AMERICAN BANKERS ASSOCIATION BRIEFING/WEBCAST
FATCA
Tuesday, May 20, 2014 ▪ 2:00 – 3:30 p.m. ET
Post-program Questions and Answers

QUESTION	ANSWER
Question regarding whether or not the US Bank (USWA) needs to be concerned about payments (wire transfers, etc.) they process and send to customers and payees that have accounts in FFIs in Model 1 IGA countries and also PFFIs in Model 2 IGA countries (FFIs and PFFIs that have GIINs)? Since the country or individual Bank has signed an agreement with the IRS, once the US Bank (USWA) confirms the FFI has validated the GIIN is the due diligence of the US Bank (USWA) complete?	Wire transfers could be withholdable payments. Where the bank is making the transfer at the direction of a customer/other person (or entity), the bank would not be the withholding agent because the bank does not have custody/control over the funds. The person/entity that is directing the transfer would be the one to make the determination about whether or not the recipient is FATCA compliant and if not, request that 30% be withheld
As a small community bank, how do we know if this applies to us? What questions do we need to ask?	The question should be: who is impacted by FATCA? ➢ All payors (including foreign payors) of “withholdable payments” made to any foreign entities ➢ Withholding agents (anyone in the stream of payment) are liable for tax imposed under these provisions ➢ All foreign entities, regardless of whether they have US owners, that have US source FDAP income or hold US stock or securities Two categories of foreign entities ▪ Foreign Financial institutions (FFI) ▪ Non-Financial Foreign Entities (NFFE) Note that because of the broad nature of FATCA, if a US entity is not properly documented, such an entity may be classified as a foreign entity for FATCA purposes. So, even as a small community bank, if you have entity accounts for which you do not have a W9, you might need to be very aware of the FATCA rules.
Is there a minimal level of about $50,000 that is exempt from this regulation?	FFIs do not need to conduct due diligence on preexisting (i) individual accounts with values of $50K or less or (ii) insurance or annuity accounts with values of $250K or less. In determining balances, the FFI must aggregate all accounts, including jointly held accounts, held by the FFI and its affiliates.

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	FFIs need not conduct due diligence on preexisting entity accounts with balances of $250K or less (determined by aggregating all accounts held by the entity at the FFI and its affiliates) until the account balance exceeds $1M.
We are a small community bank, we don t bank FFIs but do bank Foreign Entities to which the new W8BEN-E will apply. The new form is 8 pages but it appear only a few section apply to a foreign entities. What is the logic to combining FFI with entities on the same form and expect a customer to know how to complete the 8 pages of the new form. We can barely get them to complete the one page form accurately	It was necessary to do this in order to separate the individual W8 from the Entity/FFI W8. Even though the form is 8 pages long, in most cases, only a few sections would apply to an entity. So for instance, we have made it so that if you fill out a particular section, you would be asked to skip other sections that do not apply to you. Also, note that FATCA applies to an NFFE, which is not an FFI
What is meant by the enhanced due diligence requirement for individuals effective 7/1/14?	FFIs should be developing the programs and procedures necessary to identify the U.S. persons among their account holders, owners and creditors and familiarizing themselves with the required documentation in order to be FATCA compliant.s
For US Bank foreign branches - which rules trump UWSA or IGA, for instance are the branches expected prima facie accelerated due diligence or high value due diligence?	USWA
If a US custodian has an account belonging to a FFI, would withholding apply at the time of the collection and posting of a dividend or when the money is actually remitted to another institution?	When the money is actually remitted to another institution
The wire transfer withholding responsibility response was somewhat confusing. Are these details documented somewhere?	See Treas. Reg sec 1471-2(a)(4)(1). Look at example in paragraph (B).
What is a GIIN?	Global Intermediary Identification Number. This is the number that an entity receives when it registers on the IRS FATCA portal, which is used to establish the entity's FATCA status for withholding purposes and to identify the entity for reporting purposes under the regulations. The

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	GIIN may also be used by reporting model 1 FFIs to satisfy reporting requirements under local law
For reporting and or reporting, please define "what is a payment"?	See definition of "withholdable payment" below
Where do we send comment on the form?	The Form W-8 has been issued in final version (comment period is over). However, the IRS is still accepting substantive comments on the FATCA regs. Send submissions to: CC:PA:LPD:PR (REG–130967–13), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (REG–130967–13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent
Can you clarify your earlier mention of wire transfers? We are primarily concerned with passive income for NFFEs. Is there any correlation?	Wire transfers could be withholdable payments. Where the bank is making the transfer at the direction of a customer/other person (or entity), the bank would not be the withholding agent because the bank does not have custody/control over the funds. The person/entity that is directing the transfer would be the one to make the determination about whether or not the recipient is FATCA compliant and if not, request that 30% be withheld.
Does an expired W8 equate to absence of valid documentation and as such require 28% backup withholding for bank deposit interest?	Yes

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The thresholds to review accounts apply to individual and entities?	yes, there are thresholds for both individual and entity accounts. However, the threshold for entities is lower than that for individuals.
Accounts with US indicia that do not provide a waiver must be closed by June 29, 2014?	No.
What's the difference between passive and non-passive entities?	I assume you are asking the difference between passive NFFE and active NFFE. An active NFFE is an excepted NFFE, such as a publicly traded NFFE. Thus, for an active NFFE, more than 50% of its income should not be derived from passive activities (such as dividends, interest, rents, annuities, royalties, etc)
For new accounts opened for a foreign entity and foreign individuals, if they complete the W8 and we find out after that there is a US indicia, what would be the course of action?	For individuals – obtain documentary evidence (e.g., foreign passport); or written explanation to support foreign status. For entities – obtain documentation that substantiates that the entity is organized or created under the laws of a foreign country (e.g., Articles of Incorporation).
Do we obtain the supporting documentation for foreign indicia although they have signed W8s?	Yes
We are a US bank, that receives foreign sourced income as trustee, and then process wires to foreign entities. As a US withholding agent, are we required to withhold on this foreign-sourced income, since it flows through the US?	Wire transfers could be withholdable payments. Where the bank is making the transfer at the direction of a customer/other person (or entity), the bank would not be the withholding agent because the bank does not have custody/control over the funds. The person/entity that is directing the transfer would be the one to make the determination about whether or not the recipient is FATCA compliant and if not, request that 30% be withheld.
How are we expected to confirm the Substantial Presence Test? Can we have the customer just sign a certification at account opening?	You could ask the individual to confirm that they meet the substantial presence test
Can the free form written explanation curing US indicia, supersede the requirement of documentation related to SPT or closer connections	Yes

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and VISA requirements?	
Is there any process for the claims of withholding payment made by the customers?	They can file for a refund with the IRS
Do FATCA regulations require a scan of current account databases?	FATCA requires due diligence/review of all your pre-existing accounts. For FFIs, they need to search for their U.S. account holders and determine account balances and be prepared to start reporting. For USFIs, they need to check documentation of their entity account holders to determine which ones are FFIs or NFFEs. The next review would be to determine whether they are making any withholdable payments to these FFIs or NFFEs and whether the FFIs are PFFIs, and whether the NFFEs are FATCA compliant
Can banks start using the new W8 forms even though we don't have instructions?	Yes
What are the penalties for under withholding or failure to report?	For under withholding – 30% of payment made For FFI failure to report – 30% withholding
Why does a TFI has to withhold on payments made to foreign customers? Is it because of the presumption rule?	I am not quite sure I understand this question. However, I will assume the question is asking why would a USFI withhold on payments made to a foreign customer? If so, the answer is that FATCA requires a USFI that is making a withholdable payment to a foreign customer that meets the definition of an FFI to withhold 30% of such payment unless the FFI has entered into an agreement with the IRS to report on its US account holders. Also, a USFI is required to withhold on a foreign customer that is an NFFE unless the customer has provided certain certifications regarding its U.S. owners.
Can you specifically define a withholdable payment?	Any payment of a type ordinarily subject to withholding tax (e.g., FDAP), including interest, dividends, rents, premiums, and annuities

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	from sources within the US. Also includes any gross proceeds from the sale of any property that could produce interest or dividends from sources within the United States Note - Normally such gains are not subject to US income or withholding tax in the case of a foreign seller not engaged in a US business
As a US withholding agent, what documentation do we need on a non-Grantor Trust? Will a W9 for the Trust suffice, or would we also need W9's (or W8's) for all beneficiaries?	You need a W9 for only the trust
If we have a US citizen living abroad with an agency account at our institution that directs us to make payment from his account held in our trust department to his bank account in a foreign country is this a potentially reportable transaction?	Not for FATCA purposes
Do we need to obtain that bank's GIIN #?	Yes, if it is foreign bank and you are making withholdable payments to the bank
After implementation, US interest payments made to foreign entities will be 30% and to foreign individuals will be 28%?	Withholding will still be at 30% (backup withholding is 28%). However, bank deposit interest paid to undocumented foreign intermediaries or flow through entities are presumed paid to NPFFIs and are subject to 30% withholding
If the Bank identifies a foreign entity or individual that certifies being resident of a non-participating jurisdiction, do we have to automatically withhold?	You do not withhold unless the entity falls within the definition of a nonparticipating FFI. You do not withhold on an individual under FATCA. A non-participating FFI would net be on the published IRS list (this is an FFI that has not entered into an agreement with the IRS to report on its US account holders). You would withhold on payments to such an FFI. Also, an FFI that is a Model 1 FFI would not be subject to withholding. Thus, the answer is that withholding is not automatic for

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	an FFI – an analysis must be done to determine whether you should withhold on payments to an FFI
If USFI pays deposit interest to foreign individual, since deposit interest is exempt from Chapter 3 withholding, does the USFI still need to review account for lack of foreign phone number and US place of birth?	The individual should already have been documented as foreign with a W8. FATCA withholding does not apply to payments made by USFIs to individuals
Does the GIIN have to be validated annually? From the date originally provided, annually, or calendar year end?	Yes. Calendar year end
Does the Substantial Presents Test include intended presence days in the US? Example: If I have been present 15 days this year in the US but intend to be here 230 days would I still be considered a non-resident alien at this time or would I now need a TIN and sign the W-9?	The test applies as of the date you open the account, not on a future basis