



Updated FFI Agreement set forth in Rev. Proc. 2017-16

Closing the distance

The Treasury Department and IRS have released an updated, final FFI Agreement in Revenue Procedure 2017-16

On December 30, 2016, the US Treasury Department and Internal Revenue Service issued [Revenue Procedure 2017-16](#), which sets forth an updated FFI Agreement superseding the previous agreement contained in [Rev. Proc. 2014-38](#) that expired on December 31, 2016 (“2014 Agreement”). Accordingly, the new FFI Agreement will apply to all participating and Model 2FFIs with an FFI Agreement effective on or after January 1, 2017.

Participating FFIs (including Reporting Model 2 FFIs) are required to renew their FFI Agreements through the [FATCA registration website](#) prior to July 31, 2017. The actual renewal function is anticipated to be available in May 2017. A renewed FFI Agreement will apply retroactively as of January 1, 2017, provided the FFI acts pursuant to the FFI Agreement beginning on such date. If an FFI does not renew by July 31, 2017, its agreement will be treated as terminated on January 1, 2017.

The new FFI Agreement has been updated to reference and incorporate certain provisions of the recently published final and temporary Chapter 3 and FATCA regulations. Changes between the 2014 Agreement and the new FFI Agreement are discussed in detail below.

Expiration of Limited FFI and Limited Branch Statuses

The transitional Limited FFI and Limited Branch FATCA statuses expired on December 31, 2016. As such, several sections of the 2014 Agreement have been removed or revised to instead apply to entities defined as related entities or branches.

- Under the registration procedures described in Section 3 of Rev. Proc. 2017-16, language regarding treatment of certain entities as Limited Branches was removed.

- The definition of “related entity or branch” was added as Section 2.67 of the Agreement to refer to a related entity or branch of a Reporting Model 1 FFI or a Reporting Model 2 FFI that is treated as a Nonparticipating FFI under the applicable FATCA Intergovernmental Agreement (“IGA”), provided the IGA requirements with respect to such related entity or branch are satisfied.
- The following sections of the new FFI Agreement were modified based on the expiration of the Limited FFI and Limited Branch statuses:
 - Section 1.02, removing language describing the treatment of certain entities as Limited Branches.
 - Section 4.02(C), providing that a Participating FFI is required to withhold on withholdable payments made to a related entity or branch (and removing language regarding payments received on behalf of such entities). The description of reason to know standards has been removed and replaced with a reference to the applicable Regulations section.
 - Section 6.05(E), providing that a Participating FFI must also report withholdable payments made to a related entity or branch (in addition to withholdable payments received as an intermediary on behalf of such entities).
 - Section 9.01(A), providing that a Reporting Model 2 FFI must identify a related branch as a Nonparticipating FFI on the Form W-8BEN-E it provides to the withholding agent and that any withholdable payments will be subject to FATCA withholding and reporting.
 - Section 11.01(A), removing Limited FFI from the list of FFI statuses for members of an FFI Group.
- The following sections of the new FFI Agreement were modified to apply to related entities or branches of Reporting Model 2 FFIs:
 - Section 4.02(C), describing withholding requirements with respect to payments made to a related entity or branch.
 - Section 6.05(E), describing the requirement to report withholdable payments made to or received on behalf of a related entity or branch.
 - Section 7.04, describing a Reporting Model 2 FFI’s obligation to comply with the applicable Model 2 IGA with respect to each of its related branches.
 - Section 11.01(B), describing the status of a Reporting Model 2 FFI that has a related entity or branch.
 - Section 11.02(B)(6), describing the responsibilities of a Lead FI of an FFI Group with related entity or branch members.
- The following sections of the 2014 agreement have been removed:
 - Section 7.04(A), relating to the requirements of Participating FFIs maintaining Limited Branches.
 - Section 11.01(C), relating to FFI Groups with Limited FFI members.

Treatment of US Branches of FFIs

The new FFI Agreement has removed provisions regarding US branches that are treated as US persons, since the final FATCA regulations now provide that a US branch of an FFI that is treated as a US person is not required to be part of an FFI that is a Participating FFI or Registered Deemed-Compliant FFI if acting as an intermediary. Further, even where such a US branch applies the rules of section 1.1471-4(d)(2)(iii)(C) as if it were a Participating FFI, the branch is not required to be registered or agree to the terms of the FFI Agreement.

- The following sections of the 2014 Agreement have been removed:
 - Section 2.73, defining “US branch treated as a US person.”
 - Section 4.01(C), relating to special withholding requirements of a US branch treated as a US person.
 - Section 6.02(C), relating to special reporting rules for a US branch treated as a US person.
 - Section 6.06(B), relating to tax return requirements for a US branch of a Participating FFI.
- The following sections of the new FFI Agreement were modified to remove language with respect to US branches of Participating FFIs:
 - Section 3.01, removing parenthetical explaining that the due diligence procedures do not generally apply to a US branch treated as a US person.
 - Section 6.01, removing parenthetical explaining that a US branch that is not treated as a US person may elect to apply backup withholding.
 - Section 6.02(C), removing parenthetical explaining that the reporting requirements do not generally apply to a US branch treated as a US person.
 - Section 6.05(A), removing language requiring a US branch of a Participating FFI to file separate Forms 1042-S.
 - Section 6.05(A)(2), removing language requiring certain US branches that are not treated as US persons to file separate Forms 1099.

Other Clarifications Regarding Branches of Participating FFIs and Reporting Model 2 FFIs

Rev. Proc. 2017-16 includes additional updates regarding requirements with respect to branches of FFIs. For example, Section 3.01 (discussing registration procedures) now specifies that: (1) a branch may include a home office; (2) an FFI Agreement does not have to be entered into on behalf of branches that are Reporting Model 1 FFIs or US branches; and, (3) an FFI that has a branch which is eligible to be treated as a Reporting Model 2 FFI may register on the FATCA registration website on behalf of such branch to obtain a GIIN and to agree to comply with the terms of the FFI Agreement, as modified by an applicable Model 2 IGA, so that such branches may be treated as Reporting Model 2 FFIs.

Similarly, the following changes have been made to the FFI Agreement:

- Section 1.02, clarifying that a Reporting Model 2 FFI only needs to apply the FFI Agreement to *all* branches if the FFI has branches that need to be covered by the Agreement in order to be treated as Participating FFIs.
- Section 2.59, clarifying the definition of a "Participating FFI" to refer to (1) an FFI that has agreed to comply with the FFI Agreement with respect to all of its branches (other than a branch that is a Reporting Model 1 FFI or a US branch) or (2) a Reporting Model 2 FFI.

Correction and Clarification of Reporting Model 2 FFI Provisions

Several updates have been made to the FFI Agreement with respect to provisions relating to Reporting Model 2 FFIs.

Extension of 2-Year Period for Due Diligence by Reporting Model 2 FFIs. The 2014 Agreement allowed Reporting Model 2 FFIs to choose to apply the due diligence procedures of the FFI Agreement or those under an applicable Model 2 IGA for the 2-year period after the IGA has been signed without being bound to a particular set of due diligence rules. Section 3.01 was modified to extend this period to 2 years after the IGA has *entered into force*. Language was also added to clarify that a Reporting Model 2 FFI may apply either set of procedures only to the extent due diligence procedures with respect to the accounts commenced prior to the IGA's entry into force.

Use of Publicly Available Information by Reporting Model 2 FFIs. Language was added to Section 3.03(B)(2) to provide for the use of publicly available information by a Reporting Model 2 FFI for due diligence purposes to the extent described under the applicable Model 2 IGA. Further, this section specifies that such information may be relied upon until there is a change in circumstances affecting the account holder or payee's claim of FATCA status.

Presumption Rules. In Rev. Proc. 2017-16, the Treasury Department and IRS state that they do not agree that undocumented entity accounts should be treated by Reporting Model 2 FFIs as non-consenting US accounts not subject to withholding. Rather, treating undocumented entity accounts as accounts of Nonparticipating FFIs subject to withholding is consistent with the IGA approach. As such, Section 3.04(C) was revised to clarify that Reporting Model 2 FFIs must determine the status of an account as a US account, non-consenting account, or Nonparticipating FFI. Language was also added to clarify when the presumption rules must be applied (i.e., when an FFI is unable to document an entity account consistent with the Annex I procedures or when a withholdable payment is made to an entity payee that is not an account holder) and to specify that a Reporting Model 2 FFI with undocumented accounts may be deemed significantly non-compliant with an applicable IGA.

Preexisting Obligations & Preexisting Accounts

Transitional relief was announced in Notice 2014-33 allowing an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014 and before January 1, 2015 to be treated as a preexisting obligation. The recently published final regulations implement this relief by revising the definition of "preexisting obligation" accordingly. As well, the FFI Agreement has been updated to reflect these changes.

- Section 2.62, defining "preexisting account," was modified to specify the Model 2 IGA definition with respect to Reporting Model 2 FFIs.
- Section 2.63 was added, defining "preexisting obligation" by reference to section 1.1471-1(b)(104).
- Section 3.02 was modified to clarify that the due diligence timeframes under section 1.1471-4(c)(3) apply to all preexisting obligations, including those held by an entity that are opened, issued, or executed on or after July 1, 2014 and before January 1, 2015 that are treated as preexisting.

- Section 4.02(A) was revised to specify that preexisting account includes an entity account opened on or after July 1, 2014 and before January 1, 2015.

Updates to Withholding Provisions

The new FFI Agreement has been updated to clarify certain withholding provisions.

- Section 4.01(A) was updated to require withholding on withholdable payments made to Passive NFFEs that have not identified their Substantial US Owners or certified that they have no Substantial US Owners (in addition to Nonparticipating FFIs). The date for withholding on foreign pass-thru payments was also updated to January 1, 2019.
- Section 4.01(C) removes language that stated withholdable payments must also be reportable payments.
- Section 4.02(B) adds language specifying that the withholding requirements of a Participating FFI that is a Nonqualified Intermediary, Nonwithholding Foreign Partnership, or Nonwithholding Foreign Trust also apply to a Participating FFI that is a Qualified Intermediary that makes a section 1471(b)(3) election not to assume withholding responsibility for a payment.

Updates to Reporting Rules – Mergers and Bulk Acquisitions, Partnerships, Dates, and Transitional Rules

Provisions relating to reporting have been revised in accordance with rules in the temporary FATCA regulations as well as the expiration of certain transitional periods in the 2014 FATCA regulations.

Combined Reporting After a Merger or Bulk Acquisition. The temporary FATCA regulations provide for combined Form 1042-S and 8966 reporting after a merger or bulk acquisition of an FFI's accounts. Accordingly, Section 6.02(B)(2) was added to describe the time and manner of filing such forms in case of a merger or bulk acquisition of accounts. Section 6.05(F) was also revised to specify that, for purposes of combined Form 1042-S reporting after a merger or acquisition, the Chapter 3 reporting procedures may be applied even if the Participating FFI is not required to report under Chapter 3.

Form 8966 Reporting by Partnerships. The temporary regulations also provide rules for Participating FFIs that are partnerships, requiring the reporting of financial accounts held by their partners on Form 8966. As such, Section 6.02(B) references section 1.1471-4(d)(4)(iv)(C) for payments required to be reported with respect to an account that is a partner's interest in the partnership.

Expiration of Transitional Periods. The 2014 Agreement included provisions reflecting certain transitional reporting rules for calendar years 2014 and 2015. The new FFI Agreement has removed Section 6.02(B)(2), which previously limited the information required to be reported during the transitional years. Additionally, language was added to Section 6.04 (discussing transitional reporting of payments to Nonparticipating FFIs) to clarify that, with respect to calendar year 2015, gross proceeds paid to an account held by a Nonparticipating FFI are not required to be reported.

Other Modifications.

- Language was added to Section 6.02(A)(2), relating to reporting of account holders of Territory FIs, to include situations where a Territory FI is a flow-through entity (in addition to when it acts as an intermediary with respect to a withholdable payment).
- Section 6.02(A)(3), describing reporting requirements for a Trustee of a Trustee-Documented Trust, removed the reference to a Trustee-Documented Trust as defined under a Model 1 IGA, as a Participating FFI acting as a trustee in such situations would instead report to the applicable Model 1 jurisdiction instead of the IRS.
- Section 6.02(B)(1) was revised to refer to a "passive NFFE that is a US-owned foreign entity" instead of a "US-owned foreign entity" for Chapter 61 reporting purposes.

Clarification of Withholding Certificate Provisions

Updates were made to Section 9 of the FFI Agreement based on a new coordination rule in the final FATCA regulations, and the section has been generally reorganized for clarity.

- Section 9.01(B) was simplified by replacing language in the 2014 Agreement with a reference to the regulations relating to Form W-8IMY requirements.

- Section 9.02(B) was broken out into subsections (1) through (6) to better organize the content regarding allocation of withholdable payments on withholding statements. Language was added requiring a withholding statement to include information necessary for a withholding agent to fulfill its obligations under FATCA, and Chapters 3 and 61, if applicable.
- Section 9.02(B)(5) was modified based on the final FATCA regulations to allow a withholding statement to include a certification that a Participating FFI is reporting all required specified US person information with respect to an Owner-Documented FFI account holder or payee.
- Section 9.02(C), relating to an optional procedure for specific recipient reporting, removed a reference to backup withholding. Under the agreement, the procedure now only applies to payments subject to withholding under FATCA.
- Section 2.79 was revised to remove the inclusion of Forms W-8BEN-E and W-8IMY from the definition of “withholding certificate.”

Compliance Timing and Scope

Section 8 of the FFI Agreement includes revisions consistent with the final FATCA regulations with respect to the timing of certifications of compliance and the scope of inquiries of compliance.

- Section 8.03(A) updated the due date for certifications of compliance by a Responsible Officer to no later than 60 days from the date that is two years after the effective date of the agreement.
- Section 8.04(A) added a parenthetical to indicate that the absence of Form 945, 1042, 1042-S, 8966, or 1099 reporting may also warrant an IRS inquiry or request of additional information with respect to such forms and returns.
- Section 8.04(B) was revised to clarify that the IRS (in addition to the US Competent Authority) may also make an inquiry of a Reporting Model 2 FFI.

Termination and Modification of the Agreement

The updated FFI Agreement contains new procedures with respect to termination and modification of the Agreement.

- The following sections were added to the Agreement:
 - Section 12.03(C), specifying that termination of an FFI Agreement does not affect a Participating FFI’s due diligence, withholding, reporting, filing, and compliance obligations with respect to the period during which the agreement was applicable. In other words, obligations under an applicable FFI Agreement survive termination of the agreement.
 - Section 12.10, requiring, within six months of the termination of an agreement, a final certification of compliance covering the period from the end of the most recent certification period to the date of termination, regardless of whether a periodic review has been completed for such period.
- The following sections were revised:
 - Section 12.01, reflecting an updated expiration of December 31, 2018.
 - Section 12.02, removing language indicating that the IRS would not modify the agreement to include additional requirements or to expand the class of payments subject to withholding or reporting.
 - Section 12.04(B), removing US policy and applicable foreign law or policy from the list of events constituting a significant change in circumstances. Thus, significant changes in circumstances explicitly includes a change only in US federal law.
 - Section 12.07(B), clarifying that on termination of an FFI Agreement, an FFI must send notice of the termination to each withholding agent from which it receives payments and each financial institution with which it holds an account. This section previously applied more broadly to all withholding agents and FFIs to which an FFI had provided a withholding certificate.

Miscellaneous Updates

Section 11.02(B), discussing the responsibilities of a Lead FI, was updated to cover a US financial institution (in addition to a Participating FFI) that is designated as the Lead FI.

For more information please [click here](#) or contact:

[Denise Hintzke](#)

Managing Director, Global
FATCA Tax Leader
Deloitte Tax LLP
+1 212 436 4792

[Anne Mericle](#)

Senior Manager,
Global FATCA PMO
Deloitte Tax LLP
+1 212 436 3908

[Susan Schultz](#)

Managing Director, FATCA
Global Delivery Center (GDC)
Operations Leader
+1 612 397 4604

[Susan Segar](#)

Managing Director, Global
Information Reporting
Deloitte Tax LLP
+1 703 885 6328

Americas

[Matthew Cahill](#)

Partner, Global Information Reporting
Deloitte Tax LLP
+1 212 436 3420

[James Dockeray](#)

FATCA Leader, Caribbean/Bermuda
Deloitte & Touche Ltd.
+1 441 299 1399

[Anthony Martirano](#)

Managing Director, Global Information
Reporting
Deloitte Tax LLP
+1 973 602 6986

[Michael Shepard](#)

Principal, Deloitte Transactions and
Business Analytics LLP
+1 215 299 5260

[Steve Chapman](#)

Partner, Global Information Reporting
Deloitte Tax LLP
+1 212 436 2339

[Patty Florness](#)

Partner, Global Information Reporting
Deloitte Tax LLP
+1 212 436 7413

[Dennis Metzler](#)

FATCA Leader, Canada
Deloitte & Touche LLP
+1 416 601 6144

[Kristen Starling](#)

Managing Director, Global Information
Reporting
Deloitte Tax LLP
+1 212 436 4281

[David Charlton](#)

Principal, Global Information Reporting
Deloitte Tax LLP
+1 617 437 2118

[Andrea Garcia Castela](#)

Senior Manager, Global Information
Reporting-CRS
Deloitte Tax LLP
+1 212 436 3785

[Richard Marcovitz](#)

FATCA/CRS Leader, Canada
Deloitte LLP
+1 416 775 4760

[Greg Thomas](#)

Principal, Global Information Reporting
Deloitte Tax LLP
+1 415 783 5211

Asia-Pacific

[Troy Andrews](#)

FATCA/CRS Partner, New Zealand
Deloitte, New Zealand
+64 93030729

[Michael Velten](#)

FATCA Leader, Asia-Pacific
Deloitte & Touche LLP
+65 6531 5039

[Anna Bleazard](#)

FATCA FAS Leader, Asia-Pacific
Deloitte & Touche Financial Advisory
Services Pte Ltd.
+65 6216 3277

[Alison Noble](#)

FATCA Leader, Australia
Deloitte Tax Services Pty Ltd
+61 3 9671 6716

Europe, Middle East & Africa

[Brandi Caruso](#)

Tax Transparency Leader, Switzerland
Deloitte AG
+41 58 279 6397

[Owen Gibbs](#)

FATCA/CRS Tax Director, EMEA
Deloitte LLP
+44 20 7007 4819

[Chris Tragheim](#)

FATCA Tax Leader, EMEA
Deloitte LLP
+44 20 7303 2848

[Eric Centi](#)

FATCA/CRS Tax Partner, Luxembourg
Deloitte LLP
+352 45145 2162

[Humphry Hatton](#)

FATCA Co-Leader, Middle East
Deloitte LLP
+971 4 5064730

[Markus Weber](#)

Financial Services Industry Tax Leader,
Switzerland
Deloitte AG
+41 58 279 7527

[Claire Dawson](#)

FATCA Tax Leader, Middle East
Deloitte LLP
+971 4 5064900

[Umair Hameed](#)

FATCA FAS Leader, Middle East
Deloitte Corporate Finance Ltd
+971 4 5064878

[David C. Wright](#)

FATCA/CRS Tax Partner, EMEA
Deloitte LLP
+44 20 7303 4641

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