

# Why You Still Need to Care about FATCA

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# FATCA: Foreign Account Tax Compliance Act

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# FATCA: Where It Began

Public Law 111–147  
111th Congress

An Act

Making appropriations for the Departments of Commerce and Justice, and Science,  
and Related Agencies for the fiscal year ending September 30, 2010, and for  
other purposes. Mar. 18, 2010  
[H.R. 2847]

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,* Hiring Incentives

\* \* \*

## TITLE V—OFFSET PROVISIONS

### Subtitle A—Foreign Account Tax Compliance

#### PART I—INCREASED DISCLOSURE OF BENEFICIAL OWNERS

##### SEC. 501. REPORTING ON CERTAIN FOREIGN ACCOUNTS.

(a) IN GENERAL.—The Internal Revenue Code of 1986 is amended by inserting after chapter 3 the following new chapter:

##### “CHAPTER 4—TAXES TO ENFORCE REPORTING ON CERTAIN FOREIGN ACCOUNTS

“Sec. 1471. Withholdable payments to foreign financial institutions.

“Sec. 1472. Withholdable payments to other foreign entities.

## History of FATCA

- FATCA was the result of a “perfect storm” of world events, technological changes, the economic crisis and political pressure to curb offshore tax abuse
- Existing law and administrative authority were insufficient to detect and deter offshore tax evasion
- FATCA is a sea change approach to international tax compliance intended to thwart offshore tax evasion by giving the IRS tools to identify US owners of foreign accounts and entities
- An innovative approach attempting to overcome sovereign barriers to encourage voluntary compliance

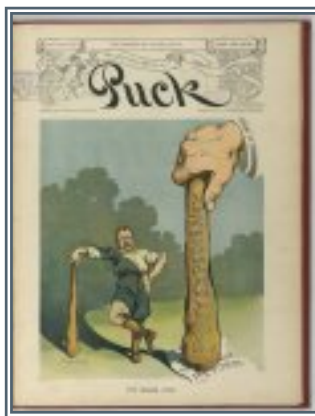
## FATCA: Nuts and Bolts

If you have US source payments, you need to care about FATCA

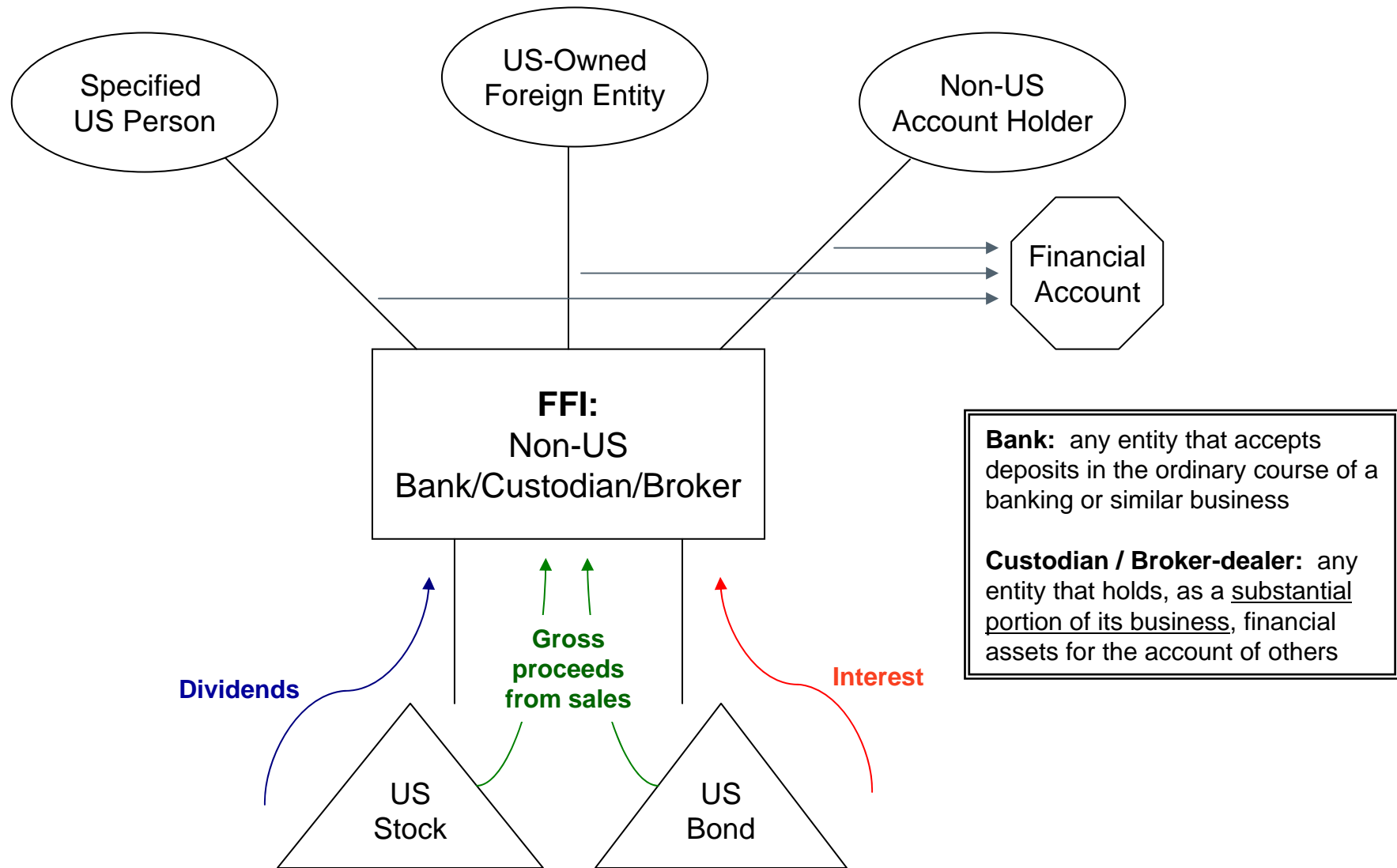


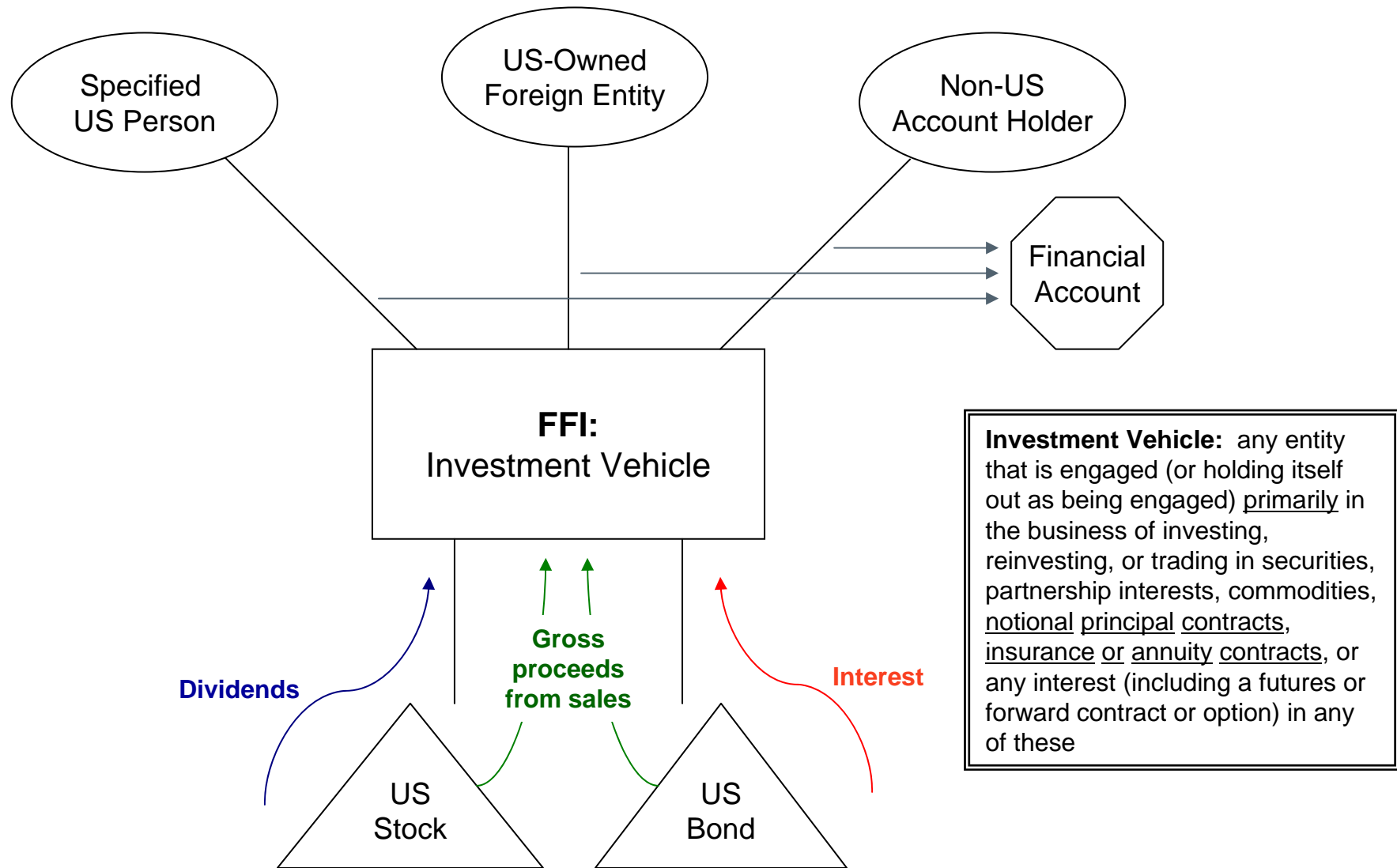
## FATCA: Nuts and Bolts

**Carrot:** Foreign financial institutions (“FFIs”) agree to tell the IRS about their US accounts; non-financial foreign entities (“NFFEs”) agree to tell withholding agents about their substantial United States owners

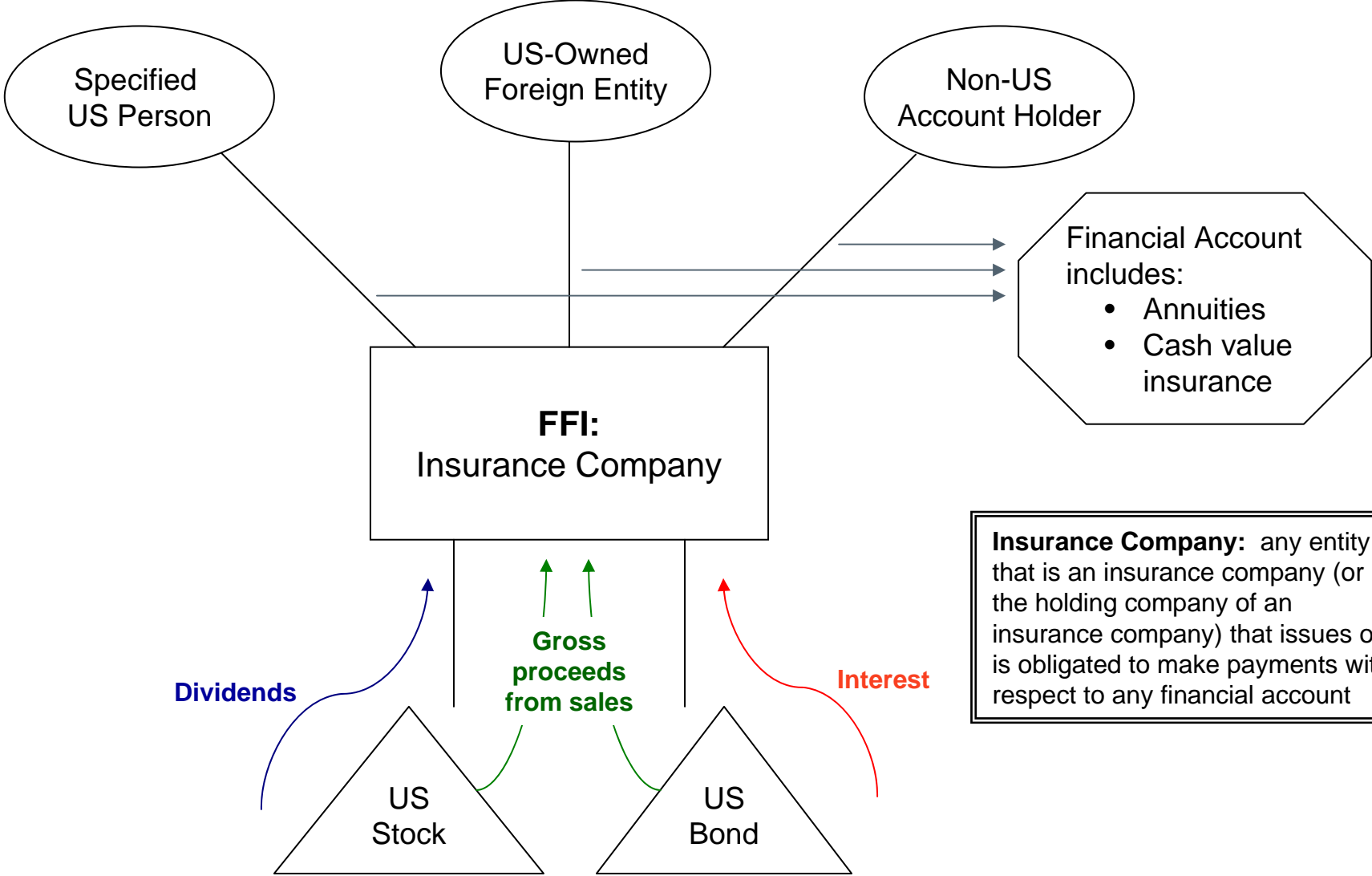


**Stick:** 30% withholding tax on all “withholdable payments”



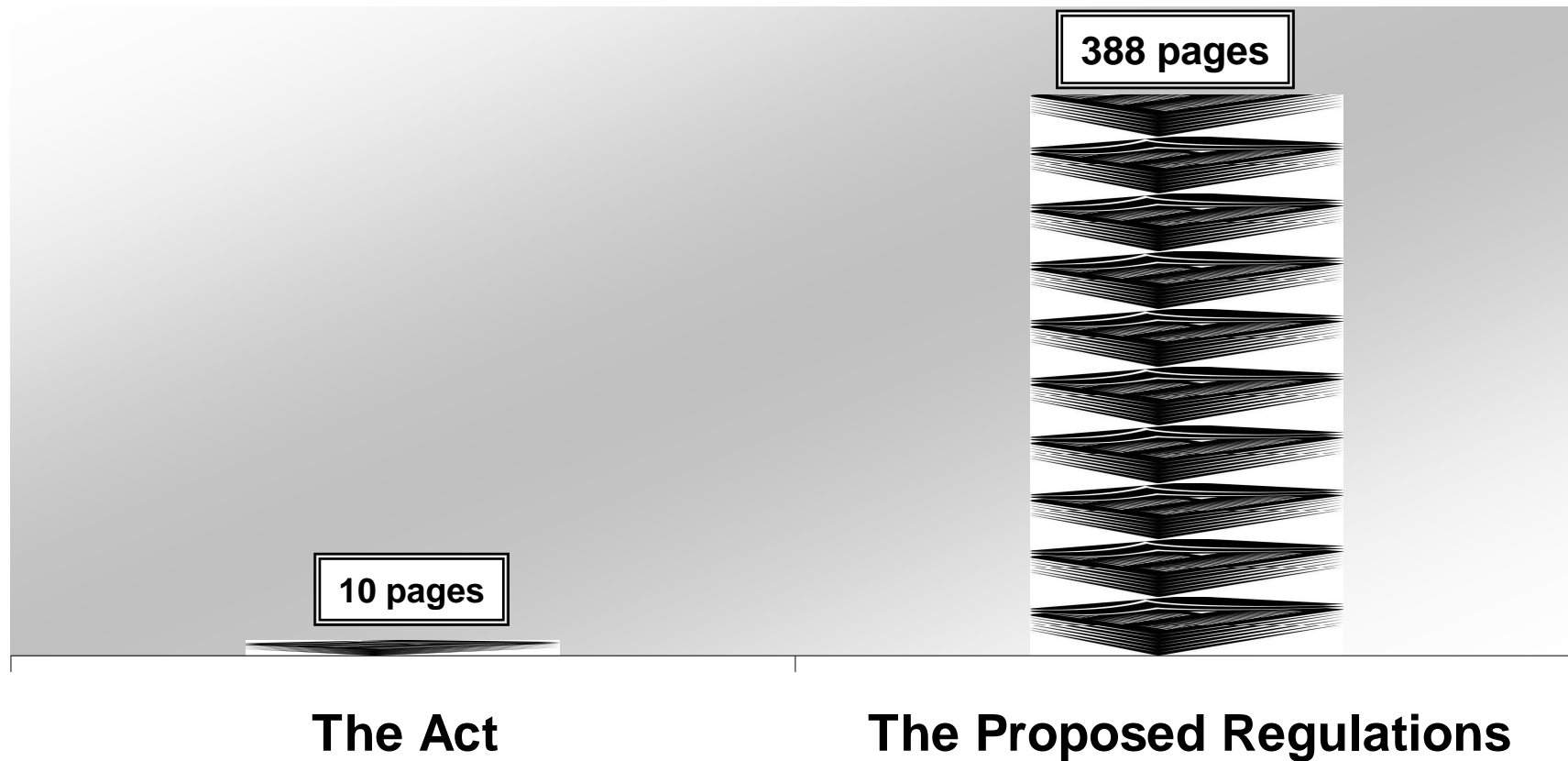








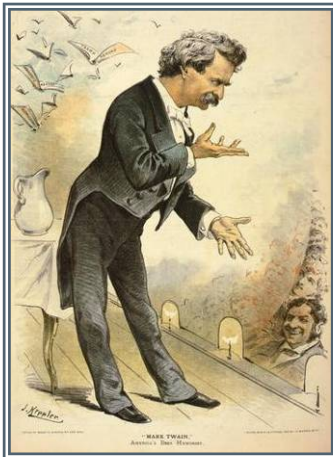
## How Many Pages Does It Take to "FATCA"?



## Highlights of Proposed Regulations

- Deemed-compliant entities
- Due diligence procedures
- Verification procedures
- Phase-in of withholding, passthru payments
- Phase-in of information to be reported
- Legal barriers to compliance
- Grandfathered obligations

## Highlights of Proposed Regulations



“All generalizations are false,  
including this one.”

– Mark Twain

## Highlights of Proposed Regulations: Deemed-Compliant Entities

- Deemed-compliant entities divided into 2 broad categories:
  - Certified: involves certification to withholding agent, no direct IRS oversight or registration
  - Registered: must register with IRS and undertake due diligence
- New types of registered deemed-compliant entities
  - Qualified collective investment vehicle
  - Restricted fund

## Highlights of Proposed Regulations: Due Diligence Procedures

- Individual accounts
  - ≤ \$50,000 exempt (\$250,000 for annuities/insurance)
  - New accounts: Generally rely on AML/KYC
  - Preexisting accounts: Search for US indicia
    - \$50,000 - \$1 million: electronic search
    - Over \$1 million: electronic and paper record search
    - Generally must complete by June 30, 2015
  - Aggregation rules apply, including when relationship manager has knowledge

## Highlights of Proposed Regulations: Due Diligence Procedures (continued)

- Entity accounts
  - ≤ \$250,000 exempt
  - In general, must determine status of account holder by June 30, 2015
    - June 30, 2014 for “prima facie FFIs”
    - Exceptions provide more time in specific situations
  - Special focus on “passive NFFEs”
    - For preexisting accounts \$250,000 to \$1 million, rely on AML/KYC
    - For accounts > \$1 million, need certification



## Highlights of Proposed Regulations: Verification

- FFI agreement will specify verification requirements
- FFI may rely on third parties to perform due diligence, but FFI ultimately responsible
- Third party audits not required
- “Responsible officer” must certify compliance to IRS
- Non-compliance may trigger additional IRS scrutiny
  - But no strict liability: high threshold before kicked out of program

## Highlights of Proposed Regulations: Phase-in of Withholding, Passthru Payments

- Starting in 2014: Withholding on payments of US-source passive income
  - “Fixed and determinable annual or periodical” or “FDAP” income
- Starting in 2015: Withholding on gross proceeds
- No withholding on “foreign passthru payments” until January 1, 2017 at earliest
  - But reporting required on “foreign reportable amounts” made in 2015 and 2016

## Highlights of Proposed Regulations: Phase-in of Withholding, Passthru Payments

- FFI must withhold 30% from any “passthru payment” to recalcitrant account holder or non-participating FFI
  - Withholdable payment
  - “Foreign passthru payment”: not yet defined
- FFIs can also elect to be withheld on rather than withhold on passthru payments
- Delay in withholding on passthru payments
  - Process proposed in Notice 2011-34 heavily criticized

## Highlights of Proposed Regulations: Phase-in of Information to be Reported

- September 30, 2014: Reports due for 2013
- March 31, 2015: Reports due for 2015
  - For 2013 and 2014, report only name, address, TIN, account number, and account balance
- March 31, 2016: Reports due for 2015
  - In addition to above, also report income
- March 31, 2017: Reports due for 2016
  - In addition to above, also report gross proceeds

## Highlights of Proposed Regulations: Legal Barriers to Compliance

- In general, FFI cannot comply with FATCA unless all members of its expanded affiliated group also comply
  - However, this rule prevents any FFI from coming into the system if even one of its affiliates cannot because of local law restrictions
- Regulations provide 2 years for all members to come into compliance
  - In meantime, restrictions apply to these affiliates, referred to as “limited FFIs” and “limited branches”

## Highlights of Proposed Regulations: Grandfathered Obligations

- No withholding on payments on, or gross proceeds from disposition of, “grandfathered obligations”
- Grandfathered obligation: any obligation outstanding on January 1, 2013
  - Had been March 18, 2012
- More detail on definition of “obligation”
  - Debt instrument under tax principles
  - Revolving credit facility or line of credit
  - Certain life insurance and annuity contracts
  - Confirmation under ISDA master agreement
  - But not equity or if lacks stated expiration or term

# Intergovernmental Approach

**U.S. TREASURY DEPARTMENT**  
**JOINT STATEMENT FROM THE UNITED STATES, FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM REGARDING AN INTERGOVERNMENTAL APPROACH TO IMPROVING INTERNATIONAL TAX COMPLIANCE AND IMPLEMENTING FATCA**

**A. General Considerations**

1. Building on their longstanding and close relationship with respect to mutual assistance in tax matters, the United States, France, Germany, Italy, Spain and the United Kingdom wish to strengthen their cooperation in combating international tax evasion.
2. On 18 March 2010 the United States enacted provisions commonly referred to as the Foreign Account Tax Compliance Act (FATCA), which sets out rules regarding reporting requirements for foreign financial institutions (FFIs) with respect to certain accounts held by U.S. persons. France, Germany, Italy, Spain and the United Kingdom are supportive of the underlying goals of FATCA. FATCA, however, has raised a number of issues, including the FFIs established in these countries may not be able to comply with the reporting, withholding and account closure requirements because of legal restrictions.
3. An intergovernmental approach to FATCA implementation would address these legal impediments to compliance, simplify practical implementation, and reduce FFI costs.
4. Because the policy objective of FATCA is to achieve reporting, not to collect withholding tax, the United States is willing to reciprocate in collecting and exchanging information to implement FATCA, and improve international tax compliance.
5. In this regard the United States is willing to reciprocate in collecting and exchanging information on an automatic basis information on accounts held in US financial institutions by residents of France, Germany, Italy, Spain and the United Kingdom. The approach, under discussion therefore, would enhance compliance and facilitate enforcement to the benefit of all partners.

6. The United States, France, Germany, Italy, Spain and the United Kingdom are cognizant of the need to keep compliance costs as low as possible for financial institutions and other stakeholders and are committed to working together over the longer term towards achieving common reporting and due diligence standards.

In light of these considerations, the United States, France, Germany, Italy, Spain and the United Kingdom have agreed to explore a common approach to FATCA implementation through domestic reporting and reciprocal automatic exchange and existing bilateral tax treaties.

**Framework for Intergovernmental Approach**

The United States and a partner country (FATCA partner) would enter into an agreement to which, subject to certain terms and conditions, the FATCA partner would agree to:

- Enact necessary implementing legislation to require FFIs in its jurisdiction to collect and report to the authorities of the FATCA partner the information required by FATCA;
- Enact legislation to require FFIs established in the FATCA partner (other than FFIs that are exempt from FATCA under the agreement or in U.S. guidance) to apply the FATCA rules to identify US accounts; and
- Enact legislation to require, on an automatic basis, the information reported to the FATCA partner to be made available to the United States.

The United States would agree to:

- Enact legislation to require FFIs established in the FATCA partner to report to the FATCA partner information on US accounts held in the FATCA partner to the IRS, with the IRS or as excepted from FATCA under the agreement or IRS guidance;
- Enact legislation to require the FATCA partner to comply with their reporting obligations to the United States (including information to the FATCA partner as appropriate); and
- Enact legislation to require the FATCA partner to make information on US accounts held in the FATCA partner available to the United States (including information on US accounts held in the FATCA partner as appropriate), consistent with IRS guidelines, as long as a low risk of tax evasion;

**Comments to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the US accounts of residents of the FATCA partner.**

In addition, as a result of the agreement with the FATCA partner described above, the FATCA partner would not be required to:

- e. Commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the US accounts of residents of the FATCA partner.

**Germany, Italy, Spain and the United Kingdom would:**

- Enact legislation to require, on an automatic basis, the information reported to the FATCA partner to be made available to the United States (including information on US accounts held in the FATCA partner as appropriate); and
- Enact legislation to require the FATCA partner to comply with their reporting obligations to the United States (including information to the FATCA partner as appropriate); and
- Enact legislation to require the FATCA partner to make information on US accounts held in the FATCA partner available to the United States (including information on US accounts held in the FATCA partner as appropriate), consistent with IRS guidelines, as long as a low risk of tax evasion;

## Intergovernmental Approach

- Framework announced same day as proposed regulations
- US, UK, France, Germany, Italy and Spain agreed to “explore” alternative way to comply with FATCA
- FFI reports FATCA information to home country, not IRS
- Home country shares information with IRS; IRS agrees to reciprocate with information on foreign accounts in US



## **Intergovernmental Approach (continued)**

- Way to overcome legal barriers to FATCA compliance
- Potentially less burden on FFIs and would avoid direct FFI contact with IRS
- Consistent with Treasury and OECD strategy to increase transparency and information sharing
- Ambitious and unrealistic timeframe to enact enabling legislation and implement
- Considerable uncertainty for FFIs in these countries

# What Next?



## Next Steps

Comments on proposed regulations due by April 30, 2012

⇒ Public hearing on May 15, 2012

Possible Issues for Comment	
<ul style="list-style-type: none"> <li>• FFI Agreement Review</li> <li>• Due Diligence Procedures</li> <li>• Coordinating FATCA with QI Regime</li> <li>• Definition of “Other Financial Payment”</li> <li>• Additional Categories of Deemed-Compliant FFIs</li> </ul>	<ul style="list-style-type: none"> <li>• Coordination of Withholding under Chapters 3 and 4</li> <li>• Anti-Abuse Procedures</li> <li>• Allocating Gross Proceeds by a Flow-Through Entity</li> <li>• Blockers</li> <li>• Refund Procedures</li> <li>• File Waivers</li> </ul>

## Next Steps (continued)

Comments on proposed regulations due by April 30, 2012

⇒ Public hearing on May 15, 2012

Possible Issues for Comment	
<ul style="list-style-type: none"><li>• Registration Review Procedures</li><li>• Centralized Compliance Option for FFI Groups</li><li>• Revisions to QI, WP, WT Agreements</li><li>• Interaction of FATCA and treaties</li></ul>	<ul style="list-style-type: none"><li>• Revised Forms</li><li>• Treatment of Equity Interest in Securitization Vehicles – Debt or Equity?</li><li>• IRS Administration and Enforcement</li></ul>

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