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Foreign Account Tax Compliance Act

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Foreign Account Tax Compliance Act (FATCA)

The Foreign Account Tax Compliance Act (FATCA) was passed in March 2010 to help prevent tax evasion by US citizens and taxpayers with offshore financial accounts. This was both an attempt to ferret out individuals with accounts set up in prior years and identify assets currently earning income outside the US.

Introduction to FATCA

This US legislation introduced a general requirement on US withholding agents to withhold tax on certain payments to foreign financial institutions (FFI) that do not agree to report certain information to the IRS regarding US accounts, and on certain payments to non-financial foreign entities (NFFEs) that do not provide information on their substantial US owners. Withholdable payments include US source income on securities and any gross proceeds from the sale of securities which generate US source income.

Who is Targeted?

FATCA is applicable to US individual taxpayers holding offshore investments that exceed reporting thresholds and also has far reaching consequences for financial institutions including banks, insurance companies, pension funds mutual funds, investment managers, private equity funds and broker dealers, collectively identified as foreign financial instiutions (FFIs). It also effectively sweeps into its net such entities as foreign trusts and family offices that are resident outside the US.

Individuals

US individual taxpayers must report their foreign financial bank accounts and assets on forms filed with the IRS and US Treasury Department. This includes the FBAR bank account form (Form 114) which has been required for several years, and newer Form 8938 that was required starting in 2012.

Entities

FFIs must report on US account holders' financial accounts and income to the IRS. In some situations they must also withhold taxes (30%) on certain types of payments. They are being forced to do this because of the potential 30% withholding that will result on any US source payment they receive if they are not FATCA compliant. Even if they have neither US account holders nor investments in the US that produce US source payments, they will be forced to comply because they will be dealing with other FFIs that are compliant and will require them to be compliant or else they will withhold on payments and/or report their non-compliance to the IRS.

Withholdable payments include US source income on securities and any gross proceeds from the sale of securities which generate US source income.

Foreign Financial Institutions

An FFI is defined as any foreign entity which:

1. Accepts deposits in the ordinary course of a banking or similar business (depository institution);
2. As a substantial portion of its business, holds financial assets for the benefit of one or more persons (custodial institution); or
3. Is an investment entity.

This last category is the most wide-ranging in that it may encompass trusts, family offices and investment advisors because it involves any entity primarily engaged in the conduct of a business for customer dealing with financial assets or an entity whose gross income is primarily attributable to investment or trading in financial assets and the entity is managed by another entity that is an FFI. There has only been a limited carve out exception for small trusts where there is no professional management involved.

Withholding will not be required if an FFI enters into an agreement with the IRS (an FFI Agreement-See Rev. Proc. 2014-38). Participating FFIs will be required to identify their US Accounts and comply with verification and due diligence procedures prescribed by FATCA regulations. US accounts are defined as any financial accounts held by a US individual taxpayer or certain US owned foreign entities. Participating FFIs are required to report certain information on an annual basis to the IRS with respect to each US account and to comply with the request for additional information from the US authorities where an account holder refuses to provide ownership information. The information that must be reported includes:

- The name, address, and taxpayer identification number (TIN) of each account holder who is a specified US person;
- The account number;
- The account balance or value;
- The gross receipts and gross withdrawals or payments from the account during each calendar year.

If foreign law prevents the FFI from reporting the required information absent a waiver from the account holder, and the account holder fails to provide a waiver within a reasonable period of time, the FFI is required to close the account. FATCA effectively enlists FFIs and many foreign governments in the US government's attempt to combat tax evasion by US taxpayers, whether resident in the US or not.

It is anticipated that these rules and requirements will increase the number of US taxpayers with hidden offshore account that consider taking part in the Offshore Voluntary Disclosure Program (OVDP) that has been implemented by the IRS (if they are still eligible).

Non-Financial Foreign Entities (NFFE):

Any foreign entity that is not an FFI is considered to be an NFFE. FATCA requires a withholding agent to withhold 30% of any withholdable payment to an NFFE unless (1) the beneficial owner of the account provides proper certification (Form W-8BEN or W-8BEN-E) that there is no substantial US owners of the entity or the tax information on the US owner, (2) the withholding agent does not know or have any reason to know that the information provided is incorrect and (3) the withholding agent reports the information to the IRS.

Family Offices and Trusts

Many family offices and foreign trusts will be considered FFIs because they fall under the Investment Entity category (described in Reg. Sec. 1.1471-5(e)). This is because most of this type of entity's gross income is from investments, which makes it fall into the category of an FFI. There are certain exceptions to the FFI classification for trusts that are not professionally managed, but this is intended to apply to small trusts, for instance, that might have been established for a child's education expenses. Even if the FFI classification can be avoided, most trusts will probably be a passive NFFE. This avoids registration with the IRS, but the NFFE will need to disclosure any Substantial US owners (beneficiaries) of the NFFE when completing a Form W-8BEN-E.

Non-Financial US Multinational Companies

FATCA even impacts US multinational companies with foreign subsidiaries. A determination for each foreign entity will be required because they too will need to document their FATCA status. The focus of FATCA is not on withholding; this is only the penalty provision to force reporting. But for foreign non-financial businesses they will need to focus on payee documentation and payment reporting to avoid the withholding penalty regime. This also highlights the withholding requirements US multinationals have always had related to payments to foreign payees where withholding under Chapter 3 and reduced treaty withholding rates have always been an issue.

While there are exemptions from being classified as an FFI related to holding companies and treasury centres for non-financial companies, they will need to review (and document) this exemption in case it is ever challenged by the IRS or an unrelated US withholding agent (e.g. US banks). There are also issues related to foreign joint ventures where they do not control the foreign legal entity.

Notice 2013-69 that was issued by the IRS introduced a new category of NFFE: the Direct Reporting NFFE. This will allow an NFFE to register with the IRS and obtain a Global Intermediary Identification Number (GIIN - discussed below). The benefit of this may be that it avoids additional documentation requests from US withholding agents about an entity's FATCA status due to the agent having a GIIN number which provides additional assurance that it is not required to withholding under the FATCA rules.

Even non-financial US companies without foreign subsidiaries will be impacted by the FATCA rules because they may be considered US withholding agents and required to withhold on certain US source payments they make to a foreign entity unless they have received proper documentation from the foreign entity (Form W-8BEN-E). These US companies should establish and document procedures to determine if withholding is required so in case they fail to withhold, they can show a good faith effort to comply with the FATCA rules.

Inter-Governmental Agreements

In many cases, foreign law would prevent an FFI from reporting directly to the IRS the information required by FATCA. To overcome these legal impediments (and probably to relieve the IRS of some of the administrative burden of enforcing FATCA), the US Treasury Department has collaborated with foreign governments to develop two alternative Model Inter-governmental Agreements (IGA) that facilitate the effective and effcient implementation of FATCA in a manner that removes domestic legal impediments to compliance. The Model 1 IGA requires FFIs to report to the authorities in their jurisdiction, rather than directly to the IRS. The partner jurisdiction then exchanges this information with the IRS on an automatic basis.

The Model 2 IGA directs the FFI to register with the IRS and report specified information about US accounts directly to the IRS in a manner consistent with the general regulations, with certain modifications. If a problem disclosing this information under domestic law, the FFIs are required to obtain consent from the US account holders to disclose this information.

UK-Model 1IGA

The first IGA the US signed was with the UK in September 2012. The UK has passed enabling legislation and issued regulations and guidance to help UK FFIs in complying with the FATCA rules for an IGA country. The *Guidance Notes* (28 August 2014) publication by HMRC is particularly helpful in understanding the procedures and rules related to FATCA in the UK and might be used as a guide in determining how IGAs will be implemented in other countries that are not as far along in the process of implementation.

Signed Agreements

Model M1 IGA Countries	38 countries
Model M2 IGA Countries	5 countries

Substantial Agreements IRS List

Model 1 IGA Countries	50 countries
Model 2 IGA Countries	8 countries

Even non-financial US companies without foreign subsidiaries will be impacted by the FATCA laws.

Annual reports must be completed on Form 8966 and filed electronically with the IRS on or before March 31 following the calendar year.

Registration and Implementation

FFIs registering with the IRS are able to do so through a secure online web portal at www.irs.gov/fatca. Upon approval, they will receive a GIIN from the IRS. FFIs that are not under a Model 1 IGA will also have to agree to follow the requirements of the FFI Agreement issued under Rev. Proc. 2014-38. FFIs must register by May 5, 2014 to ensure an issuance of a GIIN by June 30, 2014; Model 1 FFIs technically have until December 22, 2014 to ensure inclusion in the IRS FFI List as of January 1, 2015.

General Rules of Withholding

An FFI will be subject to withholding of 30% on any US source withholdable payment made after June 30, 2014 (December 31, 2014 for Model 1 FFIs) unless the withholding agent has established that the payment is exempt (e.g., the FFI is properly registered with the IRS or is an exempt organization). A withholding agent may treat a payee as a deemed compliant FFI if the withholding agent has a withholding certification that identifies the payee as a certified deemed compliant FFI. This shows the importance of providing (and obtaining) the proper documentation prior to payments after June 30, 2014.

Due diligence requirements for entity accounts

An FFI must determine if an account is a US account or an account held by a recalcitrant account holder or a non-participating FFI by applying the required procedures to establish the Chapter 4 status of each payee. This is required regardless of whether the participating FFI makes a payment to the account. For foreign trusts or family offices that are determined to be FFI (as Investment Entities) this can be an interesting exercise when trust terms allow for discretion as to whom may be a beneficiary. This will require a careful reading of trust terms and documents, as well as a review of prior year distributions.

Account Reporting

Generally, participating FFIs are required to report the following:

- The name, address and TIN of each account holder this is a specified US person.
- The account number.
- The account balance or value of the account.
- The payments during the calendar year.

Annual reports shall be completed on Form 8966 and filed electronically with the IRS on or before March 31, of the year following the end of the calendar year to which the form relates.

For Model 1 FFIs, the reporting may be slightly different, and will be made to their local tax authority (e.g., HMRC for UK FFIs). This information will then be shared with the IRS on an annual basis.

Compliance Program

Participating FFIs are required to appoint a Responsible Officer (RO) to oversee the compliance with the requirements of the FFI Agreement. The RO must establish a program that includes policies, procedures and processes sufficient for the FFI to satisfy the requirements of the FFI Agreement. The first certification period begins on the effective date of the FFI Agreement and ends at the close of the third full calendar year following that date. Each subsequent certification period covers three calendar years. There is also a requirement related to certification of due diligence procedures for preexisting account that must be made within 60 days following the date that is two years after the effective date of the FFI Agreement. The FFE Agreement expires on December 31, 2016 and may be renewed by the RO in a manner similar to the original registration: the IRS website portal.

As with other reporting requirements, the compliance program for Model 1 FFIs is not dictated by the FFI Agreement and will be determined based upon local rules in the country of the FFI.

FATCA Compliance Timeline

2014	Start of FATCA provisions	Jan. 1, 2014	Collection of US taxpayer account information starts.
		May 5, 2014	FFI must register by this date to ensure issuance of GIIN by Jun. 30, 2014.
2014	FATCA 30% withholding and reporting	Jul. 1, 2014	Start of FATCA withholding on income payments. Outstanding obligations as this date considered out of scope for future FATCA withholding.
		Mar. 31, 2015	FFIs must report to IRS: name, address, TIN, account number and account balance of US accounts for 2014. Form 8966 ‘FATCA reporting’ to be filed.
2015 **2016**		Mar. 31, 2016	FFIs must report to IRS for 2015 account. Must additionally report income payments.
2017	Expanded withholding and reporting	Jan. 1, 2017	Start of FATCA withholding on gross proceeds payments. Earliest date to apply expanded withholding pass thru payments (not yet defined).
		Mar. 31, 2017	FFIs must begin full reporting for 2016 transactions; includes gross proceeds reporting.

What We Offer

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Moore Stephens member firms in the US, UK and other IGA countries provide an integrated, deep knowledge of FATCA for a number of industries, as well as a thorough understanding of how it impacts family offices and trust situations. We can assist you in your analysis of FATCA's impact on your particular situation, aide in registering and establishing policies and procedures, and assist with your ongoing compliance requirements. For more information, please contact one of the team.

Contact information

If you would like further information on any item within this brochure, or information on our services please contact:

Project Leaders

Joseph A. Amine – Shareholder, US

T +1 248 244 3040

amine@moorestephensdm.com

Geoff Woodhouse – Partner, UK

T +44 (0)20 7651 1412

geoff.woodhouse@moorestephens.com

Project Team

Victor (Sandy) Jose – FATCA Consultant, US

T +1 248 244 3082

jose@moorestephensdm.com

Jeffrey McCann – Shareholder, US

T +1 248 244 3065

mccann@moorestephensdm.com

James Miesowicz – Shareholder, US

T +1 248 244 3115

miesowicz@moorestephensdm.com

Mia Yun – Shareholder, US

T +1 248 244 3013

yun@moorestephensdm.com

Moore Stephens Doeren Mayhew
T +1 248 244 3000
www.moorestephensdm.com

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