partner, such partnership shall pay a withholding tax under this section at such time and in such manner as the Secretary shall by regulations prescribe.” 26 USC § 1446(a).

23 Treas. Reg. § 1.1473-1(a)(4)(iii).

24 “Payments in connection with a lending transaction (including loans of securities), a forward, futures, option, or notional principal contract, or a similar financial instrument; premiums for insurance contracts or annuity contracts; amounts paid under cash value insurance or annuity contracts; dividends; interest (including substitute interest described in §1.861-2(a)(7)) other than interest described in the preceding sentence; investment advisory fees; custodial fees; and bank or brokerage fees.” Treas. Reg. § 1.1473-1(a)(4)(iii).

25 Treas. Reg. § 1.1473-1(a)(4)(iv).

26 Treas. Reg. § 1.1473-1(a)(4)(v).

require a “return of information... with respect to a sale of a fractional share of stock if the gross proceeds on the sale of the fractional share are less than \$20.”<sup>27</sup>

To coordinate with the withholding obligations of a model 1 IGA, the final regulations provide a transitional exemption for offshore payments of U.S. source FDAP income made prior to January 1, 2017. This exemption to FATCA withholding is made with respect to an offshore obligation if such payment is made by a person that is not acting as an intermediary with respect to the payment. However, this exemption will not apply in cases where a flow-through entity has a residual withholding requirement with respect to its partners, owners or beneficiaries. For purposes of this exemption, an intermediary includes a person that acts as a qualified securities lender as defined for purposes of Chapter 3.<sup>28</sup>

### 3) Entity classification

Under FATCA, an entity's responsibilities are primarily driven by its classification as either a U.S. withholding agent (USWA), a foreign financial institution (FFI), including sub-classifications, or a non-financial foreign entity (NFFE), including sub-classifications. This section describes the definitions of the various entity types under FATCA, certain exclusions to the definition of a FFI, and describes the requirements of certain entities that are not subject to the requirements of participating FFIs.

#### a) U.S. withholding agent definition

A USWA is any U.S. person that is a withholding agent. That includes any person that has the control, receipt or custody over the disposal or payment of a withholdable payment or foreign passthru payment<sup>29</sup>. This is generally a non-individual U.S. person and includes domestic partnerships, domestic corporations, any non-foreign estates and any trusts if a U.S. court is able to exercise primary supervision over the trust's administration and one or more U.S. persons have authority to control all substantial decisions of the trust.<sup>30</sup> A U.S. person also includes a foreign branch of a U.S. person that is not a qualified intermediary acting as an intermediary with respect to a payment.<sup>31</sup>

Although not U.S. persons, FATCA also treats certain entities as USWAs in terms of their responsibilities. However, these entities must generally identify themselves to other withholding agents using a Form W-8, not a Form W-9. These entities include U.S. branches of participating FFIs or registered deemed-compliant FFIs and territory financial institutions (financial institutions organized in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico or the U.S. Virgin Islands).

Although territory financial institutions are generally USWAs, if they are acting as an intermediary with respect to a withholdable payment they must generally pass information up to the USWA so that it may withhold on the payment. However, if the territory financial institution elects to be treated as a U.S. person with respect to the payment, it will need to conduct any required withholding and inform the USWA of the election using the Form W-8IMY.

#### b) Expanded affiliated group concept

Aside from entities resident in an IGA country, the final regulations define an FFI as any non-U.S. entity that is a depository institution, custodial institution, investment entity, specified insurance

---

27 Treas. Reg. § 1.6045-1(c)(3)(ix).

28 See Notice 2010-46, 2010-24 IRB 757.

29 See section 2 of this document for the definitions of a withholdable payment and foreign passthru payments.

30 IRC § 7701(a)(30).

31 Treas. Reg. § 1.1471-3(a)(3)(vii).

company or designated holding company or treasury center. Under FATCA, all FFI entities that are part of a FFI's expanded affiliated group must be a participating FFI or a registered deemed-compliant FFI. A special transitional rule applies in situations where legal restrictions would keep an entity in a particular jurisdiction from satisfying all of the requirements under an FFI agreement.

An entity is a part of an expanded affiliated group under FATCA if it is affiliated with a common parent that directly or indirectly owns over 50 percent of the stock by vote and value of such corporation, or in the case of a partnership or non-corporate entity, owns over 50 percent by value of the beneficial interest of such partnership or non-corporate entity.<sup>32</sup> The final regulations provide an exclusion from membership in an expanded affiliated group for investment entities created or funded by an FFI group member with the intention to sell the interest in the fund to other unrelated parties. This exception resulting from the contribution of seed capital<sup>33</sup> applies if:

- The member that owns the investment entity is an FFI in the business of providing seed capital to form investment entities with the intention to sell to unrelated investors;
- The investment entity was created in the ordinary course of the member's business as described directly above;
- The member owning the investment entity as of the date of acquiring the investment entity intended to hold any equity interest over 50 percent (including ownership by other members in the member's expanded affiliated group) for no more than three years; and
- For any interest held by the creating member past the three years, the aggregate value of the equity interest held by the creating member and other members in its expanded affiliated group is 50 percent or less.

FATCA provides for an anti-abuse rule designed to include entities as part of an expanded affiliated group that would otherwise not be included if there has been a change of ownership, voting rights (including a separation of voting rights and value) or form of the entity designed to avoid reporting or withholding requirements under FATCA. Entities that restructure their operations for other purposes, should carefully document the purpose behind such restrictions to avoid any lingering expanded affiliated group issues.

### **c) FFI definition**

#### ***i) Depository institution***

A depository institution is an entity that accepts deposits or other similar fund investments in the ordinary course of a banking or similar business<sup>34</sup>. However, an entity that only accepts deposits for collateral or security pursuant to a sale or lease of property (or similar financing arrangement) is not considered engaged in a banking or similar business. The distinction is that the entity is not accepting deposits from the public to finance the purchase of assets which are later sold or leased. Rather, the entity is taking the deposit to secure the sale or lease from damage, credit risk or other risks associated with the transaction.

---

<sup>32</sup> Treas. Reg. § 1.1471-5(i)(2).

<sup>33</sup> Seed capital means initial capital contributions intended as temporary investments and is deemed by the manager necessary or appropriate.

<sup>34</sup> Ordinary course of business includes: making loans or other extensions of credit (i.e., mortgages, car loans, equipment loans, credit cards, pre-paid cards, etc.); purchasing, selling, discounting, or negotiating accounts receivable, installment obligations, notes, drafts, checks bills of exchange, acceptances, or other evidences of indebtedness; issuing letters of credit and negotiating drafts drawn thereunder; providing trust or fiduciary services; financing foreign exchange transactions; or entering into, purchasing, or disposing of finance leases or leased assets. Treas. Reg. § 1.1471-5(e)(2)(i).

## ***ii) Custodial institution***

A custodial institution is an entity that holds financial assets for third parties as a substantial portion of its business. This is defined as earning over 20 percent of its gross income<sup>35</sup> from such activities during the shorter of the last three years ending on December 31 of the preceding year in which the determination is made or its existence. For example, if an entity makes this determination in 2014, it will include income earned from January 1, 2011 through December 31, 2013 in its calculation, assuming it existed in all those years.

If the entity is a start-up with no prior operating history, it must determine whether it anticipates meeting the 20 percent income test based on its expected assets and operations, including the functions or purpose for which the entity is licensed or regulated.

## ***iii) Investment entity***

An investment entity can fall under three different categories: entities that are in the investment or portfolio management business for customers, investment vehicles or entities that are professionally managed by other FFIs or investment vehicles established to invest in financial assets. Generally, small trusts or similar types of entities that are not professionally managed will not fall under this definition and instead be classified as a NFFE (likely a passive NFFE).

The first category of an investment entity will generally include investment advisors, investment management companies, brokers, etc. Specifically, this category includes any entity that earns over 50 percent of its gross income from one or more of the following investment activities during either the last three years or its existence if in existence for less than three years:

1. Trading in money market instruments (checks, bills, certificate of deposits, derivatives, etc.); foreign currency; foreign exchange, interest rate and index instruments; transferable securities; or commodity futures (e.g., broker dealers, etc.);
2. Individual or collective portfolio management; or
3. Otherwise investing, administering or managing funds, money or financial assets<sup>36</sup> on behalf of other persons (e.g., investment managers, investment advisors, etc.)

The second category of an investment entity will generally include professionally managed investment funds, mutual funds, SICAVs, trusts and other similar entities. Specifically, this category includes any entity professionally managed by a depository institution, custodial institution, specified insurance company or another investment entity. For example, the investment trusts that are managed by trust companies will generally be classified as an FFI because the trust company itself will likely fall under the investment entity definition of an FFI. Additionally, the entity's gross income attributable to investing, reinvesting or trading in financial assets must exceed 50 percent of its gross income during either the last three years or its life if the entity has existed for less than three years.

The third category of an investment entity is meant to capture any investment vehicle created to invest in financial assets. This will include collective investment vehicles, mutual funds, exchange traded funds, private equity funds, hedge funds, venture capital funds, leveraged buyout funds or any similar investment vehicles.

---

<sup>35</sup> The following income must be included in the calculation: custody, maintenance, and transfer fees; commission and fees earned from executing and pricing securities transactions; income earned from extending credit to customers with respect to financial assets held in custody (or acquired through such extension in credit); income earned on the bid-ask spread of financial assets; and fees for providing financial advice and for clearance and settlement services.

<sup>36</sup> Financial asset means a security, partnership interest, commodity, notional principal contract (swap), insurance contract or annuity contract or any interest in the aforementioned.

If the entity is a start-up with no prior operating history, it must determine whether it anticipates meeting the 50 percent income test based on its expected assets and operations including the functions or purpose for which the entity is licensed or regulated.

#### ***iv) Specified insurance company***

A specified insurance company is an insurance company or a holding company<sup>37</sup> with an insurance company in its expanded affiliated network whereby the insurance company or holding company issues or is obligated to make payments with respect to cash value insurance<sup>38</sup> or annuity contracts<sup>39</sup>. If the holding company does not actually issue the specified contracts or have to make payments on said contracts, it is not an FFI even if it has an insurance company within its expanded affiliated group that is an FFI under this definition. The reason behind including holding companies in the definition is the IRS' concern that an insurance company within the group could avoid its FATCA responsibilities by funneling withholdable payments through a holding company.

Insurance companies will also need to determine the value of any cash value insurance contracts it issues as it will affect its classification for FATCA purposes. FATCA defines a cash value contract as an insurance contract (other than a reinsurance contract between two insurance companies or a term life insurance contract) that has an aggregate cash value exceeding \$50,000 at any time during the calendar year. If an insurance company limits cash value to under \$50,000, it can effectively be excluded from the definition of an FFI unless it satisfies another FFI category. However, if the cash value of any of its insurance contracts can vary and may eventually exceed \$50,000, the insurance company should carefully consider whether it should classify itself as an FFI.

#### ***v) Holding company or treasury center***

Under the proposed FATCA regulations, a holding company or treasury center was included in what used to be the definition of an investment entity. Because the investment entity was modified to help exclude small non-professionally managed entities such as trusts, holding companies and treasury centers also fell out of scope under the revised definition. As a result, a new FFI category for holding companies and treasury centers was included in the final regulations.

The new category defines a holding company as an entity primarily involved in directly or indirectly holding all or part of the outstanding stock of one or more members of its expanded affiliated group. Additionally, to fall under the definition of an FFI, the holding company must either be part of an expanded affiliated group that includes a depository Institution, custodial institution, insurance company or an investment entity (classified as such because it is a professionally managed entity primarily engaged in investing, reinvesting or trading in financial assets or because it functions or holds itself out to be an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets); or be formed in connection with or availed by an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets. Essentially, this means that any holding company in a private equity or investment type structure will be classified as FFI, regardless of the activities it actually conducts.

---

<sup>37</sup> Entity primarily involved in directly or indirectly holding all or part of the outstanding stock of one or more members of its expanded affiliated group.

<sup>38</sup> Cash value includes any amount payable under a contract to a person upon surrender, termination, cancellation or withdrawal; or the amount that can be borrowed under said contract (e.g., by pledging as collateral). Cash value does not include an amount solely payable upon death of an insured; an amount payable due to personal injury, sickness, or indemnification of an economic loss on the occurrence of an insured event; a refund of a previously paid premium due to contract cancellation or termination; a decrease in risk exposure during the effective period; a correction to an error regarding the premium; a policyholder dividend (other than a termination dividend) that relates to an insurance contract for personal injury benefits, sickness benefits or economic loss indemnification benefits; or a return of an advance premium or premium deposit for an insurance contract for which the premium is payable at least annually if the amount of said premium does not exceed the next annual premium payable under the contract.

<sup>39</sup> An annuity contract is a contract whereby the issuer agrees to make payments for a period of time determined by reference to the life expectancy of one or more individuals. It also includes annuity contracts as defined under local law in which the issuer agrees to make payments for a term of years.

Under the new definition, a treasury center is an entity primarily involved in entering into investment, hedging and financing transactions with or for members of its expanded affiliated group to manage risk of price changes or currency fluctuations with respect to property for its expanded affiliated group; manage risk of interest rate, price or currency fluctuations of assets or liabilities for its expanded affiliated group; manage the working capital of the expanded affiliated group through investing or trading financial assets on its own account or on behalf of members in its expanded affiliated group; or act as a financing vehicle for borrowing funds for use by the expanded affiliated group.<sup>40</sup> Like the holding company definition, the treasury center must either be part of an expanded affiliated group that includes an FFI; or be formed in connection with or availed by an investment vehicle to be considered an FFI. Therefore, any treasury center in a private equity or investment type structure will generally be classified as an FFI.

### ***vi) Entities excluded from the FFI definition***

Even though an entity falls under the definition of an FFI, it may still be excluded if the entity is an excepted nonfinancial group entity; an excepted nonfinancial start-up or an entity entering a new line of business; an excepted nonfinancial entity in liquidation or bankruptcy; an excepted inter-affiliate FFI; a Section 501(c) entity; a non-profit organization; or an insurance company that falls under the FFI definition solely because of its reserving activities.

#### ***1. Excepted nonfinancial group entities***

The primary purpose of this exception is to exclude from the definition of FFI holding companies, treasury centers and captive finance companies<sup>41</sup> that are in a nonfinancial group<sup>42</sup> because they are unlikely vehicles for U.S. persons to shield assets. For example, an entity is a captive finance company that extends credit to customers, but is part of a group that is nonfinancial. Likewise, many nonfinancial groups that are engaged in active business have a treasury center entity that enters into hedging activities or other financing activities for the group would be excluded from the definition of an FFI. Finally, holding companies in nonfinancial group are also unlikely vehicles for U.S. persons to hide assets and are generally used for organizational, regulatory or tax purposes.

For this exclusion to apply, the entity in question must not be a depository institution or custodial institution and must not hold itself out to be (and was not formed in connection with or availed by) an investment vehicle established with an investment strategy to acquire or fund companies and to treat the interest in the companies as capital assets held for investment purposes. Generally, any entity in a private equity or investment type structure will not qualify for this exception given the high risk of U.S. persons using such entities to hide assets.

---

<sup>40</sup> Does not include an entity that has an outstanding equity or debt interest held by a non-expanded affiliated group member if the redemption amount, retirement amount or return earned on such interest is determined primarily by reference to the financing activities of the treasury center with members outside its expanded affiliated group or any member of their group that is an investment entity.

<sup>41</sup> A captive finance company is an entity whose primary activity is to enter into financing or leasing transactions with or for suppliers, distributors, dealers, franchisees or customers of such entity or any member of such entity's expanded affiliated group that is an active NFFE.

<sup>42</sup> A nonfinancial group must satisfy the following requirements for the prior 3 years:

- a. No more than 25 percent of the expanded affiliated group's gross income (excluding excepted nonfinancial start-up companies or entities entering a new line of business, or excepted nonfinancial entities in liquidation or bankruptcy) consists of passive income;
- b. No more than 5 percent of the expanded affiliated group's gross income is derived by FFIs (excluding transactions between group members or by members that are certified deemed-compliant FFIs);
- c. No more than 25 percent of the fair market value of assets held by the expanded affiliate group (excluding assets held by excepted nonfinancial start-up companies, entities entering a new line of business or excepted nonfinancial entities in liquidation or bankruptcy) are assets held for the production of passive income; and
- d. All FFIs in the expanded affiliated group are either participating or deemed-compliant FFIs.

## **2. *Excepted nonfinancial start-up companies or companies entering a new line of business***

This exclusion includes entities that invest capital into assets with the intent to operate a business or new line of business that is not a financial institution or passive NFFE. This exclusion expires 24 months after the initial organization of the entity or in the case of an entity starting a new line of business, 24 months after the board resolution or similar approval of the new line of business, provided that the entity qualified as an active NFFE for the 24 months preceding the approval date. Like the excepted nonfinancial entity exception, the risk of U.S. persons using these entities to shield assets is low because the entity intends to be in a non-financial business and U.S. persons will generally use passive vehicles to hide assets rather than actually operating a business.

To mitigate abuse, this exclusion will not apply if the entity functions (or hold itself out to be) an investment fund such as a private equity fund, venture capital fund, leveraged buyout fund or any similar investment vehicle established with an investment strategy to acquire or fund companies and to treat the interest in the companies as capital assets held for investment purposes. Generally, these types of funds or vehicles pose a much greater risk of shielding reportable assets.

## **3. *Excepted nonfinancial entities in liquidation or bankruptcy***

This exclusion applies to entities in liquidation or reorganization that were not financial institutions or passive NFFEs in the past five years and do not intend to recommence operations as a financial entity. Entities in liquidation or bankruptcy could technically satisfy the definition of an FFI (particularly the investment entity definitions) as a result of the activities it must conduct as part of the liquidation or bankruptcy process. However, because it is highly unlikely that a nonfinancial entity enters into bankruptcy or liquidation solely to help shield reportable assets, the IRS feels that these entities pose a very low risk of abuse.

## **4. *Excepted inter-affiliate FFI***

This exception excludes from the definition of an FFI certain entities that were created to transact a particular deal or for tax or other regulatory purposes. Typically these are entities that only perform activities within the group such as special purpose vehicles or entities (SPVs and SPEs). To qualify for the exception the entity must satisfy the following requirements:

- a. The entity does not maintain accounts aside from accounts for members within its expanded affiliated group;
- b. The entity does not hold an account with or receive payments from any withholding agent outside its expanded affiliated group;
- c. The entity does not make withholdable payments to members outside its expanded affiliated group or limited FFIs or branches; and
- d. The entity has not agreed to report or otherwise act as an agent with respect to FATCA on behalf of any financial institution, including a member of its expanded affiliated group.

## **5. *Section 501(c) entities***

This exclusion applies to 27 different types of entities under Section 501(c) of the U.S. Internal Revenue Code that are exempt from certain federal income taxes (generally non-profit entities). Insurance companies described in Section 501(c)(15) are not included in this exclusion.

## **6. Non-profit organizations**

A non-profit organization is an entity established and maintained in its jurisdiction exclusively for religious, charitable, scientific, artistic, cultural or education purposes if:

- a. It is exempt from income tax in its jurisdiction;
- b. If it has no shareholders or members with a propriety or beneficial interest in the entity's income or assets;
- c. Neither the entity's jurisdiction's laws nor the entity's formation document permit income or assets to be distributed or benefited from an individual or non-charitable entity other than to further its charitable activities or as reasonable compensation for services or property for the charity; and
- d. The jurisdiction's laws or the entity's formation document require that upon the entity's liquidation or dissolution, all of its assets be distributed to a foreign government, another non-profit organization, or the entity's government or any political subdivision thereof.

## **7. Reserving activities of an insurance company**

Because of the low risk of FATCA concern, reserving activities of an insurance company will not cause the company to be a financial institution under the depository institution, custodial institution or investment entity definitions of an FFI.

### **vii) Deemed-compliant FFIs and exempt beneficial owners**

#### *(1) Deemed-compliant FFIs*

If an entity falls under the definition of an FFI and is not excluded from the definition, it can nevertheless fall under a deemed-compliant FFI category. Generally deemed-compliant FFIs have less impact in terms of what they are required to do to comply with FATCA, but the impact varies depending on the category of deemed-compliant status. There are three categories of FFI with varying responsibilities including registered deemed-compliant FFIs, certified deemed-compliant FFIs and owner-documented FFIs.

#### **(a) Registered deemed-compliant FFIs**

Registered deemed-compliant FFIs will have to register with the IRS, obtain a GIIN and comply with certain other requirements. Like participating FFIs, registered deemed-compliant FFIs must select a responsible officer and such officer must certify every three years that the entity remains compliant. Registered deemed-compliant FFIs include local FFIs, nonreporting members of participating FFI groups, qualified credit issuers, qualified collective investment vehicles, restricted funds and sponsored investment entities and controlled foreign corporations. Reporting Model 1 IGA FFIs and Model 2 IGA FFIs treated as registered deemed-compliant are also treated as registered deemed-compliant FFIs under the regulations but the requirements for those are beyond the scope of this document.

With the exception of the qualified credit issuers, these registered deemed-compliant FFIs have requirements that are as stringent as those applicable to participating FFIs. The only real relief is generally the reporting requirements, but the rules are designed to ensure that there are no accounts to report in the first place. As a result, financial institutions should carefully consider whether a registered deemed-status status is worth the effort given the limitations they impose.

## **1. Local FFIs**

A Local FFI generally includes any FFI that is licensed and regulated as a financial institution under the laws of its country of organization, has no fixed place of business outside that country, does not solicit customers or have account holders outside the country, and has policies and procedures in place that would otherwise identify that it does not open or maintain accounts for U.S. persons. Typically, small local banks, credit unions and savings institutions will qualify for this deemed-compliant status.

## **2. Nonreporting members of participating FFI groups**

Nonreporting members of participating FFI groups of entities can be leveraged to help centralize the reporting function of a participating FFI group by making most of the entities in the group nonreporting members and moving reportable accounts to one or more participating FFIs that can conduct the required reporting and account maintenance. Unfortunately, the nonreporting entity will still need documentation and due diligence procedures in place to help identify and subsequently close or transfer U.S. accounts, recalcitrant accounts or accounts held by nonparticipating FFIs. To qualify for the status, the financial institution must be a member of a participating FFI and have policies and procedures in place to identify accounts or account holders who are of U.S. origin; become recalcitrant or register as a nonparticipating FFI; and have plans to either transfer or close the account unless it becomes a participating FFI.

## **3. Qualified collective investment vehicles**

The qualified collective investment vehicle deemed-compliant status is primarily for regulated investment vehicles that are FFIs solely engaged in investing, reinvesting or trading. Equity investors of the vehicle, direct debt investors with an interest greater than \$50,000 and other financial account holders must generally be limited to participating FFIs, registered deemed-compliant FFIs, U.S. persons that are not specified U.S. persons, nonreporting IGA FFIs, or exempt beneficial owners. Because all of the investors must be compliant, the vehicle poses a minimal risk for purposes of FATCA.

## **4. Restricted funds**

To qualify as a restricted fund, the fund must be an FFI solely because it is a foreign investment entity regulated as an investment fund under the laws of the fund's FATF-compliant country<sup>4344</sup>. Interests that are not directly issued by the fund may be sold only through distributors that are participating FFIs, registered deemed-compliant FFIs, local banks or restricted distributors<sup>45</sup>. Sales must be prohibited to specified U.S. persons, non-participating FFIs and certain types of NFFEs. The fund must also comply with certain account identification and account redemption rules. As with collective investment vehicles, because of the restriction to sell to reportable accounts and non-compliant entities and because interests in the fund must be sold through FATCA compliant entities, restricted funds pose a minimal risk for FATCA purposes.

## **5. Qualified credit card issuers**

The qualified credit card issuer category of an FFI partially addresses the issue of whether an entity that solely issues credit (i.e., credit card issuers) is considered a depository institution. Together with

---

43 Financial Asset Task Force is an inter-governmental body established in 1989 to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

44 § 1.14715(f)(1)(D)(1).

45 §1.1471-5(f)(4). An entity is a restricted distributor if it operates as a distributor that holds debt or equity interests in a restricted fund as a nominee and meets specific qualifying requirements.

the updated definition of a depository account, the new category clarifies that an overpayment on a credit card not immediately returned is considered a “deposit” under the definition of a depository institution. Because this entity also satisfies the “in the banking or similar business” requirement to the depository institution FFI definition, it will be considered an FFI under the Regulations. However, the IRS recognized that if the credit issuer limits overpayments to \$50,000 or less, it would satisfy the depository account exception to a U.S. account and pose a low risk of tax evasion. Accordingly, to qualify for this deemed-compliant status, the issuer may only accept deposits when a customer makes a payment on a balance due with a credit card and must have policies in place to prevent any particular customer from making a deposit in excess of \$50,000.

## **6. *Sponsored investment entities and controlled foreign corporations***

The sponsored investment entities and controlled foreign corporations (CFCs) deemed-compliant status allows another entity to register the sponsored entity and fulfill the requirements of the sponsored entity under FATCA. To be a sponsored investment entity, the sponsored entity cannot be a qualified intermediary, withholding partnership or withholding trust. To be a sponsored CFC, the sponsored entity must be a CFC; it cannot be a qualified intermediary, withholding partnership or withholding trust; it must be directly or indirectly owned by a U.S. financial institution (the sponsoring entity); and it must share a common electronic account system with the sponsoring entity. The sponsoring entity must manage the FFI and be authorized to enter into contracts on behalf of the FFI. Generally, sponsoring entities will be fund managers, trustees, corporate directors, managing partners and other similar entities that sponsor the entities they manage.

### **(b) Certified deemed compliant FFI**

While registered deemed-compliant FFIs will have to manage most of the administrative burdens common to participating FFIs, certified deemed-compliant FFIs will have far less administrative requirements since they do not need to register with the IRS or select a responsible officer. However, certified deemed-compliant FFIs are required to certify to their withholding agent that they meet the requirements applicable to the type of certified deemed-compliant status claimed by the FFI. Certified deemed-compliant FFIs include nonregistering local banks, sponsored closely held investment vehicles, limited life debt investment entities and low value account FFIs.

#### **1. *Nonregistering local bank***

Nonregistering local banks are generally small regulated local banks, credit unions and similar entities that are primarily depository institutions with no major operations outside the country of organization (including entities in their expanded affiliated group). Additional restrictions exist including a general prohibition against soliciting customers outside its country of organization and a maximum of \$175 million in assets (\$500 million total for an expanded affiliated group).

#### **2. *FFIs with only low-value accounts***

FFIs with only low-value accounts will generally be even smaller than a nonregistering local bank, with restrictions regarding whether the entity is regulated in its jurisdictions. To qualify, the FFI must not be an investment entity, must not have any accounts exceeding \$50,000 and must not have more than \$50 million in assets (including the total amount of assets in its expanded affiliated group). Given that most accounts under the limits imposed by this classification would not be reportable if subject to FATCA, the IRS generally feels that these entities pose limited risk.

### **3. Sponsored, closely-held investment vehicles**

This category of deemed-compliant is very similar conceptually to a sponsored investment entity and CFC under the registered deemed-compliant FFI category, but with stricter requirements given that the sponsored investment entity and CFC need to register with the IRS. For this status to apply, the sponsored closely-held investment vehicle (sponsored entity) can only be an investment entity FFI (i.e., not fall under another FFI definition); must not hold itself out as an investment vehicle for unrelated parties; must not be a qualified intermediary, withholding partnership or withholding trust; and must have fewer than 20 individuals who own all of the debt and equity interests in the sponsored entity. Additionally, the sponsored entity is required to have a contractual arrangement with a sponsoring entity that is a participating FFI, reporting Model I FFI or a U.S. institution that is authorized to manage and enter into contracts on behalf of the sponsored entity. Like its registered deemed-compliant cousin, the sponsoring entity will have to register with the IRS as a sponsoring entity (it does not need to register the sponsored entities) and perform the duties of a participating FFI with respect to the sponsored entity.

### **4. Limited life debt investment entities (transitional)**

The limited life debt investment entities status is a limited use category until January 1, 2017 for entities in existence as of December 31, 2011. The purpose behind this status was to address the existence of certain trust vehicles whereby the trust agreement or trust indenture generally prohibited the trustee from complying with FATCA due to a limitation of the trustee's authority. The status essentially provides a grace period for these types of entities to allow them to be restructured (or cease to exist naturally) for FATCA compliance. Limited life debt investment entities will meet the requirements of an FFI if it is the beneficial owner of a payment (or of payments made with respect to the account) and the FFI meets the following requirements:

- The FFI is a collective investment vehicle formed pursuant to a trust indenture or similar fiduciary arrangement that is an FFI solely because it is an investment entity that offers interests primarily to unrelated investors;
- The FFI was in existence as of December 31, 2011 and the FFI's organizational documents require that the entity liquidate on or prior to a set date and do not permit amendments to the organizational documents (including the trust indenture), without the agreement of all of the FFI's investors;
- The FFI was formed for the purpose of purchasing specific types of indebtedness and holding those assets until the termination of the asset or the vehicle;
- All payments made to the investors of the FFI are cleared through a clearing organization that is a participating FFI, a reporting Model 1 FFI or a U.S. financial institution, or made through a trustee that is a participating FFI, reporting Model 1 FFI or U.S. financial institution; and
- The FFI's trust indenture or similar fiduciary arrangement only authorizes the trustee or fiduciary to engage in activities specifically designated in the trust indenture, and the trustee or fiduciary is not authorized through a fiduciary duty or otherwise to fulfill the same obligations as a participating FFI.

#### **(c) Owner-documented FFI**

The final deemed-compliant status category, an owner-documented FFI, is meant for smaller passive investment vehicles that are technically still considered FFIs (generally as a professionally managed investment entity). The rationale behind the category is that these entities are typically very small investment entities or trusts where signing an FFI agreement would be onerous given the size of the entity. Treating them as an owner-documented FFI whereby U.S. owner information is provided to the withholding agent and subsequently reported to the IRS serves the same purpose

behind FATCA while tailoring the burden to the risk FATCA seeks to address. To qualify for owner-documented FFI status, the following requirements must be met:

- The FFI is an FFI solely because it is an investment entity;
- The FFI does not act as an intermediary with respect to the payment;
- The FFI is not owned by nor is it a member of an expanded affiliated group with any FFI that is a depository institution, custodial institution or specified insurance company;
- The FFI does not maintain a financial account for any nonparticipating FFI;
- The FFI provides the designated withholding agent<sup>46</sup> with all required documentation and agrees to notify the withholding agent if there is a change in circumstances; and

The designated withholding agent agrees to report to the IRS all the information required on any specified U.S. persons<sup>47</sup>.

## *(2) Exempt beneficial owners*

Exempt beneficial owners acting as beneficial owners of a payment are generally exempt from FATCA and consist mainly of governmental entities, international organizations and central banks. The category includes:

- Any foreign government, any political subdivision of a foreign government or any wholly owned agency or instrumentality of any one or more of the foregoing;
- Any international organization or any wholly owned agency or instrumentality;
- Any foreign central bank of issue;
- Any government of a U.S. territory; and
- Entities described that are wholly owned by one or more other exempt beneficial owners.

In addition to the above, certain retirement funds also qualify for exempt beneficial owner status. This includes treaty-qualified retirement funds established in a country with an income tax treaty with the U.S.; participation retirement funds established to provide retirement, disability or death benefits to employees; funds similar to a Section 401(a) plan; investment vehicles established exclusively to benefit exempt retirement funds; and pension funds of an exempt beneficial owner. Although the exempt category for retirement funds is welcome, many restrictions and requirements exist for each type of retirement fund such that many funds established outside the U.S. may not qualify for exempt beneficial owner status. .

### **d) Non-financial foreign entity**

If an entity does not fall under the definition of an FFI or is otherwise excluded from the definition, the entity would be considered a non-financial foreign entity (NFFE). Generally if the NFFE is not an excepted NFFE (including an active NFFE described below), the NFFE (i.e., passive NFFE) will have to provide its withholding agent with information on any substantial U.S. owners, or if none exist, a certification to that effect.

---

<sup>46</sup> A designated withholding agent is a U.S. financial institution, participating FFI, or reporting Model 1 FFI that agrees to undertake the additional due diligence and reporting in order to treat the FFI as an owner-documented FFI.

<sup>47</sup> The designated withholding agent is not required to report information with respect to an indirect owner of the FFI that holds its interest through a participating FFI, a deemed-compliant FFI (other than an owner-documented FFI), an entity that is a U.S. person, an exempt beneficial owner or an excepted NFFE.

## **i) Excepted NFFEs**

Excepted entities include publicly traded corporations and affiliates, territory NFFEs that are directly or indirectly wholly owned by bona fide U.S. territory residents in the NFFE's country of organization or active NFFEs. These types of entities generally will not be likely vehicles for U.S. persons to hide their assets because of the nature of their activities. Most U.S. persons tend to use passive vehicles to shield their income rather than conducting an actual business activity, which is why entities that do not qualify for an excepted NFFE status are required to provide substantial U.S. owner certifications.

## **ii) Active NFFEs**

Active NFFEs are entities that conduct an actual business activity other than holding assets that produce investment income such as interest, dividends, rents, etc. As mentioned previously, because effort is actually required to manage an active NFFE, they make unlikely vehicles to shield income. Any entity may be classified as an Active NFFE if:

- Less than 50 percent of its gross income for the preceding calendar year is passive income<sup>48</sup>; and
- Less than 50 percent of the weighted average percentage of assets (tested quarterly) held are assets that produce or are held for the production of passive income.

## **iii) Passive NFFEs**

As mentioned above, any NFFE that is not otherwise excepted will be a passive NFFE and must provide withholding agents with a certification regarding its substantial U.S. owners (if any). Substantial U.S. owners include any specified U.S. person directly or indirectly owning more than 10 percent of the passive NFFE<sup>49</sup> (0 percent in the case of an investment entity or specified insurance company). To further complicate matters, the passive NFFE is also required to aggregate the ownership values of any related parties<sup>50</sup> to determine whether the ownership threshold is met would keep an entity in a particular jurisdiction from signing.

---

<sup>48</sup> Passive income includes the following:

- Dividends including substitute dividend amounts;
- Interest and income equivalent to interest, including substitute interest and amounts received from or with respect to a pool of insurance contracts if the amounts received depend in whole or part upon the performance of the pool;
- Rents and royalties, other than rents and royalties derived in the active conduct of a trade or business conducted, at least in part, by employees of the NFFE;
- Annuities;
- The excess of gains over losses from the sale or exchange of property that gives rise to passive income;
- The excess of gains over losses from transactions (including futures, forwards and similar transactions) in any commodities, but not including:
  - Any commodity hedging transaction, determined by treating the entity as a controlled foreign corporation;
  - Active business gains or losses from the sale of certain commodities;
  - The excess of foreign currency gains over foreign currency losses;
  - Net income from notional principal contracts (i.e., swaps);
  - Amounts received under cash value insurance contracts; or
- Amounts earned by an insurance company in connection with its reserves for insurance and annuity contracts.

<sup>49</sup> For a corporation, substantial ownership means 10 percent or more stock ownership (by vote or value). For a partnership, substantial ownership means 10 percent or more direct or indirect ownership of the profit interest or capital interest in the partnership. For a trust, substantial ownership means 10 percent or more ownership of the beneficial interests of the trust, or ownership by a grantor in a grantor trust (or person having full access to the corpus of the trust).

<sup>50</sup> A related party means a person's family which includes: brothers and sisters, spouse, ancestors and lineal descendants. Legal adoption is also included. "Ancestors" includes parents and grandparents, and the "lineal descendants" includes children and grandchildren. Additionally, family includes spouses of any of the family members. Treas. Reg. § 1.1473-1(b)(2)(v). Reg. § 1.267(c)-1(a)(4).

#### 4) U.S. withholding agent requirements

As noted earlier, FATCA's enforcement mechanism is a 30 percent withholding tax on withholdable payments made to persons that do not qualify for a FATCA withholding exemption. Patterned after the withholding rules of Chapter 3, FATCA withholding responsibilities fall foremost on USWAs to the extent they have control, receipt, custody or disposal of a withholdable payment made to an entity subject to FATCA withholding (i.e. USWAs must remit to the IRS FATCA withholding tax withheld from withholdable payments). The IRS may collect un-withheld FATCA withholding tax from USWAs and impose penalties and interest on the USWAs for any under withheld amounts. Similar to the reporting rules of Chapter 3, USWAs must annually report aggregate FATCA withholding on Form 1042 and file Forms 1042-S with respect to each payee for any withholdable payments. This reporting will be done in conjunction with reporting required under Chapter 3. Additional reporting requirements apply as outlined in the reporting section below.

##### a) Documentation and due diligence

When a USWA makes a withholdable payment, the withholding agent must apply the 30 percent withholding to the payment depending on the FATCA classification of the payee.<sup>51</sup> This requires the withholding agent to first determine who the payee is, and then to perform due diligence with respect to documentation and other information collected from or about the payee to verify the payee's FATCA classification and whether any FATCA withholding exemptions apply. This includes determining that the payee has provided sufficient and valid documentation and withholding certificates to establish the payee's status, as well as searching the USWA's other records to confirm that the USWA does not have other information in its possession that contradicts a payee's claim of a foreign status on the withholding certificate.

##### i) Identifying the payee

Generally for FATCA purposes, the payee is the person to whom payment is made, regardless of beneficial ownership of the payment.<sup>52</sup> This general rule is different than the rules of Chapter 3 that generally require identification of a beneficial owner to determine the withholding status of a payment. The regulations provide, however, several exceptions to this general rule for certain types of payments including the following:

1. Payments to a foreign person acting as an agent or intermediary if such person is an NFFE, participating FFI, deemed-compliant FFI or restricted distributor (unless the payee is a qualified intermediary assuming withholding responsibility). The payee is the person for whom payment is being collected by the foreign person acting as an agent or intermediary.
2. Payments to foreign flow-through entities (generally partnerships, grantor trusts and simple trusts) are treated as a payments to partners or beneficial owners if the flow-through entity is not one of the following:
  - a. A nonparticipating FFI unless acting as an intermediary for an exempt beneficial owner;
  - b. An excepted NFFE not acting as an agent or intermediary;
  - c. A withholding partnership or withholding trust not acting as an intermediary or agent; or
  - d. An entity receiving income effectively connected with a U.S. trade or business.
3. Payments to a U.S. person (that is not a financial institution) acting as an agent or intermediary. If the withholding agent has actual knowledge that the person receiving the

---

<sup>51</sup> Or, if the entity receiving the payment has elected to be withheld upon under FATCA, the withholding agent must withhold an amount that satisfies the withholding instructions of the entity that has made the election based on documentation provided by that entity.

<sup>52</sup> In the case of a payment to a financial account, the payee is considered the holder of financial account.

payment is acting as an intermediary or agent of a foreign person, then the payee is the foreign person.

4. Payment to a territory financial institution that is a flow-through entity or is acting as an intermediary or an agent who has not agreed to be treated as a U.S. person (evidenced by a proper withholding certificate) for purposes of both Chapters 3 and 4. The payee is the partner, beneficial owner or owner of the territory financial institution (assuming those payees themselves do not meet one of these exceptions).
5. Payments to disregarded entities under U.S. tax rules or to branches. The owner of the entity is the payee.
6. Payments to a U.S. branch of a foreign bank or insurance company where the branch is treated as a U.S. person under Section 1.1441-1(b)(2)(iv) of the regulations. The payee is the U.S. branch. However, the branch is not treated as a U.S. person for the withholding certificate it must provide to a withholding agent. That is, it must provide a Form W-8 to certify its FATCA status.
7. Payments to a foreign branch of a U.S. person. The payee is the U.S. person, except if it is a foreign branch of a U.S. financial institution acting as a qualified Intermediary with respect to a payment.

### ***ii) Documentation to establish a payee's FATCA status***

A USWA establishes the FATCA status of a payee based on the documentation it can reliably associate with the payee, including associating documentation of underlying beneficiaries of payments to entities the USWA is required to look through for purposes of identifying the payee under FATCA. If the USWA cannot reasonably associate the payee with documentation to determine its FATCA status, or if the USWA knows or has reason to know that the documentation is not reliable or correct, the USWA must apply certain presumptions to determine the payee's FATCA status. USWAs do not generally have to make inquiries to or establish the validity of documentation unless they first have reason to know that the documentation is unreliable.

The FATCA status of a payee is determined most clearly by a valid Form W-8 or W-9 that can be associated with the payee at the time of payment. The USWA must be able to determine how much of a payment relates to a valid withholding certificate or other documentation, and must not have reason to know that any of the information, certifications or statements in the documentation is unreliable or incorrect (without having to inquire as to the truthfulness of the information).

For purposes of identifying a payee where the payment is made to a flow-through entity or intermediary, if the flow-through entity or intermediary is not the payee (as defined above) the USWA may associate a payment with a withholding certificate using an intermediary withholding certificate (e.g. a Form W-8IMY) from the flow through entity that includes documentation of the actual payee or payees of the payment.<sup>53</sup> If the flow-through entity is a participating FFI or deemed-compliant FFI, the participating FFI or deemed-compliant FFI has the option of providing a pooled allocation for Chapter 4 withholding purposes rather than the underlying documentation for each payee if the participating FFI or deemed-compliant FFI has elected to be withheld upon. A withholding certificate that fails to provide allocation information or any required documentation for one or more payees will be treated as invalid with respect to the persons for whom valid documentation and allocation information is not properly provided.

In many circumstances forms of documentation other than withholding certificates may either be required or relied upon in lieu of a withholding certificate. This documentation is classified under two main categories: documentation used to establish foreign status (documentary evidence); and

---

<sup>53</sup> If the payee is acting as both as an intermediary and a beneficial owner with respect to a payment, the withholding agent may request two withholding certificates for both capacities.

documentation used to establish a FATCA status (general documentary evidence, preexisting account documentary evidence and payee-specific documentary evidence).

Documentary evidence includes the following types of documents containing a permanent residence address for the payee (or if the withholding agent has a permanent residence address on file, the payee's country of residency, citizenship or organization):

- Certificate of residence issued by an appropriate tax official in the payee's jurisdiction indicating the payee has filed its most recent income tax return as a resident;
- For individuals, a valid non-U.S. government-issued ID typically used for identification purposes;
- For an account maintained in a qualified intermediary jurisdiction, any QI documentation referenced in the jurisdiction's attachment to the QI agreement for identifying individuals or entities (other than the Forms W-8 or W-9);
- For an entity, any official government issued document; and
- For accounts maintained outside the U.S. for an individual, a third party credit report (subject to certain conditions).

For entities other than participating FFIs or registered deemed-compliant FFIs, general documentary evidence includes any of the following:

- An organizational document (e.g., articles of incorporation, partnership agreement, trust agreement, etc.);
- A financial statement;
- A third-party credit report; and
- A letter from a government agency or statement from a government website, agency or registrar (e.g., an SEC report).

Provided there is no U.S. indicia associated for the payee that has not been cured as detailed below, preexisting account documentary evidence includes any standardized industry code or any classification in the withholding agent's records for the payee that was recorded prior to or on January 1, 2012, or if the withholding agent was formed after that date, six months after its formation.

Payee-specific documentary evidence includes a letter from an auditor or attorney located in the U.S. that is unrelated to the withholding agent or payee and is subject to the authority of a regulatory body governing the auditor's or attorney's review of the payee's FATCA status, bankruptcy filing, corporate resolution, copy of a stock market index or other documented permitted by the specific payee documentation requirements outlined below. For example, the IRS and SEC would be considered regulatory bodies depending on the documentation or review in question.

### *(1) New U.S. payee documentation*

For new payees, a USWA must treat a payee as a U.S. person if it has a valid Form W-9 from the payee, or must presume the payee is a U.S. person under the presumption rules.<sup>54</sup> This includes the application of the "eyeball test" under Chapter 61 to establish that the payee is an exempt U.S. entity, but only if the payee has either documentary evidence or general documentary evidence to establish the payee is a U.S. entity.

---

<sup>54</sup> While not necessary for USWAs, a Form W-9 will also designate whether a U.S. payee is a specified U.S. person or otherwise. In the absence of a Form W-9 indicating that a U.S. person is not a specified U.S. person, the payee will be presumed to be a specified U.S. person for FATCA purposes.

## *(2) Preexisting U.S. payee documentation*

For preexisting obligations, a USWA must treat a payee as a U.S. person if it has a valid Form W-9 from the payee, or must presume the payee is a U.S. person under the presumption rules. As an alternative, a USWA may treat a payee of a preexisting obligation as a U.S. person if it has a notation in its files that it has previously reviewed a Form W-9 that establishes the payee as a U.S. person and the withholding agent has retained the payee's TIN. A USWA may also treat a payee as a U.S. person if it has previously reviewed a Form W-9 or documentary evidence that established the payee is a U.S. person and established through documentary evidence or eyeball test that the payee is an exempt recipient.

## *(3) New foreign individual payee documentation*

A USWA may treat a payee as a foreign individual if it has a valid withholding certificate identifying the payee as a foreign person. If the individual has provided a withholding certificate with a U.S. address and/or the withholding agent has U.S. indicia in its files or other records for the individual, the withholding agent may treat the person as foreign if it obtains documentary evidence that establishes the foreign status of the individual which does not contain a U.S. address and the individual provides a reasonable written explanation supporting the claim of foreign status. If the individual's account information or documentation contains a U.S. place of birth and no other U.S. indicia exist, the withholding agent may treat the individual as foreign if it obtains a copy of the individual's Certificate of Loss of Nationality of the United States. Where both a U.S. place of birth and other U.S. indicia exist, the withholding agent must also obtain a copy of a non-U.S. passport or other government issued identification of citizenship, and either a Certificate of Loss Of Nationality of the United States or a reasonable explanation of the payees renunciation of U.S. citizenship or how the account holder did not obtain U.S. citizenship at birth.

A withholding agent may use a pre-FATCA Form W-8 (pre-2013 Form W-8) to establish the identity of a payee as a foreign individual in lieu of obtaining an updated version of a FATCA withholding certificate.

For offshore obligations, a USWA may rely on documentary evidence, in lieu of a withholding certificate, to support the payee's claim as a foreign individual. Similar to the discussion above, U.S. indicia may be cured with additional documentation.

## *(4) Preexisting foreign individual documentation:*

A USWA may treat a preexisting payee as a foreign individual only if it has a valid withholding certificate for the payee. Otherwise the payee will be classified as a U.S. individual under the presumption rules. This has few consequences for FATCA withholding purposes, but the payee may be subject to backup withholding and Form 1099 reporting for its worldwide income under Chapter 61 of the Internal Revenue Code in such cases.

A USWA does not have to search documentation to identify a U.S. place of birth for preexisting obligations, but if after January 1, 2014 the USWA discovers U.S. indicia for an account, it will be considered a change in circumstances as of the date of the discovery.

## *(5) Foreign entity payee documentation*

When a payee is identified as a foreign entity, the payee will be subject to withholding and reporting under FATCA if the payee has not certified to the USWA that it qualifies for a FATCA exemption. Generally speaking, this requires the payee to provide the USWA with a withholding certificate and any additional documentation required to establish the FATCA exemption status of the payee.

For preexisting foreign payees, the USWA may rely on a pre-FATCA Form W-8 that establishes the foreign status of the payee, but the payee must obtain any additional documentation from the payee to further establish its FATCA exemption status, or withhold on withholdable payments to the payee.

If the USWA has a valid withholding certificate for a foreign entity, but the USWA also has U.S. indicia with respect to the payee, the payee may be treated as foreign if the entity has provided documentary evidence establishing that the entity is actually organized or created under the laws of a foreign country.

#### **(a) Participating and registered deemed-compliant FFIs**

Generally, a USWA may treat a payee as participating or registered deemed-compliant FFI only if it has a valid withholding certificate identifying the payee as such. The withholding certificate must contain a valid GIIN that must be verified against the published IRS FFI list. For payments made prior to January 1, 2017, the GIIN and the payee's status as a participating FFI or deemed-compliant FFI may be transmitted orally or in writing for this purpose. A withholding agent has 90 days to verify a GIIN with the IRS before the withholding agent must treat the GIIN as invalid and the payee treated as an undocumented payee. However, where a payee has provided a withholding certificate indicating it is a Model 1 FFI, the payee's withholding certificate need not contain a GIIN. Additionally, if the payee provides "applied for" in lieu of the GIIN, the payee has 90 days to provide the GIIN to the USWA and the USWA has an additional 90 days from the date of receipt to ensure the GIIN appears on the IRS published list.

#### **(b) Owner documented FFIs**

A USWA may treat a payee as an owner documented FFI if it provides a valid withholding certificate that contains all of the underlying documentation, certifications and owner reporting statements required of an owner documented FFI, and only if the USWA, participating FFI, or Model 1 FFI is acting as a designated withholding agent with respect to the payee and the USWA, participating FFI, or Model 1 FFI does not know and has no reason to know the payee does not meet the qualifications of being an owner documented FFI. The owner reporting statement required of an owner documented FFI contains all the information required for the withholding agent to report any of the owner documented FFI's U.S. owners or debtors on its behalf, if any (the name, address, TIN Chapter 4 status of every individual and specified U.S. person that owns a debt or equity interest in the payee, looking through all entities other than specified U.S. persons). Alternatively, the owner documented FFI may provide a letter from a U.S. or U.S. affiliated auditor or attorney certifying that the auditor or attorney has timely reviewed all the FFI's debtors' or owners' documentation and determined that the entity is essentially a deemed-compliant FFI with no U.S. owners or debtors. Prior to January 1, 2017, the USWA may treat the payee as an owner documented FFI for preexisting obligations if the USWA has enough information in its AML documentation for the payee from the most recent four years to identify each specified U.S. owner of the FFI. In addition, the withholding agent does not know, or have reason to know, that any nonparticipating FFI owns an equity interest in the FFI or that any nonparticipating FFI or specified U.S. person owns a debt interest in the FFI constituting a financial account in excess of \$50,000.

#### **(c) Certified deemed — compliant FFIs**

A USWA may treat a payment as a payment to a certified deemed-compliant FFI only if the deemed-compliant FFI has provided a valid withholding certificate and the required certification that identifies the payee as such. Sponsored, closely held investment vehicles must provide a withholding certificate identifying itself as a sponsored FFI and containing the sponsor's GIIN. The GIIN must be validated as using the same procedure applicable to participating FFIs and registered deemed-compliant FFIs. Additionally, the USWA must not know that the payee has more than 20 individual investors that own direct and/or indirect interests in the payee.

#### **(d) Non-reporting IGA FFIs**

A USWA may treat a payee as a nonrepeating IGA FFI only if it has a valid withholding certificate identifying it as such. In lieu of a withholding certificate, written statements and other documentation are permitted for offshore obligations.

#### **(e) Nonparticipating FFIs**

A USWA must treat a payee as a nonparticipating FFI if it has a withholding certificate identifying the payee as a nonparticipating FFI, or if the USWA is otherwise required to treat the payee as a nonparticipating FFI due to, for example, the presumption rules, invalid documentation from the payee, or if the payee's GIIN is not validated with the IRS' published list.

If the nonparticipating FFI has provided a withholding certificate identifying itself as an intermediary or flow-through entity, the USWA may treat the underlying beneficiaries of the payment as the payees only if they are exempt beneficial owners. The remainder of the payment not allocable to exempt beneficial owners must be allocated to the nonparticipating FFI. In addition to the withholding certificate, the nonparticipating FFI must provide an exempt beneficial owner withholding statement and a valid withholding certificate or documentation sufficient to establish the chapter 4 status of each exempt beneficial owner.

#### **(f) Foreign exempt entity payee documentation**

A foreign entity may be deemed a foreign exempt entity only if it provides a valid withholding certificate and any associated documentation establishing the entity as an exempt entity. For example, a Form W-8EXP is required to exempt a foreign government, international organization or foreign central bank from FATCA withholding. A USWA may use a pre-FATCA Form W-8EXP to establish the status of a foreign government or international organization as exempt. A withholding agent cannot rely on a pre-FATCA W-8 to treat a foreign central bank as an exempt recipient unless the foreign central bank is specifically identified as an exempt beneficial owner under a Model 1 or 2 IGA.

For international organizations, a USWA may treat a payee as an international organization without requiring a withholding certificate if the name of the payee is one that is designated as an international organization by executive order (pursuant to 22 U.S.C. 288 through 288f) and there is no reason to believe the entity is acting as an intermediary or agent.

#### **(g) Payments of effectively connected income**

A USWA may treat a payment as effectively connected income to a non-U.S. person (which is not subject to withholding under FATCA) if it has a valid Form W-8ECI from the payee. A USWA may presume, in absence of documentation, that a payment to certain U.S. branches is effectively connected with a conduct of a trade or business in the U.S. if the withholding agent has both an EIN of the branch and the GIIN for the home office.

#### **(h) Payments to excepted NFFEs**

A USWA may treat a payee as an excepted NFFE if the payee provides a valid Form W-8 indicating its status as such and any necessary additional documentation or certifications. The excepted NFFE status may apply to the following types of entities as indicated on the payees withholding certificate:

- Active NFFEs;
- Nonfinancial group entities;

- Nonfinancial startup companies provided the withholding certificate contains a start-up date of the entity that is not more than 24 months prior to the payment;
- Nonfinancial entities in liquidation or bankruptcy so long as the withholding agent has no reason to know that the entity has claimed this status for more than 3 years unless the withholding agent obtains documentary evidence supporting the payees claim of its bankruptcy or liquidation status;
- 501(c) and non-profit organizations that have provided a valid Form W-8EXP and an IRS determination letter or letter of counsel establishing the entity as a non-profit organization.
- Publicly traded NFFEs and their affiliates that have provided the name of the exchange on which they are traded; or
- Excepted territory NFFEs that provide certifications that all of their owners are bona fide residents of the U.S. territory where the NFFE is organized.

Alternate documentation may be provided for new and preexisting offshore obligations.

**(i) Payments to passive NFFEs**

A USWA may treat a payee as a passive NFFE if the payee provides a valid Form W-8 indicating its status as such. In lieu of a Form W-8, for offshore obligations, the passive NFFE may provide general documentary evidence establishing the payee as a foreign entity and either a written explanation explaining why it is not an FFI or general documentary evidence establishing it as a not an FFI. In addition, to avoid withholding the passive NFFE (assuming it is not a withholding foreign partnership or trust) must provide a written certification that it does not have any substantial U.S. owners or the name, address and TIN of each substantial U.S. owner.

**(j) Other entities**

Any other entity must establish its FATCA status by providing a valid withholding certificate to the USWA properly claiming its classification.

***iii) Due diligence and standards of knowledge to validate FATCA classifications***

Similar to Chapter 3, the final FATCA regulations impose due diligence and standards of knowledge upon a withholding agent with respect to withholding certificates, associated documentation and accountholder information found in the withholding agent's files or records. If a withholding certificate is deemed invalid under these requirements, the withholding certificate will be ignored and the FATCA status of the payee will be determined based on the presumption rules. For example, if the withholding agent has U.S. indicia in its records, the payee's Form W-8 is deemed invalid. However, the withholding agent may obtain additional documentation to cure the U.S. indicia. If no curative measures are taken, however the withholding agent must treat the payee as a U.S. person under the presumption rules. A withholding agent who fails to exercise these due diligence standards to properly establish a payee's FATCA status will be liable for the withholding tax required under FATCA in the absence of proper payee documentation, as well as any associated penalties and interest.

***(1) Valid withholding certificates***

Withholding certificates generally include Forms W-9 and W-8; valid substitute Forms W-9s or W-8s; and for individuals, non-IRS forms that collect sufficient information to document the status of the individual. The FATCA regulations provide for electronic transmission of withholding certificates that are consistent with the requirements for Chapter 3. For Chapter 4 purposes, the regulations also

allow for transmission of forms by facsimile or by email if certain safeguards are met to ensure the identity of the transmitter.<sup>55</sup>

In addition to the specific requirements for certain entities types discussed above, generally for FATCA purposes, all Forms W-8 and W-9 must be signed under penalties of perjury by a person who is authorized to sign the form. In the case of a Form W-9, the form must contain the payee's TIN. Forms W-8 must not be incomplete, expired or invalid due to a change in circumstances which makes the information on the form unreliable or incorrect. Therefore, a withholding agent is required to institute procedures to ensure that change to the customer master files that constitute a change in circumstances is identified by the withholding agent. A Form W-8 must contain permanent residence information, a TIN (if required), a certification that the person is not a U.S. citizen or certification of foreign organization, as well as the entity classification of the person, the FATCA status of the person and any supporting information necessary to establish the person's FATCA status. Forms W-8 lacking such information will generally be considered insufficient to establish a payee's FATCA status.

*(2) USWA due diligence for U.S. indicia under Chapter 4*

A USWA that knows or has reason to know (e.g., based on information its files or records) that the FATCA classification on a withholding certificate is invalid may be liable for any withholding required under FATCA due to the invalid classification, as well as any penalties and interest on the withholding. A USWA has reason to know that a foreign withholding certificate is unreliable if information on the face of the withholding certificate or account information for the payee is contradictory to the claimed FATCA status. This could include documentation such as a credit report in the files of an NFFE indicating it's engaged in the banking business, suggesting it should be classified as an FFI. It would also include account information for a payee with instances of U.S. indicia that are contradictory to a claim of a foreign status on the withholding certificate. If this is the case, the USWA must either obtain additional documentation to cure the U.S. indicia, or treat the payee as a U.S. person. The following table summarizes the instances of U.S. indicia identified in the regulations and curative steps required to continue to rely on a claim of foreign status on a withholding certificate:

<b>Instance of U.S. indicia in account records despite claim of foreign status on a Form W-8</b>	<b>Curative documentation required to treat claim of foreign status as valid</b>
<b>U.S. Place of Birth (Individuals)</b>	1) Certificate of Loss of Nationality so long as no other U.S. indicia in account records,  or  2) A non-U.S. passport or other government issued ID establishing non-U.S. citizenship and either a) a Certificate of Loss of Nationality or b) a reasonable written explanation of the account holder's non-U.S. citizenship.
<b>U.S. residence address, U.S. mailing address or U.S. telephone number with no telephone number for the person outside the U.S.</b>	Documentary evidence establishing foreign status which does not contain a U.S. address. For individuals, a reasonable written explanation is also required.
<b>For an offshore obligation: Standing instructions to pay amounts to an address or an account maintained in the U.S.</b>	Documentary evidence establishing foreign status which does not contain a U.S. address.

<sup>55</sup> The regulations also allow for a withholding agent to use a substitute form that is written and filled out in a language other than English but the withholding agent must make available an English translation of the form and its contents to the IRS upon request.

Instance of U.S. indicia in account records despite claim of foreign status on a Form W-8	Curative documentation required to treat claim of foreign status as valid
U.S. power of attorney	Documentary evidence establishing foreign status which does not contain a U.S. address.
U.S. “in-care-of” or “hold mail” address	Documentary evidence establishing foreign status which does not contain a U.S. address. For individuals, a reasonable written explanation is also required.

### (3) Expiration

Forms W-8 generally expire on December 31<sup>st</sup> of the third year following the year they were signed, but will also become invalid if a change in circumstances affects any information on the form. A withholding certificate will be deemed invalid when the withholding agent becomes aware of the change in circumstances affecting the form.<sup>56</sup> However, unless there is a change in circumstances, the Form W-8 will remain valid indefinitely in the following situations<sup>57</sup>:

Valid Form W-8s provided by FFIs with valid GIINs (subject to annual re-verification of the GIIN);

Form W-8BEN provided by individuals with additional documentary evidence and no information to the contrary showing a U.S. address or U.S. telephone number (that is the only telephone number with the withholding agent for the payee) associated with the individual;

Entities that provide Form W-8BEN with documentary evidence of their foreign status;

Forms W-8IMY; or

Form W-8s from foreign governments, government of a U.S. territory, central banks (including Bank of International Settlements), international organizations or entities wholly owned by such entities.

### (4) Valid intermediary withholding statements

Entities which themselves are not beneficial owners of income may function as intermediaries to pass payments they receive through to underlying beneficial owners. Generally, intermediaries must provide an intermediary withholding certificate (Form W-8IMY) to establish their status under FATCA as an intermediary. The intermediary withholding certificate must contain a GIIN (if the intermediary is a PFFI or a registered deemed-compliant FFI) or the EIN for QIs, WPs or WTs that are not FFIs. If the intermediary is a QI, the intermediary withholding certificate must indicate whether the QI has made an election to be withheld upon and certify that is acting as a QI with respect to accounts listed on the associated withholding statement. Withholding statements are also required for other entities that are acting as intermediaries under the FATCA regulations.<sup>58</sup>

Withholding statements are considered a part of the intermediary withholding certificate subject to the same penalties of perjury statement. They may be provided in the same record with withholding statements required under Chapter 3 in any mutually agreeable form, including electronically, so long as electronic statements have safeguards to ensure reliability and can be reproduced in hard

<sup>56</sup> If the IRS has informed a withholding agent that the claimed status of a payee is incorrect, it will be deemed to know that the status is incorrect 30 business days after the date the notice is received.

<sup>57</sup> The IRS is also considering making similar changes for indefinite form validity in Chapter 3.

<sup>58</sup> Qualified Intermediaries that do not elect to assume primary withholding responsibilities for Chapter 3 purposes must also make the election to not assume primary withholding responsibilities for Chapter 4 purposes for their withholding certificate to be valid. Further, intermediary withholding certificates from territory financial institutions will be treated as valid only if the territory financial institution elects to be treated as a U.S. person and assume primary withholding responsibilities on the withholding certificate it provides.

copy. Withholding statements must allocate a payment to each payee along with their Chapter 4 status. An exception exists for FFI withholding statements. FFIs are permitted to provide pooled information that indicates the portion of payments attributable to U.S. persons, recalcitrant accounts, nonparticipating FFIs or other classes of payees not subject to withholding under Chapter 4. However, when payee-specific information is provided for Chapter 3, an allocation of the payment must be made for each payee for Chapter 4. Whether the FFI provides pooled or non-pooled information, the statement must identify each intermediary or flow-through entity that receives payment on behalf of a payee with such entity's Chapter 4 status and GIIN, when applicable.

With the exception of a pooled withholding statement discussed above, a Chapter 4 withholding statement must contain the name, address, TIN (if any), entity type, Chapter 4 status of each payee and its corresponding allocation. It must also attach a withholding certification or other appropriate documentation to establish the Chapter 4 status of the payee, including for exempt beneficial owners. Partially invalid withholding statements can still be considered valid with respect to the payees where sufficient documentation has been provided.

#### *(5) Curing errors*

The regulations allow for inconsequential errors on withholding certificates, such as abbreviated country codes that match the country of residence, to be cured through other, conclusive documentation on the payee maintained by the withholding agent. Further, retroactive affidavit statements on or attached to withholding certificates can establish the Chapter 4 status of a payee after a payment was made. For individual withholding certificates, however, if the payment was made more than a year prior to receiving the retroactive statement and withholding certificate, the withholding agent must obtain additional documentary evidence to support the individual's Chapter 4 status.

#### *(6) Sharing across expanded affiliated groups and with third-party data providers*

Generally withholding certificates must be maintained on an account by account basis, but the regulations allow for certain situations where a withholding certificate may be shared across related entities or with third-party data providers. Certificates can be shared if there are assurances that due diligence and other procedures have been executed to validate the documentation and Chapter 4 status of the payees in the shared systems or information of the related entities or third parties. Any knowledge of the withholding agent regarding a payee is imputed to the related entity or third-party managing the data, however, for purposes of determining whether adequate withholding has occurred for a given payee.

#### *(7) Transition rules*

Unless the IRS issues other guidance, a withholding agent may accept prior versions of withholding certificates for six months after the new forms are published by the IRS until the certificate expires. Prior to January 1, 2017, a withholding agent may use a pre FATCA Form W-8 in lieu of the updated version if it obtains the necessary documentary evidence to establish the payee's FATCA status, such as its FFI registration status or additional withholding statements required by FATCA.

#### ***iv) Presumption rules***

In the absence of a valid withholding certificate, a withholding agent must determine the FATCA status of a payee based on the presumption rules in the regulations. The presumption rules vary depending on the presumed entity type of the payee in the absence of reliable documentation. If the person appears to be an individual, then the withholding agent must presume the payee is an individual. If the person does not appear to be an individual, the person is presumed to be an entity.

With respect to entities, a withholding agent must treat a payee as a trust or estate if the person appears to be a trust or estate. If the payee's name indicates it's a corporation under the eyeball test, it is treated as a corporation. Otherwise, the withholding agent must treat the payee as a partnership.

Once a person's status as an individual or entity is determined, a determination must be made as to their U.S. or foreign status. The default presumption is that a payment that cannot be associated with a withholding certificate or documentary evidence is presumed to be made to a U.S. person. A payment that is reliably associated with documentation that indicates the payment is made to a U.S. person but does not indicate whether the person is a specified person, will be presumed made to a specified U.S. person unless the withholding agent can apply the presumption rules under Treas. Reg. §1.6049-4(c) to presume the person is other than a specified person.

A payment that cannot be associated with a withholding certificate or documentary evidence from a presumed entity will be deemed made to a foreign entity if it has certain indicia indicating foreign status, such as "98" in its EIN, all correspondence to a foreign address, or a telephone number for person outside the U.S. Similarly, if the entity's name appears on the "per-se list" of foreign corporations, it will be presumed to be a foreign entity. Likewise, an entity treated as exempt entity for Section 6049 purposes will be treated as a foreign person unless the withholding agent has documentation identifying the entity as a U.S. entity.

Once the entity type of the payee is established, the withholding agent must then proceed to establish the Chapter 4 status of the payee under the presumption rules and determine whether withholding under Chapter 4 is required for the entity in the absence of documentation. Generally if a foreign entity has not provided a valid withholding certificate or documentary evidence and the entity cannot be presumed to be a U.S. entity, the entity will be presumed to be a nonparticipating FFI subject to 30% withholding on withholdable payments.

#### ***v) Change in circumstances***

A change in circumstance includes any change that would affect the payee's FATCA classification, such as the addition of U.S. indicia, like a U.S. address or a U.S. phone number, in the payee's account file. A withholding certificate or documentation affected by such a change becomes invalid on the date the withholding agent knows or has reason to know that circumstances affecting the correctness of the certificate or documentation have changed. Therefore, a withholding agent must develop procedures and processes to identify changes in customer files which could result in a change in circumstances. The provider of a withholding certificate is required to notify the withholding agent within 30 days of such a change and provide the withholding agent with a new withholding certificate, written statement or documentary evidence to cure the effect of the change in circumstance. The withholding agent may continue to rely on the prior FATCA classification of the payee, however, for up to 90 days after they become aware of the change.

If the IRS removes an FFI from the IRS FFI list (because, for example the IRS revokes an FFI's agreement for non-compliance), a withholding agent will have no more than a year from the day the FFI is removed from the list before the withholding agent has reason to know of the change in circumstances, namely that the FFI is no longer a participating FFI or registered deemed-compliant. If the withholding agent discovers that the FFI's GIN has been removed prior to that date, the withholding agent will be deemed to know upon discovery.

#### ***vi) Record retention***

In general, a withholding agent must retain each withholding certificate, written statement or copy of relevant documentary evidence for as long as it may be relevant to the determination of the withholding agent's tax liability. A withholding agent may retain an original, certified copy or

photocopy (including a microfiche, electronic scan or similar means of electronic storage) of the withholding certificate, written statement or documentary evidence for Chapter 4 purposes. With respect to documentary evidence, the withholding agent must also note in its records the date on which the document was received and reviewed. Any documentation stored electronically must be made available in hard copy form to the IRS upon request during an examination.

## **b) Withholding requirements**

Beginning January 1, 2014, USWAs must withhold 30 percent on any withholdable payment made to persons that the withholding agent does not have documentation or other information permitting it to treat the payee as exempt from FATCA withholding, specifically including payments to nonparticipating FFIs, passive NFFEs that do not disclose their substantial U.S. owners, or payments to other foreign entities who have not established their FATCA withholding exemption status through sufficient documentation and are subject to withholding under the presumption rules. Additionally, some foreign entities may elect to have the USWA perform and remit any withholding they might be required to make on passthru payments of U.S. Source FDAP income to their payees. Thus, to comply with FATCA, USWAs must generally be able to identify withholdable payments to payees, determine each payee's FATCA exemption status or elective withholding requirements, and withhold accordingly.

Withholding on gross proceeds will begin on or after January 1, 2017, along with withholding on any passthru payments pushed down to the USWAs.

### ***i) Obligations to withhold and deposit***

As the entity liable for the withholding, the withholding agent also has the burden to determine if a payment meets the definition of a withholdable payment. As a default, a withholding agent must treat the entire amount of any payment, or the appropriate portion of the payment, as withholdable if the withholding agent has knowledge of the facts giving rise to a payment, but cannot determine if the payment is withholdable at the time of payment.

Deposits of withholdable amounts are subject to the same deposit procedures and late deposit penalties as withholding under Chapter 3. The regulations establish optional escrow procedures to allow withholding agents to set aside 30 percent of a payment for up to one year after payment to determine if the payment is withholdable under FATCA before remitting the proper amount of withholding to the IRS. At the expiration of the one-year period, the withholding will be deemed to be due for purposes of late deposit procedures, penalties.

### ***ii) Elections to be withheld on***

The regulations permit certain entities to make an election to be withheld upon by their withholding agent. An election to be withheld upon is only available with respect to a payment of U.S. source FDAP income if the withholding agent is a participating FFI, reporting Model 1 FFI, QI or a U.S. withholding agent. The recipient of such payment must be a participating FFI or registered deemed-compliant FFI that acts as a QI with respect to the payment and is not a QI branch of a U.S. financial institution. In such cases, the entity making the election must provide the withholding agent with a valid intermediary withholding certificate with respect to the payment notifying the withholding agent that it has elected to be withheld upon, certifies that it is not assuming primary withholding responsibility under Chapter 3, and designating whether such election is made for all accounts held with the withholding agent or for the specific accounts identified on the withholding certificate; and the intermediary withholding certificate is accompanied by a withholding statement.

## c) Reporting

USWAs must report on any FATCA withholdable payments made during the 2013 and 2014 years by March 15, 2015, and then begin reporting such payments annually thereafter. This means that while no FATCA reporting obligations exist until March 15, 2015, USWAs must be able to track and report on FATCA withholdable payments beginning January 1, 2013, even though payments are not subject to withholding until 2014. The deadlines for filings the reporting may be extended by the IRS.

Reporting will be accomplished on Forms 1042 filed with the IRS aggregating each USWA's withholdable payments made annually, and on Forms 1042-S recording each payment to a payee. The Forms 1042-S must be filed with the IRS and a copy sent to the recipients. The Form 1042 used to report FATCA payments will summarize all payments made by a USWA for both FATCA and Chapter 3 purposes, meaning USWAs will generally only be required to file one Form 1042 each year to report FATCA and Chapter 3 payments. Similarly, the USWA will report FATCA withholdable payments on Forms 1042-S for each payee. Each Form 1042-S will report the FATCA and Chapter 3 withholding for each payee for each type of income paid to the payee in a given year. Correction and amendments procedures for FATCA reporting on Forms 1042 and 1042-S are similar to those under Chapter 3.

The final regulations introduced a new Form 8966 (FATCA Report), that will be used predominantly by FFIs to report specified U.S. persons. A USWA will file a Form 8966 in limited circumstances. For example, a USWA would be required to file a Form 8966 for each specified U.S. person with a direct or indirect debt or equity interest in an owner-documented FFI. Similarly, USWAs will be required to file a Form 8966 to report any substantial U.S. owners of a passive NFFE. The Form 8966 must be filed on or before March 31 of the subsequent year after the payments are made and will be subject to similar filing requirements as Form 1042.

## d) Use of agents for reporting and withholding obligations

The final regulations permit a USWA to authorize an agent to fulfill their obligations under Chapter 4 including the receipt of withholding certificates, the payment of amounts subject to withholding, withholding and deposit of tax withheld, and the reporting required on the relevant form. An agent is authorized only if pursuant to a written agreement and a Form 8655 "Reporting Agent Authorization" is filed with the IRS if the agent is acting as a reporting agent for filing Form 1042 or making tax deposits and payments. The USWA, however, remains liable for any withholding liabilities or acts of its agents.

## 5) Foreign financial institutions requirements

### a) FFI Agreement Overview and Expanded Affiliated Group Registration Requirement

Other than Model 1 FFIs, entities meeting the definition of an FFI that are not otherwise excluded from the definition, deemed-compliant or exempt, must enter into an FFI Agreement with the U.S. Treasury to avoid withholding under FATCA. Moreover, for an FFI to be eligible to enter into an FFI agreement, all FFIs within the FFI's expanded affiliated group must register to become a participating or registered deemed-compliant FFI. However, before January 1, 2016, the expanded affiliated group is permitted to have certain entities or branches that are not able to fully satisfy the requirements of the FFI agreement so long as they obtain a limited branch of a participating FFI<sup>59</sup> or

---

<sup>59</sup> An FFI with limited branches may become a participating FFI if: it identifies the relevant jurisdiction of the limited branch(s); agrees that each limited branch will identify its account holders as required by the due diligence requirements in the FFI Agreement, retain collected documentation for six years from the FFI Agreement effective date, and report U.S. accounts to the IRS to extent permitted by local laws; agrees to treat limited branches as separate entities in determining its withholding requirements; agrees that limited branches will not open U.S. accounts or accounts held by nonparticipating FFIs including accounts

limited FFI status for all such entities. Additionally, an FFI must have at least one branch that is able to comply with the requirements of a participating FFI, even if the branch is a U.S. branch. Unfortunately, the limited FFI or branch will still be subject to withholding despite the fact that it must comply with all of the requirements of a participating FFI to the extent allowable in the entity's jurisdiction. Generally this means that it would be preferable from an FFI's point of view to not be in an expanded affiliated group if it cannot be fully FATCA compliant.

### ***i) Limited branches and limited FFIs***

FATCA defines a branch as a unit, business or office of an FFI that is treated as a branch under the laws of its jurisdiction or is otherwise regulated under the laws of such jurisdiction as separate from other offices, units or branches of the FFI and that separately maintains books and records from other branches of the FFI. A branch includes locations within the country where the FFI is organized and all units, businesses. Offices of the FFI located in the same country are considered one branch. Additionally, accounts are maintained by a particular branch if the accountholder's rights and obligations are governed by the laws of the branch's jurisdiction.

To qualify as a limited FFI or limited branch, under the laws of its jurisdiction the FFI or branch must not be able to: complete the required U.S. account reporting as provided in the FFI agreement; close the account; or transfer such accounts to a U.S. financial institution, a participating FFI or a reporting Model 1 FFI. Additionally for recalcitrant account holders and accounts held by nonparticipating FFIs, the limited FFI or limited branch must not be able to withhold when required on such accounts, block<sup>60</sup> such accounts, close such accounts or transfer such accounts to a U.S. financial institution, a participating FFI or a reporting Model 1 FFI.<sup>61</sup>

Limited FFIs and limited branches will lose limited status if they become participating or deemed-compliant FFIs or if the restrictions to FATCA compliance are removed, in which case they will lose limited status as of the beginning of the third quarter following the date the restrictions were removed. All limited FFIs will cease to be limited after December 31, 2015.

## **b) Requirements under the FFI agreement**

### ***i) Definition of a financial account***

Many of the requirements under an FFI Agreement apply to accounts or account holders. The term account or financial account are used interchangeably and have a specific definition under FATCA. As a result, not all accounts maintained by an FFI are subject to FATCA. Withholdable payments that are made to payees that are not account holders (i.e., not the owner of a financial account) are generally still subject to FATCA, however they will not be subject to the rules that are only applicable to account holders. FATCA defines a financial account as depository accounts, custodial accounts, certain equity or debt interests in another entity or insurance and annuity contracts.

---

transferred from other branches or members of the expanded affiliated group; and agrees that each limited branch will identify itself to other withholding agents as a nonparticipating FFI (including to withholding agents within the expanded affiliated group).

<sup>60</sup> Blocked means the FFI prohibits the account from conducting any transactions with respect to the account until the account is closed, transferred or the account holder provides the required documentation under FATCA.

<sup>61</sup> FFIs seeking to become limited FFIs must register with its expanded affiliated group as a limited FFI; and agree to the conditions set forth in footnote 61 above.

### *(1) Depository account*

Depository accounts include the following types of interest or non-interest bearing accounts:

- Commercial, checking, savings, time or thrift accounts;
- Accounts evidenced by a certificate of deposit, thrift certificate, investment certificate, passbook or certificate of indebtedness; and
- Any other instrument for placing money in the custody of an entity engaged in banking or similar business for which such institution is obligated to give credit (e.g., a credit balance issued by a credit card company engaged in a banking or similar business).

With respect to insurance companies, depository accounts include amounts held by the insurance company under a guaranteed investment contract or similar agreement to pay or credit interest thereon or to return the amount held.

### *(2) Custodial account*

A custodial account is an arrangement to hold a financial instrument, contract or investment (e.g., corporate stock, notes, bonds, debentures, evidence of indebtedness, currency or commodity transactions, credit default swaps, swaps based on a nonfinancial index, notional principal contracts, insurance or annuity contracts, options or other derivative instruments, etc.) for the benefit of another party.

### *(3) Certain equity or debt interests in another entity*

This financial account type includes the following types of interests that are not regularly traded on an established securities market:

1. Any equity or debt interest in an investment entity that is classified as such because it is a professionally managed entity primarily engaged in investing, reinvesting or trading in financial assets or because it functions or holds itself out to be 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 established with an investment strategy of investing, reinvesting or trading in financial assets. This includes an investment entity that also falls under any of the other FFI classifications.
2. Any equity or debt interest in a holding company or treasury center if certain conditions apply<sup>62</sup>;
3. Any equity or debt interest in a depository institution, custodial institution or investment entity (classified as such because it trades in money market instruments; manages individual or collective portfolios; or invests, administers or manages funds, money or financial assets for customers) if the value of the interest is directly or indirectly determined by reference to assets that give rise or could give rise to withholdable payments as detailed in the final regulations; or if the interest is primarily issued to avoid FATCA.

---

<sup>62</sup> Any of the following conditions must apply: 50 percent or more of the aggregate income earned by the expanded affiliated group is derived from an investment entity (or multiple investment entities); the redemption or retirement amount earned on the interest is determined directly or indirectly, primarily by reference to one or more investment entities or passive NFFEs that are members of the entity's expanded affiliated group as detailed in the final regulations; the value of the interest is directly or indirectly determined by reference to assets that give rise or could give rise to withholdable payments as detailed in the final regulations; or the interest is primarily issued to avoid FATCA.

#### *(4) Cash value insurance and annuity contracts*

A contract issued or maintained by any FFI, insurance company or holding company of an FFI if the contract is a cash value contract or an annuity contract as defined above in the definition of a specified insurance contract.

#### *(5) Exceptions to the definition of a financial account*

Although an account is considered a financial account under the above definitions, the account may be excluded from the definition of a financial account if it falls under one of the following exceptions:

1. Certain savings accounts
  - a. Certain retirement and pension accounts
  - b. Certain non-retirement savings accounts
  - c. Certain tax-favored accounts
2. Certain term life insurance contracts
3. Account held by an estate
4. Certain escrow accounts
5. Certain annuity contracts
6. Account or product excluded under an IGA (i.e., Annex II of the IGA)

Complete details for the requirements of each of these exceptions are beyond the scope of this analysis but are available in the final regulations §1.1471-5(b)(2).

#### ***ii) Documentation and due diligence***

Unless otherwise provided in an applicable Model 2 IGA, beginning January 1, 2014 participating FFIs must follow certain procedures to identify and document the FATCA status of each of its account holders to determine whether the account is a U.S. account, non-U.S. account or an account held by a recalcitrant account holder or nonparticipating FFI. Additionally, the participating FFI is required to collect and maintain certain documentation with respect to payees (other than an account holder) when making certain payments.

The following sections go into more detailed requirements for documenting entity and individual account holders, including preexisting accounts (accounts existing as of December 31, 2013).

#### *(1) New entity account documentation*

Generally, participating FFIs can follow the same documentation rules applicable to USWAs to establish the FATCA status of its entity account holders including documenting any payees where the account holder is not the payee of the payment (for example, a payment to an account holder acting as an intermediary). The participating FFI has 90 days from account opening, or if earlier, the date of a withholdable or foreign passthru payment, to document the account before it must apply the presumption rules to determine account holder's Chapter 4 status. As discussed above, the presumption rule usually results in a foreign entity being treated as a nonparticipating FFI. In the case of an account held by a passive NFFE that provided documentation to establish its status as a passive NFFE but has not provided information or certifications regarding any substantial U.S. owners, the account is considered held by a recalcitrant account holder.

Participating FFIs can generally document account holders with a Form W-8 or Form W-9 (subject to any additional requirements based on the classification of the entity as outlined in the USWA section above). However, certain exceptions exist for offshore obligations (accounts or obligations maintained outside the U.S.) which would generally apply to participating FFIs. Given the complexity of these exceptions and the possible risk of making an incorrect classification, participating FFIs should carefully consider the cost and benefits of taking advantage of this alternative documentation.

The FATCA regulations go into detailed requirements for each exception, but they can be categorized into four broad categories: written statement in lieu of W-8, written statement in lieu of a W-8 along with documentary evidence, general documentary evidence allowing the participating FFI to make the FATCA classification, and AML documentation.

### **Written statement in lieu of the Form W-8**

For this category, a participating FFI is allowed to collect a written statement certifying the entity is a particular status. The written statement does not have to be accompanied by documentary evidence where the participating FFI is not making a payment of U.S. source FDAP with respect to the offshore obligation. This exception is not available to foreign individuals. The following entities may provide a written statement to establish their Chapter 4 status: participating FFIs, registered deemed-compliant FFIs, sponsored, closely held investment vehicles, owner documented FFIs, nonreporting IGA FFIs, foreign governments, governments of U.S. territories, international organizations, foreign central banks of issue, a retirement fund described in Section 1.1471-6(f), excepted nonfinancial group entities, excepted nonfinancial start-up companies, excepted nonfinancial entities in liquidation or bankruptcy, non-profit organizations, publicly traded corporate NFFEs and their affiliates, excepted territory NFFE, active NFFE, and a passive NFFE.

The participating FFI must also collect a valid GIIN from participating FFIs, registered deemed-compliant FFIs and the sponsor's GIIN of a sponsored, closely held investment vehicle on the written statement, ensure the GIIN appears on the FFI published list within 90 days, and validate the GIIN on a yearly basis. If the entity states that the GIIN is "applied for", the entity has 90 days to provide the GIIN to the participating FFI and the participating FFI has another 90 days to verify the accuracy against the published IRS FFI list.

For owner documented FFIs, the participating FFI must also collect the FFI owner reporting statement and underlying owner documentation as outlined in the USWA section. For Passive NFFEs, the participating FFI must collect either a certification of no substantial U.S. ownership or the name, address and TIN of each substantial U.S. owner. Publically traded corporations that are NFFEs and NFFE affiliates must also provide the name of one of the exchanges in which the entity or entity affiliate is traded in the written statement.

### **Written statement in lieu of the Form W-8 containing the appropriate certifications as required by the particular entity type and documentary evidence supporting claim of foreign status**

In addition to a written statement, the entity must provide documentary evidence to support its claim of foreign status where the participating FFI is making payments of U.S. source FDAP with respect to the offshore obligation. This applies to all the entities listed in the category above.

### **General documentary evidence allowing the participating FFI to classify an individual or entity depending on the specific requirements of the FATCA classification**

This category essentially allows the participating FFI to classify an individual or entity without having to request a certification from the account holder. Using general documentary evidence, however, increases the risk that an incorrect classification is made. Participating FFIs should carefully consider the risk of incorrect classification against any benefit obtained from making the classifications relying on general documentary evidence. This category includes foreign individuals, nonreporting IGA FFIs, retirement funds described in Section 1.1471-6(f), excepted nonfinancial group entities, excepted nonfinancial start-up companies, excepted nonfinancial entities in liquidation or bankruptcy, non-profit organizations, publicly traded corporations that are NFFEs (including affiliates), excepted territory NFFEs, active NFFEs and passive NFFEs.

For nonreporting IGA FFIs, the participating FFI must also have a permanent residence for the entity or branch and must obtain a notification orally or in writing that the entity is not acting as an intermediary.

For passive NFFEs, the participating FFI must also collect either a certification of no substantial U.S. ownership or the name, address and TIN of each substantial U.S. owner.

### AML documentation

This category involves the least amount of documentation collection and allows the participating FFI to rely on documentation collected for AML purposes. However, the category only includes owner documented FFIs with a balance of \$1 million or less and is subject to the following requirements:

1. The participating FFI can rely on documentation or a certification collected for AML due diligence that sufficiently identify each individual and specified U.S. person having a direct or indirect interest in the entity and that is sufficient to make a determination of each person's FATCA classification;
2. The AML documentation relied upon satisfies the jurisdiction's AML requirements and the jurisdiction is a FATF-compliant jurisdiction;
3. The withholding agent has sufficient information to report all specified U.S. persons owning an interest in the payee; and
4. The participating FFI does not know or have reason to know of any contingent beneficiaries, unidentified beneficiaries or owners, nonparticipating FFI owners or specified U.S. person(s) or nonparticipating FFI(s) owning a debt interest constituting a financial account in excess of \$50,000 USD (other than specified U.S. persons where the participating FFI has sufficient information to report).

Entities not listed above do not have any explicit exceptions applicable to participating FFIs (i.e., offshore exceptions). The requirements for those entities will be those generally applicable to all withholding agents listed above in the USWA section (generally collecting a Form W-8). Additionally, FATCA includes other exceptions for preexisting entity accounts which are outlined in the next section.

#### *(2) Preexisting entity account documentation*

To help ease the burden of documenting and classifying the existing account holders of participating FFIs, FATCA staggers the deadlines for documentation and due diligence of such accounts. Preexisting<sup>63</sup> account holders that are prima facie FFIs<sup>64</sup> must be documented within 6 months of the participating FFI's FFI agreement effective date (generally by June 30<sup>th</sup> 2014 for timely registrations of existing FFIs). All other preexisting entity account holders must be documented within 2 years of the participating FFI's FFI agreement effective date (generally by December 31<sup>st</sup> 2015 for timely registrations of existing FFIs). Additionally, preexisting account holders not already classified as specified U.S. persons that have an aggregated<sup>65</sup> account balance of \$250,000 USD or less do not have to be identified or documented under FATCA. These accounts will lose this exception if the balance exceeds \$1 million USD at the end of any calendar year or if the account experiences a change in circumstance.

---

<sup>63</sup> Existing as of December 31, 2013.

<sup>64</sup> Entities for which you have an electronic indicator in a system classifying them as qualified intermediaries or non-qualified intermediaries.

<sup>65</sup> Multiple account balances that can be linked to the same account holder using a unique electronic indicator for the account holder must be aggregated to determine whether this exception applies.

Similar to new accounts, a participating FFI may use written statements and documentary evidence discussed above to document preexisting entity accounts. As noted for new accounts, participating FFIs should consider whether these exceptions are worth using given the complexity of the requirements and the risk of misclassification.

### *(3) Entity documentation due diligence: Standards of knowledge and reason to know*

Once documentation is collected, the participating FFI is required to conduct certain due diligence or validation procedures with respect to the documentation and information collected. The validation procedures for documentation collected (i.e., withholding certificates, written statements and documentary evidence) to document account holders are generally the same as those for U.S. withholding agents outlined above and apply regardless of whether the participating FFI makes a payment to the account. Likewise, the standards of knowledge applicable to a U.S. withholding agent will generally apply to a participating FFI regardless of whether it makes a payment to the account. However, in certain circumstances and subject to certain requirements, a participating FFI may rely on documentation collected by other entities for certain accounts acquired in a merger or acquisition.

### *(4) New individual accounts documentation*

A new individual account can be documented using one of three types of documentation (1) documentary evidence, (2) information provided by a third party credit agency or (3) a withholding certificate. Alternative identification and documentation can be applied for certain cash value insurance and annuity products discussed below. Additional documentation requirements apply if certain U.S. indicia exist in any of the information or documentation collected for FATCA, AML, account opening or for any other purpose. For U.S. accounts, the participating FFI is generally required to collect either a U.S. TIN from the account holder, or the Form W-9 containing the U.S. TIN. Additionally, if the participating FFI's jurisdiction prohibits reporting the required U.S. account holder information, the participating FFI must collect a privacy waiver from the account holder to allow for such reporting or either refrain from opening the account or transfer the account if such waiver is not provided.

## **Method 1: Documentary evidence**

Documentary evidence must include either a permanent residence address for the account holder or the account holder's country of residency or citizenship. For individuals, documentary evidence includes the following types of documentation:

- A certificate of residence issued by the local tax authority indicating the account holder has filed its most recent tax return as a resident of that country;
- A non-U.S. government issued ID typically used for identification purposes (e.g., driver's license, passport, cedula, national ID card, etc.);
- With respect to an account maintained in a jurisdiction with anti-money laundering rules that have been approved by the IRS in connection with a QI agreement, any documents other than a Form W-8 or W-9 referenced in the jurisdiction's attachment to the QI agreement for identifying individuals; and
- A third-party credit report (although this will satisfy the second documentation method below).

## Method 2: Third-party credit report

A participating FFI may use a third-party credit report to document its individual account holder if:

1. As part of account opening procedures, the account holder provides a residence address outside the U.S. and attests in writing that he or she is not a U.S. citizen or resident;
2. The agency verifies the claimed residence with at least one government data source from the FFI's jurisdiction or the individual's claimed residence country; and
3. The participating FFI relies on this information for AML due diligence with respect to the account in a FATF-compliant jurisdiction.

## Alternative method for certain insurance products

To provide relief for insurance companies that do not directly deal with insured beneficiaries under certain group policies, the insurance company can treat group cash value insurance or group annuity contracts as non-U.S. accounts until an amount is payable to the employee or certificate holder or beneficiary if the employer certifies that no employee or certificate holder (account holder) is a U.S. person. The insurance company does not need to review any information collected for the account holder to determine whether the claim of foreign status is correct. This exception is only available if the group value insurance or group annuity contract is issued to an employer covering more than 25 employees/certificate holders, if the account holders are entitled to receive any contract value and to name death beneficiaries, and the aggregate amount payable under the contract does not exceed \$1 million USD.

Additionally, a participating FFI may presume individual beneficiaries (other than the owner) of a cash value life insurance contract to be non-U.S. person unless the participating FFI has actual knowledge the beneficiary is a U.S. person (i.e., U.S. indicia is present in any documentation collected for the account and appropriate documentation to cure the indicia has not been collected as determined by the rules applicable to preexisting accounts below).

### *(5) New individual account due diligence — standards of knowledge and reason to know*

Once a participating FFI collects documentation for account holders, it must ensure the documentation is valid under the due diligence rules provided in the final regulations. For new accounts there are a set of rules generally applicable to any documentation collected for the account holder and rules applicable to documentation and other information collected for other reasons such as account opening or AML. Additionally, there are certain standards applicable to U.S. indicia discovered in the account files or any documentation collected for the account for any purposes.

In general, a claimed FATCA status on a new individual account is not valid if the participating FFI has reason to know there is a conflict with the claimed status taking into account any known facts or any documentation collected including withholding certificates, account opening files, customer account files, AML due diligence information, etc. Additionally, depending on the type of documentation collected for the account and the presence of U.S. indicia in such documentation, the participating FFI is required to collect additional documentation as outlined below to treat the account holder as a non-U.S. person.

**Additional documentation requirements for U.S. indicia if the account holder is documented with documentary evidence**

U.S. address; U.S. mailing address; U.S. telephone number (and no foreign telephone number)	U.S. place of birth	Standing instructions to transfer funds to a U.S. account*
<ul style="list-style-type: none"> <li>Documentary evidence without a U.S. address establishing foreign status and reasonable explanation supporting foreign status</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>Form W-8BEN containing a permanent residence address outside the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>No knowledge of other U.S. indicia</li> <li>Copy of the individual's Certificate of Loss of Nationality of the U.S.</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>If other U.S. indicia exist</li> <li>Form W-8BEN; and</li> <li>Either a copy of the individual's Certificate of Loss of Nationality of the U.S., or a reasonable explanation of the account holder's renunciation of U.S. citizenship or the reason U.S. citizenship was not obtained at birth</li> </ul>	<ul style="list-style-type: none"> <li>Form W-8BEN; and</li> <li>Documentary evidence supporting foreign status (if not already provided)</li> </ul> <p>* Standing instructions do not include one-time or periodic transfers</p>

**Additional documentation requirements for U.S. indicia if the account holder is documented with a withholding certificate**

U.S. address; U.S. mailing address; U.S. telephone number (and no foreign telephone number)	U.S. place of birth	Standing instructions to transfer funds to a U.S. account*
<ul style="list-style-type: none"> <li>Documentary evidence without a U.S. address establishing foreign status</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>The FFI classifies the individual as a local resident, the FFI is required to report payments made annually to the local tax authority, and the country has a tax information exchange agreement or income tax treaty with the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>No knowledge of other U.S. indicia</li> <li>Copy of the individual's Certificate of Loss of Nationality of the U.S.</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>If other U.S. indicia exist</li> <li>Non-U.S. passport or other government-issued ID evidencing citizenship outside the U.S.</li> <li>Either a copy of the individual's Certificate of Loss of Nationality of the U.S., or a reasonable explanation of the account holder's renunciation of U.S. citizenship or the reason U.S. citizenship was not obtained at birth</li> </ul>	<ul style="list-style-type: none"> <li>Documentary evidence supporting foreign status</li> </ul> <p>* Standing instructions do not include one-time or periodic transfers</p>

*(6) Preexisting individual account documentation and due diligence (standards of knowledge and reason to know)*

A participating FFI can elect to use less stringent rules to document their preexisting account holders (account holders onboarded before January 1, 2014). In terms of timing, preexisting individual accounts with an aggregate value exceeding \$1 million USD must be documented within a year of the participating FFI's FFI agreement effective date. For an FFI who timely registers, this would be December 31, 2014. All other preexisting individual accounts must be documented within two years

of the participating FFI's FFI agreement effective date. Any account not documented within this timeframe must be classified as a recalcitrant account holder.

For accounts classified as U.S. accounts, the participating FFI is generally required to collect either a U.S. TIN from the account holder, or a Form W-9 containing the account holder's U.S. TIN. Additionally, if the participating FFI's jurisdiction prohibits reporting the required U.S. account holder information, the participating FFI must collect a privacy waiver from the account holder to allow for such reporting or close or transfer the account.

For account holders that are not already classified as U.S. for other purposes (e.g., Chapters 3 or 61 of the U.S. Internal Revenue Code), a participating FFI may elect to exclude from review and treat as non-U.S. any low value accounts with an aggregate balance or value of \$50,000 USD or less as of the effective date of the FFI agreement (\$250,000 USD for cash value insurance or annuity contracts). This exception expires if the aggregate balance of the account exceeds \$1 million USD at the end of any calendar year or if a change in circumstance occurs effectively requiring the participating FFI to monitor account balances and other account changes. If the exception expires after December 31, 2014 according to the above requirement, the account holder must be classified as recalcitrant if documentation is not provided before a withholdable payment is made on the account or within the first half of the calendar year, whichever comes first.

For accounts with a balance exceeding \$50,000 USD as of the effective date of the FFI agreement (assuming the above de minimis exception is taken), the participating FFI must conduct an electronic search for U.S. indicia on data that is electronically searchable, and if any is found, it must collect the documentation outlined below to document the account holder(s). Additionally, for these low value accounts, the electronic indicia search does not have to include the "in care of" and "hold mail" indicia described below.

The final regulations provide seven forms of U.S. indicium for preexisting individual account holders as follows:

1. Designation of the account holder as a U.S. citizen or resident;
2. A U.S. place of birth;
3. A current U.S. residence address or U.S. mailing address (including a U.S. post office box);
4. A current U.S. telephone number (less restrictive documentation requirements apply if there is also a non-U.S. telephone number on file);
5. Standing instructions to pay amounts to an account maintained in the U.S.;
6. A current power of attorney or signatory authority granted to a person with a U.S. address; and
7. An "in care of" or "hold mail" address as the sole address on the account (not required for electronic indicia search on low value accounts).

Designation of U.S. citizen or resident

- Form W-8BEN; and
- Non-U.S. government issued ID

Unambiguous indication of U.S. place of birth

- Non-U.S. government issued ID; and
- Copy of the individual's Certificate of Loss of Nationality of the U.S.

or

- Form W-8BEN;
- Non-U.S. government issued ID; and
- Reasonable explanation of the account holder's renunciation of U.S. citizenship or the reason U.S. citizenship was not obtained at birth

U.S. telephone numbers and non-U.S. telephone numbers; power of attorney/signatory authority to person with U.S. address; or "in care of" or "hold mail" as sole address for account

- Form W-8BEN

or

- Documentary evidence supporting foreign status

U.S. address; only U.S. telephone number; or standing Instructions\*

- Form W-8BEN; and
- Documentary evidence supporting foreign status

\* Standing instructions do not include one-time or periodic transfers

For accounts with a balance exceeding \$1 million USD as of the effective date of the FFI agreement, the participating FFI must apply the same U.S. Indicia search and documentation above. However, it must expand its search to also include the current customer master file. To the extent the above indicia is not contained in the customer master file (for example, if the place of birth is not located in the customer master file), the participating FFI must expand its search further to include the following documents if they were obtained within five years preceding the effective date of the FFI agreement (or the year the account balance exceeded \$1 million U.S. for accounts previously subject to the low value account review rules):

- The most recent withholding certificate, written statement, and documentary evidence;
- The most recent account opening contract or documentation;
- The most recent documentation obtained for AML due diligence or other regulatory purposes;
- Any power of attorney or signature authority forms currently in effect; and
- Any standing instructions to pay amounts to another account.

In lieu of the manual search outlined above, the participating FFI may conduct an electronic search for U.S. indicia to the extent the indicia noted above (e.g., address, place of birth, nationality or residency, etc.) is available in an electronically searchable format. In addition to the indicia search for high value accounts, the participating FFI must identify accounts with a relationship manager assigned and document whether the relationship manager has actual knowledge that the account holder is a U.S. citizen or resident. Finally, participating FFIs that are QIs, WPs or WTs and have previously collected documentation from their account holders under their agreements are not required to perform the above review aside from the relationship manager inquiry for high value accounts.

Given the complexity of tracking account balances to determine whether a preexisting account must undergo additional review, participating FFIs should consider whether treating all accounts as individual is preferable to taking advantage of the de minimis exceptions. Participating FFIs should factor in the size of their account basis, the estimated cost of tracking account balance, and the likelihood of account thresholds exceeding predetermined limits in deciding whether to apply the exceptions.

### *(7) Change in circumstances*

As part of the FFI agreement, an FFI is obligated to develop procedures to monitor and identify any change of circumstance on an account, including procedures for relationship managers to identify such changes. A change of circumstance includes any change that affects the FATCA status of an account holder (e.g., U.S. indicia) and includes a change in any account belonging to the same account holder if the accounts can be electronically linked using a unique identifier, if a relationship manager knows the accounts belong to the same account holder, or if the participating FFI has treated a group of accounts as a consolidated obligation (e.g., to apply the preexisting account exception). Change of circumstances also include a change of balance that would cause a specific exception to expire (e.g., exceeding the \$50,000 limit on an account previously subject to the depository account de minimis exception, or the \$1 million limit on an account previously subject to the preexisting account de minimis exception).

If a change of circumstance occurs, the participating FFI must collect the required documentation depending on the change as provided above for entity accounts and for preexisting individual accounts.

The participating FFI must document the account before a withholdable payment is made or within 90 days of the change, whichever comes first, or the account must be classified as recalcitrant (in the case of an individual or documented Passive NFFE without completed substantial U.S. owner information) or as a nonparticipating FFI (in the case of an entity account holder not documented as a passive NFFE).

### *(8) Record retention*

Participating FFIs are required to retain either an original, certified copy or photo copy of any withholding certificates, written statements or documentary evidence used to determine the FATCA status of its account holders for six years. However, for documentary evidence collected pursuant to AML due diligence on accounts maintained outside the U.S., the participating FFI does not have to retain copies of such documentary evidence if it retains a record of the date the document was reviewed, the type of document, the document's identification number (if any), and whether U.S. indicia were identified (this last requirement doesn't apply to preexisting accounts).

The participating FFI is also required to retain a record of any searches, third-party credit agency searches, results from electronic searches, and requests and responses made to relationship managers for six years. The participating FFI must extend the retention period if the IRS requests such an extension before the six year period.

The above rules apply with respect to a participating FFI's account holders. For a participating FFI that is a withholding agent with respect to a payment, it must retain the documentation for as long as it's relevant to the determination of its withholding tax liability.

### ***iii) Withholding***

Under the FFI agreement, a participating FFI agrees to withhold 30 percent on any withholdable payment made to a recalcitrant account holder or nonparticipating FFI. The withholding must take place at the time of payment. Satisfying this requirement also satisfies the requirement to withhold on nonparticipating FFI account holders and payees under Sections 1.1471(a) and 1472. However, the rules under 1.1472 as discussed in the U.S. withholding section above will still apply to payees that are NFFEs and are not account holders.

U.S. branches of participating FFIs that are treated as a U.S. person and that satisfy their backup withholding obligations will generally follow the withholding rules applicable to USWAs.

A participating FFI acting as a nonqualified intermediary, non-withholding foreign partnership or non-withholding foreign trust may delegate its withholding responsibility to its withholding agent by providing the information necessary for that withholding agent to withhold and report on any payments e.g., providing a Form W-8IMY, withholding statement, etc. Participating FFIs are however required to withhold to the extent the withholding agent fails to withhold the correct amount. As a result, most participating FFIs will not have to perform withholding until 2017, the effective date for withholding gross proceeds and foreign passthru payments. Therefore, the major withholding concern is the residual withholding requirement of a participating FFI if the upstream U.S. withholding agent fails to perform the proper withholding. Participating FFIs will need to put controls in place to ensure proper withholding is performed by the upstream withholding agent. If withholding is not done properly, the participating FFI should have procedures in place to correct the issue and avoid having to conduct the withholding itself.

The requirement to withhold also applies to payments to limited FFIs and limited branches including those within the participating FFI's expanded affiliated group. Furthermore, a participating FFI will also be considered to have made a withholdable payment to a limited FFI or branch when the limited FFI receives a payment with respect to a transaction between the limited FFI and such participating FFI that is in the expanded affiliated group and such transaction hedges or otherwise provides total return exposure to another transaction between such participating FFI and a third party that gives rise to a withholdable payment. For example, if a participating FFI enters into an interest rate swap with a U.S. counterparty, payments to the U.S. counterparty are U.S. source income and therefore withholdable payments. To hedge, the FFI enters into another interest rate swap agreement with a limited FFI or branch. Normally, the interest paid under the swap agreement between the participating FFI and limited FFI would be considered non-U.S. source, however because the swap transaction was entered into to hedge a transaction that produces withholdable income (the swap with the U.S. counterparty), payments under the interest swap agreement will also be withholdable.

If the participating FFI must withhold on a dormant account<sup>66</sup> per the above rules, it may elect to set aside the withheld amount in escrow until the account is no longer dormant. Once the account ceases<sup>67</sup> to be dormant, the participating FFI must deposit the withheld amount within 90 days if the account holder does not provide valid documentation for the account. If the dormant account escheats to a foreign government under local laws, the participating FFI is not required to deposit the amount in escrow.

---

<sup>66</sup> A dormant account is an inactive account as defined by the participating FFI's jurisdiction or the participating FFI's normal operating procedures. If a dormant account is not addressed by the jurisdiction or normal operating procedures, it may include accounts where the account holder has not initiated any transactions on any account with the FFI for the past three years and has not communicated with the participating FFI regarding any owned accounts in the past six years. Treas. Reg. § 1.1471-4(d)(6)(ii).

<sup>67</sup> A dormant account ceases to be dormant when the account holder initiates a transaction on any account, communicates with the participating FFI on any account, or ceases to be inactive as defined by the participating FFI's jurisdiction or the participating FFI's normal operating procedures. Treas. Reg. § 1.1471-4(d)(6)(iii).

#### ***iv) Reporting***

Under the FFI agreement, a participating FFI agrees to report on specified U.S. individuals, specified U.S. owners of accounts held by owner-documented FFIs, and substantial U.S. owners of accounts held by passive NFFEs. Reporting is also required with respect to aggregate payments made to nonparticipating FFIs in 2015 and 2016, and aggregate payment information on payments made to recalcitrant account holders. Except for aggregate payments made to nonparticipating FFIs, information will be reported on the new Form 8966 ( FATCA Report) and is generally due by March 31 of the year for the prior year's information (a 90-day automatic extension can be requested along with an additional 90-day extension for certain hardship reasons). For aggregate reporting on payments to nonparticipating FFIs, the participating FFI will use the Form 1042-S which will be due by March 15 of the year for the prior year's information.

For accounts held by specified U.S. persons (U.S. accounts), by U.S.-owned foreign entities (i.e. passive NFFE), or by owner-documented FFIs, the participating FFI is generally required to report the following information:

- For passive NFFEs or owner-documented FFIs, the name of the entity;
- The name, address and TIN of each specified U.S. person, substantial U.S. owner of a passive NFFE or specified U.S. owner of an owner-documented FFI;
- The account number;
- The account balance or value of the account<sup>68</sup>;
- Payments with respect to the account (i.e., FDAP income and gross proceeds)<sup>69</sup>; and
- Any other information as required on the applicable reporting form and instructions.

For recalcitrant account holders, the participating FFI is required to report the aggregate number and aggregate balance or value of accounts held by:

- Recalcitrant account holders classified as passive NFFEs that have not provided information or certifications regarding substantial U.S. owners;
- Recalcitrant account holders classified as U.S. persons that have not provided a Form W-9 and/or privacy waiver when required;
- Recalcitrant account holders that have U.S. indicia other than the above two categories and dormant accounts;
- Recalcitrant account holders that do not have U.S. indicia other than passive NFFEs or dormant accounts; and
- Recalcitrant account holders that are dormant accounts.

If the effective date of the FFI agreement is on or before December 31, 2014, the participating FFI will be subject to phased-in reporting rules for calendar years 2013 through 2015, helping to ease the reporting burden on FFIs. Under this phased-in approach, the first FATCA report is due on March 31, 2015 with respect to the 2013 and 2014 calendar years and does not have to include information about payments made with respect to the account. On March 31, 2016, the participating

---

<sup>68</sup> This must be the average balance or value for the year if it is the reporting practice of the participating FFI; otherwise it must be the year-end balance or value and can be in local currency using procedures detailed in the final regulations.

<sup>69</sup> For depository accounts this includes the aggregate gross amount of interest paid or credited to the account. For custodial accounts this includes the aggregate gross amount of interest, dividends, and any other income paid or credited to the account as well as gross proceeds paid or credited to the account. For all other financial accounts related to debt or equity interests or insurance products this includes payments made or gross amounts paid or credited, including redemptions.

FFI will be required to include FDAP income payments on the FATCA report, and on March 31, 2017, gross proceed payments must be included.

For payments made to nonparticipating FFIs in calendar years 2015 and 2016, the participating FFI must report the aggregate amount of foreign passthru payments and U.S. source FDAP income payments per payee on the Form 1042-S.

In addition to the above reporting obligations, if the participating FFI produces account statements that summarize account activity in the ordinary courses of its business, it must retain a record of such statements for six years or for the period it currently saves such statements (whichever is longer). The IRS may request an extension of the retention period by notifying the participating FFI before the expiration of the six year period.

## **6) Administrative**

### **a) FATCA registration portal**

The IRS will implement a web-based tool known as the FATCA Registration Portal to manage all required registrations, agreements and certifications between institutions subject to FATCA requirements and the IRS. The Portal will be available by no later than July 15, 2013. Once successfully registered with the FATCA registration portal, institutions will be able to agree to comply with their obligations associated with FATCA, as well as signing their FFI agreement, if required.

The following types of entities will be expected to register on the FATCA registration portal:

- Participating FFIs
- Registered deemed-compliant FFIs
- Reporting Model 1 FFI
- Sponsored FFIs
- Qualified intermediaries (QIs)
- Withholding foreign partnerships (WPs) and withholding foreign trusts (WTs)
- Foreign branches of U.S. financial institutions

In addition to the web based portal, the IRS has released a draft of Form 8957, titled "Foreign Account Tax Compliance Act (FATCA) Registration." Form 8957 will allow an alternative method for a FFI or sponsoring entity to register as a participating FFI, reporting IGA financial institution, limited financial institution, or sponsoring entity in lieu of electronically registering through the FATCA Registration Portal. The release of this paper form came as a surprise since the IRS originally stated that FFI registration would only be allowed through the FATCA Registration Portal.

Form 8957 collects information that is needed for FFIs to register and obtain a GIIN. The IRS stated that the questions on the form will be substantially similar to the information required for electronic registration.

Form 8957 is divided into four parts:

- 1) Part 1 requests information on the financial institution, including:
  - a) Basic entity information;
  - b) Whether or not the entity is and intends to remain a qualified intermediary, withholding foreign partnership, or withholding foreign trust;
  - c) Information on any branches outside the entity's tax residence country;
  - d) Identification of a responsible officer; and
  - e) Point of contact information.
- 2) Part 2 covers information on the members of the expanded affiliated group, if any, including name, country of residence for tax purposes, and member type;
- 3) Part 3 allows for renewal information of qualified intermediaries, withholding partnerships, or withholding trusts agreements, if applicable; and
- 4) Part 4 is the responsible officer signature and certification section.

According to the Form's preliminary instructions, 1) Part 1 of the form must be completed; 2) the form will not be processed by the IRS unless it is signed, and 3) the IRS will not begin to accept the form prior to July 1, 2013. Moreover, the IRS strongly encourages applicants to register electronically through the FATCA Registration Portal and emphasizes that paper forms will not be processed until October and at a slower rate than the electronic version.

Each institution that is successfully registered with the FATCA Registration Portal (whether directly or indirectly through the Form 8957) will be issued a GIIN. This GIIN will be used as the institution's identifying number for reporting requirements and for identifying its status to withholding agents. GIINs will be issued beginning October 15, 2013. Note that the IRS plans for registered QIs, WPs and WTs to use their GIIN in lieu of their existing EIN number for purposes of QI, WP or WT reporting requirements and establishing QI, WP or WT status vis-à-vis withholding agents. All registered institutions which are issued a GIIN will be listed on the IRS FFI List which will be posted electronically. The first posting of this list is scheduled for December 2, 2013 and will be updated monthly going forward. In order to be included on the first posting an institution must register through the FATCA registration portal by October 25, 2013.

### **b) Responsible officer and FFI compliance program**

Each participating FFI must appoint a responsible officer who will personally (or through designated persons) oversee compliance with the FFI agreement through an established compliance program. The responsible officer will be an officer of the institution or the institution's expanded affiliated group with sufficient authority to certify compliance with the FFI agreement to the IRS. The compliance program established must include policies, procedures and processes sufficient for the FFI to satisfy the requirements of its agreement. The responsible officer will periodically review compliance with the requirements of the agreement, as well as the sufficiency of the established compliance program, throughout each certification period. Within six months of the end of each certification period, the responsible officer will be required to provide certification to the IRS that the FFI either maintained effective internal controls during the certification period or, if a material failure<sup>70</sup> was

---

<sup>70</sup> §1.1471-5(f)(3)(iv) A material failure is a failure of the participating FFI to fulfill the requirements of the FFI agreement. A failure is material if it was the result of a deliberate action on the part of one or more employees of the participating FFI (its agent, sponsor or compliance FI) to avoid the requirements of the FFI agreement. It is also a material failure if it was due to an error attributable to a failure of the participating FFI to implement internal controls sufficient for the participating FFI to meet the requirements of this section. A

identified during a certification period which is not remediated by the date of certification, the responsible officer must issue a qualified certification to the IRS.

Note that the first certification period will begin on the effective date of the FFI agreement and end at the close of the third full calendar year from that effective date. Each subsequent certification period will last three full calendar years from the end of the first period, unless the FFI agreement provides otherwise.

Further note that if an FFI is part of an expanded affiliated group it may elect to participate in a consolidated compliance program for that group. The consolidated group program is not required to include every FFI in the expanded affiliated group, and an expanded affiliated group may have multiple consolidated compliance groups. However, each branch within the consolidated compliance program must be subject to periodic review for compliance with the requirements of the agreement and consolidated program.

### **c) FFI enforcement: Compliance verification and event of default**

If the IRS identifies concerns of substantial non-compliance with the requirements of the FFI agreement, based on the information included in submitted compliance certifications (described above), they may request additional information to verify compliance. Alternatively, the IRS may request the performance of specific review procedures to be performed by an external auditor or third party consultant. In order to verify the sufficiency of the established compliance program, as well as to verify compliance with the FFI agreement, information requested during such a review may include:

- A description or copy of the participating FFI's policies and procedures for fulfilling the requirements of the FFI agreement;
- A description of the participating FFI's procedures for conducting the periodic reviews; and/or
- Copies of any written reports documenting the findings of the period reviews.

If, based on the results of this compliance verification review, the IRS determines the institution failed to establish or maintain a compliance program that fulfills the requirements of the FFI agreement or failure to perform a periodic review, the institution may be notified of an event of default.

An event of default occurs if the IRS determines the participating FFI has failed to perform material obligations required with respect to due diligence, withholding or reporting requirements of the FFI agreement, or failed to substantially comply with the requirements of the FFI agreement.

---

material failure will not constitute an event of default unless such material failure occurs in more than limited circumstances when a participating FFI has not substantially complied with the requirements of an FFI agreement.

An event of default also includes the occurrence of any of the following:

- Failure to make the required initial compliance program certification or to make the periodic certifications required within the specified time period;
- Failure to take timely corrective actions to remedy a material failure after making a qualified certification;
- Failure to obtain valid waivers from holders of U.S. accounts or failure to otherwise close or transfer such U.S. accounts as required;
- Failure to significantly reduce, over a period of time, the number of account holders or payees that the participating FFI is required to treat as recalcitrant account holders or nonparticipating FFIs;
- Making incorrect claims for refund under the collective refund procedures;
- Failure to cooperate with an IRS request for additional information or making any fraudulent statement or misrepresentation of material fact to the IRS; or
- Any transaction relating to sponsorship, promotion or noncustodial distribution for or on behalf of any local FFI that is an investment entity.

Following an event of default known by or disclosed to the IRS, the IRS will deliver to the participating FFI a notice of default specifying the event of default. The IRS will request the participating FFI to remediate the default within a specified time period. The FFI must respond to the notice by providing information responsive to the request, or state the reason why it does not agree that an event of default has occurred. If the FFI does not provide a response within the timeframe provided, the IRS may deliver a notice terminating the FFI's participating FFI status.

A participating FFI will be permitted to remediate an event of default to the extent that it agrees with the IRS on a remediation plan. Such a plan may include providing specific information regarding the FFI's U.S. accounts when the FFI has been unable to report all of the information with respect to such accounts and has been unable to close or transfer such accounts. The IRS may, as part of a remediation plan, require additional information from the FFI or performance of the specified review procedures pursuant to the FFI agreement.

## **d) Refunds**

In the event of overpayment of tax as a result of withholding under Chapter 4 for an account holder or payee during a calendar year, a participating FFI or reporting Model 1 FFI may request a credit or refund from the IRS for the overpayment on behalf of the account holder or payee. If the participating FFI or reporting Model 1 FFI does not request a credit or refund, the participating FFI or Model 1 FFI (or its withholding agent) must file and furnish within a reasonable period a Form 1042-S (or other form as the IRS may prescribe) and Form 1042 (or amended forms) to report to any account holder or payee that has requested such form with regard to the tax withheld by the participating FFI or Model 1 FFI or its withholding agent.

In order to use the collective refund procedures, the FFI or reporting Model 1 FFI must have included all account holders and payees for which they seek a refund on a Form 1042-S (which has not been furnished to the account holder or payees) in a reporting pool of nonparticipating FFIs or recalcitrant account holders with respect to the payments for which the refund is sought. When filing a claim for collective refund with the IRS, the participating FFI or reporting Model 1 FFI will submit a Form 1042 (or amended Form 1042) containing a reconciliation of amounts withheld and the claim for a credit or refund, a schedule identifying taxes withheld for each account holder or payee to which the claim relates, and a copy of the Form 1042-S furnished to the participating FFI or reporting Model 1 FFI by its withholding agent reporting the taxes withheld to which the claim relates (if applicable). The participating FFI or reporting Model 1 FFI must also submit a statement including the reason for overpayment and certain representations about the overpayment, including confirmation that the participating FFI or reporting Model 1 FFI will not issue a Form 1042-S to any account holder or payee for which a refund is being sought.

Note that collective refunds are not permitted for payments made to an account holder or payee that is a nonparticipating FFI, a participating FFI or reporting Model 1 FFI that is a flow-through entity or acting as an intermediary, a U.S. person or a passive NFFE that is a flow-through entity with respect to taxes allocated to its substantial U.S. owners. Further, no credit or refund will be allowed after the statutory period of limitation for refunds has expired.

## 7) Appendix

### a) Acronyms

AML:	Anti-Money Laundering
EIN:	Employer ID Number
FATCA:	Foreign Account Tax Compliance Act
FATF:	Financial Asset Task Force
FDAP:	Fixed, Determinable, Annual, Periodic
FFI:	Foreign Financial Institutions
GIIN:	Global Intermediary Identification Number
IGAs:	Intergovernmental Agreements
IRS:	Internal Revenue Service
ISDA:	International Swaps and Derivatives Association
NFFEs:	Non-Financial Foreign Entities
NQI:	Nonqualified Intermediary
NWP:	Non-withholding Partnership
NWT:	Non-withholding Trust
OID:	Original Issue Discount
PFFI:	Participating Foreign Financial Institutions
QI:	Qualified Intermediary
SEC:	Securities and Exchange Commission
SICAV:	Societe d'Investissement A Capital Variable
SPV:	Special Purpose Vehicle
SPE:	Special Purpose Entity
TIN:	Taxpayer Identification Number
USD:	United States Dollar
USWAs:	United States Withholding Agents
WP:	Withholding Partnership
WT:	Withholding Trust

## b) Glossary

Term	Definition
Account	Solely for purposes of Chapter 4 of the Internal Revenue Code, account means a financial account as defined in Treas. Reg. §1.1471-5(b) and includes a depository account, custodial account, any equity or debt interest in a financial institution, any cash value insurance contract and any annuity contract issued or maintained by a financial institution.
Account holder	The term account holder is the person listed or identified as the holder or owner of the account with the FFI that maintains that account, regardless of whether the entity is a flow-through entity.
Active NFFE	An active NFFE is any entity that is a NFFE if less than 50 percent of its gross income for the preceding calendar year is passive income and less than 50 percent of the weighted average percentage of assets (tested quarterly) held by it are assets that produce or are held for the production of passive income (i.e. dividends, interest, annuities etc.)
AML due diligence	The term AML due diligence means the customer due diligence procedures of a financial institution pursuant to the anti-money laundering or similar requirements to which a financial institution, or branch thereof, is subject. This includes identifying the customer (including the owners of the customer), understanding the nature and purpose of the account, and ongoing monitoring.
Beneficial owner	The term beneficial owner means the person who is the owner of the income for tax purposes and who beneficially owns that income. Thus, a person receiving income in a capacity as a nominee, agent or custodian for another person is not the beneficial owner of the income.
Broker	The term broker means any person, U.S. or foreign, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others. A broker includes an obligor that regularly issues and retires its own debt obligations, a corporation that regularly redeems its own stock, and a clearing organization that affects sales of securities for its members. A broker does not include an international organization that redeems or retires an obligation of which it is the issuer, a stock transfer agent that records transfers of stock for a corporation if the nature of the activities of the agent is such that the agent ordinarily would not know the gross proceeds from sales, an escrow agent that effects no sales other than such transactions as are incidental to the purpose of escrow (such as sales to collect on collateral), or a corporation that issues and retires long-term debt on an irregular basis.
Certified deemed-compliant FFI	A certified deemed-compliant FFI means an FFI that has certified as to its status as a deemed-compliant FFI by providing a withholding agent with the documentation applicable to the relevant deemed-compliant category. A certified deemed-compliant FFI is not required to register with the IRS.
Chapter 3	For purposes of Chapter 4 of the Internal Revenue Code, any reference to Chapter 3 means Sections 1441 through 1464 and the regulations thereunder, but does not include Sections 1445 and 1446 and the regulations thereunder, unless the context indicates otherwise.
Chapter 4 of the Internal Revenue Code	The term Chapter 4 of the Internal Revenue Code means Sections 1471 through 1474 and the regulations thereunder.
Chapter 4 reportable amount	The term Chapter 4 reportable amount means an amount reportable on a Form 1042-S for purposes of Chapter 4 of the Internal Revenue Code (Sections 1471-1474). This means U.S. source FDAP income (regardless of whether subject to withholding under Chapter 4 and including a passthru payment that is U.S. source FDAP income); gross proceeds subject to withholding under Chapter 4; and foreign pass-thru payments subject to withholding under Chapter 4.
Chapter 4 status	The term Chapter 4 status means, with respect to a person, the person's status as a U.S. person, a specified U.S. person, a foreign individual, a participating FFI, a deemed-compliant FFI, a Model 1 FFI, an exempt beneficial owner, a nonparticipating FFI, a territory financial institution, a QI branch of a U.S. financial institution, an excepted NFFE or a passive NFFE.
Complex trust	A complex trust is a trust that is not a simple trust or a grantor trust.
Custodial account	The term custodial account means an account for the benefit of another person that holds any financial instrument or contract held for investment (including, but not limited to, a depository account, a share or stock in a corporation, a note, bond, debenture or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a non-financial index, a notional principal contract, an insurance or annuity contract, and any option or other derivative instrument) for the benefit of another person.

Term	Definition
Customer master file	A customer master file includes the primary files of a participating FFI or deemed-compliant FFI for maintaining account holder information, such as information used for contacting account holders and for satisfying AML due diligence.
Deemed-compliant FFI	The term deemed-compliant FFI means an FFI that is treated as meeting the requirements of Section 1471(b). Also includes a QI branch of a U.S. financial institution that is a reporting Model 1 FFI.
Depository account	The term depository account means a commercial, checking, savings, time or thrift account, or an account which is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness or other similar instrument; and any amount held by an insurance company under an agreement to pay or credit interest thereon.
Documentary evidence	The term documentary evidence means documents, other than a withholding certificate or written statement that a withholding agent is permitted to rely upon to determine the Chapter 4 status of a person.
Documentation	The term documentation means withholding certificates, written statements, documentary evidence and other documents that may be relevant in determining the status of a person for the purpose of a reporting or withholding requirement under Chapter 4 of the Internal Revenue Code, including any document containing a determination of the account holder's citizenship or residency for tax or AML due diligence purposes or an account holder's claim of citizenship or residency for tax or AML due diligence purposes.
Dormant account	A dormant account is an account (other than a cash value insurance contract or annuity contract) treated as a dormant or inactive account under applicable laws or regulations or the normal operating procedures of the participating FFI that are consistently applied for all accounts maintained by such institution in a particular jurisdiction. If neither applicable laws or regulations nor the normal operating procedures of the participating FFI maintaining the account address dormant or inactive accounts, an account will be treated as a dormant account if the account holder (A) has not initiated a transaction with regard to the account or any other account held by the account holder with the FFI in the past three years; and (B) has not communicated with the FFI that maintains such account regarding the account or any other account held by the account holder with the FFI in the past six years.
EIN	The term EIN means an employer identification number (also known as a federal tax identification number).
Electronically searchable information	The term electronically searchable information means information that an FFI maintains in its tax reporting files, customer master files or similar files that is stored in the form of an electronic database against which standard queries in programming languages, such as Structured Query Language, may be used. Information, data or files are not electronically searchable merely because they are stored in an image retrieval system (such as portable document format (.pdf) or scanned documents).
Entity	The term entity means any person other than an individual.
Excepted NFFE	The term excepted NFFE means an NFFE that is one of the following: (i) publicly traded corporation whose stock is regularly traded on one or more established securities markets; (ii) certain affiliated entities related to a publicly traded corporation; (iii) any corporation that is a member of the same expanded affiliated group as a corporation, (iv) certain territory entities that is directly or indirectly wholly owned by one or more bona fide residents of the same U.S. possession under the laws of which the entity is organized he term "bona fide resident of a U.S. possession" means an individual who qualifies as a bona fide resident); (v) an active NFFE; and (vi) excepted nonfinancial entities like holding companies, treasury centers and captive finance companies that are members of a nonfinancial group; start-up companies; entities that are liquidating from bankruptcy; and non-profit organizations.
Exempt beneficial owner	The term exempt beneficial owner includes a foreign government, any political subdivision of a foreign government or any wholly owned agency or instrumentality of any one or more of the foregoing; any international organizations and any wholly owned agency or instrumentality thereof; any foreign central bank of issue; governments of U.S. possessions; certain retirement funds; and entities wholly owned by exempt beneficial owners.

Term	Definition
Expanded affiliated group	A financial institution generally would be part of an “expanded affiliated group” that includes another financial institution if: (i) one financial institution controls the other financial institution directly or through a chain of controlled entities or (ii) they are both under the common control (directly or through a chain of controlled entities) of a single corporation (whether or not such corporation is a financial institution itself). FATCA defines an “expanded affiliated group” as an “affiliated group,” as defined by Section 1504(a), but by substituting a more-than-50% ownership requirement for the at-least-80% ownership requirement in each place where it appears in Section 1504(a), and disregarding the Section 1504(b)(2) prohibition on including insurance companies in an affiliated group and the Section 1504(b)(3) prohibition on including non-U.S. corporations in an affiliated group. It also includes partnerships and trusts if they are controlled, within the meaning of Section 954(d)(3), by other members of the expanded affiliated group (including other controlled partnerships or trusts). Under FATCA, all FFI entities that are part of a FFI’s expanded affiliated group must be a participating FFI or a registered deemed-compliant FFI.
FATCA	The Foreign Account Tax Compliance Act (FATCA) is codified as Chapter 4 of the Internal Revenue Code. It represents the Treasury Department’s efforts to prevent U.S. taxpayers who hold financial assets in non-U.S. financial institutions (foreign financial institutions or FFIs) and other offshore vehicles from avoiding their U.S. tax obligations. The intent behind the law is for foreign financial institutions (FFIs) to identify and report to the IRS U.S. persons holding assets abroad and for certain non-financial foreign entities (NFFEs) to identify their substantial U.S. owners. In order to comply with the rules, FFIs are required to enter into an FFI agreement with the U.S. Treasury or comply with intergovernmental agreements (IGAs) entered into by their local jurisdictions. U.S. withholding agents (USWAs) must document all of their relationships with foreign entities in order to assist with the enforcement of the rules. Failure to enter into an agreement or provide required documentation will result in the imposition of a 30% withholding tax on certain payments made to such customers and counter-parties. Failure to impose the requisite withholding under FATCA requirements could result in significant financial exposure.
FATCA registration portal	The FATCA registration portal is a web-based tool that will be implemented to manage all required registrations, agreements and certifications between institutions subject to FATCA requirements and the IRS.
FATF	The term FATF means the Financial Action Task Force, which is an inter-governmental body that develops and promotes international policies to combat money laundering and terrorist financing.
FATF-compliant	The term FATF-compliant means the relevant jurisdiction is not subject to a FATF call on its members and other jurisdictions to apply counter-measures to protect the international financial system from the on-going and substantial money laundering and terrorist financing (ML/TF) risks emanating from the jurisdiction; is not a jurisdiction with strategic AML/CFT deficiencies that has not made sufficient progress in addressing the deficiencies; and is not a jurisdiction with strategic AML/CFT deficiencies irrespective of whether the jurisdiction has agreed upon an action plan with the FATF.
FDAP income	The term FDAP income means fixed or determinable annual or periodic income. Includes interest, dividends, rents, royalties, commissions, fees and premiums.
Foreign financial institution	An FFI is defined as any financial institution that is a foreign entity, other than a financial institution organized under the laws of a possession of the United States. Financial institution means any entity that: (i) accepts deposits or other similar investments of funds in the ordinary course of a banking or similar business (Depository Institution); (ii) holds, as a substantial portion of its business, financial assets for the benefit of one or more other persons (Custodial Institution); (iii) primarily conducts trading in money market instruments, foreign currency, foreign exchange interest rate, and index instruments, transferable securities or commodity futures; individual or collective portfolio management; or investing, administering or managing funds, money or financial assets on behalf of other persons (Investment Entity); (iv) is an insurance company or holding company within an expanded affiliated group that includes an insurance company, and the insurance company or holding company issues, or is obligated to make payments with respect to a cash value insurance or annuity contract (Specified Insurance Company); or (v) is a holding company that holds stock in other members of its expanded affiliated group or treasury center that is part of an expanded affiliated group that includes a depository institution, custodial institution, insurance company or investment entity, or is formed in connection with or availed of by a an investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets (Holding Company or Treasury Center).

Term	Definition
FFI agreement	The term FFI agreement refers to an agreement between the IRS and the participating FFI. An FFI agreement includes a QI agreement, a withholding partnership agreement and a withholding trust agreement that is entered into by a FFI Model 1 FFI) that has an effective date or renewal date on or after December 31, 2013.
Financial account	Section 1471(d)(2) defines a financial account as any depository account, any custodial account, and any equity or debt interest in an FFI, other than interests that are regularly traded on an established securities market. It includes traditional bank, brokerage, money market accounts, and interests in investment vehicles, and excludes most debt and equity securities issued by banks and brokerage firms, subject to an anti-abuse rule. It excludes certain savings accounts (including both retirement and pension accounts and nonretirement savings accounts) that meet certain requirements with respect to tax treatment and the type and amount of contributions. It also excludes any account that otherwise constitutes a financial account if it is held solely by one or more exempt beneficial owners or by nonparticipating FFIs that hold the account as intermediaries solely on behalf of one or more such owners. Thus, a participating FFI need not determine whether such an account is a U.S. account or held by a recalcitrant account holder.
Flow-through entity	The term flow-through entity means a partnership, simple trust or grantor trust, as determined under U.S. tax principles.
Flow-through withholding certificate	The term flow-through withholding certificate means a Form W-8IMY submitted by a foreign partnership, foreign simple trust or foreign grantor trust.
Foreign entity	A foreign entity is any entity that is not a U.S. person, including a territory entity.
Foreign passthru payments	The final regulations reserve on the definition of a foreign passthru payment.
Foreign payee	The term foreign payee means any payee other than a U.S. payee.
Foreign person	The term foreign person means any person other than a U.S. person and includes, with respect to a withholdable payment, a foreign branch of a U.S. person that furnishes an intermediary withholding certificate indicating that it is a QI.
Global Intermediary Identification Number (GIIN)	A GIIN is the identification number used to identify the FFI for FATCA registration purposes and U.S. information reporting purposes. This represents combination of the FATCA ID and FFI EIN that were outlined in the proposed regulations.
Grandfather obligations	Grandfather obligations are any obligation outstanding on January 1, 2014 but does not include any legal agreement or instrument that: (1) is treated as equity for U.S. tax purposes (2) lacks a stated expiration or term (for example, a savings deposit or demand deposit, a deferred annuity contract or a life insurance contract or annuity contract that permits a substitution of a new individual as the insured or as the annuitant under the contract); (3) is a brokerage agreement, custodial agreement, investment linked insurance contract, investment linked annuity contract or similar agreement to hold financial assets for the account of others and to make and receive payments of income and other amounts with respect to such assets; or (4) is a master agreement that merely sets forth standard terms and conditions that are intended to apply to a series of transactions between parties but that does not set forth all of the specific terms necessary to conclude a particular transaction.
Grantor trust	A grantor trust is a trust where one or more persons are treated as owners of all or a portion of the trust under Sections 671 through 679. If only a portion of the trust is treated as owned by a person, that portion is a grantor trust with respect to that person.
Gross proceeds	The term gross proceeds means the proceeds from any sale, exchange or disposition of property that requires recognition of gain or loss under Section 1001, without regard to whether the owner of such property is a foreign person that is not subject to U.S. federal income tax with respect to such sale, exchange or disposition. For purposes of this definition, property is of a type that can produce interest or dividends that would be U.S. source FDAP income.
Insurance company	The term insurance company means a company more than half of the business of which during the calendar year is issuing (or being obligated to make payments with respect to) insurance or annuity contracts or the reinsuring of such contracts.

Term	Definition
Intergovernmental agreements (IGAs)	Intergovernmental agreements are intended to enable FFIs to identify and report to the IRS U.S. persons that hold assets abroad and for certain non-financial foreign entities (NFFEs) to identify their substantial U.S. owners. In order to comply with the rules, FFIs are required to enter into an FFI agreement with the U.S. Treasury or comply with intergovernmental agreements (IGAs) entered into by their local jurisdictions. U.S. withholding agents (USWAs) must document all of their relationships with foreign entities in order to assist with the enforcement of the rules.
Intermediary	An intermediary means, with respect to a payment that it receives, a person that, for that payment, acts as a custodian, broker, nominee or otherwise as an agent for another person, regardless of whether such other person is the beneficial owner of the amount paid, a flow-through entity or another intermediary
Intermediary withholding certificate	The term intermediary withholding certificate means a Form W-8IMY submitted by an intermediary.
Limited branch	A limited branch is a branch of an FFI that, under the laws of the jurisdiction as of February 15, 2012 and that apply with respect to the accounts maintained by the branch, cannot do certain things. It cannot, with respect to accounts and the FFI agreement it is required to treat as U.S. accounts, report such accounts to the IRS, close such accounts within a reasonable period of time or transfer such accounts to a branch of the FFI, a participating FFI member of the expanded affiliated group of the FFI, or another participating FFI that may so report. It also cannot, with respect to recalcitrant account holders and accounts held by nonparticipating FFIs, withhold with respect to each such account, block such accounts (an account is considered blocked when the FFI prohibits the account holder from effecting any transactions with respect to an account until such time as the account is closed, transferred or the account holder provides the documentation for the FFI to determine the U.S. or non-U.S. status of the account), close each such account within a reasonable period of time or transfer such account to another branch of the FFI or a participating FFI member of the expanded affiliated group of the FFI that is not subject to the restrictions with respect to such account holders.
Limited FFI	A limited FFI is a member of an expanded affiliated group that includes one or more participating FFIs that agrees to the conditions to become a limited FFI and if under the laws of each jurisdiction that apply with respect to the accounts. A limited FFI is required to treat as U.S. accounts, report such accounts to the IRS, close such accounts within a reasonable period of time or transfer such accounts to an affiliate or other participating FFI that may so report. With respect to recalcitrant account holders and accounts held by nonparticipating FFIs, a limited FFI is required to withhold with respect to each such account, block each such account, close each such account within a reasonable period of time or transfer each such account to an affiliate of the FFI that is a participating FFI.
Non-financial foreign entity (NFFE)	The term NFFE means a foreign entity that is not a financial institution (including a territory NFFE). The term also means a foreign entity treated as an NFFE pursuant to a Model 1 IGA or Model 2 IGA.
Nonparticipating FFI	The term nonparticipating FFI means an FFI other than a participating FFI, a deemed-compliant FFI or an exempt beneficial owner.
Nonqualified Intermediary (NQI)	A nonqualified intermediary means any intermediary that is not a U.S. person and not a qualified intermediary, or a qualified intermediary that is not acting in its capacity as a qualified intermediary with respect to a payment.
Nonqualified intermediary withholding statement	A NQI shall provide a withholding statement to the extent the nonqualified intermediary is required to furnish, or does furnish, documentation for payees on whose behalf it receives reportable amounts or to the extent it otherwise provides the documentation of such payees to a withholding agent.
Non-withholding partnership (NWP)	The term non-withholding foreign partnership or NWP means a foreign partnership that is not a withholding foreign partnership.
Non-withholding Trust (NWT)	The term non-withholding foreign trust or NWT means a foreign trust that is a simple trust or grantor trust and is not a withholding foreign trust.
Offshore obligation	The term offshore obligation means any account, instrument or contract maintained and executed at an office or branch of a withholding agent at any location outside of the United States or in any location in a possession of the United States. The term payment with respect to an offshore obligation means a payment made outside of the United States, within the meaning of 1.6049-5(e), with respect to an offshore obligation.

Term	Definition
Participating FFI	The term participating FFI means an FFI that has agreed to comply with requirements of an FFI agreement, including an FFI described in a Model 2 IGA that has agreed to comply with the requirements of an FFI agreement. The term also includes a QI branch of a U.S. financial institution, unless such branch is a reporting Model 1 FFI.
Participating FFI group	The term participating FFI group means an expanded affiliated group that includes one or more participating FFIs. The term participating FFI group also means an expanded affiliated group in which one or more members of the group is a reporting Model 1 FFI and each member of the group that is an FFI is a registered deemed-compliant FFI, nonreporting IGA FFI, limited FFI or retirement fund described in §1.1471-6(f).
Partnership	The term partnership means a business entity that is not a corporation and that has at least two members.
Passive NFFE	The term passive NFFE means an NFFE other than an excepted NFFE.
Passthru payment	The term passthru payment means any withholdable payment and any foreign passthru payment.
Payee	For purposes of Chapter 4 of the Internal Revenue Code, a payee is the person to whom a payment is made, regardless of whether such person is the beneficial owner of the amount.
Payor	The term payor means any person who is required to make an information return with respect to any reportable payment, including any middlemen.
Person	The term person means an individual, a trust, estate, partnership, association, company or corporation. The term person does not include a wholly owned entity that is disregarded for federal tax purposes as an entity separate from its owner. Notwithstanding the previous sentence, the term person includes, with respect to a withholdable payment, a foreign branch of a U.S. person that furnishes an intermediary withholding certificate indicating that it is a QI.
Possession of the United States	The term possession of the United States means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico or the U.S. Virgin Islands.
Preexisting entity account	A preexisting entity account is a financial account held by one or more entities that is a preexisting obligation.
Preexisting individual account	A preexisting individual account is a financial account held by one or more individuals that is a preexisting obligation.
Preexisting obligation	The term preexisting obligation means any account, instrument or contract maintained or executed by the withholding agent as of January 1, 2014. With respect to a participating FFI, the term preexisting obligation means any account, instrument or contract maintained or executed by the FFI prior to the date that the participating FFI's FFI agreement becomes effective. With respect to a registered deemed-compliant FFI, a preexisting obligation means any account, instrument or contract maintained or executed by the FFI prior to the earlier of the date that the FFI registers as a deemed-compliant FFI or the date the FFI implements its required account opening procedures.
Presumption rules	A set of rules used to determine the status of the account holder or person you pay as U.S. or foreign and other relevant characteristics, including their status under chapter 3 and 4, where you cannot reliably associate an account holder or payment with valid documentation.
Prima facie FFI	A prima facie FFI is any payee if the withholding agent has available as a part of its electronically searchable information a designation for the payee as a QI or NQI; or for an account maintained in the United States, the payee is presumed to be a foreign entity or is documented as a foreign entity for purposes of Chapter 3 or 61; and the withholding agent has recorded as part of its electronically searchable information a standardized industry code that indicates that the payee is a financial institution.
QI agreement	A QI agreement is a withholding agreement entered into with the Internal Revenue Service (IRS) pursuant to Rev. Proc. 2000-12, 2000-4 I.R.B. 387 and Treasury Regulation §1.1441-1(e)(5) by a foreign entity. Under its terms, the QI generally must report annually certain aggregate information concerning the beneficial owners of U.S. source payments and make any necessary tax payments to the IRS.

Term	Definition
Qualified intermediary (QI)	With respect to a payment to a foreign person, the term qualified intermediary means a person that is a party to a withholding agreement with the IRS and such person is: (A) a foreign financial institution or a foreign clearing organization; (B) a foreign branch or office of a U.S. financial institution or a foreign branch or office of a U.S. clearing organization; (C) a foreign corporation for purposes of presenting claims of benefits under an income tax treaty on behalf of its shareholders; or (D) any other person acceptable to the IRS.
Recalcitrant account holder	The term recalcitrant account holder means any account holder of an account maintained by a participating FFI if such account holder is not an FFI (or presumed to be an FFI), the account does not meet the exception to U.S. account status (applying to depository accounts with a balance of \$50,000 or less) or does not qualify for any of the exceptions from the documentation requirements (including if the participating FFI elects not to apply such exceptions), and the account holder fails to comply with requests by the participating FFI for the documentation or information that is required for determining the status of such account as a U.S. account or other than a U.S. account; the account holder fails to provide a valid Form W-9 upon request from the participating FFI or fails to provide a correct name and TIN combination upon request from the participating FFI when the participating FFI has received notice from the IRS indicating that the name and TIN combination reported by the participating FFI (or branch or division thereof) for the account holder is incorrect; or if foreign law would prevent reporting by the participating FFI (or branch or division thereof) on information with respect to such account, the account holder (or substantial U.S. owner of an account holder that is a U.S.-owned foreign entity) fails to provide a valid and effective waiver of such law to permit such reporting.
Recalcitrant NFFE	An NFFE that does not disclose its substantial U.S. owners or that fails to certify it does not have substantial U.S. owners
Recipient	The term recipient means a person that is a recipient of a Chapter 4 reportable amount, and includes the person required to be reported on a Form 1042-S with respect to a payment of U.S. source FDAP income. With respect to a payment other than U.S. source FDAP income, the regulations reserve.
Responsible officer	An officer of a participating FFI, registered deemed-compliant FFI, or a compliance FI with sufficient authority to ensure the FFI meets its applicable FFI requirements. Among other things, the responsible must certify every three years that the entity remains compliant.
Withholding agent	A USWA is any U.S. person that is a withholding agent. That includes any person that has the control, receipt, custody over the disposal or payment of a withholdable payment or foreign passthru payment. This is generally a non-individual U.S. person and includes domestic partnerships, domestic corporations, any non-foreign estates and any trusts if a U.S. court is able to exercise primary supervision over the trust's administration and one or more U.S. persons have authority to control all substantial decisions of the trust. A U.S. person also includes a foreign branch of a U.S. person that is not a qualified intermediary acting as an intermediary with respect to a payment.
Withholdable payment	The term withholdable payment means any payment of U.S. source FDAP income and any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income.

This alert contains general information only and Deloitte is not, by means of this alert, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This alert is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this alert.

**About Deloitte**

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms. Please see [www.deloitte.com/us/about](http://www.deloitte.com/us/about) for a detailed description of the legal structure of Deloitte LLP and its subsidiaries. Certain services may not be available to attest clients under the rules and regulations of public accounting.

Copyright © 2013 Deloitte Development LLC. All rights reserved.  
Member of Deloitte Touche Tohmatsu Limited