

# Global IRW Newsbriefs

## Understanding the preliminary guidance and request for comments regarding the implementation of FATCA (IRS Notice 2010-60)

On August 27, 2010, the Internal Revenue Service ("IRS") issued Notice 2010-60 (the "Notice") which provides the highly-anticipated initial insights into how the U.S. Treasury Department ("Treasury") and the IRS are approaching the implementation of certain sections of the Foreign Account Tax Compliance Act ("FATCA"). The Notice is the first step in the efforts of the IRS and Treasury to accelerate the publication of preliminary guidance to allow affected persons time to implement the systems and processes necessary to comply fully with the new withholding, documentation and reporting obligations resulting from FATCA. The Notice advances the dialogue between the public and the government by providing more detail on some of the key, time-sensitive rules and identifying areas in which the government is expressly seeking input from the public.

The Notice is heavily focused on certain priority issues involving the implementation of FATCA and the impact to Foreign Financial Institutions ("FFIs") to come into compliance with the new rules and solicits comments from the public on an array of issues the future guidance will need to address.

Written comments must be received by November 1, 2010. A full text of the Notice can be found at <http://www.irs.gov/pub/irs-drop/n-10-60.pdf>.

*Observation:* The FATCA provisions enacted on March 10, 2010, left much of the implementation aspects of the legislation reserved for the Secretary to develop via Treasury Regulations ("Regulations"). Congress gave Treasury unusually broad discretion to implement exceptions and exclusions and otherwise limit the legislation's scope, in order to make the rules practical and focused on the underlying goal of the legislation -- providing the IRS with an increased ability to detect U.S. tax evaders hiding their money in foreign accounts. Although the Notice provides insight into many of the definitions and procedures to be included in the proposed and final regulations and other related guidance, it is very limited in the exercise of the discretion given by Congress, leaving that to later guidance.

This Newsbrief provides an executive summary of the key points contained in the Notice, as well as a more in-depth analysis on the five sections outlined in the Notice with a Glossary of defined terms.

## Executive summary

FATCA, was included in the Hiring Incentives to Restore Employment ("HIRE") Act enacted in March 2010, and is generally effective for payments made after December 31, 2012. The Notice addresses a new "Chapter 4" to the Internal Revenue Code ("IRC" or "Code"). Generally, these provisions impose a 30 percent withholding tax on any "withholdable payment" made either to a FFI (including a qualified intermediary ("QI")) or to a NFFE, if the FFI or NFFE fails to comply with new reporting, disclosure, and related requirements. The provisions of Chapter 4 are in addition to, and do not replace the existing non-resident alien ("NRA") withholding rules of Chapter 3 ("NRA withholding"). The statute directs Treasury and IRS to implement rules to coordinate the two withholding regimes in order to avoid imposing withholding tax twice and otherwise preserving the extensive procedural rules presently in place for Chapter 3 withholding.

Highlights of the Notice include:

1. Grandfathered obligations - Chapter 4 withholding does not apply to any payment under any obligation outstanding on March 18, 2012, or from the gross proceeds from the disposition of such an obligation. Regulations will provide that the term "obligation" for this purpose means any "legal agreement" that produces or could produce withholdable payments, but excludes (i) any instrument treated as equity for U.S. tax purposes, and (ii) any legal agreement that lacks a definitive expiration or term (such as savings deposits, demand deposits accounts, and other similar accounts). Also, brokerage, custodial and similar agreements to hold financial assets for the account of others and to make and receive payments of income and other amounts with respect to such assets are not within the scope of a legal agreement for this purpose.
2. The Notice divides potential FFI's into five categories:
  - (i) Deemed compliant FFIs,
  - (ii) Exempted entities, including entities that present a low risk of being vehicles for U.S. tax evasion,
  - (iii) Participating FFIs that have entered into an agreement with the IRS to undertake the information collection and reporting responsibilities contemplated by the legislation,
  - (iv) Non-participating FFI's, and
  - (v) Entities excluded from the definition of an FFI (and that default to NFFE classification).
3. The procedures to be used by an FFI and U.S. Financial Institution ("USFI") to collect information and identify account holders. Transitional rules are provided for pre-existing accounts (controlled by the effective date of the agreement the institution enters into with IRS) to determine status based on specific indicia found using information available in electronic form. These procedures also delay the time before withholding becomes required for pre-existing accounts under FATCA by up to two years in certain scenarios. However, the provisions for accounts opened after the FFI's agreement becomes effective are not as flexible and require a review of all Know Your Customer ("KYC") documentation.
4. Reporting on U.S. accounts - For FFIs that do not elect to be subject to the same-year reporting rules as U.S. financial institutions, a new form will be provided to report the account information in U.S. dollars and electronically.
5. Request for specific comments - In each section of the Notice, Treasury and the IRS request additional comments regarding how to implement the respective provisions. The final section deals with a request for a number of specific comments ranging from the electronic filing provisions to the extent that local laws can be used to accomplish the provisions of FATCA.

Treasury and the IRS intend to issue proposed regulations and related guidance incorporating the principles contained in the Notice and addressing other matters necessary to implement FATCA. Future guidance is expected to include a draft FFI Agreement and draft information reporting and certification forms. Treasury and the IRS have requested comments on the issues addressed in this Notice and the priority of other issues that should be addressed in future guidance.

Future Newsbriefs will be provided as guidance is provided from Treasury or the IRS.

## Section I- Grandfathered obligations

FATCA provides that Chapter 4 withholding is not required on payments made on obligations or gross proceeds from the disposition of obligations that are outstanding on March 18, 2012. The Notice provides that, for purposes of FATCA, the term obligation means any legal agreement that produces or could produce withholdable payments and that "the regulations will provide that an obligation for this purpose does not include any instrument treated as equity for U.S. tax purposes, or any legal agreement that lacks a definitive expiration or term."

**Observation:** The Notice outlines that savings deposits and demand accounts, which are at the core of most retail financial institutions and their vast branch networks are not obligations that qualify for an exemption from Chapter 4 withholding under the FATCA grandfather provisions.

Under the Notice, it is expected that a legal agreement that produces withholdable payments does not include brokerage, custodial and similar agreements to hold financial assets for the account of others and to make and receive payments of income and other amounts with respect to such assets.

**Observation:** This provision seems to directly target the private wealth banks and structured transactions which may pose a high risk that a U.S. person could use to evade U.S. taxes.

## Section II- FFI and NFFE

### Overview

FATCA divides the recipients of withholdable payments into two categories -- FFIs and NFFEs -- with materially different compliance obligations for the two categories. The definition of a FFI in the legislation is expansive and remains so under the Notice. However the Notice further identifies the following five classes of foreign entities:

- (i) Those excluded from the definition of a financial institution and are treated as NFFEs,
- (ii) Entities treated as deemed-compliant FFIs,
- (iii) Foreign entities exempted from the compliance requirements, either expressly in the statute or identified in the forthcoming regulations as posing a low risk of tax evasion,
- (iv) Participating FFIs, and
- (v) Non-participating FFIs

### Foreign financial institutions

The Notice also provides additional guidance on the definition of a financial institution:

- *Accepts deposits in the ordinary course of a banking or similar business* - The Notice provides that these entities generally include, but are not limited to, entities that meet the definition of "banks" under the IRC.
- *Engaged in the business of holding financial assets for the account of others* - The Notice provides examples of these types of entities, which include broker-dealers, clearing organizations, trust companies, custodial banks, and entities acting as custodians with respect to the assets of employee benefit plans.
- *Engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading securities, interest in partnerships, commodities or any interest (including a futures or forward contracts or options in such securities, partnership interests or commodities)* - The Notice states that the regulations will provide that this test will be determined on the basis of all relevant facts and circumstances. However, future guidance will provide guidelines for determining what types of activities, either in whole or part, meet this definition and clarifies that the term "business" is distinct from the more proscribed term "trade or business" and, by way of example, observes that although isolated transactions might not give rise to a trade or business, isolated transactions may cause any entity to meet this definition depending on such factors as the magnitude and importance of the transaction in comparison to the entity's other activities.

**Observation:** The explanation could lead one to conclude that a specific transaction could result in an entity being an FFI in one year, but not in another.

### Exceptions to the FFI definition

Consistent with the Joint Committee on Taxation Technical Explanation for FATCA, which provided that the Secretary would provide additional guidance with respect to the scope of the FFI definition, the Notice provides examples of entities which would be exempt from FFI status and from FATCA withholding. These exceptions apply even though the entity would otherwise fall within the FFI definition of being primarily engaged in investing, reinvesting or trading in securities:

- Certain holding companies - This is limited to entities whose primary purpose is to act as a holding company for a subsidiary or group of subsidiaries that primarily engage in a trade or business other than that of a "financial institution.
- Start-up companies - This exception applies to certain entities that invest capital into assets with the intent to operate a non financial institution business, but is not yet operating such a business. This exclusion only applies to the first 24 months after the entity's organization. After such time, a foreign entity will no longer qualify for this particular exclusion from the definition of an FFI.

*Observation:* In order to alleviate the "burdens" of FATCA as a barrier to new business, the Notice allows these entities a grace period. Consistent with the Joint Committee Technical Explanation, this exclusion does not include venture funds or other investment funds that invests in start-up entities.

- Non-financial entities that are liquidating or emerging from reorganization or bankruptcy - This exception only applies if such an entity were not a financial institution before beginning the liquidation or reorganization process.

*Observation:* As these types of entities are operating under the purview of a Court or similar body and the sale of assets is critical to the plan for reorganization, this exclusion contemplates isolated transactions that could cause an entity to fall under the definition of an FFI in a specific year.

- Hedging/financing centers of a non-financial group - An entity that primarily engages in financing and hedging transactions with or for members of its expanded affiliated group that are not FFIs and does not provide such services to non-affiliates, may only be excluded from the definition of financial institution if the expanded affiliated group is primarily engaged in a non-Financial Institution business.

*Request for Information:* Specific comments are requested on how the classes of entities discussed above may be specifically defined in regulations, what mechanisms withholding agents could use to properly identify such entities (including self-certification, as appropriate), and whether other classes of entities should be similarly excluded.

### Insurance companies

Treasury and the IRS noted that they do not view the issuance of insurance or reinsurance contracts without cash value (for example, most property and casualty insurance or reinsurance contracts or term life insurance contracts) as implicating the concerns of Chapter 4. As such, it is anticipated that the regulations would treat entities whose business consists solely of issuing such contracts as non-financial institutions for purposes of Chapter 4.

**Observation:** The insurance products identified by the IRS primarily exist due to their tax-advantaged status (they allow earnings to grow tax deferred until they are paid out to the policy holder). As these products are highly structured and in some cases created under the particulars of the law in a foreign country, this is area that is in need of significant comments from industry.

**Request for Information:** Contracts such as life insurance (other than term life insurance contracts without cash value) and annuity contracts that typically combine insurance

protection with an investment component may present the risk of U.S. tax evasion that Chapter 4 is designed to prevent. As such, Treasury and the IRS have requested comments with respect to the appropriate treatment under Chapter 4 of entities that issue these products.

#### Entities with certain identified owners

Industry commentators have noted that the definition of FFI includes investment funds and other entities that may have a small number of direct or indirect account holders, all of whom are individuals or NFFEs that will not be subject to withholding or reporting (for example, a trust or similar vehicle that is settled and funded by a single person for the sole benefit of his or her children). For such entities, the administrative burden of entering into an FFI Agreement and complying with the reporting requirements may be disproportionate to the amount of U.S. investments giving rise to withholdable payments or passthru payments beneficially owned by such entity. As such, future guidance will treat certain types of entities that are FFIs as deemed-compliant FFIs, if the withholding agent:

- (i) Specifically identifies each individual, specified U.S. person, or excepted NFFE that has an interest in such entity, either directly or through ownership in one or more other entities,
- (ii) Obtains from each such person the documentation that the withholding agent would be required to obtain from such person under the guidance described in Section III of the Notice if such person were a new account holder or direct payee of the withholding agent, and
- (iii) The withholding agent reports to the IRS, in such manner as will be provided in future guidance, any specified U.S. person identified as a direct or indirect interest holder in the entity (Documented FFIs).

*Request for Information:* Comments are requested as to whether certain small FFIs should be treated as NFFEs, for purposes of applying FATCA, regardless of whether withholding agents currently determine the direct and indirect owners of such entities for purposes of complying with local law or regulatory obligations.

#### Financial institutions organized in U.S. territories

Although entities organized in a U.S. territory generally are treated as foreign for purposes of the IRC an FFI does not include a financial institution organized under the laws of a U.S. territory ("Territory-Organized FI"). Treasury and the IRS intend to permit financial institutions organized in territories to assume the responsibilities imposed on U.S. withholding agents under FATCA. However, as such entities remain withholding agents under FATCA, the IRS and Treasury will provide future guidance to address the FATCA withholding obligations of Territory-Organized FIs and to address potential compliance concerns.

#### Classes of persons posing a low risk of tax evasion - retirement plans

Unlike the Chapter 3 withholding rules, FATCA specifically excludes withholding on payments beneficially owned by a foreign government or a political subdivision of a foreign government, an international organization, or a foreign central bank of issue. FATCA also provides the Secretary with broad discretion to eliminate other classes of persons, if they are determined to pose a low risk of tax evasion.

The Notice provides that future regulations may qualify certain retirement plans, which pose a low tax evasion risk, as exempt from FATCA only if the entity:

- (i) Qualifies as a retirement plan under the law of the country in which it is established,
- (ii) Is sponsored by a foreign employer, and
- (iii) Does not allow U.S. participants or beneficiaries other than employees who worked for the foreign employer in the country in which such retirement plan is established during the period in which benefits accrued.

**Observation:** The narrowly proposed rule allowing U.S. participants or beneficiaries only if they worked for the employer in the country in which the plan was established is overly restrictive and may exclude from coverage many retirement plans sponsored by employers whose operations cross country lines.

**Request for Information:** Comments are requested on the definition of a retirement plan for this purpose, and how such a plan could appropriately identify or document itself to a withholding agent to verify its compliance with any such definitional requirements; and whether other categories of foreign employee benefit or deferred compensation plans should be subject to the same treatment as foreign retirement plans for Chapter 4 purposes.

### U.S. branches of FFIs

Although foreign entities with a U.S. branch are not excluded from the definition of an FFI, the income earned by the U.S. branch that is connected to a U.S. business is excluded from the definition of a withholdable payment (the Effectively Connected Income ("ECI") exclusion). Future regulations are expected to be issued regarding the application of the ECI exclusion by withholding agents making payments to U.S. branches of FFIs. These regulations are not expected to incorporate the type of presumption rules currently in existence under the NRA withholding regime for payments made to certain U.S. branches of regulated banks and insurance companies.

The Notice reinforces that the ECI exclusion does not, however, cover all payments that may be made to an FFI's U.S. branch, specifically the withholdable payments received by a U.S. branch as an intermediary on behalf of its account holders. Treasury and the IRS are considering permitting a U.S. branch to document its account holders for FATCA purposes under the requirements to be imposed on a USFI and will provide rules to avoid duplicate reporting. If the U.S. branch receives withholdable payments other than in its capacity as an intermediary, which payments are not eligible for the ECI exclusion, the FFI generally will be required to execute an FFI Agreement to avoid withholding.

**Request for Information:** Comments are requested as to other possible rules or methods that withholding agents could use to determine the application of the ECI exclusion.

### Controlled foreign corporations

The Joint Committee report noted that a deemed compliant FFI may include certain controlled foreign corporations (CFCs) owned by U.S. financial institutions and certain U.S. branches of foreign financial institutions. For information reporting purposes, a CFC is treated as a U.S. payor and is subject to the NRA withholding and domestic withholding regimes. Despite already being subject to current information reporting regimes, the Notice specifically states that a CFC that qualifies as a financial institution is an FFI under FATCA and that it would not be appropriate to treat the CFC as a deemed compliant FFI with FATCA because the current documentation and year-end reporting requirements imposed on CFCs are less stringent than those imposed on FFIs, and that any other treatment, could create a significant risk of tax evasion. The Notice outlined the following differences:

- Form 1099 reporting and withholding are not required on two important classes of persons who are subject to reporting and withholding by a participating FFI under FATCA.
  - CFCs are not required to report on certain payments to domestic corporations, whereas FFIs are required to report information on account holders that are specified U.S. persons, which includes certain domestic corporations; and
  - The NRA withholding regime currently does not impose transparency on U.S. owners of non-U.S. entities, unless the non-U.S. entity is disregarded or is fiscally transparent. Thus, financial institutions that are CFCs are generally not required to report on the U.S. owners of non-U.S. entities. However, FATCA imposes reporting obligations on FFIs who are CFCs with U.S. accounts or CFCs making withholdable payments to NFFEs.
- FFIs need to obtain waivers from account holders when a reporting obligation would otherwise be prohibited under non-U.S. law (or, in the absence of such a waiver, to close such holders' accounts). No comparable requirement would apply to FFIs that are CFCs if they were exempted from FFI status.

To prevent duplicative reporting, the Notice specifies future guidance will coordinate the FATCA reporting of CFCs with the various other information reporting and withholding regimes.

**Request for Information:** Comments are requested regarding the treatment of CFCs and the treatment of other non-U.S. entities, including, e.g. any non-U.S. charitable organizations that may

fall within the definition of an FFI. In particular, Treasury and the IRS request comments providing specific suggestions for defining and identifying specific classes of non-U.S. entities that should be: (i) excluded from the definition of FFI; (ii) identified as being deemed compliant; or (iii) identified as posing a low risk of tax evasion.

### **Section III - Collection of information and identification of persons by FFIs under Section 1471 (FFI) and 1472 (NFFE)**

Possibly the most awaited provisions of FATCA are those dealing with the millions of existing accounts subject to the FATCA regime. For FFIs, the most significant responsibility is to determine which, if any, of existing accounts are U.S. accounts, which are defined as financial accounts held by one or more "specified U.S. persons" or "U.S. owned foreign entities." The Notice contains significant detail about the responsibilities of FFIs who have entered into an IRS Agreement ("FFI Agreement") ("participating FFIs") as well as the responsibilities for USFIs, which will be virtually identical to the documentation provisions for FFIs and NFFEs. Although initially the documentation framework set forth in the Notice appears reasonable and straight forward, the implementation and compliance will be burdensome, and costly.

#### **Overview of the responsibilities of participating FFIs and USFIs**

Generally, a "participating FFI" will need to satisfy the following requirements to comply with IRC section 1471 (hereafter "FFI rules") and section 1472 (hereafter "NFFE rules"):

1. Determine whether individual account holders are to be treated as U.S. persons or other persons; and
2. Determine whether account holders who are entities should be treated as U.S. persons, FFIs, entities described in section 1471(f) (hereafter "excepted FFIs"), or NFFEs. Next, determine whether:
  - a) Entities that are U.S. persons are to be treated as specified U.S. persons or other U.S. persons,
  - b) FFIs are to be treated as participating FFIs, deemed-compliant FFIs, or non-participating FFIs, and
  - c) NFFEs are to be treated as "U.S.-owned foreign entities."

The Notice provides that USFIs will need to follow similar requirements when withholdable payments are made to FFIs and NFFEs. Generally, USFIs making withholdable payments to entities will need to determine whether to treat those entities as U.S. persons, FFIs, excepted NFFEs, or NFFEs. Next, they must determine whether:

1. FFIs are to be treated as participating FFIs, deemed-compliant FFIs, or non-participating FFIs; and
2. NFFEs are to be treated as excepted NFFEs or as other NFFEs.

Specifically, to comply with FFI rules and NFFE rules, the Notice has separate documentation procedures for the following types of accounts:

- a) Preexisting financial accounts held by individuals ("preexisting individual accounts"),
- b) New financial accounts held by individuals ("new individual accounts"),
- c) Preexisting financial accounts held by persons other than individuals ("preexisting entity accounts"), and
- d) New financial accounts held by persons other than individuals ("new entity accounts").

#### **Participating FFIs**

Under the FFI Agreement, participating FFIs will be required to identify financial accounts held by specified U.S. persons or U.S.-owned foreign entities. Preexisting account holders may already be documented as a U.S. person with Form W-9, Request for Taxpayer Identification Number and Certification, or documented as a non-U.S. person with Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding.

Generally, the Notice provides that participating FFIs will be permitted to rely on Forms W-9 collected for other U.S. tax purposes to document accounts for individuals as U.S. accounts and that Forms W-9 or W-8BEN (or substitute forms) will be required to be collected from certain other account holders.

**Observation:** Future regulations hopefully will address the impact, if any, that Forms W-9 are not retained on preexisting accounts in accordance with the three-year retention rule set forth in the regulations to Code section 3406 (the backup withholding provisions for U.S. persons).

Specifically, as noted above, participating FFIs (as well as other withholding agents) will be required to identify other FFIs as participating FFIs, deemed-compliant FFIs, or non-participating FFIs (or as excepted FFIs). To assist in the identification process, the Notice provides the IRS is contemplating issuing employer identification numbers ("EINs") to participating FFIs ("FFI EINs") and that participating FFIs will use their FFI EINs to identify themselves to withholding agents. Until withholding agents are able to verify the status of FFIs with the IRS, withholding agents and participating FFIs will be permitted to rely on certifications provided by FFIs as to their status as participating FFIs, unless the withholding agent or Participating FFI knows or has reason to know that the certification provided is incorrect.

**Observation:** In recent years, the IRS has continued to move in the direction of electronic communication with taxpayers. Given the massive requests that are likely to be made to verify FFI EINs, we anticipate that the IRS will create an electronic matching system, similar to the TIN Matching system used to verify TINs for U.S. persons.

### Participating FFIs' identification of individual accounts for the FFI rules

The following table outlines the documentation required to be obtained by participating FFIs depending on whether account holders are preexisting individual accounts (accounts opened prior to the FFI Agreement's effective date) or new individual accounts (accounts opened after the FFI Agreement's effective date).

**Table 1: Participating FFI requirements for preexisting individual accounts and new individual accounts**

Step	Preexisting individual accounts	New individual accounts
Overview	Generally, required to determine if preexisting individual accounts should be treated as (1) U.S. accounts, (2) accounts of recalcitrant account holders, or (3) other accounts.	Generally, required to determine if such new accounts are to be treated as U.S. accounts, which will include new account relationships established by individuals holding preexisting financial accounts with the FFI (e.g., a custodial account opened after the effective date of the participating FFI's FFI Agreement by an individual who maintains a preexisting depository account at the FFI).
1.	(Optional): An FFI may treat a depository account as other than a U.S. account if the depository accounts held by the account holder at such FFI are less than \$50,000 (or the equivalent in foreign currency).  The \$50,000 threshold is determined by averaging the month-end balances or values during the calendar year preceding the entry into force of the FFI's FFI Agreement (or, other balance if determined less frequently than monthly for purposes of reporting to the account holder during the year) of all depository accounts held by the account holder at such FFI was less than \$50,000 (or the equivalent in foreign currency).	(Optional): An FFI may treat a depository account as other than a U.S. account if the depository accounts held by the new individual financial account at such FFI are less than \$50,000 (or the equivalent in foreign currency).  The \$50,000 threshold is determined by averaging the month-end balances or values during the calendar year preceding the entry into force of the FFI's FFI Agreement (or, other balance if determined less frequently than monthly for purposes of reporting to the account holder during the year) of all depository accounts held by the account holder at such FFI was less than \$50,000 (or the equivalent in foreign currency).
2.	For accounts not eliminated under the \$50,000 threshold (Step 1), all account holders who are already documented (e.g., Form W-9) as U.S. persons for other U.S. tax purposes, e.g., NRA withholding and reporting regime and U.S. payee reporting regime, will be treated as specified U.S. persons, and those account holders'	For accounts not addressed in step 1, the FFI will categorize all account holders already documented (e.g., Form W-9) as U.S. persons for other U.S. tax purposes as specified U.S. persons for purposes of FATCA, and treat those account holders' financial accounts as U.S. accounts for purposes FATCA,

Step	Preexisting individual accounts	New individual accounts
	financial accounts will be treated as U.S. accounts.	
3.	<p>For accounts not addressed in steps 1 or 2, the FFI shall treat an account as other than a U.S. account if the electronically searchable information maintained by the FFI <b>and</b> associated with the account (e.g., customer information kept for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements) does not include any "<i>indicia of potential U.S. status.</i>"</p> <p>The indicia of potential U.S. status are set forth in Table 2</p>	<p>For accounts not qualifying for the \$50,000 exemption or not already documented as U.S. person (steps 1 &amp; 2), the FFI will obtain and examine from individuals who are beneficial owners of new individual accounts documentary evidence establishing the U.S. or non-U.S. status of individual account holders. For new individual accounts that are identified as held by U.S. persons in this step, the FFI must obtain Forms W-9 from the individual holders of the accounts,</p>
4.	<p>For the step 3 accounts with indicia of potential U.S. status, the FFI will be required to obtain certain documentation to establish whether the account is a U.S. account.</p> <p>The necessary document to be obtained for each indicia of potential U.S. status is set forth in Table 2.</p>	<p>For accounts not qualifying for the \$50,000 exemption or not already documented as U.S. person in steps 1,2 and 3, the FFI will examine all other information collected in connection with the new individual financial account (e.g., for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements) for indicia of potential U.S. status.</p> <p>The indicia of potential U.S. status are consistent with those found for preexisting accounts, please refer to Table 2.</p>
5.	<p>Required documentation from step 4 must be requested by the FFI no later than one year after the effective date of the FFI's FFI Agreement. If the required documentation is not provided within one year after the date of request, then such account holders will be classified as recalcitrant account holders from such date until the date on which appropriate documentation is received from the account holder by the participating FFI.</p>	<p>The necessary document to be collected for each indicia of potential U.S. status is consistent with documents required for preexisting accounts, please refer to Table 2.</p>
6.	Not Applicable	<p>An FFI will be required to repeat steps 4 and 5 each time the FFI knows or has reason to know that circumstances affecting the correctness of the classification of an account as a U.S. account have changed.</p>
Note.	<p>The Notice provides that future guidance will prescribe circumstances under which the preexisting individual procedures will be reapplied for accounts that are treated as other than U.S. accounts in step 1 and that have an average monthly balance exceeding \$50,000 in a year subsequent to the first year in which the FFI's FFI Agreement is applied with respect to existing accounts.</p>	<p>The Notice provides that future guidance will prescribe the period during which the new individual procedures must be performed, the default treatment of account holders during that period, and the circumstances under which the new individual procedures will need to be reapplied for accounts that are treated as other than U.S. accounts in step 1 and that have an average monthly balance (or, other balance if determined less frequently than monthly for purposes of reporting to the account holder during the year) exceeding \$50,000 in a year ending after the date on which the account was opened.</p>

**Observation:** Based on the FATCA comment letters provided in response to IRS Announcement 2010-22, many financial institutions have indicated the \$50,000 exclusion (step 1) is too low and will be impractical to implement due to system's limitations, especially if there are multiple entities under one FFI Agreement. Thus, we anticipate that many FFIs will elect not to apply this step.

**Table 2: Indicia of potential U.S. status and the required documentation**

Indicia of potential U.S. status (Preexisting Accounts & New Accounts)	Required documentation to establish as a U.S. Account
Identification of any account holder as a U.S. resident or U.S. citizen;	Form W-9
A U.S. address associated with an account holder of the account (whether a residence address or a correspondence address)	Form W-9 establishing U.S. status, or Form W-8BEN <b>and</b> documentary evidence establishing non-U.S. status. <i>Documentary evidence is satisfied to prove non-U.S. status if the account holder provides a non-U.S. passport or other similar evidence of non-U.S. citizenship.</i>
A U.S. place of birth for an account holder of the account;	
An "in care of" address, a "hold mail" address, or a P.O. address that is the sole address on file with respect to the account holder;	Form W-9 establishing U.S. status, or Form W-8BEN <b>or</b> documentary establishing non-U.S. status of the individual account holder.
A power of attorney or signatory authority granted to a person with a U.S. address; or	<i>Participating FFIs will be entitled to rely on the documentation received from account holders unless it knows or has reason to know that the information contained in such documentation is unreliable or incorrect</i>
Standing instructions to transfer funds to an account maintained in the U.S., or directions received from a U.S. address.	

**Observation:** It appears that complying with the "standing instructions" indicia will be extremely difficult due to both systems limitations and that various front and back offices at a financial institution have the potential to "touch" an account holder. Paper communications with account holders are still a common practice and could easily be missed.

For pre-existing individual accounts only, participating FFIs are permitted to rely on documentation maintained in an account holder's files and are required to obtain additional documentation from an account holder only where the above-described documentation has not been collected previously. However,

- Within two years after the effective date of the FFI's Agreement, all preexisting individual accounts that were treated as other than U.S. accounts (see Table 1, steps 1 and 3) **and** that had an average monthly balance (or, other balance if determined less frequently than monthly for purposes of reporting to the account holder during the year) exceeding \$1,000,000 during the year preceding the first year in which the FFI's FFI Agreement enters into effect, will be subject to the new individual account procedures (see Table 1) to determine whether such accounts should continue to be treated as other than U.S. accounts, unless the Participating FFIs has collected, reviewed, and maintained documentation sufficient to establish the U.S. or non-U.S. status of such accounts, and such U.S. or non-U.S. status is reflected in electronically searchable information maintained by the FFI and associated with the account.

**Observation:** In effect, it seems FFI's will have two years from the effective date of the FFI's FFI Agreement before any type of withholding is required. This seems to be in a response to the consistent comments received from industry that the deadline for compliance appears to be too short.

- Within five years after the effective date of the FFI's Agreement, all preexisting individual accounts treated as other than U.S. accounts (see Table 1, steps 1 and 3) (irrespective of the account's value) will be subject to the new individual account procedures (see Table 1) to determine whether such

accounts should continue to be treated as other than U.S. accounts, unless the Participating FFI has collected, reviewed, and maintained documentary evidence sufficient to establish the U.S. or non-U.S. status of such accounts, and such U.S. or non-U.S. status is reflected in electronically searchable information maintained by the FFI and associated with the account.

- The Notice provides that future guidance will prescribe circumstances under which the preexisting individual account procedures (see Table 1) which will be reapplied for accounts that are treated as other than U.S. accounts in step 1 and that have an average monthly balance exceeding \$50,000 in a year subsequent to the first year in which the FFI's FFI Agreement is applied with respect to existing accounts.
- For documentary evidence only, a participating FFI will be deemed to have maintained documentation if the participating FFI retains a record of the documentary evidence collected and reviewed, notes the type of document, any identification number contained in the document, the document's place and date of issuance, and its expiration date, if any. Reminder: Forms W-8BEN or W-9 must be retained.

**Observation:** Under the Notice, copies of Forms W-8BEN and W-9 must be retained. Future guidance from the IRS will need to clarify that the electronic storage rules set forth in Rev. Proc. 97-22 and FSA 200229001 are applicable for FATCA.

**Observation:** The Notice highlights that the IRS is not only looking to documentation provided in Forms W-8BEN or W-9, but to all of the information received from account holders. These provisions imply that the IRS believes most of the documentation remains in electronic form. Depending on the institution and its commitment to technology, completely distinctive levels of due diligence and compliance can be achieved.

## Financial accounts held by entities - identification by participating FFIs

Among the more complicated provisions included in the Notice are the documentation requirements applicable to participating FFIs with respect to financial accounts held by entities ("entity accounts"), which will be dependent on whether the accounts are preexisting entity accounts or "new entity accounts."

### *Preexisting entity accounts:*

For financial accounts held by non-individuals when a FFI's FI Agreement becomes effective, the participating FFIs will be required to determine if preexisting entity accounts should be treated as (1) U.S. accounts, (2) accounts of participating FFIs, (3) accounts of deemed-compliant FFIs, (4) accounts of nonparticipating FFIs, (5) accounts of entities that are excepted FFIs, (6) accounts of recalcitrant account holders, (7) accounts of excepted NFFEs, (8) accounts of other NFFEs, or (9) other accounts. Such determinations will be made in accordance with the documentation procedures set forth in Table 3, below.

*Request for Information:* Treasury and the IRS request comments regarding the development of presumptions on which a participating FFI could rely to determine whether a person identified as a U.S. person is a specified U.S. person, if documentation establishing to the contrary is not provided within one year after the FFI's FFI Agreement enters into effect. See Step 1 under Table 3 below.

### *New entity accounts:*

For new financial accounts held by non-individuals and opened after the date on which the participating FFI's FFI Agreement is effective, the participating FFI will follow similar procedures for preexisting entity accounts to determine whether such accounts are to be treated as (1) U.S. accounts, (2) accounts of participating FFIs, (3) accounts of deemed-compliant FFIs, (4) accounts of excepted FFI entities, (5) accounts of nonparticipating FFIs, (6) accounts of recalcitrant account holders, (7) accounts of excepted NFFEs, or (8) accounts of other NFFEs. Such determinations will be made in accordance with the documentation procedures set forth in Table 3, below.

**Table 3: Participating FFIs' identification of entity accounts**

Step	Preexisting entity accounts: (Opened before January 1, 2013 or the effective date of the FFI Agreement)	New entity accounts opened after January 1, 2013 or the effective date of the FFI Agreement)
1.	<p>Participating FFIs will treat all account holders already identified as U.S. persons for other U.S. tax purposes as U.S. persons for purposes of the FFI rules.</p> <ul style="list-style-type: none"> <li>• Participating FFIs will permit such entities to provide documentation establishing that they are not specified U.S. persons for purposes of FATCA.</li> <li>• Any U.S. person that does not provide such documentation within one year after the participating FFI's FFI Agreement is effective will be classified as a specified U.S. person for purposes of FATCA until such documentation is received.</li> </ul>	Same
2.	<p>For the entity account holders not identified in step 1, the FFI will review its electronically searchable files for indications that the entity account holder is a U.S. entity (e.g., a place of incorporation in the United States):</p> <ul style="list-style-type: none"> <li>• Such entities will be presumed to be U.S. entities and, within one year of the FFIs effective date, the FFI will be required to request documentation establishing that they are not U.S. persons or, if they are U.S. persons, they are not specified U.S. persons for purposes of FATCA. <ul style="list-style-type: none"> <li>○ Prior to the FFI's request, entity account holders will be permitted to present documentation</li> </ul> </li> </ul>	See Note below

Step	Preexisting entity accounts: (Opened before January 1, 2013 or the effective date of the FFI Agreement)	New entity accounts opened after January 1, 2013 or the effective date of the FFI Agreement)
	<p>establishing they are not U.S. persons or specified U.S. persons for purposes of FATCA.</p> <ul style="list-style-type: none"> <li>○ Should the requested documentation not be presented within one year after the date of the request, the account holder will be classified as a specified U.S. person until such documentation is received and shall be treated as a recalcitrant account holder. This treatment will continue until the FFI receives the information it is required to report with respect to such account holder.</li> <li>● An account holder treated as a specified U.S. person shall be treated as a recalcitrant account holder until the FFI receives the information it is required to report with respect to such account holder.</li> </ul>	
3.	<p>All entity account holders not classified as U.S. persons in steps 1 or 2 will be initially presumed to be non-U.S. entities.</p> <ul style="list-style-type: none"> <li>a) The participating FFI will then determine whether the entity's name (or other information readily available in its electronically searchable files) clearly indicates that the entity is an FFI. If such information exists, the participating FFI will tentatively classify the entity as an FFI.</li> <li>b) If the entity account holder is tentatively classified as an FFI in step 3a, the participating FFIs will request both the entity's FFI EIN and certification of its Participating FFIs status. Upon receipt of the FFI EIN and certification of Participating FFIs status, treat the entity as a Participating FFI for purposes of applying the FFI rules, subject to confirmation with the IRS that the FFI EIN is valid.</li> <li>c) If an entity account holder tentatively classified as an FFI in step 3a does not provide the documentation requested within nine months after the participating FFI's FFI Agreement is effective, the Participating FFIs will, within one year after the participating FFI's Agreement is effective, request documentation from the entity indicating whether the entity is a (a) participating FFI, (b) deemed-compliant FFI, (c) non-participating FFI, (d) excepted FFI entity, or (d) NFFE. <ul style="list-style-type: none"> <li>○ An entity account holder that does not present such documentation within one year after the date of this request, will be treated as a non-participating FFI until the date on which appropriate documentation is received by the participating FFI. During the interim period, the entity account holder will be considered an excepted NFFE, and its account will be treated as other than a U.S. account, unless the entity is otherwise identified by the IRS on a published list. If the entity is so identified, the entity will be treated as a non-participating FFI.</li> <li>○ The Notice indicates that Treasury and the IRS are contemplating requiring participating FFIs to report information regarding the identity of any entity that provides documentation indicating that it is a participating FFI, but that does not provide a valid FFI EIN</li> </ul> </li> </ul>	See Note below
4.	<p>With respect to any entity account holder not identified in steps 1, 2 or 3:</p> <ul style="list-style-type: none"> <li>a) The participating FFI will examine the entity's account file</li> </ul>	Same

Step	Preexisting entity accounts: (Opened before January 1, 2013 or the effective date of the FFI Agreement)	New entity accounts opened after January 1, 2013 or the effective date of the FFI Agreement)
	<p>for evidence that the entity is engaged in an active trade or business (other than a financial institution business). Appropriate evidence in this regard may include (a) statements of business activities, (b) physical assets used in business activities, (c) persons employed in business activities, and (d) receivables and payables related to business activities (such as may be shown on audited financial statements or other business records provided by the account holder).</p> <ul style="list-style-type: none"> <li>○ The Notice indicates that Treasury and the IRS are considering permitting FFIs to rely in part on information obtained from third-party credit databases.</li> <li>○ An entity account holder identified in this step as engaged in an active trade or business will be treated as an excepted NFFE and an account of such an entity will be treated as other than a U.S. account for purposes of FATCA.</li> </ul> <p>b) For entity account holders not deemed to be engaged in an active trade or business, the FFI will permit the account holder to present documentation showing or certifying that they are a (a) participating FFI (in which case the procedures of step 3(b) and (c) (above) will apply), (b) deemed compliant FFI, (c) non-participating FFI, (d) NFFE, or (d) excepted FFI entity.</p> <ul style="list-style-type: none"> <li>○ The participating FFI will be permitted to rely on existing documentary evidence in its account files for this purpose, unless the Participating FFI knows or has reason to know that the documentation is unreliable or incorrect.</li> <li>○ If the participating FFI does not have existing documentary evidence on which it can rely for this purpose, the Participating FFI will request documentation as required to show or certify the status of the entity account holder within one year after the participating FFI's FFI Agreement is effective.</li> <li>○ If the entity account holder does not present the documentation required by this step, the entity account holder will be treated as a non-Participating FFI from the date that is one year after the date of the FFI's request for documentation until the date appropriate documentation is received from the entity account holder by the participating FFI.</li> </ul> <p>c) If the documentation provided by the account holder in the step 4b indicates that the account holder is an NFFE, the participating FFI must either:</p> <ul style="list-style-type: none"> <li>○ Obtain documentary evidence (or rely on existing documentary evidence in its account files) that the NFFE is an excepted NFFE, or</li> <li>○ (1) Specifically identify each individual, and each other specified U.S. person that has an interest in such NFFE, either directly or through ownership in one or more other entities, other than through ownership in an excepted NFFE, as (a) a participating FFI, (b) a deemed-compliant FFI, or (c) an excepted FFI entity, and (2) if a specified U.S. person is identified in (1), treat the</li> </ul>	

Step	Preexisting entity accounts: (Opened before January 1, 2013 or the effective date of the FFI Agreement)	New entity accounts opened after January 1, 2013 or the effective date of the FFI Agreement)
	<p>account as a U.S. account and obtain with respect to each such person the documentation that the Participating FFI would be required to obtain from such person if such person were a new account holder and report any such specified U.S. person to the IRS.</p> <ul style="list-style-type: none"> <li>○ If the Participating FFI is unable to obtain the documentation required by this provision with respect to a specified U.S. person identified in (1), the account holder will be treated as a recalcitrant account holder from the date that is two years after the date on which the participating FFI's FFI Agreement is effective until the date appropriate documentation is received from the account holder by the participating FFI.</li> <li>○ A Participating FFI will be entitled to rely on the documentation received from entity account holders unless it knows or has reason to know that the information contained in such documentation is unreliable or incorrect.</li> </ul>	

Note: For new entity accounts only: FFIs must determine how to treat such accounts using all information collected by the FFI (e.g., for purposes of opening and maintaining the account, corresponding with the account holder, and complying with regulatory requirements, including anti-money laundering/know-your-customer ("AML/KYC") requirements), regardless of whether such information is available in electronically searchable files. Information collected by the FFI for purposes of opening and maintaining the account, corresponding with the account holder, and complying with regulatory requirements, including AML/KYC requirements would also be treated as known by the FFI for purposes of determining whether the FFI should treat documentation provided by an entity as unreliable or incorrect.

**Observation:** For preexisting entity accounts, step 1, it is implied, but not clearly stated, that the account holders that are U.S. persons are not treated as specified U.S. persons during the one year documentation waiting period.

**Request for Information:** Comments are requested about the level of evidence that is sufficient to establish under step 4(a) that an entity is engaged in an active trade or business, as well as ways in which step 4(a) can be structured to ensure that it is not subject to abuse.

#### Coordination with NFFE rules

Participating FFI who makes a withholdable payment to NFFE account holders will be treated as a withholding agent for the NFFE rules. The Notice provides that NFFE account holders are subject to the FFI entity documentation procedures, rather than the NFFE certification procedures set forth in the NFFE rules.

#### Due diligence requirements of USFIs

A USFI making withholdable payments will be required to determine if its payees are U.S. persons, participating FFIs, deemed-compliant FFIs, non-participating FFIs, excepted FFIs, excepted NFFEs, or other NFFEs. If the payee is an account holder of the USFI, the procedures to be applied are parallel to the Participating FFIs account holder procedures. The procedures to be applied are set forth in Table 4, below.

Additionally, with respect to non-U.S. entity account holders, USFIs will be required to determine if their non-U.S. entity account holders are NFFEs subject to reporting or withholding under the NFFE rules or FFIs subject to withholding under FFI rules.

**Table 4: USFIs' due diligence requirement for preexisting entity accounts and new non-U.S. entity accounts**

Step	Identification of non-U.S. entities that hold preexisting financial accounts (Opened before January 1, 2013)	Identification of new non-U.S. entity financial accounts (Opened after January 1, 2013)
1.	The USFI will treat all entity account holders identified as U.S. persons for purposes of the NRA withholding regime or U.S. payee reporting regime as U.S. persons for purposes of FATCA. The remaining entity account holders will be treated as non-U.S. entities for purposes of FATCA.	See Notes below
2.	<p>For each entity account holder treated as a non-U.S. entity in step 1:</p> <ul style="list-style-type: none"> <li>a) The USFI will determine whether the non-U.S. entity's name (or other information readily available to the USFI in its electronically searchable files regarding the entity account holder) clearly indicates that the non-U.S. entity is an FFI. If so, the USFI will <i>tentatively</i> classify the entity as an FFI.</li> <li>b) If a non-U.S. entity account holder is tentatively classified as an FFI in step 2(a), the USFI will request the entity account holder's certification of its Participating FFI status and FFI EIN, and upon receipt of the FFI EIN and certification of Participating FFI status, treat the Non-U.S. entity as a Participating FFI for purposes of applying the FFI rules, subject to confirmation with the IRS that the FFI EIN is valid.</li> <li>c) If a non-U.S. entity account holder does not provide a valid FFI EIN by December 31, 2013, the USFI will request documentation from the non-U.S. entity indicating whether the non-U.S. entity is a participating FFI, a deemed-compliant FFI, an excepted FFI entity, a non-participating FFI, or an NFFE. <ul style="list-style-type: none"> <li>o If the requested documentation is not provided by December 31, 2014, then any non-U.S. entity will be classified as a non-Participating FFI from such date until the date on which appropriate documentation is received from the entity account holder by the USFI.</li> <li>o During the interim period, the entity will be considered an excepted NFFE unless identified by the IRS on a published list. If so identified, the entity will be treated as a non-participating FFI.</li> <li>- Treasury and the IRS also contemplate requiring USFIs to report information regarding the identity of any entity that provides documentation indicating that it is a participating FFI, but does not provide a valid FFI EIN.</li> </ul> </li> </ul>	
3.	<p>With respect to any entity account holder not treated as a U.S. person or as an FFI:</p> <ul style="list-style-type: none"> <li>a) The USFI will examine the entity's account file for evidence that the entity is engaged in an active trade or business (other than an FI business). Appropriate evidence in this regard may include (a) statements of business activities, (b) physical assets used in business activities, (c) persons employed in business activities, and (d) receivables and payables related to business activities (such as may be shown on audited financial statements or other business records). <ul style="list-style-type: none"> <li>o For this purpose, Treasury and the IRS are also considering permitting USFIs to rely in part on information obtained from third-party credit databases. A non-U.S. entity account holder identified in this step as engaged in an active trade or business will be treated as an excepted NFFE for purposes of FATCA.</li> </ul> </li> <li>b) For entity account holders not deemed to be engaged in an active trade or business (step 3a), USFIs will request the entity account holder to present documentation certifying that they are a Participating FFI (in which case the procedures of step 2(b) and (c) (above) will apply), a deemed-compliant FFI, a non-participating FFI, an excepted FFI, or an NFFE. A USFI will be permitted to rely on existing documentary evidence in its account files for this purpose, unless the USFI knows or has reason to</li> </ul>	See Note below

Step	Identification of non-U.S. entities that hold preexisting financial accounts (Opened before January 1, 2013)	Identification of new non-U.S. entity financial accounts (Opened after January 1, 2013)
	<p>know that the documentation is unreliable or incorrect.</p> <ul style="list-style-type: none"> <li>○ Any entity account holder that does not present such documentation by December 31, 2014 will be treated as a non-Participating FFIs for purposes of FATCA from after such date until the date on which appropriate documentation is received from the entity account holder by the USFI.</li> </ul> <p>c) If the documentation provided by the account holder in step 3(b) (above) indicates that the account holder is an NFFE, the USFI must either:</p> <ul style="list-style-type: none"> <li>○ Obtain documentary evidence (or rely on existing documentary evidence in its account files) that the NFFE is an excepted NFFE or</li> <li>○ Specifically (1) identify each individual <b>and</b> each other specified U.S. person that has an interest in such NFFE, either directly or through ownership in one or more other entities, other than through ownership in an excepted NFFE, as (a) a participating FFI, (b) a deemed-compliant FFI, or (c) an excepted FFI entity, <b>and</b> (2) if a specified U.S. person is identified in (1), obtain with respect to each such person the documentation that the USFI would be required to obtain from such person if such person were a new account holder, and report any such specified U.S. person to the IRS in such manner as will be provided in future guidance.</li> <li>○ For existing accounts, if the USFI is unable to identify such persons or obtain the documentation required by this paragraph with respect to a specified U.S. person identified in (1) by December 31, 2014, the USFI will apply withholding under the NFFE rules after such date until the date on which appropriate documentation is received from the account holder by the USFI.</li> </ul>	

Notes:

1. For new non-U.S. entity accounts, a USFI will be required to determine whether such accounts are to be treated as (1) U.S. accounts, (2) accounts of participating FFIs, (3) accounts of deemed-compliant FFIs, (4) accounts of excepted FFI entities, (5) accounts of non-participating FFIs, (6) accounts of excepted NFFEs, or (7) accounts of other NFFEs.
2. Also, USFIs must identify non-U.S. entities using all information collected by the USFI (e.g., for purposes of opening and maintaining the account, corresponding with the account holder, and complying with regulatory requirements, including AML/KYC requirements), regardless of whether such information is available in electronically searchable files. Information collected by the USFI for purposes of opening and maintaining the account, corresponding with the account holder, and complying with regulatory requirements, including AML/KYC requirements, would also be treated as known by the USFI for purposes of determining whether the USFI should treat documentation provided by an entity as unreliable or incorrect.

*Request for Comments:* The Notice specifically requested comments regarding appropriate procedures for identifying participating FFIs, deemed-compliant FFIs, nonparticipating FFIs, excepted FFIs, excepted NFFEs, and other NFFEs from among new account holders of USFIs.

## Section IV - Year-end reporting on U.S. accounts

### Reporting option one - Statutory requirement

Unless the participating FFI makes an election to be subject to the same year-end reporting rules as U.S. financial institutions (e.g., a U.S. payor), the annual information reporting requirement under FATCA will require the participating FFI to provide each of the following:

- The name, address, and taxpayer identification number ("TIN") of each account holder that is a specified U.S. person,
- The name, address, and TIN of each substantial U.S. owner of any account holder that is a U.S.-owned foreign entity,
- The account number,
- The account balance or value (as specified by the Secretary), and
- Except to the extent provided by the Secretary, the gross receipts and gross withdrawals or payments from the account (as specified by the Secretary).

The Notice provides that the IRS is developing a new form for reporting by participating FFIs under FATCA, and that such form must be electronically filed. Additionally, Treasury and the IRS state their intention to issue guidance coordinating the reporting provisions of FATCA with other U.S. tax reporting obligations (e.g., NRA withholding regime and U.S. person withholding regime).

The Notice provides certain details (and requests certain comments) on the information to be reported:

- Account identification: The account number to be reported may be an actual account number or, if none is used by the participating FFI, a serial number or other unique participating FFI-assigned number that will distinguish the specific account.
- Account balance or value:
  - Future guidance will provide that all such amounts must be reported in U.S. dollars and will provide the appropriate method for currency translation.
  - For deposit and custodian accounts, Treasury and the IRS are considering requiring reporting of the highest of the month-end balances during the year or, if the balance is determined less frequently than monthly, the highest of the balances as determined for purposes of reporting to the account holder during the year. Also, upon request by the IRS, the participating FFI will need to provide additional account-related information (e.g., copies of account statements including monthly or quarterly balances and daily receipts and withdrawals).
- For a U.S. account that is an interest in an entity that is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities, Treasury and IRS are considering requiring such a participating FFI to report the highest value of such account during the year, as determined for the purpose that requires the most frequent determination of value by the participating FFI.

Example: Assuming that a participating FFI is required to be valued for two reasons, annually for purposes of reporting to its interest holders, and quarterly for purposes of calculating the compensation of the investment advisor to the participating FFI, the value reported would be the highest of the quarterly values determined for purposes of calculating the compensation of the investment advisor.

The Notice specifically asks for comments on the following in relation to information on account balances or value:

- The above approaches and other potential approaches that may provide adequate information in a manner that will be administrable by participating FFIs without being subject to manipulation by U.S. account holders,
- Possible currency translation conventions,
- Specific situations in which non-U.S. laws may prevent the reporting of the information described above,

- Specific steps that would be required of a participating FFI (and account holders of U.S. accounts maintained by the participating FFI) in order to overcome or waive any such restriction.

Gross receipts and withdrawals:

- Generally, the legislation provides for reporting of gross receipts and gross withdrawals. The Notice does not provide any guidance, but requests comments as to how to minimize burdens on participating FFIs with respect to such reporting.

Reporting option two - Participating FFIs election to be treated as a U.S. payor:

The Notice provides that a participating FFI's election to report as a U.S. payor will still require the reporting of the same identifying information (name, address and TIN) required for Reporting Option One. Reporting Option Two will also require a participating FFI to report under Code section 6041 (miscellaneous payments), 6042 (dividends), 6045 (gross proceeds) and 6049 (interest), as if the participating FFI were a U.S. person and each holder of a U.S. account that is a specified U.S. person or a U.S. owned foreign entity were an individual and citizen of the United States (i.e., this means there are no exempt recipients under Reporting Option Two).

**Observation:** The U.S. payor election means the participating FFI will be required to report both U.S. and foreign source payments to specified U.S. persons whether or not the payment is made inside the U.S. Currently, most FFIs, including Qualified Intermediaries ("QIs"), are eligible for the non-U.S. payor exception to information reporting, which provides that foreign source income paid to U.S. persons outside of the U.S. is not subject to Form 1099 reporting. Also, unless an exception is provided under the cost basis reporting regulations, a participating FFI making the election to be treated as a U.S. payor will be subject to cost basis reporting under section 6045, which is effective January 1, 2011.

The Notice further provides that future guidance will address the time and manner of making this election; and the conditions for meeting the reporting requirements of the election.

The Notice does request comments as to whether and in what circumstances a participating FFI should be permitted to make the election as to a subset of its accounts without making the election for all of its accounts. For example, whether a participating FFI should be permitted to make the election with respect to accounts held by individuals without requiring that the participating FFI make the election with respect to accounts held by entities.

Elimination of duplicative reporting

In the Notice, Treasury and the IRS state their belief that, where possible, it is preferable for reporting to be performed by the participating FFI that is in a direct payment relationship with the account holder. Future regulations will provide that, where a participating FFI holds an account of another participating FFI, only the participating FFI with the more direct relationship with the investor or customer will be required to report the information required under participating FFI rules.

**Example:** A participating FFI (Fund) issues shares that are treated as a financial account; and the shares are held by another participating FFI (Custodian) on behalf of a U.S. person. Both the shares and the custodial account would be financial accounts. Would both the Fund and the Custodian be required to report the shares of the Fund owned by a specified U.S. person? The Notice provides that, in this example, only the Custodian will be required to report the Fund shares held by the Custodian. The shares of the Fund held by the Custodian will not be a U.S. account subject to reporting by the Fund.

Also, if all of a participating FFI's direct account holders are also participating FFIs, the first -mentioned participating FFI would have no reporting obligations under the participating FFI rules.

Reporting of recalcitrant accounts

In the Notice, Treasury and IRS intend to require the following reporting by a participating FFI:

- The number and aggregate value of financial accounts held by recalcitrant account holders;
- The number and aggregate value of financial accounts held by related or non-related non-participating FFIs; and
- The number and aggregate value of financial accounts held by that have U.S. indicia (as described in relation to Section III above).

## **Section V - Request for specific comments**

In addition to the request for comments throughout the Notice, the Treasury and IRS have requested specific comments on the following issues:

- Verification requirements applicable to participating FFIs :
  - a) The procedures to be performed by public accountants or other external auditors when conducting an AML/KYC or similar engagement, including information on the objectives, procedures, and types of reports issued as a part of such engagements.
  - b) The following points for the purpose of providing the Treasury and IRS with information in relation to the possibility (which Treasury and IRS are considering) of relying on written certification by high-level management employees of the applicable financial institution:
    - (i) The information and representations to be included in such certifications;
    - (ii) The extent to which external auditors may rely on such certifications;
    - (iii) The extent to which the format of reports associated with such engagements could be modified to further compliance with FATCA; and
    - (iv) The extent to which public accountants would be able to perform, consistent with their attestation or other accounting standards, verification procedures and reporting with respect to FFIs under engagements that are not agreed-upon procedures.
- Treatment of passthru payments (i.e., any withholdable payment or any other payment to the extent attributable to a withholdable payment ):
  - a) Methods that a participating FFI could use to determine whether payments it makes are attributable to withholdable payments, including any associated information reporting that may be necessary and which take into account the administrative burden imposed by the approach.
- Election to be withheld upon (i.e., to the extent withholdable payments or passthru payments made to it are allocable to accounts held by recalcitrant account holders or non-participating FFIs), an election by a participating FFI to have a withholding agent withhold on such payments made to it, rather than act as a withholding agent for such payments it makes to its account holders. Comments are requested on the following:
  - a) The appropriate scope of such an election;
  - b) The types of financial accounts for which such an election should be available; and
  - c) The type of information reporting an electing FFI would need to provide to a withholding agent so that the appropriate amount of tax could be deducted and withheld from any withholdable payments or other passthru payments made to the electing FFI.
- Sanctions with respect to recalcitrant account holders:
  - a) What measures should be taken to address long-term recalcitrant accounts; and
  - b) Whether and in what circumstances, Treasury and the IRS should consider terminating FFI Agreements due to the number of recalcitrant account holders remaining after a reasonable period of time.
- Whether restrictions prohibiting U.S. account holders and AML/KYC requirements, and potentially certain additional requirements, may provide a basis to treat certain FFIs as meeting the requirements imposed on FFIs under Chapter 4 (section 1471(b)(2)(A)) in the case of collective investment vehicles, brokers and distributors in the intermediation chain, as well as other types of investment vehicles and FFIs under consideration by IRS and Treasury, and specifically as to the following:
  - a) Specific information about the applicable laws and regulations that may result in an investment vehicle's determination to prohibit sales of its interests to U.S. persons;

- b) The categories of investment vehicles that may be covered by such laws and regulations;
  - c) Examples of the distribution or similar agreements that prohibit sales of interests to U.S. persons;
  - d) Information regarding the legally binding nature of such prohibitions and the penalties applicable to a violation of such prohibitions;
  - e) The extent to which the AML/KYC laws used to enforce such a prohibition would apply in identifying U.S. persons (as defined for U.S. tax purposes) that may invest in one or more, directly or through ownership in one or more other entities;
  - f) The extent to which purchases of interests by non-participating FFIs would be treated as unsuitable investments and the extent to which and mechanisms by which non-participating FFIs could be prohibited from purchasing such interests; and
  - g) Approaches that would allow Treasury and the IRS to verify or otherwise ensure compliance with such prohibitions.
- Electronic filing requirements for financial institutions - Treasury and the IRS intend to require electronic filings to be made by all or most financial institutions, including many existing filers, with regard to tax for which financial institutions are liable under the non-resident alien withholding regime (Chapter 3) and FATCA (Chapter 4) beginning with returns filed for tax returns filed for tax able years ending after December 31, 2012.
  - Application of Chapter 4 by U.S. withholding agents other than USFIs :
    - a) With Treasury and the IRS considering permitting U.S. withholding agents other than USFIs to rely on a non-U.S. entity's certification as to its classification for FATCA purposes, absent reason to know that the certification is incorrect, comments are requested on the form of certifications from a non-U.S. entity as to its classification for FATCA purposes, their renewal provisions, and circumstances under which a withholding agent should not be required to solicit such certifications from certain classes of persons or with respect to certain classes of payments, such as arm's-length payments made for goods or services in the ordinary course of the withholding agent's trade or business.
    - b) With Treasury and the IRS anticipating providing an exception to the withholding required under the NFFE rules for payments made to an NFFE engaged in an active trade or business by withholding agents other than financial institutions, comments are requested regarding the following:
      - (i) The appropriateness of such an exception;
      - (ii) How a withholding agent may determine whether an NFFE is engaged in an active trade or business; and
      - (iii) Other exceptions to withholding under section 1472 that may be appropriate.
  - Potential modifications to FATCA requirements based on availability of information from other sources - Given that, in some cases, information required to be collected and reported by FFIs under FATCA may otherwise be readily available to the IRS through other means, Treasury and the IRS intend to consider approaches to minimize the burden on participating FFIs and have solicited comments on possible approaches to reduce this burden.
    - a) Example of a measure under consideration: An exemption from a participating FFI's obligation to withhold on passthru payments is under consideration where reporting by the participating FFI to the IRS is sufficient to permit the IRS to obtain information about the identities of those recalcitrant account holders through an information exchange request to a foreign jurisdiction.

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## GLOSSARY

Defined Term	Cite	Definition
Deemed compliant FFI	Notice 2010-60	An FFI that (i) complies with such procedures as the Secretary may prescribe to ensure that such institution does not maintain U.S. accounts and meets such other requirements as the Secretary may prescribe with respect to accounts of other FFIs maintained by such institution; or (ii) is a member of a class of institutions with respect to which the Secretary determines that the application of section 1471 is not necessary to carry out the purposes of Section 1471. Because such a deemed-compliant FFI would remain a financial institution under Section 1471(d)(5), it would not be an NFFE, and therefore would not be subject to withholding under section 1472.
Excepted NFFE	Notice 2010-60	NFFEs that will not be subject to withholding or reporting under sections 1471 or 1472 or future regulations.
Expanded affiliated group	1471(e)	For purposes of this section, the term expanded affiliated group means an affiliated group as defined in section 1504(a), determined by (A) substituting "more than 50 percent" for "at least 80 percent" each place it appears, and (B) without regard to paragraphs (2) and (3) of section 1504(b). A partnership or any other entity (other than a corporation) shall be treated as a member of an expanded affiliated group if such entity is controlled (within the meaning of section 954(d)(3)) by members of such group by reason of this sentence.
Financial account	Section 1471 (d)(2)	A financial account means, with respect to any financial institution (A) any depository account maintained by such financial institution, (B) any custodial account maintained by such financial institution, and (C) any equity or debt interest in such financial institution (other than interests which are regularly traded on an established securities market). Any equity or debt interest which constitutes a financial account under subparagraph (C) with respect to any financial institution shall be treated for purposes of this section as maintained by such financial institution
Financial institution	1471(d)(5)	Except as otherwise provided by the Secretary, a financial institution for purposes of this provision is any entity that (1) accepts deposits in the ordinary course of a banking or similar business; (2) as a substantial portion of its business, holds financial assets for the account of others; or (3) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, interests in partnerships, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities
Foreign entity	1473(5)	The term foreign entity means any entity which is not a United States person.
Foreign financial institution	1471(d)(4)	The term foreign financial institution means any financial institution which is a foreign entity. Except as otherwise provided by the Secretary, such term shall not include a financial institution which is organized under the laws of any possession of the United States
Indicia of potential U.S. status	Notice 2010-60	Such indicia include: (i) documentation suggesting that account holders are U.S. residents or U.S. citizens; (ii) a U.S. address

Defined Term	Cite	Definition
		associated with an account holder of the account (whether a residence address or a correspondence address); (iii) a U.S. place of birth for an account holder of the account; or (iv) any other indicia of potential U.S. status, including an “in care of” address, a “hold mail” address, a P.O. address that is the sole address on file with respect to the account holder, (v) a power of attorney or signatory authority granted to a person with a U.S. address, or (vi) standing instructions to transfer funds to an account maintained in the United States or directions received from a U.S. address.
New entity account	Notice 2010-60	New entity accounts are financial accounts held by persons other than individuals opened after the date that a participating FFI's Agreement becomes effective.
New foreign entity account	Notice 2010-60	For financial accounts that are opened at a USFI on or after January 1, 2013 and are held by persons other than individuals (new USFI accounts held by foreign entities).
New individual account	Notice 2010-60	New individual accounts are accounts opened by individuals after the date that a participating FFI's FFI Agreement becomes effective.
Non-financial foreign entity	1472(d)	For purposes of this section, the term non-financial foreign entity means any foreign entity which is not a financial institution (as defined in section 1471(d)(5)).
Non-participating FFI	Notice 2010-60	An FFI who fails to enter into an FFI Agreement to meet the requirements of section 1471(b).
Nonresident alien	7701	An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).
Participating FFI	Notice 2010-60	An FFI who enters into an Agreement to meet the requirements of section 1471(b) and agrees to undertake certain due diligence, reporting and withholding responsibilities
Passthru payment	1471(d)(7)	The term passthru payment means any withholdable payment or other payment to the extent attributable to a withholdable payment.
Preexisting entity account	Notice 2010-60	Preexisting entity accounts are financial accounts held by persons other than individuals as of the date that a participating FFI's FFI Agreement becomes effective.
Pre-existing individual account	Notice 2010-60	Preexisting individual accounts are financial accounts held by individuals as of the date that a participating FFI's FFI Agreement becomes effective
Recalcitrant account holder	1471 (d)(6)	The term recalcitrant account holder means any account holder which (A) fails to comply with reasonable requests for the information referred to in subsection (b)(1)(A) or (c)(1)(A), or (B) fails to provide a waiver described in subsection (b)(1)(F) upon request.

Defined Term	Cite	Definition
Resident alien	7701	An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements if (i), (ii) and (iii): (i) lawfully admitted for permanent resident of the United States at any time during such calendar year, (ii) Substantial presence test. Such individual meets the substantial presence test paragraph 3, or (iii) First year election. Such individual makes an election provided in paragraph 4.
Specified financial institution payment	1474 (b)(2)(B)	The term specified financial institution payment means any payment if the beneficial owner of such payment is a foreign financial institution.
Specified United States person	1473 (3)	Except as otherwise provided by the Secretary, the term specified United States person means any United States person other than (A) any corporation the stock of which is regularly traded on an established securities market. (B) any corporation which is a member of the same expanded affiliated group (as defined in section 1471(e)(2) without regard to the last sentence thereof) as a corporation the stock of which is regularly traded on an established securities market. (C) any organisation exempt from taxation under section 501(a) or an individual retirement plan. (D) the United States or any wholly owned agency or instrumentality thereof. (E) any State, the District of Columbia, any possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing. (F) any bank (as defined in section 581, (G) any real estate investment trust as defined in section 856), (H) any regulated investment company (as defined in section 851), (I) any common trust fund (as defined in section 584(a)), and (J) any trust which- (i) is exempt from tax under section 664(c), or (ii) is described in section 4947 (a)(1).
Substantial United States owner	1473(2)	The term substantial United States owner means (i) with respect to any corporation, any specified United States person which owns, directly or indirectly more than 10 percent of the stock of such corporation (by vote or value), (ii) with respect to any partnership, any specified United States person which owns, directly or indirectly, more than 10 percent of the profits interests or capital interests in such partnerships, and (iii) in the case of a trust – (I) any specified United States person treated as an owner of any portion of such trust under subpart E of part I of subchapter J of chapter 1, and (II) to the extent provided by the Secretary in regulations or other guidance, any specified United States person which holds, directly or indirectly, more than 10 percent of the beneficial interests of such trust.
Territory-organized FI	Notice 2010-60	A financial institution organized under the laws of a U.S. territory.
United States account	1471 (d)(1)	In general, The term United States account means any financial account which is held by one or more specified United States persons or United States owned foreign entities.
United States owned foreign entity	1471(d)(3)	The term United States owned foreign entity means any foreign entity which has one or more substantial United States owners.
Withholdable payment	1473 (1)	The term withholdable payment means (i) any payment of interest (including any original issue discount), dividends, rents, salaries, wages premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical

Defined Term	Cite	Definition
		gains, profits and income, if such payment is from sources within the United States, and (ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States. Exception for income connected with United States business. Such term shall not include any item of income which is taken into account under section 871(b)(1) or 882(a)(1) for the taxable year.
Withholding agent	1473(4)	The term withholding agent means all persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment.

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