

FATCA Withholding Exceptions and Limitations

A withholding agent (W/A) that makes withholdable payments to documented or presumed non-U.S. entities must determine if the payment is subject to withholding. (See Regs. §1.1471-2(a)(4)).

Wire Transfers: A W/A that is not related to a documented beneficial owner or payee is not required to withhold on a withholdable payment made if the W/A **lacks control, custody, or knowledge of the payment**. (See Regs. §1.1471-2(a)(4)(i)).

- Factors:
 - W/A must not be related to payee or beneficial owner
 - The determination of whether a W/A agent is related to the payee or beneficial owner is subject to the application of the rules of §482. Under these rules, parties are considered to be related if they are owned or controlled directly or indirectly by the same interests.
 - W/A must lack custody over or control of the payment
 - At any time between withholding obligation date and the due date for filing Form 1042, the W/A must not have control over or custody of money or property owned by the beneficial owner. Control or custody is generally defined in the negative by describing circumstances under which a W/A will not lack control or custody. For example, if the lack of control or custody is part of a pre-arranged plan known to the withholding agent to avoid FATCA withholding, the W/A would be treated as having control or custody.
 - Custody or control is not lacking merely because the W/A has directed another (e.g., an agent) to make the payment instead of making it directly.
 - W/A must not have knowledge of the facts that give rise to an obligation to withhold. (See Regs. §1.1471-2(a)(4)(i)(A)).
 - The regulations define this factor in the negative and by example. The mere fact that the W/A does not have knowledge of the character and source of a payment will not mean that the W/A lacks the knowledge of the facts

that give rise to the payment. However, the mere fact that the W/A has knowledge will not automatically result in the requirement to withhold. See example in the regulations below:

Reg. Section 1.1471-2(a)(4)(i)(B) Example.

A, an individual, owns stock in DC, a domestic corporation, through a custodian, Bank 1, that is a participating FFI. A also has a money market account at Bank 2, which is also a participating FFI. DC pays a dividend of \$1,000 that is deposited in A's custodial account at Bank 1. A then directs Bank 1 to transfer \$1,000 to A's money market account at Bank 2. With respect to the payment of the dividend into A's custodial account with Bank 1, both DC and Bank 1 are withholding agents making a withholdable payment for which they have custody, control, and knowledge. See §1.1473-1(a)(2)(vii)(B) and (d). Therefore, both DC and Bank 1 have an obligation to withhold on the payment unless they can reliably associate the payment with documentation sufficient to treat the respective payees as not subject to withholding under chapter 4. With respect to the wire transfer of \$1,000 from A's account at Bank 1 to A's account at Bank 2, neither Bank 1 nor Bank 2 is required to withhold with respect to the transfer because neither bank has knowledge of the facts that gave rise to the payment. Even though Bank 1 is a custodian with respect to A's interest in DC and has knowledge regarding the \$1,000 dividend paid to A, once Bank 1 credits the \$1,000 dividend to A's account, the \$1,000 becomes A's property. When A transfers the \$1,000 to its account at Bank 2, this constitutes a separate payment about which Bank 1 has no knowledge regarding the type of payment made. Further, Bank 2 only has knowledge that it receives \$1,000 to be credited to A's account but has no knowledge regarding the type of payment made. Accordingly, Bank 1 and Bank 2 have no withholding obligation with respect to the transfer from A's custodial account at Bank 1 to A's money market account at Bank 2.