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# FATCA Basics for USFIs and FFIs

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# FATCA Overview

- FATCA (Foreign Account Tax Compliance Act), enacted as part of the Hiring Incentives to Restore Employment (“HIRE”) Act in March 2010, added a new Chapter 4 to the Code.
- FATCA aims to reduce tax evasion by U.S. persons with respect to offshore financial assets.
- The goal is to provide increased reporting, not collect tax, but the “hammer” is a new 30% withholding tax.

# FATCA Objective

- The goal of FATCA is to induce foreign financial institutions (FFIs) to report U.S. account owners to the IRS by imposing a 30% U.S. withholding tax on certain payments to FFIs (including banks, brokers, custodians and investment funds) that fail to comply with this reporting obligation.
- FATCA also imposes certain reporting obligations on entities that meet the definition of non financial foreign entities (NFFEs).
- The withholding obligation is imposed on anyone that makes certain types of payments to an entity that meets the definition of an FFI or NFFE.
- The reporting and withholding rules under FATCA will be phased in between 2014 through 2017



# Who is Impacted?

- 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).
- U.S. financial institutions (USFIs) that have foreign entity accounts that could be FFIs or NFFEs
  - USFIs that do not have foreign entity accounts should be aware that their US entity accounts could be deemed to be foreign if there are no forms W-9 on file for such accounts. Thus, it is very important that all USFIs conduct due diligence and account reviews, rather than simply dismiss FATCA because they do not have any foreign entity account customers.

# Where are we now?

- Proposed Regulations released February 8, 2012.
- Final Regulations issued on January 17, 2013.
- Technical Corrections and Revisions made to the final FATCA Regulations in January 2012.
- Harmonizing Regulations (the “Harmonization Rules”) to bridge existing chapter 3 and Chapter 61 rules to the new FATCA rules issued in January 2014.
- Additional Technical Corrections expected.
- Revised Forms W-8 and W-8BEN-E released – awaiting for some Instructions.
- Notice 2014-33 announces transition and good-faith effort waivers of penalties

# “Financial Institution”

- FFI must enter into agreement with IRS and comply with due diligence, reporting and withholding requirements regarding financial accounts held by U.S. persons or U.S. owned foreign entities.
- FFI is defined very broadly to include any entity that:
  - accepts deposits in the ordinary course of a banking or similar business;
  - holds, as a substantial portion of its business, financial assets for the account of others;
  - Is an “Investment Entity;” or
  - is a “Specified Insurance Company.”

# Intergovernmental Approach to FATCA

- Intergovernmental Agreements (IGAs) between the U.S. and foreign jurisdictions used for FATCA implementation.
- IGAs intended to facilitate the exchange of information between the countries' tax authorities and financial institutions.
- Over 60 IGAs are currently in effect between the U.S. and foreign jurisdictions.
  - Only U.K. has issued local IGA guidance to date
- Two types of IGAs – Model 1 and Model 2
- In a “Model 1” reciprocal IGA, each financial institution reports the information to its own government, and the two governments exchange the information with each other.
- In a “Model 2” non-reciprocal IGA, the information will only come from the foreign country to the U.S. and the FFI will report directly to the IRS.

# Portal Registration

- The IRS opened a web-based to enable FFIs to register with the IRS to confirm they are compliant with FATCA reporting requirements and are, therefore, “Participating FFIs (“PFFI”).
- Thus, the FFI must be ready and able to complete the registration in a relatively short time frame.
- FFIs issued Global Intermediary Identification Numbers (“GIIN”) to establish compliance.
- IRS will post “IRS FFI List” of participating FFIs and registered deemed compliant FFIs (including Model I IGA FFIs).
- Financial institutions can register as sponsoring entities
- Sponsoring entity will provide sponsored entity information and obtains GIIN for sponsored entity.
- If sponsoring entity is an FFI itself, and needs to become a participating FFI (or registered deemed compliant, or Model I IGA), it needs to register separately with its own GIIN.



# Foreign Branches of USFIs

- Must register through the Portal
- If branch is Model I FFI, register and obtain GIIN.
- If branch is QI, register through portal to renew QI (regardless of whether branch is Model I FFI)
- Non-QI branch in Model 2 country or non-IGA country, not required to register with the IRS.

# Timeline (2013-14)

- 6/30/2014 – cutoff date for outstanding accounts and obligations to be treated as “preexisting” accounts or “grandfathered” obligations. All accounts opened on or after 7/1/2014 are “new” accounts.
- 7/1/2014 – Withholding begins on U.S. source FDAP payments made to Non-participating FFIs (NPFIs) and Non-financial Foreign Entities (NFFE). Also cutoff date for grandfathered obligations.

# Timeline (cont.)

- Participating FFIs and withholding agents have until December 31, 2015 to document all pre-existing account holders (that are not prima-facie FFIs)
- First reporting with respect to 2013 and 2014 due by March 31, 2015.
- No withholding on gross proceeds until January 1, 2017 and not before January 1, 2017 on foreign passthru payments
- Not required to withhold before January 1, 2016 with respect to pre-existing obligation held by an FFI if there's no documentation indicating status as a non-participating FFI or as a prima facie FFI.

# Notice 2014-33

- On May 2 the IRS released Notice 2014-33, granting a 6-month extension for entity accounts opened after July 1 and before December 31, 2014 to be treated as “preexisting accounts.” The extension also will apply to the due diligence required under IGAs.
- The IRS also announced that calendar years 2014 and 2015 will be considered a “transition period” for purposes of enforcement and administration, during which the IRS will not impose penalties for withholding agents making “good faith efforts” to comply with FATCA.

# Notice 2014-33: Good Faith Efforts

- If a withholding agent makes “good faith efforts” to comply with its FATCA obligations, then during calendar years 2014 and 2015, the IRS will provide transitional relief from penalties and enforcement.
- The notice provides that withholding agents who fail to make good faith efforts to comply with FATCA will not be given any relief from IRS enforcement during the transition period.

# Notice 2014-33: Entity Accounts

- Entity accounts opened between July 1 and December 31, 2014 do not need to be documented until July 1, 2016.
- “Prima facie FFIs” must still be documented by December 31, 2014.
- Entity accounts opened on or after January 1, 2015 must be documented and classified for FATCA purposes, or they will be subject to 30% FATCA withholding.

# Notice 2014-33: Individual Accounts

- Individual accounts opened after July 1, 2014 must be documented (does not apply to USFIs).
- Individuals may provide either the 2006 or 2014 version of Forms W-8BEN and W-8ECI until August 31, 2014.
- Forms signed after this date must be the 2014 version of the form.
- For accounts opened after July 1, 2014, the withholding agent must review the account records for U.S. indicia.
- If a form was validated prior to July 1, 2014, the withholding agent is not required to go back and check for U.S. indicia, unless it learns of a change in circumstance.

# BANKING

## FATCA Rules Applicable to Banks and Similar Financial Institutions



# Which entity is a “Depository Institution”?

- A depository institution is an entity that accepts deposits in the ordinary course of a banking or similar business, and is regularly engages in one or more of the following activities:
  - Provides loans and extends credit
  - Purchases and sells obligations, notes, drafts, etc.
  - Issues letters of credit
  - Provides trust or fiduciary services
  - Finances foreign exchange transactions, or
  - Enters into, purchases or disposes of finance leases or leased assets

# Depository Institution (cont.)

- A depository institution does not include an entity that solely accepts deposits as collateral or security pursuant to a sale or lease of property or pursuant to a similar financing arrangement
- The definition for FATCA proposes is broader than the definition of a “bank” under Section 581
- Whether the entity is subject to local banking laws is relevant but not determinative.

# “PFFI” – Participating FFI

- To avoid the 30% withholding, an FFI (and all of its affiliates) must:
  - Enter into an agreement with the IRS to comply with certain requirements (thereby making the FFI a PFFI)
  - Under the agreement, a PFFI will be required to:
    - Obtain information on all account holders to determine which accounts are US accounts.
    - Comply with required due diligence/verification procedures and certify completion of such procedures.
    - Report information on US accounts to the IRS.
    - Deduct and withhold a 30% tax on any “passthru payment” to recalcitrant account holders or other FFIs that are not PFFIs or deemed compliance FFIs.
    - Comply with IRS information requests.
    - Attempt to obtain a waiver of applicable bank secrecy or other information disclosure limitations or close the US account.

# Exceptions from FFI Status

- Certain retirement plans (one of the “exempt beneficial owner” categories)
- Not-for-profit organizations (one of the “exempted NFFE” categories).
- Holding company, treasury company, treasury centers and captive finance company (including combination of these activities), that are part of a non-financial group (one of the Excepted NFFE categories); This exception doesn’t include entities formed by private equity funds
- Inter-affiliate FFIs.

# Deemed Compliant FFI

- FFIs can avoid 30% withholding if they are deemed compliant FFIs.
  - Example: Non-US local financial entities that serve local customers/investors.
- Two types: Registered Deemed Compliant and Certified Deemed Compliant.
- Registered deemed certified FFIs are still required to meet certain requirements including performing diligence to identify and eliminate US accounts and registering with IRS
- Certified deemed compliant FFIs are required to certify status to the withholding agent
  - Example: Small, local, non-US banks

# Local FFIs

- Includes insurance companies, credit unions and investment entities
- Regulated as a financial institution in their jurisdiction.
- No solicitation of customers outside country of incorporation.
- May have a “back office” in another jurisdiction (provided not advertised)
- Must not discriminate against opening accounts for U.S. persons.
- All members of the EAG must be a local FFI in same country (except for NFFE members and retirement funds)

# Registered Deemed Compliant FFIs

- Qualified Credit Card Issuers that agree to prevent customer from having a deposit in excess of \$50,000.
- Sponsored FFIs for which a “sponsoring entity” agrees to perform all due diligence, withholding, reporting and other requirements the sponsored FFI would have been required to perform if it were a participating FFI.

# CDC FFIs/EAGs

- Certified Deemed Compliant FFIs:
  - Non-registering local banks
  - Includes certain credit unions
  - Threshold for local assets is \$175 million for the FFI and \$500 million for the EAG
- Expanded Affiliate Group
  - All FFIs within the EAG must be participating or deemed compliant FFIs



# Due Diligence

- FATCA effectively recruits non-U.S. financial institutions that hold U.S. assets, either for their own account or for their clients, as U.S. revenue agents.
- The due diligence that an FFI must complete on its accounts in order to be FATCA-compliant is extraordinary.
- From a high level, there are six categories of tasks: identifying (i) “United States accounts,” (ii) each account holder that is a “specified United States person”, (iii) each “United States owned foreign entity”, (iv) each “substantial United States owner” of such entity, (v) the nature of each foreign entity as an FFI (and if so, what type), non-FFI, governmental or other exempt entity, corporation, partnership, trust, etc., and (vi) other definitional requirements that need to be identified.

# Due Diligence (Cont.)

- FFIs must conduct due diligence to determine their U.S. account holders
- The regulations allow FFIs to limit due diligence to electronic records, unless the account has a balance or value in excess of \$1M.
- Preexisting accounts (accounts outstanding before 6/30/14) with values of less than \$50K and insurance policies with values of \$250K or less are excluded from due diligence.
- Account balances not maintained in USD are valued at the spot rate in effect on the last day of the preceding year.
- FFIs may rely on their existing account opening procedures for identifying U.S. accounts unless the new account is a “passive investment entity” or has indicia of U.S. ownership.
- New account of pre-existing customer is treated as pre-existing obligation if FFI or withholding agent treats new and old obligation as one obligation for purposes of applying AML due diligence

# Individual Accounts

- FFIs do not need to conduct due diligence on preexisting (i) accounts with values of \$50K or less or (ii) insurance or annuity accounts with values of \$250K or less.
- FFIs with accounts with higher values but less than \$1M may limit due diligence for U.S. indicia to electronic searches.
- In determining balances, the FFI must aggregate all accounts, including jointly held accounts, held by the FFI and its affiliates.
- If an indicia of U.S. ownership is found, the FFI must conduct additional due diligence.
- FFIs holding accounts with values in excess of \$1M must search non-electronic files for indicia of U.S. ownership and must make an inquiry of the relationship manager.
- FFIs may rely upon their "know your customer" (KYC) and anti-money laundering (AML) procedures to determine if a new account is owned by a U.S. person.

# Entity Accounts

- 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.
- The FFI can rely on its KYC/AML records to determine whether the account holder is a U.S. person.
- If the account balance is \$1M or less, the FFI can rely on its electronic records to determine whether the entity has substantial U.S. owners.
- If the account balance is in excess of \$1M, the FFI must make an independent search to determine if the entity has U.S. owners or obtain certification from the entity that it does not have substantial U.S. owners.
- The FFI must obtain certification regarding the substantial U.S. owners from the entity opening the account.

# Financial Account

- FATCA reporting is required only with respect to “United States Accounts.”
- Definition of Financial Account:
  - A U.S. account is any “financial account” held by a U.S. person or a U.S.-owned foreign entity.
  - Accordingly, if an account falls outside of the definition of a “financial account,” it is exempt from FATCA due diligence and reporting.
- Categories of Financial Account:
  - Depository accounts in a financial institution.
    - A credit balance with respect to a credit card account issued by a credit card company is a depository account.
  - Custodial accounts.
  - Non-publicly traded equity or debt in certain financial institutions.
  - Cash value insurance contracts and annuity contracts.

# Financial Accounts (Exclusions)

- Escrow accounts
- Negotiable and traded debt instruments
- Advance premiums and deposits related to insurance contracts with premiums payable annually (not to exceed the annual premium)
- Equity and debt interests in Financial Institutions if regularly traded on an established securities market (but included if held in a non-publicly-traded investment entity which is professionally managed by depository, custodial or specified insurance company, or if held in hedge funds, mutual funds, etc.).
- Retirement and pension accounts (regardless of whether from government, employer, employee contributions and regardless of whether contributions relate to earned income)

# Withholdable Payments

- “Withholdable payments” under FATCA generally constitute (i) U.S. source “fixed, determinable annual or periodic (“FDAP” income (generally passive investment income) and (ii) gross proceeds from disposition of property giving rise to U.S. source interest or dividends.
- Passthru payments and payments made under a “Section 871(m) contract” (i.e., equity-linked swaps, securities loans and certain repos) will later become withholdable payments subject to further guidance.
- If a payment is grossed up in respect of FATCA withholding tax, the gross-up payment is treated as U.S. source FDAP income.

# Withholding on Gross Proceeds

- Delayed until January 1, 2017
- Clearing organizations can determine gross proceeds based on net amount paid or credited to a member's account
- Exclusion of proceeds from transactions not subject to recognition under Sec. 1058.



# Exceptions from Withholdable Payments

- Nonfinancial Payments for: (i) services, including wages and other forms of employee compensation, such as stock options, (ii) the use of property, (iii) office and equipment leases, (iv) software licenses, (v) transportation, (vi) freight, (vii) gambling winnings, (viii) awards, (ix) prizes, (x) scholarships, and (xi) interest on outstanding accounts payable arising from the acquisition of goods or services.
- Proceeds from sales of property that gives rise to one of the above categories is also excluded.
- Payment of U.S. source FDAP income made with regard to an offshore obligation prior to 1/1/17, by a person that is not acting as an intermediary with regard to the payment.

# Wire Transfers

- In general, not “withholdable” payment to the USFI that makes the transfer at the direction of another.
- The person/entity that directs the transfer is considered to have custody/control over the funds, and therefore, should make the determination of whether to withhold on the foreign payee.
- See Treas. Reg. sec 1471-2(a)(4)(1) - example in paragraph (B).

# Withholding Obligation

- FATCA withholding is scheduled to begin on 7/1/14 with respect to U.S. source FDAP payments, which includes interest, dividends, rents and other investment type payments, and on 1/1/2017 for gross proceeds and pass-through payments.
- The FATCA withholding will be in addition to the “regular” withholding on such U.S. source FDAP payments imposed by Chapter 3 of the Code.

# Payments to a US Branch of an FFI

- Withholdable payments to U.S. branch of an FFI is treated as payment to a U.S. person if treated as such under the section 1441 regulations (U.S. branch is treated as payee)
- However, payments made to the U.S. branch are not treated as made to U.S. person for purposes of the withholding certificate that the payee must provide to the withholding agent (payee must provide an IRS Form W-8, not W-9).

# Grandfathered Obligations

- Payments made with respect to “grandfathered obligations” are not subject to FATCA withholding.
  - An “obligation” includes any legal agreement that produces or could produce withholdable payments other than an instrument treated as equity for US tax purposes or legal agreement that lacks a definitive expiration or term, that is outstanding on 7/1/14 and not materially modified thereafter.
- A material modification will create a “new” obligation for this purpose
- Includes the following:
  - Section 871(m) transactions executed within 6 months of regulations
  - Lines of credit and revolving credit facility – provided that the material terms are fixed
  - Certain derivatives transactions
  - Foreign passthru payments if the obligation is executed within 6 months of the regulations.

# Passthru Payments

- Any withholdable payment or other payment to the extent attributable to a withholdable payment.
- Withholding will not begin before 1/1/17, and the IRS will issue specific guidance before that date.
- Passthru payments may be recharacterized as US source “withholdable payment” even if the payment is made between two foreign persons

# Documentation for Withholding and Due Diligence

- Needed for account due diligence and to provide to withholding agents.
- W-9/W-8BEN were modified for Chapter 4 certifications
- Additional types of documentation may be permitted in certain circumstances (e.g., documentary evidence, AML/KYC)
- The IRS will publish the list of FFI-GIINs, which will be required to be referenced.
- Withholding agent can rely on status of participating or registered deemed compliant FFI by checking GIIN against IRS FFI list.
- Documentation can remain valid indefinitely (need not be refreshed) for specified low risk categories

# Documentation (cont.)

- Withholding agents may rely on:
  - Other documentary evidence (rather than W-9) to establish U.S. status of payee
  - certain presumption rules in lieu of documentation
  - documentation for multiple accounts of same payee if aggregate accounts and share information
  - documentation supplied by common agent (fund advisor or principal underwriter) for multiple parties
  - third party data provider
  - certification provided by introducing brokers who are QIs or participating FFIs if acting as agent of the payee.
  - electronic submissions of withholding certificates with handwritten signatures (need not be certified or notarized)



# Certification/Verification by the FFI

- PFFIs rely on a responsible officer to establish a compliance program that includes policies, procedures, and processes sufficient for the PFFI.
- The PFFI must subject its compliance program to periodic review.
- The responsible officer may be any officer of any PFFI or reporting Model 1 FFI in the PFFIs expanded affiliated group with sufficient authority to fulfill the duties.
- The responsible officer may designate others to implement and oversee the compliance with the verification requirements, but must make any required certifications to the IRS.
- The responsible officer is required to certify to the IRS that it maintains effective internal controls and that there were no material failures during the certification period, or any material failures that did occur were corrected.

# Material Failure

- A material failure is a failure of the PFFI to fulfill the requirements of the FFI agreement if the failure was the result of a deliberate action by the PFFI to avoid the requirements of the FFI agreement or was an error attributable to a failure to implement sufficient internal controls.
- If a material failure occurring during the certification period has not been corrected, or if an event of default has occurred, a responsible officer may instead make a qualified certification.
- In limited circumstances, some material failures will not result in an event of default.

# IRS Review of Compliance

- The regulations provide for general inquiries under which the IRS contacts the PFFI to request additional information regarding the information reported on the returns filed by the PFFI, and for inquiries when the IRS determines in its discretion that there may have been substantial non-compliance with an FFI agreement.
- The IRS expects that inquiries regarding substantial non-compliance will not be made on a routine basis.
- If a determination that there may have been substantial noncompliance is made, the IRS may inquire as to the FFI's compliance with certain requirements of the FFI agreement and may request information necessary to verify the PFFI's compliance with the FFI agreement, such as a description of the PFFI's procedures for conducting its periodic review.
- The IRS may also request the performance of specified review procedures (including an external audit).

# Event of Default

- If the IRS determines, based upon its review, that the FFI has not substantially complied with the FFI agreement, it will deliver a notice of event of default.
- An event of default does not result in automatic termination of the FFI agreement.
- If the IRS becomes aware of an event of default, it will deliver a notice of default to the PFFI and allow it to develop a plan to remediate the default.
- If the PFFI fails to respond to the notice or comply with an agreed-upon remediation plan, the IRS may terminate the FFI's PFFI status within a reasonable period of time, subject to an FFI's request for reconsideration of termination by written request to the LB&I Director for Foreign Payments Practice.

# IGAs

# Model I Agreement

- Two versions – reciprocal and non-reciprocal
- In a reciprocal agreement, the U.S. agrees to report on foreign country residents who have accounts in U.S. financial institutions (i.e., a two-way exchange of information).
- In non-reciprocal, agreement, only the foreign country agrees to provide information to the US.

# “Depository Institution” under Model 1

- Accepts deposits in ordinary course of banking or similar business
- Custodial Institutions – entity holding financial assets for the account of others as a substantial part of its business (attributable gross income of 20% for prior three-year period)
- Financial Institution has duties and obligations imposed with respect to Reportable Accounts
  - Reportable Accounts – Financial Accounts held by Specified U.S. Persons or by a Non-U.S. Entity with one or more Controlling Persons (natural persons who exercise control over an entity) that are Specified U.S. Persons. (compared to 10% threshold in the regulations- in alliance with KYC/AML procedures)

# “Financial Account” under Model 1

- An account maintained at a Financial Institution including:
  - In the case of an investment entity, any equity or debt instrument in the Financial institution (except if regularly traded on an established securities market)
  - In the case of any other Financial Institution, any equity or debt interest in the Financial Institution (other than regularly traded), if the value of the interest is determined directly or indirectly, primarily by reference to assets that would give rise to U.S. source withholdable payments and if the class of interests was established for the purpose of avoiding FATCA reporting.



# Reporting Obligations under Model I

- FATCA partner Financial Institution must report to **its Government** (which will then report to the IRS) the information for all Reportable Accounts:
  - With respect to 2013 and 2014, the name, address, TIN, account number, account balance.
  - With respect to 2015, also gross amount of dividends, interest paid in Custodial Accounts, as well as interest in Depository Accounts
  - With respect to 2016 and subsequent years, all of the above plus gross proceeds.
- Information must be exchanged within nine months after the calendar year (for 2013, not later than September 30, 2015)
- Amount and characterization of payments made to such accounts may be determined under local country's tax laws

# Application of FATCA to IGA FFIs

- FFI is deemed to comply with the FATCA rules under the Code and regulations and will not be subject to withholding on receipt of U.S. source (FDAP) withholdable payments.
- The FFI need not sign an FFI Agreement with the IRS
- FFI acting as QI which assumes primary withholding tax responsibility must withhold 30% of any U.S. source (FDAP) Withholdable Payment to non-participating FFIs.
- All other FFIs acting as intermediaries which make payments of Withholdable Payment to a non-participating FFI, must provide to the immediate payor of the income information required for the withholding and reporting to occur with respect to the payment.
- No requirement to withhold tax with respect to recalcitrant account holders or to close the account

# Related Entities and Branches under Model I

- The concept of “related party” is broader than “expanded affiliated group”, i.e., control or common control of more than 50%.
- Related entities or branches in non-IGA jurisdictions will not prevent IGA FFI from maintaining status as compliant FFI (unlike Regulations) provided certain conditions are met:
  - FFI treats branch or affiliate as a separate non-participating FFI (and the branch or affiliate identifies itself as such);
  - Each branch or affiliate identifies its U.S. accounts and reports accordingly under Sec. 1471; and
  - Each affiliate or branch does not solicit U.S. accounts held by persons that are not residents of the country of the affiliate or branch or accounts held by non-participating FFI’s located outside its jurisdiction

# Other Model I Rules

- Withholding on gross proceeds and foreign passthru payments reserved until the countries come to a mutually agreeable approach
- Annex I sets out the elaborate due diligence obligations for identifying U.S. reportable accounts and on payments to non-participating FFIs (generally, in accordance with the regulations).
- Annex II fleshes out non-reporting FFIs, e.g., those who will be deemed compliant (small local FFIs, collective investment vehicles, non-profits), exempt beneficial owners (retirement funds), and exempt products (retirement or other tax favored accounts or products).
- Retirement plans set forth in Annex II will be considered deemed compliant or exempt beneficial owner.

# Model II Agreement

- Unlike the Model I IGA, the Model II IGA calls for registration with, and direct FFI reporting to, the IRS.
- The Model II contemplates direct reporting by the FFI to the IRS with group or aggregate reporting of recalcitrant account holders for subsequent exchange of information upon request
- Model I involves the local government while Model II involves direct reporting by the FFI to the IRS without local government involvement

# Model II Agreement (cont.)

- The Model II IGA has many of the same provisions as the Model I IGA with some exceptions:
  - With respect to pre-existing accounts identified as U.S. 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 U.S. Accounts”) will be reported to the IRS subject to exchange of information requests
  - Similar process with respect to Non-Participating FFIs

# Model II Agreement (cont.)

- Local government must then provide the information within six months of the request
- FFI otherwise treated as FATCA compliant
  - Not subject to withholding
  - Not required to withhold on recalcitrant account holders nor to close the account
  - Not required to withhold on foreign passthru payments
- Similar Annex I and Annex II provisions as in Model I IGA (with some twists).
- Model I IGAs do not require compliance with Final Regulations (but may elect to do so)
- Model II IGAs must comply with Final Regulations as modified by IGA

# More Information

- IRS has created a FATCA page on IRS.gov.
  - Contains regularly updated FAQs/Answers.
- Look out for more ABA web briefings
- Take a look at some FATCA materials and Q&As posted on ABA FATCA webpage.
- Contact ABA if you need more information.