

## FATCA Frequently Asked Questions (FAQs)

### Closing the distance

Global Financial Services Industry



#### 1. What is FATCA?

FATCA stands for the Foreign Account Tax Compliance Act. It colloquially refers to provisions included in the Hiring Incentives to Restore Employment Act signed into law on March 18, 2010 and effective January 1, 2013 (although, as explained in more detail below, withholding and other requirements do not start until July 1, 2014 at the earliest). It adds a new chapter to the Internal Revenue Code (Chapter 4) aimed at addressing perceived tax abuse by U.S. persons through the use of offshore accounts. The new rules require 1) foreign financial institutions (FFI's) to provide the Internal Revenue Service (IRS) with information on certain U.S. persons invested in accounts outside of the U.S. and 2) certain non-U.S. entities to provide information about any U.S. owners.

#### 2. When is withholding going to start?

FATCA withholding begins for U.S. source fixed or determinable annual or periodical (FDAP) payments made on or after June 30, 2014. FATCA withholding for U.S. source gross proceeds will begin January 1, 2017. Passthru payments will become subject to FATCA withholding no earlier than January 1, 2017.

#### 3. Who is impacted by FATCA?

Any entity making or receiving a payment of U.S. source income should consider whether it is subject to FATCA. FATCA may apply to both financial and non-financial operating companies. Due to this breadth, FATCA impacts virtually all non-U.S. entities, directly or indirectly, receiving most

types of U.S. source income, including gross proceeds from the sale or disposition of U.S. property which can produce interest or dividends.

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

#### 4. What is an FFI?

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

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

Generally non-U.S. entities such as banks, broker/dealers, insurance companies, hedge funds, securitization vehicles, and private equity funds will be considered FFIs.

#### Exclusions

- Insurance companies that do not make payments with respect to cash value insurance or annuity contracts
- Excepted nonfinancial group entities (e.g. holding companies, certain treasury centers, or certain captive finance companies)
- Excepted nonfinancial start-up companies or companies entering a new line of business.
- Excepted nonfinancial entities in liquidation or bankruptcy
- Excepted inter-affiliate FFIs (entities that do not maintain financial accounts and do not hold an account with or receive payments from any withholding agent other than a member of their expanded affiliated group).
- Certain organizations falling under Section 501 ( c) of the Internal Revenue Code (e.g. corporations organized under act of Congress, title holding corporations for exempt organizations, labor agricultural and horticultural organizations, business leagues, chambers of commerce, real estate board, etc.).
- Non-profit organizations that meet certain conditions.

#### 5. What is an FFI Agreement?

In general, an FFI will enter into an agreement (referred to as “FFI Agreement”) with the U.S. Department of Treasury (U.S. Treasury) by which the FFI can avoid FATCA withholding on

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

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

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

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

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

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

According to Notice 2013-43, the FFI Agreement of a participating FFI that registers and receives a Global Intermediary Identification Number (GIIN) from the IRS on or before June 30, 2014, will have an effective date of June 30, 2014. Therefore, an FFI that registers, enters into an FFI Agreement and receives a GIIN by **June 30, 2014** will be identified as a participating FFI and thus avoid FATCA withholding that will begin July 1, 2014. In order to confirm that it has its GIIN by June 30, 2014 FFIs must register between January 1, 2014 and April 25, 2014. FFIs that enter FFI Agreements after June 30, 2014 but before January 1, 2015 will be considered participating FFIs for 2014, however they may be subject to FATCA withholding due the lack of time to identify them as participating FFIs before FATCA withholding begins on July 1, 2014. The effective date for any FFI Agreement entered after June 30, 2014 will be the date the FFI enters the FFI Agreement.

## 7. Is FATCA definitely happening?

Yes, FATCA has been signed into law. On January 17, 2013, Treasury and the IRS published final regulations. Likewise, on July 26, 2012, Treasury released a model (Model 1) for bilateral agreements with other jurisdictions under which FFIs would satisfy their FATCA requirements by reporting information to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States. On November 14, 2012, Treasury released a second model agreement (Model 2), under which FFIs would report specified information directly to the IRS in a manner consistent with the final regulations, supplemented by government-to-government exchange of information on request. U.S. Treasury has concluded a number of intergovernmental agreements (IGAs) and is currently negotiating with more than 100 countries. [Click here](#) to see latest status.

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

The January 1, 2013 effective date is statutorily mandated and thus it would take an act of Congress to change it. On July 14, 2011, the IRS released Notice 2011-53 (published in Internal Revenue Bulletin 2011-32 on August 8, 2011) which provided transitional relief for significant obligations under FATCA. The IRS stated in the accompanying news release that using a phased implementation takes into account concerns raised in comments to Notice 2010-60 and Notice 2011-34 and the IRS' desire to provide a workable timeline for FATCA implementation. Recently, the IRS has released Notice 2013-43 that in consideration of public comments highlighting how the uncertainty of whether certain jurisdiction will enter into IGAs hinders the ability of FFIs and withholding agents to complete due diligence and other implementation procedures pushed back the opening of the FFI Registration system and extended most of the FATCA deadlines established in the final regulations.

## 9. Why worry about FATCA now?

Although FATCA does not become effective until June 30, 2014, companies need to start thinking about it **now**. Consideration needs to be given to the development of new procedures and the systems implementation process will take some time, in some cases 18 to 24 months. An initial pilot analysis should be done so budgets are formulated appropriately. Deloitte has become a leader in this analysis.

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

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

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

## 11. By what date do I need to be prepared?

New account due diligence procedures generally must be in place from July 1, 2014 or the effective date of the FFI Agreement. The due diligence procedure for pre-existing accounts that are prima facie FFI must be completed by December 31, 2014, those that could be considered high value accounts will need to be performed within one year from the effective date of the FFI Agreement. For all other pre-existing accounts due diligence procedures must be performed within two years of the effective date of the FFI Agreement.

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

As of now, the U.S. Treasury has indicated that special exceptions will not be provided to certain countries.

The U.S. Treasury has been entering into Intergovernmental Agreements ("IGAs") with various countries. There are two of these agreements, a Model 1 and Model 2 which provide standard terms that are generally are not negotiable. However, the signatory countries have been able to negotiate the ability to exclude certain products and entities as nonreporting financial institutions and products in the Annex II of the Intergovernmental Agreement. The IGAs do include what is colloquially referred to as the "most-favored nation" provision, providing that, with respect to certain terms of the

IGA, a signatory country is entitled to the benefit of any more favorable provision agreed to in a comparable IGA with another partner jurisdiction, subject to certain conditions.

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

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

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

The application of the FATCA rules is not driven by whether an FFI actually has U.S. clients. Therefore, closing such accounts will not exempt you from FATCA.

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

U.S. Final Regulations lists seven indicia of U.S. status:

- U.S. citizenship or lawful permanent resident (green card) status;
- A U.S. birthplace;
- A U.S. residence address or a U.S. correspondence address (including a U.S. P.O. box);
- A U.S. telephone number (regardless of whether such number is the only telephone number associated with the account holder)
- Standing instructions to pay any amounts from the account to an account maintained in the U.S.;
- An “in care of” address or a “hold mail” address that is the sole address with respect to the client; or
- A power of attorney or signatory authority granted to a person with a U.S. address.

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

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

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

U.S. Indicia	Documentation Required
U.S. Citizenship or lawful permanent resident	1. Obtain W-9 or a W-8BEN <b>and</b> 2. Non-U.S. passport or similar documentation evidencing citizenship in a country other than the U.S.

U.S. birth place	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>and</b></li> <li>2. Non-U.S. passport or similar documentation evidencing citizenship in a country other than the U.S.; <b>and</b></li> <li>3. A copy of the individual's Certificate of Loss of Nationality of the U.S. <b>or</b> a written explanation of the account holder's renunciation of U.S. citizenship</li> </ol>
U.S. address (residence, correspondence, or P.O. Box)	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>and</b></li> <li>2. Non-U.S. passport or similar documentation establishing foreign citizenship <b>or</b> a certificate of residence or other QI documentation for identifying the client.</li> </ol>
One or more U.S. telephone numbers and no other telephone numbers	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>and</b></li> <li>2. Non-U.S. passport or similar documentation establishing foreign citizenship <b>or</b> a certificate of residence or other QI documentation for identifying the client.</li> </ol>
One or more U.S. telephone numbers and at least one telephone number outside the U.S.	<ol style="list-style-type: none"> <li>1. Obtain W-9 or W-8BEN; <b>or</b></li> <li>2. Non-U.S. passport or similar documentation establishing foreign citizenship <b>or</b> a certificate of residence or other QI documentation for identifying the client.</li> </ol>
Instructions to transfer funds to U.S. accounts or directions regularly received from a U.S. address	<ol style="list-style-type: none"> <li>3. Request W-9 or W-8BEN; <b>and</b></li> <li>4. Documentary evidence establishing non-U.S. status</li> </ol>
Only address on file is "in care of" or "hold mail" or U.S. P.O. Box	Request W-9, W-8BEN; <b>or</b> Documentary evidence establishing non-U.S. status
Power of Attorney or signatory authority granted to person with U.S. address	Request W-9, W-8BEN; <b>or</b> Documentary evidence establishing non-U.S. status

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

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

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

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

Certain “foreign passthru” payments will also be subject to FATCA — a foreign passthru payment is a payment that is attributable to U.S. source income. Notice 2011-34 introduced the concept of the passthru payment percentage and provided details and examples of its calculation and application within the FATCA framework. The IGAs contain a commitment of the U.S. and the signatory countries to work together to develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimizes burden.

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

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

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

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

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

Although FATCA withholding is at 30% it is not the equivalent of withholding applied by other sections of the tax code. The preamble to the final regulations indicates that withholding under chapter 4 is intended as an incentive to FFIs to become participating FFIs, rather than as a proxy for the tax on the income of the issuer. It also applies to different types of income than the current U.S. withholding regime, such as insurance premiums and interest paid by foreign branches of U.S. bank. And it applies regardless of statutory or treaty exemptions or reductions.

### **21. Do I need to renew my Qualified Intermediary (QI) agreement expiring in 2013 while becoming compliant with FATCA?**

Notice 2011-53 provided an automatic extension until December 31, 2013 for all QI agreements, withholding foreign partnership agreements and withholding foreign trust agreements of entities qualifying as FFIs that expire on December 31, 2012. Recent Notice 2013-43 grants a new extension until June 30, 2014 for all those agreements that would otherwise expire on December 31, 2013. Any FFI that enters into an FFI agreement on or before June 30, 2014 will be considered to have renewed its QI agreements, withholding foreign partnership agreements and withholding foreign trust agreement.

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

That will depend on what type of documentation you have collected from your clients, as well as whether they have any indicia of US status.

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

If a non-U.S. entity does not, directly or indirectly, invest in any U.S. securities, receive any FDAP income, receive any bank deposit interest from foreign branches of U.S. banks, or receive anything that constitute a foreign pa thru payment then it will not be subject to FATCA withholding. However, there may be other reasons that an entity will need to comply with FATCA, either because it is part of an expanded affiliated group or because market pressure may force them to do so,

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

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

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

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

Whether you are impacted by the FATCA rules is not driven by whether you have a business in the U.S.. It is solely determined by whether you meet the definition of a FFI or receive any "withholdable" payments.

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

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

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

Yes. Indeed, taking a page from the United States' FATCA playbook, the United Kingdom, France, Germany, Italy, and Spain have recently announced an agreement to develop a multilateral tax information exchange methodology among the G5 countries. The agreement is expected to allow for the automatic exchange of financial information among the G5 countries and lays the groundwork for expanding multilateral automatic tax information exchange protocols to other European countries including the G20. Similar to FATCA, the information exchange will help identify and deter residents from evading local tax and promote enhanced cross border financial information reporting. The G5 will base the multilateral tax information exchange pilot on the Model Intergovernmental Agreement (IGA) previously developed between the U.S. and the G5.

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

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



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

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

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

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

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

No. Only gross proceeds from the sale or disposition of U.S. property of a type that can produce interest or dividends are subject to withholding under the FATCA rules. This would include not only stocks and bonds but also repayment of loans.

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

Specified insurance companies are subject to FATCA. Specified insurance companies are those obligated to make payments with respect to a cash value insurance or annuity contract. For these purposes, cash value insurance contract is defined as an insurance contract (other than an indemnity reinsurance contract between two insurance companies and most term life insurance contracts) that has an aggregate cash value greater than \$50,000 at any time during the calendar year. Annuity payments and proceeds from life insurance contracts received by non-U.S. persons from a policy or contract issued by a U.S. insurer, or its foreign branch, are currently treated as FDAP and considered "withholdable payments" under FATCA.

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

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

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

Unlikely. All clients must be documented and withholdable payments (i.e., U.S. source FDAP income and gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States) made to a non-participating FFI or certain other non-U.S. entities may be subject to withholding under FATCA.

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

A USFI must adopt procedures to properly document accountholders and counterparties in conjunction with FATCA. It will also be required to follow certain documentation procedures to determine how to classify entities that hold preexisting financial accounts to which it makes withholdable payments. A USFI must also determine how to treat new entity accounts using

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

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

Changing your corporate structure so the USFI becomes the parent would not change any U.S or local country responsibility. In fact, in Notice 2010-60 U.S. Treasury indicated that FFIs that are also controlled foreign corporations (CFCs) (certain non-U.S. entities ultimately controlled by a U.S. parent or shareholder) will be subject to FATCA (meaning that they must become participating FFIs to avoid withholding under chapter 4) even though they may already be subject to documentation and reporting. Likewise, it is important to note that in those jurisdictions in which an IGA is signed, the rules established in the IGA will apply to all the financial institutions located in such jurisdiction (regardless of their branch, affiliate or headquarter status).

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

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

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

There is no rule specifying the amount of recalcitrant account holders that a FFI could maintain. The FFI Agreement will not terminate as long as the FFI complies with the FATCA withholding and reporting requirements related to those clients.

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

According to the Final Regulations, FFIs are required to aggregate account balances across all entities within the FFI's expanded affiliated group only to the extent that:

- The withholding agent's computerized systems link the obligations by reference to a data element such as client number, EIN, or foreign tax identifying number and consolidates the customer information and payment information for the obligations; or
- The withholding agent has treated the obligations as consolidated obligations for purposes of sharing documentation or for purposes of treating one or more accounts as preexisting obligations.

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

Similar to the above, FFIs will be required to aggregate balances irrespective of relationship type — in this instance the FFI would be required to aggregate bank accounts, brokerage accounts and insurance policies with cash values if the abovementioned conditions are not met.

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

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

**42. What types of entities are deemed compliant?**

Final regulations identify certain types of entities as excluded from the definition of an FFI, or deemed compliant. Such entities include:

- Local FFIs that do not solicit account holders outside their country of organization and implement procedures to monitor whether the FFI opens or maintains an account for specified U.S. persons, entities controlled or beneficially owned by one or more specified U.S. persons or non participating FFIs
- Non-registering local banks that operate solely as a bank, credit union or similar organization, whose main business consists primarily of receiving deposits and do not solicit customers outside its country of incorporation if they do not exceed certain amounts in assets on their balance sheet.
- Nonreporting members of participating FFI groups implementing policies and procedures to ensure that they do not open or maintain accounts for recalcitrant account holders, nonparticipating FFIs, or U.S. accounts.
- Certain qualified collective investment vehicles that only have participating FFIs, registered deemed-compliant FFIs, qualified retirement plans, certain non-profit organizations, U.S. persons that are not specified U.S. persons, nonreporting IGA FFIs or exempt beneficial owners as direct interest holders.
- Restricted funds that prohibit sales and other transfers of debt or equity interests to specified U.S. persons, nonparticipating FFIs or passive NFFEs with one or more substantial U.S. owners, when interests issued directly by the fund are redeemed by or transferred by the fund rather than sold by investors on any secondary market, and, interests not issued directly by the fund are sold only through distributors that are participating FFIs, registered deemed-compliant FFIs, nonregistering local banks or restricted distributors.
- Qualified credit card issuers
- Sponsored investment entities and controlled foreign corporations

- FFIs with only low-value accounts
- Sponsored, closely held investment vehicles
- Owner documented FFIs (entities with certain identified owners)

#### **43. How do you obtain deemed compliant status?**

It depends on the case. Registered deemed compliant FFIs will have to comply with the registration in the IRS requirements. A certified deemed compliant FFI will need to certify its status as a deemed-compliant FFI by providing a withholding agent with the documentation required by FATCA Regulations.

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

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

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

It was expected that the vast majority of the approximately 250,000 FFIs around the world will enter into an FFI Agreement and thus become participating FFIs. However, the number of FFIs expecting to sign an FFI Agreement has decreased significantly due to the signing of Model 1 Agreements. Under Model 1 IGA, the FFIs located in the signing jurisdiction are not required to sign an individual FFI Agreement. It should be noted that more than 100 countries are currently negotiating a Model 1 Agreement with the U.S.

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

FATCA provides that an FFI should close an account holder's account if the holder of the account fails to provide the FFI with a waiver of any foreign law that would prevent the FFI from collecting the required FATCA documentation. FFIs located in Model 1 IGA jurisdictions are not required to close accounts.

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

Except for those FFIs located in Model 1 IGA jurisdictions (that are not required to sign an individual FFI Agreement), each FFI in an affiliated group will need to enter into a separate FFI Agreement with the IRS.

In any case, all FFIs will have to register in the IRS Registration portal before April 25, 2014.

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

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

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

The final regulations provide that a participating FFI (or a reporting Model 1 FFI) may file a collective refund claim on behalf of its account holders and payees that were overwithheld upon under FATCA, subject to certain conditions and procedural requirements.

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

In general, the beneficial owner of a payment is entitled to a refund for any overpayment of tax actually due under other provisions of the Internal Revenue Code. However, with respect to any tax properly deducted and withheld under FATCA from a payment beneficially owned by an FFI, Final regulations provide that the FFI is not entitled to a credit or refund, except to the extent required by a treaty obligation of the United States (and, if a credit or refund is required by a treaty obligation of the United States, no interest shall be allowed or paid with respect to such credit or refund). In addition, Final regulations provide that no credit or refund shall be allowed or paid with respect to any tax properly deducted and withheld under FATCA unless the beneficial owner of the payment provides the Secretary with such information as the Secretary may require to determine whether such beneficial owner is a U.S. owned foreign entity and the identity of any substantial U.S. owners of such entity.

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

Most FFIs will not be required to file Forms 1099. They will instead file a Form 8957 providing information about any U.S. accounts. Form 1099 reporting is part of the information reporting regime applicable to most U.S. banks.

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

Yes. Final Regulations provide that FFIs and deemed compliant FFIs (including QIs, WPs, and WTs) that make payments that are considered FATCA reportable amounts to a recalcitrant account holder or a nonparticipating FFI, must complete a Form 1042-S to report such payments.

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

FATCA withholding only applies to withholdable payments, which are defined as certain income and gross proceeds from "sources within the United States". It will also apply to foreign pass thru payments which may include non-U.S. source income.

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

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

#### **55. When will the final rules be issued?**

Final Regulations have been already issued and released on January 17, 2013. However, Notice 2013-43, which was recently released, informs that IRS intends to amend the final regulations to

postpone by six months the start of FATCA withholding, and to make corresponding adjustments to various other time frames provided in the final regulations.

### **56. What additional information must I collect?**

Generally, the new documentation to collect is the withholding certificates (forms W-8, W-9 or substitute forms). In case of FFIs located in Model 1 IGA jurisdictions, they will also have to request a self-certification from the account holders.

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

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

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

No, the requirement to close accounts is for secrecy countries where the account holder refuses to waive their right to secrecy. However, FFIs will be required to report on payments made to nonparticipating FFIs.

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

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

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

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

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

A Trust will only be considered an FFI if is managed by an individual (it does not hire any entity as a third –party service provider to perform any activity related to trading, portfolio management or investment, administering or managing funds, money or financial assets), the trust’s assets consist solely of financial assets, and its income consists solely of income for those financial assets.

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

Final Regulations provide special transitional rules for limited FFIs and limited branches of FATCA participating groups. However, both of them will be subject to 30% FATCA withholding on any withholdable payments received.

## How can I get more information from Deloitte?

You can visit the Deloitte FATCA website at <http://www.deloitte.com/us/fatca> or contact any of the following individuals.

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