

FATCA

Foreign Account Tax Compliance Act



What US taxpayers need to know.



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»» Outline of Today's Topic

- Background of FATCA
- Background on international withholding
- What is FATCA and who will it affect?
- What are the compliance requirements?
- How will US taxpayers comply with the requirements?

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»» Background of FATCA

- It's been estimated the US loses 100 billion of tax revenue each year due to offshore tax abuse
- Swiss banking and similar types of tax shelters
- FATCA is expected to raise \$7.6 billion in revenue over a 10-year period.
- Accomplishes this by penalizing foreign entities who do not comply with US law
- FATCA is leading a global initiative on tax reporting

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»»» Background for International Withholding

- Foreign withholding requirements – prior to FATCA
 - Withholding required on Fixed, Determinable, Annual and Periodic (FDAP) payments when payment is US source and payee is a foreign recipient
 - Withholding rate is 30%, but rate may be reduced through a tax treaty
 - Covered under IRC §1441 and §1442

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»»» Chapter 3 Withholding Example

- US payor remits \$100,000 interest payment to a foreign payee who is a resident of a foreign country. Foreign country does not have a tax treaty with the US.
- US payor is required to withhold 30% under Chapter 3 withholding, or \$30,000
- US payor files form 1042 and 1042-S which displays the \$100,000 payment and \$30,000 of withholding
- Foreign payee may be required to file a US form (1040NR, 1120-F, etc.)
- If a tax treaty applies, Form W-8BEN required to claim treaty benefits and reduced withholding allowed.

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»»» What is FATCA?

- FATCA stands for Foreign Account Tax Compliance Act.
- FATCA originated from the HIRE act of 2010.
- Goal of FATCA is to decrease amount of tax evasion through foreign entities by requiring certain foreign entities to submit information to the US government.

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»»» Intergovernmental Agreements (IGA)

- Agreements between the US and foreign countries to share certain financial information
- Model 1 and Model 2
- Annex I and Annex II

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»» Type of withholding required

- Foreign withholding requirements – prior to FATCA
 - Chapter 3 Withholding
 - Withholding required on FDAP payments when payment is US source and payee is a foreign recipient
 - Withholding rate is 30%, but rate **may be reduced** through tax treaties
 - Covered under IRC §1441 and §1442
- Additional withholding under FATCA
 - Chapter 4 Withholding
 - Withholding required on FDAP payments when payment is US source and payee is a foreign recipient
 - Withholding rate is 30% **and is not reduced** by tax treaties
 - FATCA Withholding Requirements are found under IRC §1471 through §1474

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»» Type of Withholding Required

Chapter 3 Withholding

Interest
Dividends
Annuities
Rents
Royalties
Compensation for services

Chapter 4 Withholding

Interest
Dividends
Annuities
Rents
Royalties
Gross Proceeds
Certain Insurance Premiums
Passthru Payments

**Neither withholding requirement applies to sales of goods

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»»» FATCA withholding exceptions

- Includes payments for:
 - Services (including wages and other forms of employee compensation such as stock options)
 - Use of property
 - Office and equipment leases
 - Software licenses
 - Transportation
 - Freight
 - Gambling winnings
 - Awards
 - Prizes
 - Scholarships
 - Interest on outstanding accounts payable arising from the acquisition of goods or services

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»»» Who does FATCA affect?

- Foreign Financial Institutions (FFI)
- Non-Financial Foreign Entities (NFFE)
 - Active NFFEs are an excepted NFFE
 - 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 are assets that produce or are held for the production of passive income.
 - Passive NFFEs
 - Certify no substantial US owners or disclose substantial US owners
 - Substantial U.S. owners include any specified U.S. person directly or indirectly owning more than 10 percent of the passive NFFE
- Any US person making a payment to a foreign payee

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»» How does this affect US payers?

- Need to be aware of who is receiving US source payments.
- Withholding of 30% for certain payments.
- If US payer fails to withhold and was required, US payer is liable for the withholding payment.
- Care required – contractual obligations.
- Foreign entities – FATCA withholding may not be a creditable tax. FATCA is a penalty designed to compel foreign entities to disclose information related to US taxpayers.

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»» When does FATCA go into effect?

- FATCA withholding requirements are phased in over multiple dates including:
 - July 1, 2014
 - FATCA withholding on FDAP income
 - Grandfathered obligations are excepted from withholding
 - January 1, 2017
 - US withholding agents are required to withhold on gross proceeds and foreign pass-through payments

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»» IRS Transition Period

- IRS Notice 2014-33
 - Provided good faith exceptions allowing for a transition period during 2014 and 2015
- Transition period is due to lack of guidance regarding IRS reporting (i.e. no instructions)
- Affected parties which make a good faith effort to comply with FATCA will not be subject to stiff penalties

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»» How do companies comply with FATCA?

- IRS audit approach
 - The general audit approach when auditing foreign withholding:
 - Determine all foreign payees
 - Determine all payments of covered items to identified payees
 - Determine which of the payments are subject to withholding
 - Presumption is 30% withholding applies
 - Taxpayer's justification for not withholding
 - W-8 forms
 - Other allowable documentation
 - Presumption Rules

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How do companies comply with FATCA?

- US payers need to keep documentation as evidence for not withholding.
- Acceptable documentation includes:
 - W-9s
 - W-8BEN-E
 - W-8 forms received prior to creation W-8BEN-E do not include information necessary to comply with FATCA. US payers should request W-8BEN-E.
 - Other Documentation

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How do companies comply with FATCA?

- Forms related to FATCA compliance:
 - Form 8966 – FATCA Report
 - Form 8957 – Paper version of online registration
 - Form W-8BEN-E - Certification by foreign payee of NFFE or FFI status
 - Form 1042 and Form 1042-S - withholding remittance
 - Form W-8IMY - Certificate of foreign intermediary, foreign flow-through entity, or certain US branches for US tax withholding
 - W-8EXP – Certificate of foreign government or other foreign organization
 - W-8ECI - Effectively connected income exclusion

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»» IRS Form 8966

- Used to report substantial US beneficiaries to the IRS
- US payor will fill out form with information provided by foreign NFFE and submit to IRS, or NFFE can self report

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»» IRS Form 8957

- If an entity decides to register, best to use IRS online registration.
- Paper form to register with the IRS
- FFIs and NFFEs can use form to register and self report substantial US beneficiaries

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»» IRS Form W-8BEN-E

- Used by entities. Supersedes W-8BEN which is now used only for individuals
- Currently 8 pages long, 30 parts.
- Foreign payee classifies themselves as NFFE or FFI.
- Also includes a section for Chapter 3 withholding.

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»» IRS Form W-8BEN-E

- Part I: Identification of Beneficial Owner
 - Line 5, Typically:
 - Active NFFE
 - Passive NFFE
 - Excepted non-financial start-up company
- Part II: Applies to FFIs
- Part III: Used for Chapter 3 withholding
- Part IV-XXVIII: Completed based on Part I, Line 5
- Part XXIX: Certification
- Part XXX: Substantial US owners of Passive NFFE

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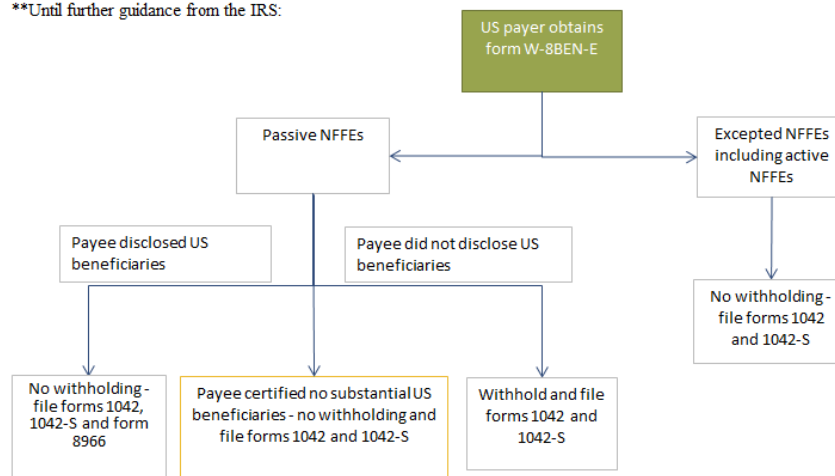
IRS Form 1042 & 1042-S

- Largely impacted by FATCA
- IRS recently published instructions for form 1042 and 1042-S
- Multiple codes for FATCA payments
 - On form 1042 US payors need to classify and report payments according to FATCA status
 - ****Optional in 2014****

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How do companies comply with FATCA?

****Until further guidance from the IRS:**



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Summary

- FATCA affects both US payers making payments to foreign entities and foreign entities receiving US source payments
- US sourced payments from US payers to foreign payees when the character of the payment is:
 - FDAP (fixed, determinable, annual, and periodic)
 - Interest, dividends, annuities, rents, royalties, gross proceeds and insurance premiums
- Income effectively connected with a US trade or business is generally exempt from FATCA

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Summary

- Practical tips for clients to comply with FATCA
 - Analyze departments of company for payments to foreign entities.
 - Determine whether payment is withholdable.
 - If payment is withholdable, request W-8BEN-E.
 - If an excepted NFFE, no withholding is required.
 - If a passive NFFE, foreign entity needs to disclose US beneficiaries or certify there are none.

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»» Effects to US Payors

- Create internal processes for identifying FATCA compliance
- Update systems to capture FATCA data
- Additional disclosure requirements

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»» Effects to NFFEs

- Completion of W-8BEN-E
 - Classify entities and entities within group
- Gather information if substantial US owners
 - May require authorization

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»» Updates/Recent developments

- IRS issued transition period for FATCA
 - IRS Notice 2014-33
- Recently issued instructions for:
 - Forms 1042 & 1042-S
 - Form W-8BEN-E
 - Form 8966
- US use of FATCA regarding relations with foreign countries

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»» Common Questions

- Do tax treaties affect FATCA withholding?
- Is FATCA withheld on gross payments or net?
- As a US payor am I allowed to accept alternative documentation from a foreign payee?
i.e. non W-8BEN-E form.

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Common Questions

- Does the NFFE need to obtain a TIN?
- If a company has a GIIN, does the foreign payee need to supply a W-8BEN-E?
- How do companies get there withholding back?

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Common Questions

- Does FATCA apply to payments made to wholly owned subsidiaries?
- We have a W-8BEN prior to July 1st, 2014. Do we need to request a W-8BEN-E on July 1st, 2014?
- If a US Payor makes a payment to an unrelated US entity or person, and the payment is then paid to a NFFE, does the original US Payor have a FATCA withholding requirement?

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Final FATCA Regulations Timeline

FATCA Compliance Action Items		2014	2015	2016	2017	2018
General Compliance	1099-REG: GIN registration deadline for first 2014 List (First 2015 list for Model 1 FFIs)	Apr 25	Dec 22 for Model 1 FFI			
	First 2014 GIN list	Jun 2				
	1099-REG: Effective date of Agreement for FFIs receiving a GIN prior to July 1, 2014	Jun 30				
	1099-REG: End of transition period for affiliated group rule			Jan 1		
New / Pre-existing Accounts	1099-REG: Begin new account onboarding	Jul 1				
	1099-REG: Begin GIN Verification for Model 1 ICA FFIs		Jan 1			
	1099-REG: Complete documenting/classifying preexisting entity accounts		Oct 31 Initial accounts		Jun 30 All other entity accounts	
Withholding	1099-REG: Complete documenting/classifying preexisting accounts		Dec 31 Initial accounts		Jun 30 All other accounts	
	1099-REG: Grandfathered obligation cutoff	Jul 1				
	1099-REG: Begin withholding on U.S. source income (excludes certain offshore payments)	Jul 1				
	1099-REG: Begin withholding on offshore U.S. source income payments and gross proceeds				Jan 1	
Reporting	1099-REG: Begin withholding on foreign passthru payments				Jan 1	
	1099-REG: Begin U.S. Account/Owner information and balance reporting (for 2014 calendar year)		Nov 30			
	1099-REG: Begin U.S. Account/Owner income reporting (for prior year)			Mar 31		
	1099-REG: Begin U.S. Account/Owner gross proceeds reporting (for prior year)				Mar 31	
	1099-REG: Aggregate reporting on NPTFI account holder payments (only for 2015 and 2016)			Mar 31	Mar 31	
	1099-REG: Begin U.S. Owner reporting		Mar 31			
	1099-REG: Reporting on withholdable income payments made to recipients**		Mar 15			
	1099-REG: Begin reporting on gross proceeds made to recipients**					Mar 15