FOREIGN ACCOUNT TAX COMPLIANCE ACT ("FATCA"): COMPLIANCE TO ELIMINATE WITHHOLDING TAX

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FATCA Overview

- US federal income tax is imposed on “worldwide income” of citizens, residents and US corporations.
- How does the United States collect tax?
  - Voluntary compliance
    - But helped with:
      - Withholding
      - Reporting

FATCA Overview (cont)

- Some US Investors were trying to evade US tax by:
  - Depositing money offshore *or*
  - Becoming investors in offshore funds that invest in the United States, which offshore funds legitimately had no US tax in two cases:
    - No tax on portfolio interest
    - No tax on capital gains from the sale of stocks or securities
      - Except for sale of US real property holding companies
  - Etc, etc, etc.

FATCA Overview (cont)

- Administration of income tax as it extends to activities conducted offshore has proven difficult without a sustainable information sharing network.
- In the absence of a meaningful information exchange network, US taxpayers employed offshore accounts in avoiding over $300 billion in taxes (by some estimates) annually.
- In 2010, Congress enacted FATCA to end this type of tax evasion.

FATCA's Birth (Chapter 4: Sections 1471 – 1474)

- **FATCA added new chapter 4 to Code and enacted as part of Hiring Incentives to Restore Employment ("HIRE") Act in March 2010**
  - **Addresses US tax non-compliance by providing transparency with respect to assets and investments held offshore**
- **FATCA requires that foreign financial institutions comply with the information network to avoid the imposition of 30% withholding tax on US-source investment income.**
  - FATCA is widely viewed as both a "carrot" and a "stick"

Perspective

- US Side: Withholding Agent
  - Do I impose tax?
    - Gross up for FATCA?
  - Must get updated IRS Form W-8
    - Form will have to report a new IRS FATCA ID number: GIIN (global intermediary information number)
  - And must verify accuracy of GIIN on IRS data-base

Perspective

- Foreign Side: Recipient
  - Am I a Foreign Financial Institution (FFI)? Non-foreign Financial Entity (NFFE)?
    - World is split between FFIs and NFFEs
  - If so, what do I do to eliminate FATCA withholding tax?

What can be done?

Important Observations – How to Eliminate Withholding

- FATCA withholding will apply on "withholdable payments" made to a Foreign Financial Institution ("FFI") *unless*:
  - FFI becomes a Participating FFI by signing an agreement with the IRS;
  - FFI is a resident of a country that signs an Inter-governmental Agreement ("IGA") with the IRS;
  - FFI finds an applicable exemption under the FATCA regulations, which offer many options but ones that may not help many FFIs; or
  - FFI avoids investing in the United States, an unrealistic option.

Full Compliance

- Although burdensome, the final regulations and IGAs allow extensive reliance on existing customer intake and AML/KYC due diligence procedures
- FFIs should consider the possibility of falling within a deemed-compliant category; for non-US investment funds, this likely will require amending distributions agreements and offering documents
- Offering documents of investment funds should disclose potential FATCA withholding risk and requirement of investors to furnish additional tax information as necessary
- ISDA schedules, credit agreements and similar agreements should address potential FATCA liability (*e.g.*, the ISDA FATCA Provision)

IGA Scorecard as of November 15, 2013

- Signed IGAs
  - UK, France, Ireland, Denmark, Germany, Spain, Japan, Mexico, Norway, and Switzerland (all Model 1 except for Japan and Switzerland)
- IGAs initialed but not yet formally signed
  - Italy, Bermuda (Model 2) and Cayman Islands (Model 1)
- IGAs finalizing negotiations
  - Canada, Finland, Guernsey, Isle of Man, Jersey, and The Netherlands

Exit United States Entirely

- This approach will avoid FATCA withholding tax, but (perhaps severely) limit available investments (including those made indirectly through FFIs)
- Prior to July 1, 2014, sell all US investments: stock of US issuers, US real property, etc. held directly or through certain flow-through or intermediary FFIs
- Prior to effective date of foreign passthru payment withholding (not before 2017), dispose of all remaining US investments held indirectly through FFIs
- Do not invest any cash in United States from 2014 on – including temporary “warehousing” or overnight sweep investment in US treasury bills or US money market funds
- Exception: Grandfathered obligations, subject to limitations on material modifications

Continue Investing in United States, but forbid Direct or Indirect Investors (As Determined for US Tax Purposes)

- May limit/avoid FFI reporting but not requirements to enter into FFI agreement/register under IGA, perform due diligence and withhold on payments to nonparticipating FFIs, unless FFI can fall within deemed-compliant category
- Note: US person definition for US federal tax purposes is not identical to definition for purposes of Regulation S of the US Securities Act of 1933 (*e.g.*, US citizen residing outside United States is US person for US federal tax, but not Regulation S, purposes)
- Still can be issues if nonparticipating FFIs or passive NFFEs with substantial US owners invest

KEY DATES

Foreign Account Tax Compliance Act

KEY DATES

- August 19, 2013
  - FATCA registration portal opened
- Early 2014
  - First GIINs assigned by IRS by this date
- April 25, 2014
  - Last day to register to get on the first list posted of PFIs and registered deemed compliant FFIs (including Model 1 FFIs posted on IRS web
- June 2, 2014
  - First list of PFFIs and registered deemed compliant FFIs (including Model 1 FFIs) posted on IRS web (list to be updated monthly)
- June 30, 2014
  - FFI Agreement effective date if receive GIIN on or before this date

Key Dates

- July 1, 2014
  - Chapter 4 withholding on most US source payments begins (does not apply to grandfathered obligations or those set forth below)
- January 1, 2015
  - Payments to pre-existing accounts of NFFEs subject to Chapter 4 withholding rules (prior to this date only payments to passive NFFEs with at least 1 substantial US owner subject to Chapter 4 withholding
- January 1, 2017 or later
  - Chapter 4 withholding on
    - Gross proceeds (sales of stock/securities)
    - Foreign pass-through payments – payments made by FFI and attributable to withholdable payments that FFI receives (distributions to fund's equityholders)

Implementation

- <u>Withholding starts on 7/1/2014</u>
- <u>BUT</u>
  - <u>Gross proceeds withholding</u> (sales of stock/securities): wait until 1/1/2017
  - <u>Pass-thru payments</u>: wait until 1/1/2017 or later
    - Pass-thru Payment is made by FFI & attributable to withholdable payments that FFI receives
      - Distributions to fund's equityholders

Effective Dates – Must I worry?

- Grandfathered Obligations outstanding on 7/1/2014
  - No FATCA withholding except for equity
    - Question: What happens if "significant modification" of debt?
  - Potential "gross-up" issue for existing "master" agreements; see ISDA protocol for FATCA
- Pre-existing obligations on 6/30/2014
  - Withholding delayed based on client profile:
    - July 1, 2014 -- prima facie FFIs (QIs, NQIs, certain SIC codes for accounts in the United States)
    - January 1, 2016 – other FFIs
    - January 1, 2015 – high value (> $1mil) individ. accts. at PFFIs
    - January 1, 2016 – other individual accounts at PFFIs
  - Dates may be accelerated due to actual knowledge

FFIs – Am I an FFI?

- Banking or Depository institution
  - Accepts deposits <u>and</u> is in banking or financing business
  - Excluded:
    - Money transfer entities are <u>not</u> (do not accept deposits)
    - Entity that accepts deposits as collateral or security is not (not in banking business)
    - Finance companies that do not fund operations through deposits are excluded
    - Networks for credit card banks that hold cash collateral are excluded

FFIs – Who are in (cont)?

- Custodial institution
  - Exists if 20% of income attributable to holding of financial assets on behalf of others
- Specified Insurance companies and insurance holding companies
  - If issues or makes payment with respect to cash value insurance contract or an annuity contract

FFIs – Who are in (cont)?

- Investment entity – 3 categories
  - #1: Entities primarily conducting business on behalf of customers (trading, portfolio management, administering or managing funds)
    - Catches the **Manager or Administrator**
      - <u>Question</u>:
      - Why is this here (it is also in the IGAs)?
      - What does the Manager or Administrator then do?
    - <u>Excludes</u>: Individual who does this service. (ex. 7)

FFIs – Who are in (cont)?

- Investment entity – 3 categories
  - #2: Other entities if business is primarily investing or trading in financial assets AND entity is managed by depository institution, custodial institution or specified insurance company, i.e., professionally managed.
    - Are you an entity?
      - Question: Is **Grantor Trust** or **Disregarded Entity** (“DRE”) an entity that can be a FFI?
      - Uncertain

FFIs – Who are in (cont)?

- Investment entity – 3 categories
  - #2: Other entities if business is primarily investing or trading in *financial assets* AND *professionally managed*
    - Excludes passive, non-commercial investment vehicles and **trusts** since not "on behalf of customers" (as long as not professionally managed). Treated as NFFE.
      - <u>Question</u>: If entity holds itself out as mutual fund, hedge fund, etc., then what? See category #3.
    - Excludes professionally managed foreign real estate investment fund
      - <u>Question</u>: If real estate held through corp. or PS then do you lose exemption? Probably yes!

FFIs – Who are in (cont)?

- Investment entity – 3 categories
  - #3: Collective investment fund, mutual fund, private equity fund, hedge fund
- Potential for different results under Regs vs. IGA
  - Final regulations are closer than proposed regs to the IGA Investment Entity definition
  - However, inconsistencies remain between regs and IGA
    - IGA includes reference to Financial Action Task Force (FATF) definition of “financial institution”
    - Similar entities may have different FATCA status depending on country of organization (IGA vs. non-IGA)

Diversion: Expanded Affiliated Group (EAG)

- More than 50% common ownership
  - Partnerships can be part of EAG if such entity is controlled by members of such group
    - Question: Do you need a corp. at the top of the chain OR can a partnership be the head of the group?
- All FFIs in group must participate in FATCA
  - Exceptions:
    - Limited branches: Branch that as of 2/15/2012 cannot satisfy all conditions allowed until the end of 2015
    - Limited FFI: Limited status will cease at the end of 2015

FFI Exceptions

- Excepted Non-financial group entities (also excepted NFFEs)
  - Holding company, treasury company, treasury centers & captive finance company (including combination of these activities) that are part of a non-financial group
    - Exception doesn't include entities formed or availed of by private equity funds, hedge funds, etc.
      - Question: What happens when a private equity fund buys an operating company?

FFI Exceptions (cont)

- Start up non-financial companies
- Nonfinancial company in liquidation
- Foreign §501(c)(3) company
- Non-profit organization
  - FATCA requirements dictate review

FFI Exceptions (cont)

- Interaffiliate FFIs
  - If entity does not maintain financial accounts and doesn’t receive payment from a withholding agent, and doesn’t make withholdable payments except to EAG members
  - Helps dormant companies and those formed for regulatory purposes

FFI Exempt Beneficial Owners: Reg. §1.1471-6

- Foreign Governments
  - Includes integral parts, controlled entities & political subdivisions
- International Organizations
- Foreign Central Banks
- USA Territory

FFI Exempt Beneficial Owners (cont)

- Retirement plans
  - Treaty qualified
  - Broad participation exemption
  - Narrow participation exemption
    - Watch out: Less than 50 participants
  - Pension plan funds & investment vehicles exclusively for pension plans
    - Question: Will any non-pension ownership (e.g., carried interest) lose exemption?

Deemed Compliant FFIs

- Three types:
  - Registered deemed compliant
  - Certified deemed compliant
    - Least burdensome category
  - Owner documented FFI

Registered Deemed Compliant FFIs

- Local FFI
- Nonparticipating Member of FFI Group
  - Alleviates burden for some members of EAG
- Qualified Collective Investment Vehicle (“CIV”)
  - May aid UCITs, etc.
- Restricted Fund
  - May aid private equity fund, etc.
- Qualified Credit Card Issuer

Qualified CIV – Some details:

- Relief for entities <u>owned solely</u> through participating FFIs or by large institutional investors
  - Allows ownership by retirement plans & non-profit organizations
    - Otherwise, can possibly meet deemed compliant status as restricted fund
- <u>Regulated</u> by all countries where it operates or if its fund manager is regulated with respect to the entity in all countries where investment entity operates
  - **<u>Question</u>**: What countries qualify? Will there be a list published?
- Bearer shares OK if issued pre-1/1/ 2013 and entity identifies status of holder prior to payment and no more bearer shares issued after 12/31/2012

Restricted Fund – some details

- <u>Regulated</u> in all countries where it operates or fund manager is regulated in all countries where entity is registered and operates
- Interest in the funds can be issued only by fund or designated <u>distributor</u> (not US distributor)
  - Foreign branch of US financial institution is permitted distributor
  - Interests in funds can be issued by fund directly if investor can't sell on open market and can only redeem through fund
  - Funds given until later of 6/30/2014 or six months after registering to renegotiate distribution agreements to include relevant restrictions and prohibitions
- Bearer share rules same as with collective investment vehicles

Registered Deemed Compliant (cont)

Sponsored Investment Entities – Added relief

- Sponsored entity: Investment entity (not QI/WP/WT)
- Sponsoring entity:
  - Authorized to manage the FFI & enter into contracts on its behalf
    - Question: What about an administrator?
    - Question: What if 2 managers—can 1 satisfy both their obligations?
  - Agrees to perform all due diligence, reporting, withholding
  - Registers with IRS

Registered Deemed Compliant (cont)

Sponsored Investment Entities (cont)

- Sponsoring entity in different country than FFI:
  - Question: Who does Sponsoring Entity report to?
    - If IGA in Sponsoring Entity Country & IGA in Sponsored Entity country
    - If IGA in one country & No IGA in the other country
    - If no IGA in either country
  - Question: If Manager is sponsor for all the FFIs it manages, what FATCA responsibility is on the Sponsor?

Certified Deemed Compliant FFI

- Nonregistering Local Bank
- FFIs with only low value accounts
- Limited life debt investment entities
  - Was in existence on 12/31/2011 & relief only until 1/1/2017
  - Formed pursuant to “trust indenture”
    - <u>Question</u>: What if just a non-US corp?
  - No amendments of organizational documents w/o unanimous consent
    - <u>Question</u>: Most funds do not do this—any relief?

Certified Deemed Compliant FFI

- Sponsored Closely held Investment Vehicle
  - Sponsoring entity: Authorized to manage the FFI & "enter into contracts on behalf of the FFI"
    - Question: Can administrator be a sponsor?
  - Qualifying entity: Not relevant if held out as investment vehicle for unrelated persons & 20 or fewer holders of equity & debt

Owner Documented FFIs

- Conditions:
  - For investment entity only - no banks/custodians
  - No restriction on debt issuance but may have to report holders of debt
  - Must submit to each cooperating withholding agent, every three years, certifications and certain identifying information with respect to each of its equity holders and certain debt holders.
- <u>Question</u>: How useful is this?
  - Need cooperation of withholding agents who are already over-whelmed with FATCA compliance

The other foreign investor: Non-Foreign Financial Entity (NFFE)

- In order to avoid FATCA withholding, NFFE must either:
  - Identify its substantial US owners, or
  - If it does not have substantial US owners, certify that to an applicable withholding agent
- No due diligence requirement on NFFE

Non-Foreign Financial Entity (cont)

- NFFE would include any foreign entity that is not an FFI
  - Exempt NFFEs:
    - Publicly traded corporation
    - Active NFFEs - less than 50% of gross income for is passive income or less than 50% of assets produce passive income;
    - Exempt entities noted earlier or Territory NFFEs

FATCA Registration Portal

- Opened August 19, 2013
  - http://www.irs.gov/Businesses/Corporations/FATCA-Registration
  - Form 8957 (paper registration but portal registration is the preferred method)
  - Can register as FFIs, sponsoring entities, limited FFIs, registered deemed compliant FFIs, or Model I FFIs (treated as registered deemed compliant)
  - Model I or Model II IGA FFIs can register so long as IGA is in place (even if notification not yet completed)
- Last day to register is April 25, 2014 to be on the first June 2, 2014 list
- IRS will post "IRS FFI List" of participating FFIs and registered deemed compliant FFIs (including Model I IGA FFIs) on June 2, 2014

FATCA Registration Process

- Create Account.
  - Financial Institution ("FI") will receive a FATCA ID and will create an access code that is used to log on to its online FATCA account. Branches will not have separate online FATCA accounts, but will be assigned separate GIINs.
  - May register as a Single FI, Lead FI, Member FI, or a Sponsoring Entity.
- Complete Registration Process
  - Part 1: Each FI provides basic identifying information.
  - Part 2: Each Lead FI identifies its Member FIs.
  - Part 3: Current QIs, WPs or WTs complete to renew their existing agreements. In order to become a new QI, WP or WT, an FI must complete IRS Form 14345.
  - Part 4: Each FI certifies the provided information is accurate and complete and agrees to comply with its FATCA obligations.
- Sign & Submit Registration Form.
  - Cannot be done until January 1, 2014.
- Receive Approval.
- GIIN Issued.

FATCA Registration Process:
Definitions

- A Single FI is an FI that does not have an member FIs and that is registering as a PFFI or RDCFFI for itself or one or more branches.
- A Lead FI is an FI that will initiate the FATCA registration process for each of its Member FIs and that is authorized to carry out most aspects of its Member FI's FATCA registrations. A Lead FI is not obligated to act as a Lead FI for all members of its expanded affiliated group.
- A Member FI is an FFI that is registering as a member of an expanded affiliated group and that is not acting as a Lead FI.
- A Sponsoring Entity is an entity that will perform the due diligence, withholding, and reporting obligations of one or more sponsored investment entities or controlled foreign institutions.

FATCA ID Number - GIIN

- FFI gets a GIIN from the IRS—global intermediary information number
  - Question: Any exceptions for getting a GIIN?
    - IGA Model I resident?
  - Question: Even if exempt, should you get one anyway?
  - Question: If I get this after April 25, 2014, and there is FATCA withholding, can I get a refund?
    - New refund mechanism—how will it work?

What must withholding agent do to not withhold?

- Once an FFI finds a path to eliminate withholding, a US withholding agent will still have to withhold *unless*
  - FFI furnishes an updated Form W-8 to the withholding agent
    - Question: Any exceptions to need to update?
  - Agent verifies the accuracy of FFI's status on IRS master database
    - There will be a time lag between getting a FATCA EIN and having that number put on the Master List
    - Question: Any exceptions? IGA Model I resident?

Revised IRS Form W-8BEN

- Revised W-8BEN incorporates FATCA
  - IRS Form W-8BEN-E (used for non-US entities)
    - Form went from one page (easy to read) to six pages (detailed and complex)
    - Burden on *both* non-US investor to complete and US person to make sure it is correct and complete
- <u>Question regarding foreign TINs</u>: Unclear what standards the form recipient should apply when reviewing this information (e.g., if no foreign TIN, should form be rejected?)
- More enhanced due diligence will be required
  - E.g., if a client certifies on W-8BEN-E to be an “Excepted NFFE,” the form must be invalidated if withholding agent has evidence that client is a financial institution
- <u>Question</u>: When will the drafts be finalized?

Financial Accounts? – Disclosure Target

- Depository account
  - Excludes (i) escrow accounts, (ii) negotiable and traded debt instruments; & (iii) advance premiums and deposits if relate to insurance contracts with premiums payable annually
  - Includes (i) credit card balance & (ii) insurance company GIC
- Equity and debt interests in Financial Institutions
  - Generally excluded if interests regularly traded on an established securities market.
  - Included if held in investment entity (unless publicly traded) which is professionally managed or is a hedge fund, mutual fund, etc.
  - Included if held in entities acting solely as depository institutions, custodial institutions, investment entities acting on behalf of customers or insurance company if value determined by assets giving rise to withholdable payments

FATCA Implementation-PFFI Agreement Requirements

- Due diligence
  - Determine which account holders are US persons or US owned foreign entities (more than 10% US ownership or any owner in investment entity)
- Reporting
  - Inform the IRS of the identity of these people & added data so IRS can make sure US tax is being paid
- Withholding/Termination of Account Status
  - Withholding can apply to account holders who are recalcitrant holders or non-participating FFIs
  - Recalcitrants that are known US persons also subject to closure or transfer within a “reasonable time”

FATCA Implementation-Due Diligence

- Pre-existing v. New Accounts
  - Announcement 2013-43:
    - June 30, 2014 is the key date
- Identity of Account Holder
  - Individual v. Entity

FATCA Implementation-Individual Due Diligence

- Pre-existing Accounts
  - Accounts ≦ $50,000
    - No review needed
  - Accounts ＞ $50,000 but not more than $1M
    - Electronic review only
  - Accounts ＞ $1M
    - Electronic review and review paper records and talk to account manager
- New Accounts
  - Certification as to status

FATCA Implementation-Individual Due Diligence (cont)

- Search for US indicia in your records
  - List person as a US citizen/resident alien
  - US place of birth
  - US resident address
  - US telephone number
  - Instructions to transfer funds to the United States
  - POA to person with US address
  - In care of address or hold mail address that is the sole address of the holder
- If you find it, you must do more:

FATCA Implementation-Individual Due Diligence (cont)

- List person as a US citizen/resident alien
  - Must report but must get Form W-9 & waiver of foreign law that may block disclosure
- US place of birth
  - If they say they are not US citizen/resident, FFI must get:
    - Documentary evidence (e.g., passport) evidencing foreign citizenship, *and* a copy of the individual's Certificate of Loss of Nationality of the United States (DS-4083); OR
    - A Form W-8BEN, documentary evidence evidencing foreign citizenship, *and* a reasonable written explanation
- For other indicia
  - If they say they are not US citizen/resident, FFI must get
    - Form W-8
    - Evidence that person is not a US person US resident address

FATCA Implementation-Entity Due Diligence

- Pre-existing Accounts
  - Accounts ≦ $250K
    - No review needed until account balance exceeds $1M
  - Accounts ＞ $250K
    - Review required
- New Accounts
  - Certification as to status

FATCA Implementation - Reporting

- No reporting for 2013
  - Notice 2013-43
- Reporting for 2014
  - Due March 31, 2015
    - Possible extensions to September 30
  - Model 1 IGA – Due September 30, 2015

FATCA Implementation-Fundamental Importance of Collaboration and Cooperation

- Underlying objective is <u>irrelevant</u> without a widely accepted means of implementation.
- Emphasize narrow objective of FATCA.
- Emphasize reciprocal/mutually beneficial aspects of limited information sharing among participating governments.
- Facilitate an environment whereby means of participation may be reduced to standardized form or agreement.

Model Intergovernmental FATCA Agreements ("IGAs") Published by IRS

- 1st Step:
  - Developed in collaboration with the governments of France, Germany, Italy, Spain and the UK to resolve legal obstacles raised in connection with direct FFI reporting of customer information to IRS under FATCA and potential conflicts in law.
- IRS will permit registration as long as the country is on an IRS list, even if any necessary ratification has not been completed.
- Applies to branch within country <u>only</u>.

IGAs (cont)

- IGAs signal unprecedented approach to sharing information.
  - <u>Question</u>: Should this be viewed as a harbinger for further sharing of tax information?
- Is the IGA a template for the future?
  - Likely to be the preferred route for the IRS over PFFI Agreements
    - Replaces the potential for 100s or 1,000s of PFFIs from each country with only a single IGA with that country
    - Extricates IRS from awkward posture of having to deal with FFI itself and shifts burden to adopting country's tax authority
  - <u>BUT</u> it does burden the IRS with additional workload under Reciprocal Model

IGAs (cont)

- Model I: FFI located in one of the partner countries must comply with FATCA by reporting information to taxing authority located in its <u>own</u> country once its government signs an IGA.
  - Potential conflicts arising in connection with direct IRS reporting eliminated
  - 2 Types:
    - Reciprocal – 2 way street
    - Non-reciprocal – 1 way street (only United States gets information)
- Model II: FFI located in one of the partner countries must comply with FATCA by reporting information “directly” to United States and agreeing to comply with the requirements of an FFI Agreement

IGAs (cont)

- Model II has many of same provisions as Model I with some exceptions:
  - With respect to pre-existing accounts identified as US accounts, FFI must seek to obtain consent of the account holder to report information to the IRS, and must advise the account holder that, absent such consent, aggregate information with respect to recalcitrant account holders (referred to as “Non-Consenting US Accounts”) will be reported to the IRS subject to exchange of information requests
  - Similar process with respect to Non-Participating FFIs
  - Local government must then provide the information within six months of the request

IGAs (cont)

- Treasury is discussing IGAs with more than 50 countries.
- IGA discussions fall into 3 different categories:
  - Countries with which Treasury is <u>in the process of finalizing</u> an IGA, and Treasury hopes to conclude negotiations by year-end;
  - Countries with which Treasury is <u>actively engaged</u> in a dialogue, and Treasury hopes to conclude negotiations with several of these countries by year-end; and
  - Countries with which Treasury is <u>working to explore</u> IGA options.

Jurisdictions negotiating IGAs

AMERICAS

- Mexico (Model 1 – 11/2012)
- **Canada**
- **Argentina**
- the Cayman Islands (lModel 1 initialed)
- Bahamas (Model 1)
- Bermuda (Model 2 – initialed)
- **Brazil**
- the British Virgin Islands
- Chile
- Saint Maarten

EUROPE, MIDDLE EAST, AFRICA

- Denmark (Model 1 – 11/2012)
- **Germany** (Model 1 – signed)
- Ireland (Model 1 – 12/2012)
- **Italy** (Model 1 - initialed)
- Norway (Model 1 – signed)
- Spain (Model 1 – not published yet)
- <u>Switzerland (Model 2 – 02/2013)</u>
- **United Kingdom** (Model 1 – 09/2012)
- **France** (Model 1)
- Finland
- Guernsey, Jersey (Model 1)
- Isle of Man (Model 1)
- the Netherlands
- Belgium
- Cyprus
- Estonia
- Hungary (Model 1 – signed)
- Israel
- Liechtenstein
- Malta
- the Slovak Republic
- Sweden
- **South Africa** (likely Model 1)
- the Czech Republic
- Gibraltar
- Lebanon
- Luxembourg
- Romania
- **Russia**
- Seychelles
- Slovenia

ASIA PACIFIC

- **Japan** (Model 2 - signed)
- **Australia**
- **Korea**
- Malaysia
- New Zealand
- Singapore
- **India**

<u>Source:</u> United States Treasury Publication of Nov. 8th, 2012 incl. later developments

Bold Direct G20 member
- IGA Model concluded
- In the process of finalizing an IGA
- Actively engaged in a dialogue
- Working to explore options

Advantages of IGAs

- IGA eliminated the need to have to withhold on recalcitrant holders
- IGA relaxed the time in which information must be given to the IRS:
  - In Notice 2013-43, the IRS stated it would not require reporting of 2013 taxpayer information from FFIs in Model 1 jurisdictions. For 2014 and thereafter, information is required within 9 months of end of the year (eliminating the need to ask for extensions to get this date).
- Annex 1: Contains 15 pages of due diligence procedures built upon the Proposed Regulations to follow to identify US reportable accounts.
  - But no reference to, e.g., ODFFIs; potential to elect regs?

Advantages of IGAs (cont)

- Model IGAs provide a work-around to those foreign entities whose countries of residence have data protection, privacy and other laws legally preventing foreign entities from complying with provisions of FATCA
- Annex II deals with non-reporting FFIs, e.g., those who will be deemed compliant, exempt beneficial owners, and exempt products
  - List of country specific entities/products

FATCA's Future

- IRS Notice 2013-69 (10/29/13) issued a draft FFI Agreement and also stated that changes will be made in regulations concerning:
  - Form 1099 reporting by payors other than a U.S. payor or a U.S. Middleman as defined in Treas. Reg. §1.6049-5(c)(5)
  - Coordination with Section 3406 (Backup Withholding) to provide that if there is withholding under FATCA that backup withholding will not apply

FATCA's Future - IRS Notice 2013-69 (cont)

- An FFI agrees in an FFI Agreement to:
  - Comply with information-gathering, verification and due diligence procedures with respect to the identification of accounts owned by U.S. Persons
  - Report annually certain information regarding its U.S. account holders
  - Deduct and withhold at a 30% rate on "pass-thru payments" made to "recalcitrant account holders" or to non-participating foreign financial institutions
  - Request a waiver from its U.S. account holders of any data protection laws that would prevent the FFI from obtaining the required information or, alternatively, close the account

FATCA's Future (cont.)

- Modification of transactional reporting requirements for foreign reportable amounts paid to non-participating FFIs to provide that a participating FFI is only required to report foreign reportable amounts paid with respect to a financial account that it maintains for a non-participating FFI. Such reporting will be required on Form 8966 instead of Form 1042-S

FATCA's Future (cont.)

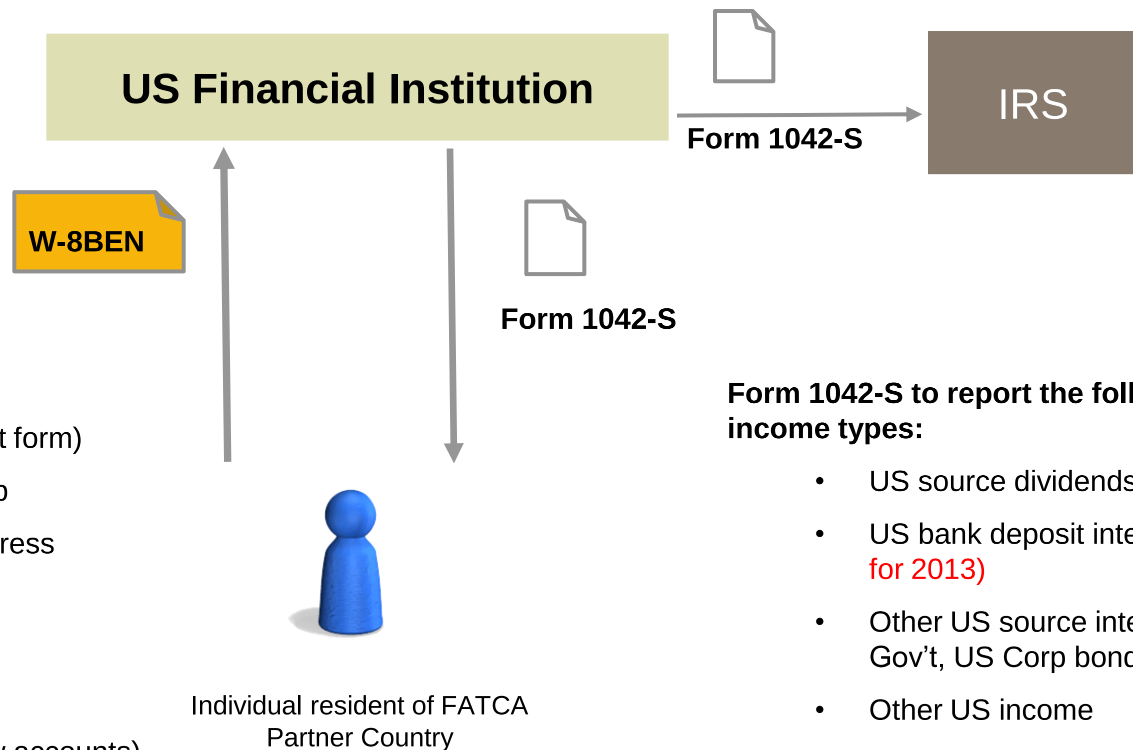
- Direct Reporting NFFEs or Sponsored Direct Reporting NFFEs:
  - These Regulations will allow passive NFFE to elect to file form 8966 directly with IRS instead of providing the information to the withholding agent or participating FFIs with which NFFE held financial account. Direct Reporting NFFE will have to register or obtain a GIIN and agree to comply with FATCA information reporting
  - Passive NFFE will not include an NFFE that acts as a Qualified intermediary, withholding foreign partnership or withholding foreign trust.

FATCA's Future (cont.)

- Modify definition of U.S. person in FATCA regulations to include a foreign insurance company that is not a specified insurance company and that elects pursuant to Section 953(d) to be subject to U.S. income tax as if it were a U.S. person.
- IRS will update relevant forms to reflect the above changes.

IGA Example #1 (Model 1 with reciprocity)

Individual account holder – resident of FATCA Partner Country



Form W-8BEN content:

- Non-US TIN (on draft form)
- Country of citizenship
- Perm. residence address

Due diligence "red flags":

- US place of birth (new accounts) (new)
- Only US telephone number (new)
- Other US indicia (e.g., US mailing address)

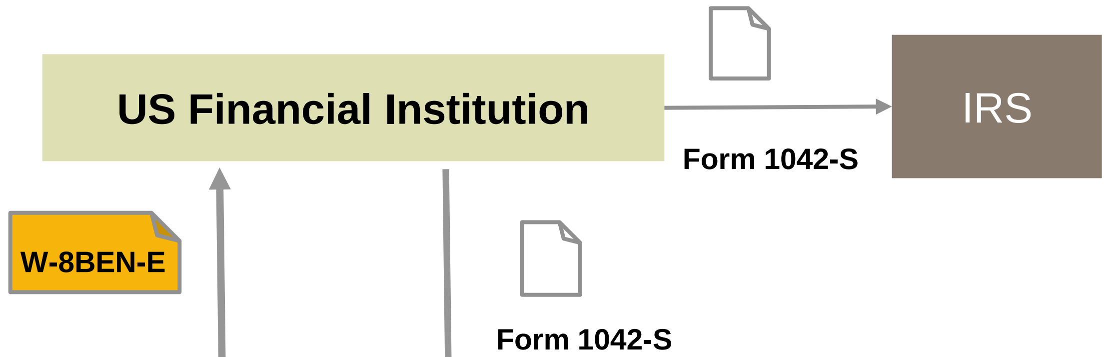
Form 1042-S to report the following income types:

- US source dividends
- US bank deposit interest (new for 2013)
- Other US source interest (US Gov't, US Corp bonds)
- Other US income

Information may be subject to exchange with FATCA Partner Country under IGA (Model 1 w/ reciprocity)

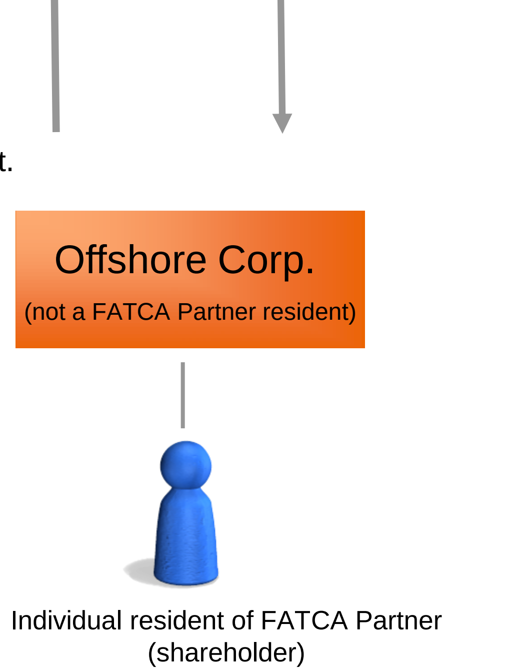
IGA Example #2

Entity account holder; *shareholder* is individual resident of FATCA Partner



Form W-8BEN-E possibilities:

1. **"Passive NFFE"** cert. on W-8BEN-E, plus rep there is no US ben owner
2. **"Owner documented" FFI"** cert. on W-8BEN-E, plus ben owner documentation (*passport or similar KYC is acceptable in lieu of W-8BEN?*) and "owner reporting statement"



Due diligence "red flags":

- Only US telephone number (new)
- Other US indicia (e.g., US mailing address)
- Conflicting information regarding FATCA status

Form 1042-S to report following income:

- US source dividends
- US Gov't, US Corp. interest
- Other US income

Bank deposit interest not reported (account holder is not an individual)

Information not subject to exchange under IGA

- Account held by Offshore Corp, not a resident of a FATCA Partner country