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Final Regulations Implementing the Foreign Account Tax Compliance Act ("FATCA")

On January 17, 2013, the Internal Revenue Service ("IRS") released final regulations (the "Final Regulations") implementing the reporting and withholding provisions of the HIRE Act (commonly known as the Foreign Account Tax Compliance Act, or FATCA, provisions) that target noncompliance by U.S. taxpayers using foreign accounts. The Final Regulations build on proposed regulations published on February 15, 2012, (see prior client alert here) and IRS notices (see prior client alert here) to provide additional certainty for financial institutions and government counterparts by finalizing the step-by-step process for U.S. account identification, information reporting, and withholding requirements for foreign financial institutions ("FFIs"), non-financial foreign entities ("NFFEs"), and U.S. withholding agents. As noted in our prior alerts, separate withholding regimes potentially apply to U.S. source payments to FFIs and NFFEs.

As FATCA implementation has evolved, greater emphasis has been placed on the role of intergovernmental agreements ("IGAs"). Since the proposed regulations were released, Treasury has collaborated with foreign governments to develop two alternative model IGAs that facilitate the effective and efficient implementation of FATCA by eliminating legal barriers to participation and compliance, reducing administrative burdens, and ensuring the participation of all FFIs in a partner jurisdiction. To date, Denmark, Germany, Ireland, Italy, Mexico, Norway, Spain, Switzerland, and the United Kingdom have signed or initialed IGAs and Treasury is engaged with more than 50 countries and jurisdictions to curtail offshore tax evasion, with more signed IGAs expected to follow in the near future. The Final Regulations continue this trend, permitting IGAs to serve as an efficient and effective means of fostering international cooperation and implementing FATCA. In order to reduce administrative burdens for FFIs with operations in multiple jurisdictions, the Final Regulations coordinate the obligations for FFIs under the Final Regulations and the IGAs.

As evidence of the way Treasury's approach to FATCA has evolved, the Final Regulations extend the deadline and provide other relief from withholding with respect to certain grandfathered obligations and certain payments made by non-financial entities in order to limit market disruption, reduce administrative burdens, and establish certainty. Most notably, the Final Regulations change the definition of grandfathered obligations from obligations issued before January 1, 2013 to those issued before January 1, 2014.

The Final Regulations also expand the categories of FFIs that are deemed to comply with FATCA without the need to enter into an agreement with the IRS. The Final Regulations refine and clarify the treatment of investment entities in order to focus the application of FATCA on higher-risk financial institutions that provide services to the global investment community. The Final Regulations: (1) expand and clarify the treatment of certain categories of low-risk entities,

such as governmental entities and retirement funds; (2) provide that certain investment entities may be subject to being reported on by the FFIs with which they hold accounts rather than being required to register as FFIs and report to the IRS; and (3) clarify the types of passive investment entities that must be identified and reported by FFIs. The Final Regulations also treat passive entities that are not professionally managed as NFFEs, rather than FFIs, and significantly broaden exemptions in the proposed regulations for FFIs and some passive NFFEs that are part of a nonfinancial group of companies and that support the operations of the group or provide no meaningful investment opportunities to third parties, such as certain holding companies, treasury centers, and captive finance companies.

One of the most notable changes is the introduction of an online registration portal. The Final Regulations provide that an online registration portal for FFIs will be accessible by July 15, 2013. FFIs registering with the IRS will be able to do so through a secure online web portal, the "FATCA Registration Portal" (the "Portal"), from anywhere in the world. The Portal is designed to accomplish an entirely paperless registration process. FFIs will be able to use the Portal to register their status (such as participating FFI or reporting Model 1 FFI) and manage their registration information.[1] An FFI's submission and maintenance of registration information through the Portal will maximize processing efficiencies, minimize errors, and ensure expedient issuance of a Global Intermediary Identification Number ("GIIN"). An FFI will use its GIIN to establish its FATCA status for withholding purposes and to identify itself for FATCA reporting purposes. The IRS currently contemplates that the GIIN may also be used by reporting Model 1 FFIs to satisfy reporting requirements under local law and is discussing this possibility with its Model 1 IGA partners.

DETAILED DISCUSSION

I. Explanation of Key Terms

A. FFI

The Final Regulations define an FFI to be any financial institution that is a foreign entity.[2] However, in the case of an entity that is resident in a country that has in effect a Model 1 or Model 2 IGA (discussed below), an FFI is any entity that is treated as an FFI under such agreement.[3] For purposes of the Final Regulations, a "financial institution" is any entity that (i) accepts deposits in the ordinary course of a banking or similar business, (ii) holds, as a substantial portion of its business, financial assets for the benefit of one or more other persons,

[1] A reporting Model 1 FFI means an FFI with respect to which a foreign government or agency thereof agrees to obtain and exchange information pursuant to a Model 1 IGA (discussed below), other than an FFI that is treated as a nonparticipating FFI under the Model 1 IGA. Treas. Reg. § 1.1471-1(b)(107).
[2] Treas. Reg. § 1.1471-5(d).
[3] Id.

(iii) is an investment entity, (iv) is an insurance company (or a holding company that is a member of an affiliated group that includes an insurance company), and the insurance company or holding company issues or is obligated with respect to, certain cash value insurance or annuity contracts, or (v) is an entity that is a holding company or treasury center that (A) is part of an expanded affiliated group that includes an institution described in items (i) through (iv), or (B) is formed in connection with or availed of by an investment vehicle (including a mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar fund) established with an investment strategy of investing, reinvesting, or trading in financial assets.[4]

For purposes of the Final Regulations, an "investment entity" includes an entity (i) that conducts as a business on behalf of a customer the activities of trading in certain financial assets, portfolio management, or investment and management of financial assets, (ii) whose income is primarily attributable to investing, reinvesting, or trading in financial assets, and (iii) that "functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets."[5] The definition of investment entity in the Final Regulations is potentially very broad, since any entity whose principal activity is holding financial assets might be said to "function" as a vehicle that is "similar" to an investment fund. However, it appears this language was intended only to cover entities that are marketed or held out to investors as vehicles for investing in financial assets and that do not fall into the other two prongs of the definition of investment entity. The preamble to the Final Regulations states: "[P]assive entities that are not professionally managed are generally treated as passive NFFEs rather than as FFIs. However, entities that function or hold themselves out as mutual funds, hedge funds, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets are investment entities."[6]

The Final Regulations do not define what it means for an entity to be "formed in connection with" or "availed of by" an investment vehicle. Without further guidance, taxpayers will be required to interpret and apply these open-ended terms on a case-by-case basis. For instance, many holding companies and treasury centers might fall under the definition of a financial institution, since the Final Regulations state that such entities that are "formed in connection with" or "availed of by" an investment vehicle are financial institutions.[7]

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[4] Treas. Reg. § 1.1471-5(e)(1).
[5] Treas. Reg. § 1.1471-5(e)(4)(i).
[6] T.D. 9610, 78 Fed. Reg. 5874, 5888 (Jan. 28, 2013).
[7] Treas. Reg. § 1.1471-5(e)(1)(v)(B).

An FFI is considered to be a "participating FFI" if it enters into an FFI agreement with the IRS.[8] A participating FFI is required to deduct and withhold tax on payments to nonparticipating FFIs and to recalcitrant account holders.[9] A participating FFI must also perform due diligence to determine, for each account, whether the holder of such account is a specified U.S. person or a nonparticipating FFI.[10] A participating FFI is also required to report certain information with respect to U.S. accounts and accounts held by recalcitrant account holders to the IRS.[11]

Certain types of entities are "deemed-compliant FFIs." The Final Regulations generally retain the same deemed-compliant categories that were included in the proposed regulations but have made several modifications and clarifications in response to comments received. In addition, the Final Regulations introduce new types of deemed-compliant FFIs for certain credit card issuers,[12] sponsored FFIs,[13] and limited life debt investment entities.[14] The Final Regulations do not add a specific deemed-compliant category for insurance companies although the preamble to the proposed regulations noted that such a category was being considered.[15] Rather, as noted in the preamble, insurance companies may be able to qualify as registered deemed-compliant local FFIs and certified deemed-compliant FFIs with only low-value accounts under the Final Regulations.[16] Finally, in the context of IGAs, Treasury will continue to identify entities that qualify as deemed-compliant FFIs on a jurisdiction-specific basis, and the Final Regulations treat those entities as deemed-compliant FFIs.[17]

Specifically, the Final Regulations provide for three different categories of deemed-compliant FFIs: "registered deemed-compliant FFIs," "certified deemed-compliant FFIs," and "owner-documented FFIs."[18] Registered deemed-compliant FFIs include certain local FFIs which are licensed and regulated in a foreign country and have no fixed place of business outside of that country and which have procedures in place to monitor accounts opened by specified U.S. persons, certain investment funds for which certain restrictions on investments by U.S. persons are in place, certain qualified credit card issuers, and certain sponsored investment entities that are sponsored by a sponsoring entity that has registered with the IRS.[19] Certified

[8] Treas. Reg. § 1.1471-1(b)(85).
[9] Treas. Reg. § 1.1471-4(a)(1).
[10] Treas. Reg. § 1.1471-4(a)(2).
[11] Treas. Reg. § 1.1471-4(a)(3).
[12] See Treas. Reg. § 1.1471-5(f)(1)(i)(E).
[13] See Treas. Reg. § 1.1471-5(f)(2)(iii).
[14] See Treas. Reg. § 1.1471-5(f)(2)(iv).
[15] See T.D. 9610, 78 Fed. Reg. 5874, 5889.
[16] Id.
[17] See id.
[18] Treas. Reg. § 1.1471-5(f).
[19] Treas. Reg. § 1.1471-5(f)(1)(i), (ii), (iii).

deemed-compliant FFIs include certain nonregistering local banks which are licensed and regulated in a foreign country and have no fixed place of business outside of that country, certain FFIs with only low-value accounts, and certain sponsored, closely held investment vehicles.[20]

Recognizing that certain existing trust vehicles formed for the purpose of investing in limited types of debt obligations with the intent to hold such securities until maturity or liquation may not be able to register the vehicles as participating FFIs due to the limited powers of the trustees, the Final Regulations add a fourth category of certified deemed-compliant FFIs, "limited life debt investment entities," for certain legacy securitization vehicles.[21] To qualify for this treatment, a securitization vehicle must have been in existence as of December 31, 2011, and must meet certain requirements.[22] This date of existence requirement may be too narrow to provide relief for many existing securitization vehicles. These requirements include having organizational documents that set forth a date by which the entity must be liquidated and that do not permit amendments without the agreement of all the entity's investors.[23] Additionally, all payments made to the investors of the securitization vehicle must be cleared through a clearing organization that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution or made through a trustee that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution.[24] This requirement that payments to investors must be made through a clearing agency or a trustee may present issues for certain securitization vehicles (e.g., certain securitization vehicles with tax equity in the form of preferred shares). Securitization vehicle organizational documents may not require liquidation on a set date. Further, the organizational documents of many securitization vehicles do not require unanimous investor consent for all amendments. This category of certified deemed-compliant FFIs is intended to provide transitional relief, with the category ceasing to exist for entities that do not satisfy the requirements noted above prior to January 1, 2017.

The final category of deemed-compliant FFIs is owner-documented FFIs. Owner-documented FFIs are certain investment entities that are not owned or affiliated with any FFI that is a depository institution, custodial institution, or specified insurance company and which do not maintain financial accounts for any nonparticipating FFIs and which have a designated withholding agent.[25]

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[20] Treas. Reg. § 1.1471-5(f)(2).
[21] Treas. Reg. § 1.1471-5(f)(2)(iv).
[22] Id.
[23] Treas. Reg. § 1.1471-5(f)(2)(iv)(B).
[24] Treas. Reg. § 1.1471-5(f)(2)(iv)(D).
[25] Treas. Reg. § 1.1471-5(f)(3).

B. NFFE

An NFFE is any foreign entity that is not a financial institution.[26] The term also includes foreign entities that are treated as NFFEs under an IGA.[27] Additionally, the Final Regulations treat passive entities that are not professionally managed as NFFEs rather than as FFIs.[28]

C. Withholdable Payment

For purposes of the Final Regulations, a withholdable payment is any payment of (i) U.S. source fixed or determinable annual or periodic income (*e.g.*, interest, dividends, rents, salaries, wages), and (ii) for any sales occurring after December 31, 2016, gross proceeds from the disposition of any property of a type that can produce any of the foregoing types of income or profits.[29]

D. Withholding Agent

For purposes of the Final Regulations, a withholding agent is any person, U.S. or foreign, that has the control, receipt, custody, disposal, or payment of a withholdable payment or a foreign passthru payment.[30] A "passthru payment" is any withholdable payment or other payment to the extent attributable to a withholdable payment.[31]

II. Withholding Requirements

A. Withholding on Payments to FFI

1. 30% Withholding Requirement and Exceptions to Withholding

In general, after December 31, 2013, a withholding agent is required to withhold 30% of any withholdable payment to a payee that is an FFI.[32] There are several exceptions to the withholding requirement. Generally, no withholding is required on payments to a participating FFI.[33] Withholding is required, however, on certain withholdable payments of U.S. source FDAP income to participating FFIs that are acting as an intermediary or flow-through entity, unless the participating FFI provides the withholding agent with documentation that establishes that no withholding is required.[34] Withholding generally is not required on payments to deemed-compliant FFIs, subject to certain exceptions, or on payments allocable to exempt beneficial

[26] Treas. Reg. § 1.1471-1(b)(74).
[27] Treas. Reg. § 1.1471-1(b)(74).
[28] T.D. 9610, 78 Fed. Reg. 5874, 5876; Treas. Reg. § 1.1471-1(b)(42).
[29] Treas. Reg. § 1.1473-1(a)(1).
[30] Treas. Reg. § 1.1473-1(d).
[31] IRC § 1471(d)(7).
[32] Treas. Reg. § 1.1471-2(a)(1).
[33] Treas. Reg. § 1.1471-2(a)(4)(iii).
[34] Treas. Reg. §§ 1.1471-2(a)(2)(i); 1.1471-2(a)(4)(iii).

owners.[35] For this purpose, exempt beneficial owners include foreign governments, certain international organizations, certain foreign central banks, certain retirement funds, and certain investment entities owned by exempt beneficial owners.[36]

2. Grandfathered Obligations

No FATCA withholding is required with respect to certain grandfathered obligations. The Final Regulations expand the exemptions relating to grandfathered obligations, as compared to the proposed regulations. For purposes of the Final Regulations, a payment made under a grandfathered obligation is not a withholdable payment (and no withholding is required with respect to such a payment).[37] Grandfathered obligations include (i) any obligation that is outstanding on January 1, 2014, (ii) any obligation that gives rise to a withholdable payment solely because the obligation is treated as giving rise to a dividend equivalent under Code section 871(m), provided that the obligation is executed on or before the date that is six months after the date on which obligations of its type are first treated as giving rise to dividend equivalents, and (iii) any agreement requiring a secured party to make a payment with respect to, or to repay, collateral posted to secure a grandfathered obligation.[38] Solely with respect to foreign passthru payments, the term grandfathered obligation also includes any obligation that is executed on or before the date that is six months after the date on which final regulations defining the term foreign passthru payment are filed with the Federal Register.[39] "Obligation" in the term "grandfathered obligation" means any legally binding instrument or agreement (including a debt instrument, a credit facility, and a derivatives transaction under an ISDA Master Agreement).[40] However, an "obligation" does not include any instrument that is treated as equity for U.S. tax purposes or which lacks a stated expiration or term.[41] The Final Regulations also contain exemptions for "preexisting obligations" (discussed below) which are different than "grandfathered obligations."

3. IGAs

The IRS has developed model IGAs that are intended to allow FFIs to comply with FATCA reporting requirements without violating foreign law. The United States has entered into IGAs with certain countries (including Denmark, Ireland, Mexico, Switzerland, and the

[35] Treas. Reg. § 1.1471-2(a)(4)(iv), (v).
[36] Treas. Reg. § 1.1471-6.
[37] Treas. Reg. § 1.1471-2(b)(1).
[38] Treas. Reg. § 1.1471-2(b)(2)(i)(A). The "Code" as used herein, refers to the Internal Revenue Code of 1986, as amended.
[39] Treas. Reg. § 1.1471-2(b)(2)(i)(B).
[40] Treas. Reg. § 1.1471-2(b)(2)(ii)(A).
[41] Treas. Reg. § 1.1471-2(b)(2)(ii)(B).

United Kingdom)[42] and is currently negotiating IGAs with others. There are two different models of IGA. Under a Model 1 IGA, the foreign government requires financial institutions resident in the foreign country to report information on U.S. accounts to the foreign government, and the foreign government passes on such information to the IRS. FFIs in jurisdictions with a Model 1 IGA are treated as complying with, and not subject to withholding under, Code section 1471. Under a Model 2 IGA, the foreign government directs and enables financial institutions resident in the foreign country to register with the IRS and comply with the requirements of an FFI agreement. Under a Model 2 IGA, the FATCA information reporting is done directly by the FFIs to the IRS (and not done by the foreign government).

B. Withholding on Payments to NFFEs

1. 30% Withholding

A major point of concern that was identified in connection with underreporting of income by taxpayers was the use of foreign corporations or entities to hold assets offshore. The Final Regulations require certain NFFEs that present a high risk of U.S. tax avoidance to provide withholding agents with the name, address, and taxpayer identification number of any substantial U.S. owner (e.g., an owner that owns more than 10% of a foreign corporation's stock (by vote or value)). Withholding agents are required to report this information to the IRS.

In general, after December 31, 2013, any withholding agent making a withholdable payment to an NFFE is required to withhold tax at a rate of 30% if the NFFE does not comply with these disclosure and reporting requirements unless certain requirements are met with respect to the beneficial owner of a payment that is beneficially owned by the NFFE or another NFFE.[43] These requirements are met with respect to the beneficial owner of a payment if: (i) the beneficial owner or payee provides the withholding agent with either a certification that such beneficial owner does not have any substantial U.S. owners, or the name, address, and taxpayer identification number of each substantial U.S. owner; (ii) the withholding agent does not know or have reason to know that any information provided by the beneficial owner or payee is incorrect; and (iii) the withholding agent reports the information provided to the IRS.[44]

The Final Regulations clarify the interaction of Code section 1472 withholding with a participating FFI's withholding obligations under Code section 1471(b) and the associated regulations. A participating FFI that complies with its withholding obligations under section 1471(b) will be deemed to satisfy its obligations under Code section 1472 with respect to

[42] IGAs have been initialed with Germany, Italy, Norway, and Spain.
[43] Treas. Reg. § 1.1472-1(b)(1).
[44] Treas. Reg. § 1.1472-1(b)(1)(i)-(iii).

withholdable payments made to NFFEs that are account holders.[45] Code section 1472 will continue to apply to a participating FFI that acts as a withholding agent on a withholdable payment made to an NFFE that is not an account holder (for example, a payment with respect to a contract that does not constitute a financial account).[46] These withholding obligations will be limited by the Final Regulations, however, which provide a temporary exception from the definition of withholdable payment for certain payments of U.S. source FDAP income made prior to January 1, 2017, with respect to offshore obligations.[47]

2. Exceptions to Withholding

a) Excepted NFFEs

A withholding agent is not required to withhold on a withholdable payment (or portion thereof) if the withholding agent can treat the payment as beneficially owned by an excepted NFFE.[48] The Final Regulations provide expanded categories of excepted NFFEs to address the treatment of holding companies and similar entities that are part of and that support a group conducting an active trade or business. An excepted NFFE means an NFFE that falls in one of the following categories.

i) Publicly traded corporations

A "publicly traded corporation" is a corporation the stock of which is regularly traded on one or more established securities markets for the calendar year.[49] The Final Regulations provide definitions for the terms "regularly traded"[50] and "established securities market."[51] An anti-abuse rule disregards trades or patterns of trades conducted with a principal purpose of meeting the regularly traded requirement of this provision.[52]

ii) Certain affiliated entities related to publicly traded corporations

This exception includes any corporation that is a member of the same expanded affiliated group (as defined in Final Regulation section 1.1471-5(i)) as a publicly traded corporation.[53]

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[45] Treas. Reg. § 1.1472-1(a).
[46] Id.
[47] See Treas. Reg. § 1.1473-1(a)(4)(vi).
[48] Treas. Reg. § 1.1472-1(c)(1).
[49] Treas. Reg. § 1.1472-1(c)(1)(i).
[50] Treas. Reg. § 1.1472-1(c)(1)(i)(A).
[51] Treas. Reg. § 1.1472-1(c)(1)(i)(C).
[52] Treas. Reg. § 1.1472-1(c)(1)(i)(B)(3).
[53] Treas. Reg. § 1.1472-1(c)(1)(ii).

iii) Certain territory entities

This exception includes any territory entity that is directly or indirectly wholly-owned by one or more bona fide residents of the U.S. territory under the laws of which the entity is organized.[54]

iv) Active NFFEs

The Final Regulations clarify that an active NFFE is any entity where less than 50% of its gross income is from passive income and less than 50% of its assets are passive assets (that is, assets that produce or are held for the production of passive income), on a weighted average basis (tested quarterly).[55] The Final Regulations clarify the scope of passive income, including the rules regarding commodities. Treasury declined to define passive income by reference to Code section 954(c), believing that providing a specific list of items constituting passive income in the Final Regulations would provide more certainty for withholding agents and NFFEs. In addition, the Final Regulations expand the exceptions to passive income in a number of respects. First, passive income does not include dividends, interest, rents, and royalties received or accrued from a related person (as defined in Code section 954(d)(3)) to the extent that they are properly allocable to income of the payor that is not passive income.[56] Second, an exception from passive income is provided for certain income earned by dealers acting in the ordinary course of their trade or business.[57]

v) Excepted nonfinancial entities

This exception includes holding companies, treasury centers, and captive finance companies that are members of a nonfinancial group; start-up companies; entities that are liquidating or emerging from bankruptcy; and non-profit organizations.[58]

b) Payments to exempt beneficial owners or NFFEs that are withholding partnerships or withholding trusts.

A withholding agent is not required to withhold on a withholdable payment (or portion thereof) if the withholding agent can treat the payment as made to an exempt beneficial owner or to a withholding foreign partnership ("WP") or withholding foreign trust ("WT").[59]

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[54] Treas. Reg. § 1.1472-1(c)(1)(iii).
[55] Treas. Reg. § 1.1472-1(c)(1)(iv).
[56] Treas. Reg. § 1.1472-1(c)(1)(iv)(B)(1).
[57] Treas. Reg. § 1.1472-1(c)(1)(iv)(B)(2).
[58] Treas. Reg. § 1.1472-1(c)(1)(v).
[59] Treas. Reg. § 1.1472-1(c)(2). The term WP or withholding foreign partnership means a foreign partnership that has executed the agreement described in Treasury Regulation section 1.1441-5(c)(2)(ii). Treas. Reg.

A withholding agent may treat a withholdable payment as beneficially owned by an excepted NFFE if the withholding agent can reliably associate the payment with valid documentation to determine the payee's status as an excepted NFFE under the rules of Final Regulation section 1.1471-3(d).[60] A withholding agent may treat the payee of a withholdable payment as an NFFE that is a WP or WT if the withholding agent can reliably associate the payment with valid documentation to determine the payee's status as such under the rules of Final Regulation section 1.1471-3(b)(3) and (d).[61] A withholding agent that cannot reliably associate the payment with documentation must treat the payment as made to a payee in accordance with the presumption rules under Final Regulation section 1.1471-3(f).[62] Under the Final Regulations, a withholding agent may choose to rely on presumption rules in lieu of accepting and reviewing documentation of payees. This accommodates withholding agents that are unsure whether the documentation they have obtained is reliable or that do not wish to accept the responsibility associated with the acceptance of the documentation.

C. Withholding on Preexisting Obligations – Transitional Relief

The Final Regulations contain transitional exemptions to the withholding requirements for payments with respect to preexisting obligations, which allow FFIs time to comply with due diligence requirements. A "preexisting obligation," which is merely provided with a transition period before withholding is required, should not be confused with a "grandfathered obligation" (discussed in the text above), which is exempt from the FATCA regime. A "preexisting obligation" is any account, instrument, contract, debt, or equity interest maintained, executed or issued by the withholding agent that is outstanding on December 31, 2013.[63] For participating FFIs, a preexisting obligation means any account, instrument, or contract (including a debt, or equity interest) maintained executed, or issued by the FFI that is outstanding on the effective date of the FFI agreement.[64] For registered deemed-compliant FFIs, a preexisting obligation is any account, instrument, or contract (including a debt, or equity interest) maintained, executed or issued by the FFI before the later of the date that the FFI registers as a deemed-compliant FFI and receives a GIIN or the date the FFI is required to implement its account opening procedures under Regulation section 1.1471-5(f).[65]

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§ 1.1471-1(b)(140). The term WT or withholding foreign trust means a foreign grantor trust or foreign simple trust that has executed the agreement described Treasury Regulation section 1.1441-5(e)(5)(v). Treas. Reg. § 1.1471-1(b)(142).

[60] Treas. Reg. § 1.1472-1(d)(1).

[61] Treas. Reg. § 1.1472-1(d)(2).

[62] Treas. Reg. § 1.1472-1(d)(5).

[63] Treas. Reg. § 1.1471-1(b)(98)(i).

[64] Id.

[65] Id.

For payments to FFIs with respect to preexisting obligations that are maintained, executed, or issued by a withholding agent, and are outstanding on December 31, 2013, no withholding is required under Code section 1471 for payments made prior to January 1, 2016, if the withholding agent does not have documentation indicating that the payee is a nonparticipating FFI and the payee is not prima facie FFI.[66] A "prima facie" FFI is an entity that the withholding agent has designated as a qualified intermediary, a nonqualified intermediary, or as a foreign entity falling under certain industry codes for financial institutions (e.g., certain NAICS classifications for banks, credit unions, brokerages, and other financial institutions).[67] With respect to payments to prima facie FFIs, a withholding agent must treat the payee as a nonparticipating FFI beginning on July 1, 2014, unless the withholding agent obtains documentation establishing a different status for the prima facie FFI.[68] For payments to NFFEs with respect to preexisting obligations, no withholding is required under Code section 1472 for payments made before January 1, 2015, if the payee is not a prima facie FFI and if the withholding agent does not have documentation indicating the payee's status as a passive NFFE with one or more substantial U.S. owners.[69] The IRS has reportedly informally stated it will change the preexisting obligation transitional relief ending date for payments to NFFEs to match the preexisting obligation transitional relief ending date for payments to FFIs (that is, that the ending date for the transitional relief in Final Regulation section 1.1472-1(b)(2) will be corrected to January 1, 2016).[70]

D. Key Dates Under the Final Regulations

Activity	**Effective Date**
Expected date the Portal will open for FATCA registration	July 15, 2013
Registration deadline for FFIs to ensure inclusion on the IRS's electronically posted list of participating FFIs and registered-deemed compliant FFIs	October 25, 2013

[66] Treas. Reg. § 1.1471-2(a)(4)(ii)(A).
[67] Treas. Reg. § 1.1471-2(a)(4)(ii)(B).
[68] Treas. Reg. § 1.1471-2(a)(4)(ii)(B).
[69] Treas. Reg. § 1.1472-1(b)(2).
[70] See Lee A. Sheppard, *Boo-Boos in the FATCA Regulations*, Tax Notes Today, 2013 TNT 32-3, Feb. 15, 2013.

Activity	Effective Date
Expiration of grandfather period for issuance of obligations exempted from FATCA withholding (unless the obligation gives rise to a withholdable payment solely because obligation is treated as giving rise to a dividend equivalent under Code section 871(m) or unless the obligation requires a secured party to make a payment with respect to, or to repay, collateral posted to secure a grandfathered obligation) (See below for effective date with respect to foreign passthru payments)	January 1, 2014
FATCA withholding required on U.S. source FDAP payments to nonparticipating FFIs	January 1, 2014
FATCA withholding required on U.S. source FDAP payments to prima facie FFIs	July 1, 2014
FATCA withholding required on payments to NFFEs made with respect to a preexisting obligation to a payee that is not a prima facie FFI or a passive NFFE with one or more substantial U.S. owners[71]	January 1, 2015
Reporting deadline for participating FFIs to file information reports with the IRS for both the 2013 and 2014 calendar year	March 31, 2015
Withholding on payments with respect to preexisting obligations that are outstanding on December 31, 2013, unless payee is a nonparticipating FFI or the payee is not prima facie FFI	January 1, 2016
FATCA withholding required on gross proceeds	January 1, 2017

[71] But see text accompanying footnote 70, above.

Activity	Effective Date
Withholding required with respect to foreign passthru payments	Later of January 1, 2017 or six months after final Treasury Regulations defining a "foreign passthru payment" are issued.
FATCA withholding required on U.S. source FDAP payments made with respect to an offshore obligation	January 1, 2017

III. Documentation Requirements

A. Documentation

The Final Regulations generally permit a withholding agent to rely upon a withholding certificate to establish FATCA status of a payee without obtaining additional documentary evidence, unless such documentary evidence is required under other withholding provisions of the Code.[72] Alternatively, a withholding agent may elect to rely upon presumption rules in the Final Regulations in lieu of obtaining documentation from the payee.[73] This accommodates withholding agents that are unsure whether the documentation they have obtained is reliable or that do not wish to accept the responsibility associated with the acceptance of the documentation.

The Final Regulations expand the types of documentary evidence upon which a withholding agent may rely with respect to offshore obligations, including for example, government websites and reports from government agencies.[74] For preexisting obligations, the Final Regulations permit a withholding agent to rely on information previously recorded in the withholding agent's files, in addition to standardized industry codes, in determining the FATCA status of the payee.[75]

The Final Regulations permit reliance on written statements without additional documentation for offshore obligations that do not generate payments of U.S. source FDAP income (such as a depository account maintained outside of the United States by an FFI) and

[72] Treas. Reg. § 1.1471-3(c)(1).
[73] See Treas. Reg. § 1.1471-3(f).
[74] Treas. Reg. § 1.1471-3(c)(5)(ii)(A).
[75] Treas. Reg. § 1.1471-3(c)(5)(ii)(B).

enumerate the elements they must contain.[76] A written statement may also be relied upon with respect to an offshore obligation that generates payments of U.S. source FDAP income if it is accompanied by documentary evidence establishing the foreign status of the person named on the written statement.[77] The Final Regulations remove the penalties of perjury requirement for written statements used as documentation for payments made outside of the United States on offshore obligations, other than for payments of U.S. source FDAP income, as signed documentation outside of the United States generally does not require signature under penalties of perjury and such a requirement would depart from current anti-money laundering due diligence procedures.

The Final Regulations provide that substitute forms may be both prepared in and filled out in a foreign language, provided the withholding agent furnishes the IRS with a translated version upon request.[78] Such substitute forms must contain the same certifications as the official IRS form to the extent relevant.[79] For this purpose, a substitute form for individuals is acceptable, provided that the form contains the required information, including the individual's permanent residence address, all relevant tax identification numbers, and, if not signed under penalties of perjury, the withholding agent has obtained applicable documentary evidence that supports the person's claim of foreign status.[80] Qualifying non-IRS forms also may be used within the United States for offshore obligations. The Final Regulations provide that a withholding agent may rely upon a pre-FATCA Form W-8 in lieu of obtaining an updated version of the withholding certificate in certain circumstances.[81]

The Final Regulations generally require documentation to be refreshed every three years; however, certain documentation is permitted to remain valid indefinitely, subject to a change in circumstances, if the FATCA status claimed is a specified low-risk category.[82]

The so-called "eyeball test" permitted under other withholding provisions of the Code treats payments inside the United States to certain entities that have "incorporated," "corporation," or an indication of status as a financial institution in their names as made to U.S. exempt recipients.[83] Moreover, withholding agents often already obtain documentary evidence for these entities to satisfy anti-money laundering due diligence requirements. The Final Regulations permit a withholding agent to rely upon documentary evidence obtained with respect

[76] Treas. Reg. § 1.1471-3(c)(2)(ii), (c)(4), (d)(4)(iii).
[77] Id.
[78] Treas. Reg. § 1.1471-3(c)(6)(v)(A).
[79] Id.
[80] Treas. Reg. § 1.1471-3(c)(6)(v)(B).
[81] Treas. Reg. § 1.1471-3(c)(6)(vii), (d)(1).
[82] Treas. Reg. § 1.1471-3(c)(6)(ii).
[83] See Treas. Reg. § 1.6049-4(c)(1)(ii).

to the payee, in lieu of a Form W-9, in order to establish the entity's status as a U.S. person and rely on the "eyeball test" to determine (to the extent applicable) the payee's status as other than a specified U.S. person under FATCA.[84] The Final Regulations permit a withholding agent to presume that a payment made to a U.S. branch of certain banks and insurance companies is a payment of income that is effectively connected with a trade or business within the United States (and, thus, not a withholdable payment) if the withholding agent obtains a GIIN that enables the withholding agent to confirm that the FFI is a participating FFI or registered deemed-compliant FFI, as well as an employer identification number for the U.S. branch that enables the withholding agent to properly report the payment. However, the eyeball test relief in the Final Regulations is limited because, in the absence of documentation, the presumption rules in the Final Regulations limit the use of the eyeball test for certain types of payees, including corporations, financial institutions, nominees or custodians, and swap dealers.[85] Thus, even if a corporation is "eyeballed" as exempt because its legal name includes an approved corporate indicator and there are no other foreign indicators such as a foreign address, absent a withholding certificate or other documentary evidence of U.S. status that would preclude the application of the presumption standards, such a corporation will be considered foreign and presumed under these new standards to be a non-participating FFI subject to FATCA withholding.

B. Reliance on Common Agents and Third Parties

The Final Regulations provide rules with respect to sharing and relying upon documentation that has been provided by a common agent for multiple parties, including a fund advisor or principal underwriter that collects documentation for a family of mutual funds.[86] This reliance is made contingent upon the agent also sharing any knowledge regarding inaccuracy or unreliability of the FATCA status claims across all the withholding agents with which the agent shares the documentation.[87] The Final Regulations provide rules permitting a withholding agent to rely upon documentation collected with respect to an entity by a third-party data provider, subject to conditions including: (1) the third-party data provider is in the business of collecting information regarding entities and providing business reports or credit reports to unrelated customers and must have reviewed all information it has for the entity and verified that such additional information does not conflict with the FATCA status claimed by the entity; (2) the third-party data provider collects documentation sufficient to meet the applicable documentation requirements; and (3) the third-party data provider provides notice of changes in circumstances.[88] This provision permits withholding agents to rely upon documentation collected by a third-party

[84] Treas. Reg. § 1.1471-3(d)(2).
[85] Treas. Reg. § 1.1471-3(f)(3)(ii).
[86] Treas. Reg. § 1.1471-3(c)(9)(i).
[87] Id.
[88] Treas. Reg. § 1.1471-3(c)(9)(ii).

data provider, but does not relieve the withholding agent of the obligation to determine whether that documentation is reliable based on the information contained in the documentation and other information in the withholding agent's files.

C. Standards of Knowledge

Under the Final Regulations, the standards of knowledge provisions have been modified to allow withholding agents to rely on a claim of status as a participating or registered-deemed-compliant FFI based on checking the payee's GIIN against the published IRS FFI list.[89] Prior to January 1, 2015, a withholding agent is not required to confirm GIINs regarding an FFI's claim of status as a reporting Model 1 FFI.[90] However, an FFI will have reason to know that such claim is unreliable if the withholding agent does not have a permanent residence address for the FFI (or address of the relevant branch) in the relevant country that has in effect a Model 1 IGA.[91]

The Final Regulations further provide: (1) limits on a withholding agent's reason to know regarding a payee's claim of status as a foreign person;[92] (2) limits on the review that must be conducted with respect to particular types of documentation, and in particular on the scope of review with respect to preexisting obligations;[93] and (3) further guidance regarding when a payee has made a reasonable explanation regarding the presence of U.S. indicia.[94]

IV. Coordination with Other Withholding Regimes

In the case of a withholdable payment that is both subject to withholding under FATCA and is an amount subject to withholding under Treasury Regulation section 1.1441-2(a), a withholding agent may credit the withholding applied under FATCA against its liability for any tax due under Code sections 1441, 1442, or 1443.[95] Any amount subject to withholding under Code section 1445 is not subject to withholding under FATCA.[96] The Final Regulations add a provision to permit a withholding agent to offset its obligation to withhold under FATCA with respect to payments of dividend equivalents under Code section 871(m) in a security lending or substantially similar transaction to the extent that another withholding agent has withheld with respect to the same underlying security in such a transaction.[97] This offset is permitted only

[89] Treas. Reg. § 1.1471-3(e)(3)(i).
[90] Treas. Reg. § 1.1471-3(e)(3)(ii).
[91] Id.
[92] Treas. Reg. § 1.1471-3(e)(4)(ii)(B)(1)-(2), (iv)(B)(1)-(2).
[93] Treas. Reg. § 1.1471-3(e)(4)(ii)(C)(2), (iv)(C)(2).
[94] Treas. Reg. § 1.1471-3(e)(4)(ii)(B), (ii)(C)(2), (iv)(B), (iv)(C)(2).
[95] Treas. Reg. § 1.1474-6(b)(1).
[96] Treas. Reg. § 1.1474-6(c)(1).
[97] Treas. Reg. § 1.1474-6(b)(3).

when there is sufficient evidence that tax was actually withheld as determined under other withholding provisions of the Code.[98]

V. Withholding Agent Liability

A withholding agent that is required to withhold with respect to a payment under FATCA but fails either to withhold or to deposit any tax withheld with an authorized financial institution is liable for the amount of tax not withheld and deposited.[99] Proposed regulations described the circumstances under which a withholding agent could appoint agents to fulfill its obligations under FATCA and the withholding agent's liability. The Final Regulations remove restrictions on the use of sub-agents and clarify that a withholding agent remains liable for the acts of both its agents and its agents' sub-agents.[100] The withholding agent's liability will exist even if the agent is also a withholding agent and is itself separately liable for failure to comply with the FATCA provisions.[101] The same tax, interest, or penalties, however, will not be collected more than once. The Final Regulations also clarify that any agent or sub-agent that acts as a reporting agent for filing returns or making deposits and payments reportable on the form on behalf of a withholding agent must file an IRS Form 8655, "Reporting Agent Authorization," with the IRS.[102]

A withholding agent that cannot reliably associate a payment with documentation on the date of payment and that does not withhold or withholds at less than the 30% rate, is liable for the tax required to be withheld under FATCA (including interest, penalties, or additions to tax otherwise applicable in respect of the failure to deduct and withhold) unless the withholding agent has (1) appropriately relied on the permitted presumptions in order to treat the payment as exempt from withholding or (2) obtained after the date of payment valid documentation that meets the requirements to establish that the payment was, in fact, exempt from withholding.[103] If a withholding agent fails to deduct and withhold any amount required to be deducted and withheld, and the tax is satisfied by another withholding agent or is otherwise paid, then the amount of tax required to be deducted and withheld will not be collected from the first-mentioned withholding agent.[104] However, the withholding agent is not relieved from liability in any such case for any interest or penalties or additions to tax otherwise applicable in respect of the failure to deduct and withhold.

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[98] Id.
[99] Treas. Reg. § 1.1474-1(a)(2).
[100] Treas. Reg. § 1.1474-1(a)(3).
[101] Treas. Reg. § 1.1474-1(a)(3)(iii).
[102] Treas. Reg. § 1.1474-1(a)(3)(ii)(B).
[103] Treas. Reg. § 1.1474-1(a)(4)(i).
[104] Treas. Reg. § 1.1474-1(a)(4)(ii).

VI. The FATCA Registration Portal

FFIs registering with the IRS will be able to do so through the Portal, from anywhere in the world. The Portal will be the primary means for financial institutions to interact with the IRS to complete and maintain their FATCA registrations, agreements, and certifications, and is designed to provide an entirely paperless registration process. The Portal will be accessible to financial institutions beginning no later than July 15, 2013. At that time, financial institutions will be able to register and, as appropriate, agree to comply with their obligations as participating FFIs or as sponsoring entities, or to register and agree to act as limited FFIs or registered deemed-compliant FFIs (including reporting Model 1 FFIs, which are treated as registered deemed-compliant FFIs under the Final Regulations). The IRS will permit registration of FFIs that are reporting Model 1 FFIs or described as a Reporting Financial Institution under a Model 2 IGA so long as the associated jurisdiction is identified on a list published by the IRS of countries treated as having in effect an IGA, as appropriate, even if any necessary ratification of such IGA in the jurisdiction has not yet been completed. Once a financial institution has registered, the IRS will approve its registration. The IRS intends, upon such approval, to issue a GIIN to each participating FFI and registered deemed-compliant FFI. These GIINs will be assigned beginning no later than October 15, 2013, and should be used as the institution's identifying number for satisfying its reporting requirements and identifying its status to withholding agents. The IRS will electronically post the first list (IRS FFI List) of participating FFIs and registered deemed-compliant FFIs (including reporting Model 1 FFIs) on December 2, 2013. The IRS intends to update the IRS FFI List on a monthly basis. The last date by which a financial institution can register with the IRS to ensure its inclusion on the December 2013 IRS FFI List is October 25, 2013.

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