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## FATCA



## FATCA

### Final Regulation Changes

- HIRE Act of 2010
  - Chapter 4 (IRC Sec. 1471-1474)
  - Effective date 1/1/14; final Regs 1/17/13
  - Goal: Monitor & tax assets and income of US taxpayers with accounts in FFI's & NFFE's
  - How: Withholdable payments (WP) @ 30% in 2014
  - WP: 1) FDAP & 2) Gross proceeds from sale of investment type property
  - WP: Doesn't include ECI

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- Withholding regime on payments to:
    - Foreign Financial Institutions (FFI)
    - Non Foreign Financial Entities (NFFE)
  
  - Existing Withholding rules continue:
    - Chapter 3 (IRC 1441 -1461)
    - Backup Withholding (IRC 5406)
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## FATCA

- What is an FFI?
  - Financial Institution that:
    - ❖ Accepts deposits
    - ❖ Holds custodial accounts
    - ❖ Makes investments
- Ex: Banks, investment funds, insurance co

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- Avoiding the 30% withholding tax:
  - Participating FFI
  - Deemed compliant FFI (nonreg local banks, retirement funds, nonprofit orgs, FFI low value a/c's)
  - Exempt beneficial owner

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- FFI Agreement requirements:
  - Due diligence: foreign financial accts of Specified US persons (10%) or US owned foreign entities
  - Collect information and report to the IRS on US accts
  - Withhold 30% on “passthru payments” to:
    - ❖ Nonparticipating FFI’s
    - ❖ Recalcitrant account holders
      - Forced account closure if no waiver of bank secrecy
  - Extends to all FFI’s in an expanded affiliated group

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- Withholding on NFFE payment:
  - NFFE is any foreign entity not an FFI
  - Avoid withholding if “excepted NFFE”
  - Also avoid w/h if:
    - ❖ The NFFE certifies it has no substantial US owners or
    - ❖ provide the w/h agent with name, address, US TIN of each substantial US owner

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- Intergovernmental Agreements (IGA's):
  - Type 1 & Type 2:
  - FFI's not otherwise excepted or exempt identify US accounts under partner jurisdiction rules
  - Allows FFI's in Model 1 partner jurisdiction to *not* apply final regs except as in IGA, partner jurisdiction exchanges information automatically (T2 direct to IRS)
  - FFI can elect to apply regs instead of IGA
  - Ten countries so far: UK, DA, FR, GM, EI, JA, MX, NO, SP, SZ



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- Final Regs changed many definitions:
  - FFI's are:
    - ❖ Depository institution: accept deposits and engage in one or more of: loans, factoring, loc's, fiduciary services, f/x transactions, leasing
      - Money transfer only: not FFI
      - Certain lessors, lenders, including networks for credit card banks holding collateral: not FFI

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- Final Reg definition changes:
  - Custodial institution:
    - ❖ Holds financial assets for others
    - ❖ Income from services at least 20% of GI over 3 yrs
    - ❖ Types of income qualifying:
      - Custody, a/c mntce, trsnfr fees; commission; margin income; bid/ask spread income; fees for financial advice; clearance & settlement fees

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- Final Reg definition changes:
  - Investment entity:
    - ❖ GI at least 50% from business of investing; reinvesting; securities trading; partnership interests; commodities; notional principal contracts; insurance/annuity contracts or interest in same *and*
    - ❖ Class A investment entity (for third parties);
    - ❖ Class B IE (managed by certain FFI's or Class A entity);
    - ❖ Class C IE (fund or other investment vehicle)
  - Potential exposure for “nonholding” brokers and trusts

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- Final Reg definition changes:
  - Insurance companies as FFI (or holding company that's a member of an EAG):
    - ❖ Must issue cash value insurance contracts or annuities (term insurance, no cash value, excepted)

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- Final Reg definition changes:
  - Holding company and treasury centers as FFI:
    - ❖ If part of an EAG that includes depository, custodial, insurance, or investment entity or part of fund established to invest or trade in financial assets
    - ❖ Examples: private equity fund with nontraded debt and equity interest issued by intermediate company formed in connection with a fund

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- FFI Exceptions:
  - Excepted nonfinancial group entities (HC, TC)
    - ❖ Can hold \$ for members of group; no private equity fund
  - Excepted inter-affiliate FFI if:
    - ❖ Dormant; special purpose; regulatory & inactive outside of group
    - ❖ No financial acct outside of group; no acct with WA or receive \$ from WA outside group; no WP to other than to its EAG that are not limited FFIs or limited branches; has not agreed to report under Reg. 1.1471-4(d)(1)(ii) or otherwise act as agent

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- Other FFI exceptions:
  - Excepted companies in new line of business:
    - ❖ Nonfinancial startups or new line of business other than FFI or passive NFFE, and that don't act as an investment fund
  - Certain 501(c) and nonprofit entities (except insurance companies under 501(c)(15))
  - Insurance company engaged in reserving activity only

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- Other Final Reg changes:
  - Exempt beneficial owners include:
    - ❖ Intergovernmental or supranational organizations made up of foreign govts; recognized under foreign law; no private inurement of income
  - Expanded definition of retirement funds (can include entities owned by exempt beneficial owner)
  - Commercial activities of FG, IO, FCB, UST govts okay only if for benefit of other exempt beneficial owners



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- Other issues:
  - Excepted NFFE's now include entity earning less than 50% of it's income from passive income – treated as payee with respect to payment if not agent or QI
  - Includes holding companies and the like that support active trade or business of a group

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- Grandfathered Obligations:
  - Cut-off date extended to 1/1/14; GO's outstanding on that date not subject to w/h unless materially modified
  - Also applies to payments on collateral of GO's
    - ❖ Allocate if secures both GO and non GO debt
  - Other categories: foreign passthru payments; divd equivalent amounts under 871(m)
  - WA can rely on written statement from issuer that obligation is grandfathered (absent knowledge otherwise)

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- Changes to “account” definition:
  - Negotiable debt instruments traded in regltd mkt or over the counter; advance premiums or deposits recvd by insurance company – both *not* depository accounts
  - Credit card credit balance *is* a depository account
  - Changes to savings account definition
  - Changes to equity and debt interests
  - Immediate annuities purchased by a/c holder i/c/w retirement/pension a/c; < \$50K cash value; indemnity reinsurance contracts; certain term life – all *not* a/c

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- A/c held by disregarded entity treated as held by owner of DE
- Any holder who can access value; change beneficiary; named owner; entitled to receive future payment; fixed amount payee - under insurance contract – *all* deemed a/c holder

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- EAG & Sponsoring Entities:
  - Various rule changes for EAG's dealing with definition of reentry into consolidated group; option exercise; control; seed capital; duplicative documentation
  - Sponsoring entity can perform due diligence, w/h, reporting; etc. for an entity or group
  - Sponsoring entity needs to register as such and can be a "compliance" FI

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- Collective refund procedure added
  - PFFI or Model 1 IGA FI can apply
    - ❖ but, they are usually exempt from w/h so benefits recalcitrant a/c holder or non-participating FFI

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- Timeline:
  - Agreements:
    - ❖ Effective date of agreement is 12/31/13 for FFI if register and get FATCA number by end of 2013;
    - ❖ Otherwise, date IRS issues a GIIN
    - ❖ Notice 2013-43 delayed to 7/1/14
  - W/H:
    - ❖ 7/1/14 on FDAP from non GO's
    - ❖ 7/1/14 on clients that are “prima facie FFIs” for USWA, PFFI, and registered deemed compliant FFIs

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- Timeline:
  - W/H:
    - ❖ 1/1/16 for client entities not prima facie FFIs
    - ❖ 1/1/15 for high value individual a/c
    - ❖ 1/1/16 for low value individual a/c
    - ❖ 1/1/17 for foreign “passthru” payments and gross sale proceeds
    - ❖ 7/1/14 for NFFEs
    - ❖ 1/1/15 for preexisting obligation & not prima facie FFI or passive NFFE
    - ❖ 1/1/17 for offshore payment of US FDAP (unless QI)



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- New a/c implementation: 7/1/14 for USWA, PFFI, registered DCFFI – all a/c's maintained by them on 7/1/14 treated as pre-existing a/c's
- Other deadlines for preexisting obligations for payments
- PFFI reporting: agreement date pre 2015 must report a/c's maintained during 2013 open on 12/31/13 and file information reports for 2013 and 2014 by 4/1/15

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- Various:
  - Extensive revisions to documentation provisions
  - **New forms and to be revised forms:**
    - ❖ **8966** – FATCA report for FFIs/other WA
    - ❖ **8957** – “FATCA” Registration
    - ❖ W-8; W-8IMY; W-8ECI; W-8EXP; W-8BEN;  
**W-8BEN-E**; 1042; 1042-S
  - Registration portal – delayed opening: 8/19/13
    - ❖ First GIIN list out by 6/2/14 (registration complete by 4/25/14 to be on list)