FATCA: up-date
(Foreign Account Tax Compliance Act)

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FATCA up-date

- Introduction

- Main FATCA requirements

- Local law restrictions

- Resolving conflicts of law: the intergovernmental agreements ("IGAs")

- Latest developments

- Beyond FATCA: the OECD’s project on automatic exchange of information
1. Introduction
The Foreign Account Tax Compliance Act (FATCA) is US tax legislation that aims to prevent or detect tax evasion by U.S. Persons who
- hold bank deposits and/or securities in offshore accounts, or
- own foreign investment entities (e.g., personal investment corporations and trusts)

FATCA was enacted into law on 3/18/2010 as part of the HIRE ACT

- Added new Chapter 4 to the Internal Revenue Code

Non participating FFI (foreign financial institution) and NFFE (Non financial foreign entities) may be subject to a 30% FATCA withholding under certain circumstances.
Algerian Bank invests in US Treasury securities that generate US source interest income and eventually gross proceeds from sale.

- If the Bank is a NPFFI a new 30% FATCA withholding tax will apply to periodic payments of interest income, and if the bonds are sold after 2016, on gross sale proceeds.

**Example: Impact of non compliance with FATCA**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest Income paid after 2014 to a new account</td>
<td>$100</td>
</tr>
<tr>
<td>FATCA Withholding tax</td>
<td>$30</td>
</tr>
<tr>
<td>Gross Sales Proceeds paid after 2016</td>
<td>$2000</td>
</tr>
<tr>
<td>FATCA Withholding tax</td>
<td>$600</td>
</tr>
</tbody>
</table>

US Treasury Securities
Example: Impact of non compliance with FATCA

- Derivative transactions
  - ISDA Master Agreement signed, with new trades in 2014
  - Bank A and Bank B in non-IGA jurisdictions. Bank A signs up to FATCA; counterparty does not (perhaps because it cannot).

  ![Diagram showing Bank A (South Afr) and Bank B (Nigeria)](image)

  **FATCA withholding from 2014/2017**

- Bank A could be required to apply FATCA withholding:
  - from July 2014 if payments have US source (from 2017 on US collateral) and are not grandfathered
  - from 2017 if passthru withholding introduced
Example: Impact of non compliance with FATCA

- Letter of credit

Where underlying obligation is of a non-US entity then no payment under the letter of credit should constitute US source FDAP income

In this example FATCA withholding should not be relevant (may be some reporting)

Speak to your Tax Department if the underlying obligation is of a US entity
2. Main FATCA Requirements
FATCA Requirements

- FATCA’s main goal: obtain the reporting to the IRS of accounts held by specified US persons.

- Under the « Final regs » for FATCA, this is achieved for Foreign Financial Institutions (FFIs) via an obligation to enter into a FFI agreement with the IRS which includes their FATCA obligations.

- In certain circumstances, foreign branches of US FIs are considered FFIs (e.g. QI branch or Model 1 IGA jurisdictions).
FATCA Requirements : Customer Due Diligence

Individual customers

- **Preexisting accounts** (i.e. existing before July 1st, 2014):
  - The participating FFI has to check indicia in the account documentation to determine if the account holder is a « specified US person »
  - Where the account holder is a specified US person, the PFFI transfers to the IRS information concerning the account holder ID and the account balance (end of the year balance)
  - The way the information is transferred to the IRS depends on whether an IGA is in place (and which type) for the location of the account.
  - Reporting is generally* required above a threshold of 50 000,00 USD (end of the year balance)

- Individual accounts **opened after July 1st, 2014** (« new accounts »):
  - The participating FFI has to check during the opening process whether the account holder is a « specified US person », and transfer information accordingly
  - Threshold (depository accounts) : 50 000,00 USD (end of the year balance)**

* See Tres. Reg. §1.1471-4(c)(5)(iii): specifically 250 000,00 USD for cash value insurance or annuity contracts. All these excepted accounts must never exceed 1 000 000,00 USD

See also Tres. Reg. § 1.1471-4(c)(5)(iv)(D) for enhanced review of high value accounts (above 1m$).
Aggregation rules apply for these threshold.

** Tres. Reg. §1.1471-4(c)(4)
Individual customers

- **US Indicia:**
  - Designation of the account holder as a U.S. citizen or resident
  - A U.S. place of birth
  - A current U.S. residence address or U.S. mailing address (including a U.S. post office box)
  - Standing instructions to pay amounts from the account to an account maintained in the United States
  - A current power of attorney or signatory authority granted to a person with a U.S. address
  or
  - An “in-care-of” address or a “hold mail” address that is the sole address the FFI has identified for the account holder
Entity customers:

- **Entity’s preexisting accounts (opened before 1 January 2015 according to IRS Notice 2014-33)**:
  - The participating FFI has to check indicia in the account documentation to determine whether the entity is **US owned**, i.e. if there is a «substantial US owner»
  - If the accountholder is US owned, the PFFI transfers to the IRS information concerning the substantial US owner and the account balance (end of the year)
  - The way the information is transferred to the IRS depends on whether an IGA is in place (and which type) for the location of the account.
  - Reporting is generally** required above a threshold: 250 000,00 USD (end of the year balance)

- **Entity’s new accounts (opened after 31 December 2014)**:
  - The participating FFI has to check during the opening process whether the account holder is a «US person», and transfer information accordingly
  - No threshold. The PFFI has to report all new accounts.

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* Tres. Reg. §1.1471-5(c), **(10% threshold)**

** Tres. Reg. §1.1471- 4(c)(3)(iii), accounts must never exceed 1 000 000,00 USD and aggregation rules apply
New Accounts Due diligence

• NPFFI: Unless documentation sufficient to determine the FATCA status of the payee or account holder is provided to the withholding agent, an entity will be presumed to be an NPFFI and subject to FATCA withholding
  • Applies to new accounts opened or obligations entered into after 12/31/2014
  • This presumption is rebutted by providing documentation sufficient to establish that the payee or account holder is FATCA compliant

• Key Differences between FATCA and prior law:
  – FATCA requires increased due diligence on the claims made
  – A withholding agent must treat the claim as invalid, if any information contained in the account opening file or other client files “conflicts” with the payee’s claimed FATCA status
  – This includes a review of information or documentation collected in the performance of due diligence under Anti-money laundering (“AML”) and Know-your-customer (“KYC”) rules.
  – A claim of foreign status will be treated as unreliable if there are certain types of “U.S. indicia” present, unless additional documentation sufficient to “cure” the U.S. indicia is obtained.
  – This means that clients having U.S. indicia will be required to provide additional documentation to substantiate a claim of foreign status.
Incentives to comply

- Cases where Withholding arises:
  - Each PFFI has to perform withholding on withholdable payments made to:
    - recalcitrant accountholders
    - non participating FFIs

- Special issues
  - Withholding is also required where a withholdable payment is made to:
    - Limited FFIs
    - Limited branches

- Specifically, what happens where information for client classification is not available/withheld by the client/ where FATCA compliance has not been achieved?
  - « Recalcitrant » customers
    The customer does not want to (or cannot) forward the necessary information, and the participating bank does not have the relevant documentation in its archives
    - after an unsuccessful request: **withhold 30%** on withholdable payments made on the account

- Where the FFI is a **limited FFI or limited branch*** (i.e. there is a local law restriction making FATCA compliance illegal) : must block, or close the account after a reasonable period of time

- Poorly prepared FFIs or institutions not willing to be FATCA compliant
  - the FI is not compliant with FATCA requirements (in whole or in part)
  - as a result, the FI is considered as **non participating**, consequently it will suffer a **30% withholding** on incoming US payments and could be isolated by participating FIs.

* Specific status available until 31 December 2015, under Final Regs
FATCA requirements : wrap-up

- FATCA requirements include :
  - **Information collection and processing** about accountholders and classification of such customers (as « specified US person »)
  - **Reporting** to the IRS (or through the local country authority if a Model 1 IGA is in place)
  - **Blocking, transferring or closing** of accounts in certain cases, where PFFI cannot be compliant
  - Performing FATCA **withholding**

- Exceptions
  - As provided under an Intergovernmental Agreement (IGA)
  - As provided under a FFI Agreement : aggregate reporting
  - As provided in the Final Regs (e.g.):
    - Exempt beneficial owner (governments, central banks …)
    - Excepted entities: Passive NFFE where it is a publicly traded corporation or a territory entity; an active NFFE…
FATCA will affect FIs progressively

- FATCA obligations will kick in between 2014 and 2017:
  - July 1st, 2014: there will be a withholding tax on US some FDAP payments made to NPFFIs or to recalcitrant customers
    This day is also an important date separating (i) preexisting accounts and new accounts for individuals, and (ii) existing obligations and new obligations.
  - January 1st, 2017: withholding tax on « US proceeds » and on principal if payments made to NPFFIs or to recalcitrant customers

*FDAP: complex notion in US tax Law: fixed or determinable, annual or periodical US source income.
3. Local Law restrictions
Local law restrictions

- FATCA raises 2 main concerns:
  - compliance with local law
  - compliance with the contract in place

- FATCA compliance can lead to a breach of local Law, especially:
  - bank secrecy
  - data protection
  - confidentiality obligations

- FATCA compliance can lead to a breach of the contract signed with the customers, and for instance, its confidentiality undertakings

- FATCA rules foresee these issues, and require foreign financial institutions to obtain a valid and effective consent/waiver. Such requirement cannot be fulfilled where a waiver is prohibited under local law or would be ineffective. Where consent/waiver is not obtained within a reasonable period of time, the FFI must transfer or block such account
Local law restrictions: issue and possible solution

- FATCA imposes obligations on FFIs that may be in **conflict** with the laws of the jurisdiction in which an FFI operates, including
  - Privacy laws prohibiting the sharing of personal information on clients, including sharing with a foreign tax authority
  - Access-to-banking laws that guarantee that an account must be opened or that accounts may not be closed unilaterally
  - Laws prohibiting the withholding of taxes for a foreign government or withholding without clients’ consent

- The IGAs present an opportunity for a country to support its FFIs compliance with FATCA by
  - Changing local laws to remove legal obstacles to FATCA compliance
  - Accepting the U.S. offer in the IGAs to modify or eliminate certain FFIs obligations that would apply under the Final FATCA Regulations
4. Resolving conflicts of laws: The Intergovernmental Agreements ("IGAs")
The Intergovernmental Agreements (IGAs)

Signed between the US and a sovereign state

- **Goal**: mitigate the extraterritorial effects of FATCA, remove the difficulties related to local Law and increase the number of PFFIs

- There are currently two models of IGAs

- The **model 1 IGAs** facilitate compliance by local institutions. They are likely to solve contractual or legal issues. The last model 1 IGA was released by the IRS on November 4, 2013
  - Examples: France, Germany, Italy, Ireland, Spain, UK

- The **model 2 IGAs** allow local institutions to sign (in practice to be compliant with) the FFI agreement. They are likely to solve the contractual or local law issues, or solve issues with obtaining the consent of the account holder. The last model 2 IGA was released on November 4, 2013
  - Examples: Bermuda, Japan, Switzerland

- Where a jurisdiction has no IGA, a FFI willing to participate has to formally sign a FFI agreement with the IRS.
The Intergovernmental Agreements (IGAs): model 1 IGA

The FFIs located in a partner jurisdiction pass on tax information to their national tax authority.

The national tax authority of the partner jurisdiction collects information and forwards it to the IRS.

The transfer of information is done on an automatic basis.

The FFIs identify US accounts through due diligence described in the IGA annex 1.

The FFI will not suffer from withholding, and will not have to perform withholding unless it elects to do so.

The exchange of information can be performed on a reciprocal basis or not (model 1A is reciprocal, model 1B is not).

Note: There may be withholding and/or reporting obligations in addition to the reporting obligations in a model 1 IGA.
The Intergovernmental Agreements (IGAs): model 1 IGA

- Model 1 IGA example:

- Model 1 IGA can be reciprocal (Model 1A) or not (Model 1B)
The Intergovernmental Agreements (IGAs): model 2 IGA

The partner jurisdiction directs and allows FFIs located in the jurisdiction to report the required information concerning US accounts **directly to the IRS**

The FFIs identify US accounts through due diligence described in the IGA’s annex 1

The FFIs report directly required tax information to the IRS

The FFIs report **aggregated information** concerning recalcitrant preexisting accountholders. However, the IRS is allowed to ask for specific information of certain groups of accountholders through a « group demand »

The FFIs who comply with the « FFI agreement » will not suffer from withholding

The exchange of information is not performed on a reciprocal basis
The Intergovernmental Agreements (IGAs): model 2 IGA

- Model 2 IGA example:

  - US issuer
  - Bank (Intermediary)
  - IRS (US)
  - Swiss Direction Fédérale des Impôts
  - IGA 2 Sw.-US

  Interest flow:
  - US issuer → Bank (Intermediary)
  - Bank (Intermediary) → Swiss reporting Bank

  Reporting flow:
  - IRS (US) → Swiss Direction Fédérale des Impôts
  - Swiss reporting Bank → IRS (US)

  IRS (US) receives reports from Swiss reporting Bank on interest paid to US issuer.

  Possible queries:
  - IRS (US) to Swiss Direction Fédérale des Impôts for further information.

Account of a specified US person held by the bank.
The Intergovernmental Agreements (IGAs)

**Signed Model 2:**
Austria, Bermuda, Chile, Japan, Switzerland

**Reported to be discussing options**
Botswana, Cambodia, China, Lebanon, Pakistan, Sint Maarten

**IGA expected to be signed**
Argentina, Bahrain, Greece, Kazakhstan, Malaysia, Taiwan, Thailand, Trinidad and Tobago

**Model 2 not signed but treated as in effect:**
Armenia, Hong Kong, Paraguay

**Signed Model 1:**
Australia, Belgium, Canada, The Cayman Islands, Costa Rica, Denmark, Estonia, Finland, France, Germany, Gibraltar, Guernsey, Honduras, Hungary, Ireland, Isle of Man, Italy, Jamaica, Jersey, Liechtenstein, Luxembourg, Malta, Mauritius, Mexico, The Netherlands, New Zealand, Norway, Slovenia, Spain, South Africa, The United Kingdom

**Model 1 not signed but treated as in effect:**
Antigua and Barbuda, Azerbaijan, Bahamas, Barbados, Belarus, Brazil, British Virgin Islands, Bulgaria, Columbia, Croatia, Curaçao, Cyprus, Czech Republic, Georgia, India, Indonesia, Israel, Kosovo, Kuwait, Latvia, Lithuania, Panama, Peru, Poland, Portugal, Qatar, Romania, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Seychelles, Singapore, Slovakia, South Korea, Sweden, Turkey, Turkmenistan, Turks and Caicos Islands, United Arab Emirates

*Last update June 17, 2014*
Facing FATCA: wrap-up

- Three situations:
  - **Model 1 IGA**
    - No direct reporting to the IRS (except possibly in very limited circumstances)
    - A participating FFI is compliant with FATCA as long as it applies the IGA, no direct agreement with the IRS needed
    - Registration with the IRS, as a single entity, or as part of a group: FATCA status has to be carefully assessed
    - Pending issues: coordination with other US withholding regimes. Are some withholding provisions of US Tax Laws applicable despite the IGA?
  - **Model 2 IGA or no IGA and where FATCA compliance is not illegal**
    - Direct reporting to the IRS
    - A participating FFI is compliant with FATCA as long as it applies the IGA or the FFI agreement
    - Pending issues: coordination with other US withholding regimes
  - **No IGA and where compliance with FATCA is illegal**
    - In the jurisdiction, a FFI cannot be FATCA compliant
    - Limited FFI status?
    - Transfer of accounts?
5. Latest developments
FATCA: latest developments

- February 20, 2014: new FATCA regulations. Published in the Federal Register on March 6, 2014.

- April 2, 2014: Treasury and IRS issue Announcement 2014-17. It embeds a list of countries that have signed an IGA or have reached an agreement on the substance of an IGA. These two sets of countries are treated as having an IGA in effect.

- May 2, 2014: IRS issued Notice 2014-33. Under final regulations years 2014 and 2015 will be regarded as a transition period. FFIs that will show good faith efforts to be compliant, or reasonnable efforts, will not risk enforcement. Model 1 and Model 2 IGAs will be updated to include provisions to treat entity accounts opened between July 1, and December 31, 2014, as preexisting accounts. The notice announces also an alignment of the final Reg with IGAs provisions related to « limited » status with further provisions to come related to jurisdictions that prohibit the identification with the IRS of limited FFI.

- Latest update of some IRS Instructions relevant to W-8 forms are still awaited (inst W-8 and inst W-8IMY).
Future actions post July 1\textsuperscript{st} deadline

- **Pre-existing accounts documentation**
  
  - Will need to be addressed before year end as this is the deadline for application of FATCA to Prima Facie FFIs (Notice 2014-33 does not change this deadline)
  
  - In some cases, this has been solved by banks through the issuance of amended General Terms
  
  - In other cases banks will need to contact clients to amend agreements
6. Beyond FATCA: the OECD’s project on automatic exchange of information for Tax purpose
The OECD project: development from the model 1 IGA

- The OECD project is much more complex:

Issuer → Bank (intermediary) → Bank participating jurisdiction

Income,…
Income,…

AEOI agreement

Competent Authority of the jurisdiction

Account of a resident from another (or several) participating jurisdiction

Queries: minor administrative errors

Competent Authority Residence 1

Competent Authority Residence n
The Common Reporting Standard (CRS)

The so-called common reporting standard is a set of documents that encompass:

- a model **Competent Authority Agreement**
  
  Aim: the automatic exchange of financial account information to improve international tax compliance

- an **Annex** to the agreement
  
  also known as the “Common Reporting Standard” because it defines the common standard on reporting and due diligence for financial account information

- a **Commentary** on the model agreement and the annex, awaited in June 2014

Moreover, technical documents specify the practical implementation of the CRS

- the CRS XML schema and the XML user guide
Timeframe for CRS

• 17 January 2014 : the CFA (OECD’s Committee on Fiscal Affairs) has adopted the CRS

• 13 February 2014 : public release of the CRS

• End of March and of April 2014 : BIAC meeting at OECD on Commentary to the CRS

• End of June 2014: release of the Commentary to the CRS

• October 2014: endorsement by the G20, first agreements signed by early adopters?

• 2016 : first due diligence in place?

• 2017: first reportings under OECD’s AEOI?
Conclusion
Impact of FATCA on Client’s Relationship with its Bank

- **What Your Financial Institution Will Ask you**
  What is your **FATCA status**? (Participating, Non Participating, Registered Deemed Compliant Foreign Financial Institution, Limited Financial Institution…)

  - **Establish FATCA status** by providing appropriate documentation:
    - U.S. Legal Entities – Form W-9
    - Non-U.S. Legal Entities – Form W-8
    - Request for additional documentation if US indicia are present (e.g. phone number, address in the U.S.: to confirm no US ownership)

  - Failure to provide appropriate documentation will result in **reporting to tax authorities** and in 30% FATCA withholding in specific cases

  - You have to **inform your bank of any change in circumstances** that affects your FATCA status.

- **Impact on Transactional Documentation**
  - May need to update Legal Documents, where consent is needed or where gross-up clauses exist and need to be partly desactivated in light of FATCA.

*A multi-national corporation must determine the FATCA status for each entity in its expanded affiliated group.*
Appendix
Timeframe for FATCA

- In accordance with IRS notice 2013-43 (July 12, 2013) and IRS notice 2014-33 (May 2, 2014)

<table>
<thead>
<tr>
<th>FATCA compliance obligations</th>
<th>Dues Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finalize FFI Registration</td>
<td>05/05/2014</td>
</tr>
<tr>
<td>FFI Agreements Effective</td>
<td>30/06/2014</td>
</tr>
<tr>
<td>Grandfathered Obligations (<em>those that produce/could produce U.S. source income</em>)</td>
<td>30/06/2014</td>
</tr>
<tr>
<td>New Account Due Diligence procedures in place for individuals (for entities)</td>
<td>1/07/2014  (1/01/2015)</td>
</tr>
<tr>
<td>Withhold on U.S. Source FDAP Income</td>
<td>1/07/2014</td>
</tr>
<tr>
<td>Due Diligence on prima facie FFIs among preexisting entity accounts (documentation)</td>
<td>31/12/2014</td>
</tr>
<tr>
<td>U.S. Account Reporting (for 2014)</td>
<td>June 2015 under French IGA</td>
</tr>
<tr>
<td>Due Diligence on high-value accounts among preexisting individual accounts</td>
<td>30/06/2015</td>
</tr>
<tr>
<td>Due Diligence on all remaining preexisting accounts</td>
<td>30/06/2016</td>
</tr>
<tr>
<td>Withhold on Gross Proceeds</td>
<td>1/01/2017</td>
</tr>
<tr>
<td>Withhold on Foreign Passthru Payments</td>
<td>1/01/2017 (if implemented)</td>
</tr>
</tbody>
</table>
Announcement 2014-17 (April 2, 2014)

- Announcement by the US Treasury and IRS

- A list of countries is maintained on the IRS website, showing countries that have signed an IGA, and countries that have reached an agreement on the substance of an IGA

- Countries that have reached an agreement on the substance of an IGA are treated as having an IGA in effect

- A sort of grace period is announced for countries on the list to sign an IGA, without risking withholding.

- Where an agreement on the substance is reached, the requirements in order to be treated as having an IGA in effect are:
  - to be on the list at the latest on July 1, 2014
  - to have an IGA signed before January 1, 2015

- This means that a country that is not on the list on July 1, 2014, or being on the list, has not signed before January 1, 2015 will be considered to have no IGA with the US (until it signs an IGA).
Announcement 2014-17: list of countries on June 17, 2014

- **IGA Model 1 signed** (date) - 32 countries
  Australia (4-28-2014), Belgium (4-23-2014), Canada (2-5-2014), Cayman Islands (11-29-2013), Costa Rica (11-26-2013), Denmark (11-19-2012), Estonia (4-11-2014), Finland (3-5-2014), France (11-14-2013), Germany (5-31-2013), Gibraltar (5-8-2014), Guernsey (12-13-2013), Hungary (2-4-2014), Honduras (3-31-2014), Ireland (1-23-2013), Isle of Man (12-13-2013), Italy (1-10-2014), Jamaica (5-1-2014), Jersey (12-13-2013), Liechtenstein (5-19-2014), Luxembourg (3-28-2014), Malta (12-16-2013), Mauritius (12-27-2013), Mexico (4-9-2014), Netherlands (12-18-2013), New Zealand (6-12-2014), Norway (4-15-2013), South Africa (6-9-2014), Spain (5-14-2013), Slovenia (6-2-2014), United Kingdom (9-12-2012)

- **IGA Model 2 signed** (date) - 5 countries
  Austria (4-29-2014), Bermuda (12-19-2013), Chile (3-5-2014), Japan (6-11-2013), Switzerland (2-14-2013)

- **IGA Model 1 agreement in substance** (date) - 39 countries
  Antigua and Barbuda (6-3-2014), Azerbaijan (5-16-2014), Bahamas (4-17-2014), Barbados (5-27-2014), Belarus (6-6-2014), Brazil (4-2-2014), British Virgin Islands (4-2-2014), Bulgaria (4-23-2014), Colombia (4-23-2014), Croatia (4-2-2014), Curacao (4-30-2014), Czech Republic (4-2-2014), Cyprus (4-22-2014), Georgia (6-12-2014), India (4-11-2014), Indonesia (5-4-2014), Israel (4-28-2014), Kosovo (4-2-2014), Kuwait (5-1-2014), Latvia (4-2-2014), Lithuania (4-2-2014), Panama (5-1-2014), Peru (5-1-2014), Poland (4-2-2014), Portugal (4-2-2014), Qatar (4-2-2014), Romania (4-2-2014), St. Kitts and Nevis (6-4-2014), St. Lucia (6-12-2014), St. Vincent and the Grenadines (6-2-2014), Seychelles (5-28-2014), Singapore (5-5-2014), Slovak Republic (4-11-2014), South Korea (4-2-2014), Sweden (4-24-2014), Turkey (6-3-2014), Turkmenistan (6-3-2014), Turks and Caicos Islands (5-12-2014), United Arab Emirates (5-21-2014)

- **IGA Model 2 agreement in substance** (date) - 3 countries
  Armenia (5-8-2014), Hong Kong (5-9-2014), Paraguay (6-6-2014)

*last updated June 17, 2014*
IRS Notice 2014-33 (May 2, 2014)

- **New Accounts for Entities**
  - New accounts opened and contracts entered into by legal entities after 6/30/2014 and **before 1/1/2015** will be treated as “pre-existing accounts”
  - Means that New Account Due Diligence (NADD) does not apply, unless account is opened or contract is entered into after 2014
  - Means that entities will not be “presumed” to be NPFFIs subject FATCA withholding before 1/1/2015
  - FATCA status of Prima facie FFIs with pre-existing accounts must be documented prior to 1/1/2015

- **New Accounts for Individuals**
  - **No change**

- **Audit relief**
  - Calendar years 2014 and 2015 will be regarded as a **transition period for IRS enforcement** of FATCA’s due diligence, reporting and withholding rules and for the recently published coordination rules
  - Will not apply to withholding agents that do not make a “**good faith effort**” to implement FATCA
IRS Notice 2014-33: other changes (short summary)

• Modified Standard of Knowledge (Chapter 3)
  • If a pre-existing account was documented prior to July 1, 2014, the withholding agent is not required to apply the new reason to know standards relating to a US telephone number or US place of birth until it is notified of a change in circumstance respecting foreign status or reviews documentation that contains a US place of birth.
  • Applies to renewals for Form W-8 that expire at the end of 2014.

• Reasonable Explanation (FATCA)
  • A withholding agent may use a check list containing specified alternate certifications to obtain a reasonable explanation to support an individual’s claim of foreign status.
  • Under Notice 2014-33, a foreign individual will be permitted to provide a written statement in his/her own words to support his foreign status, even if it does not make any certification enumerated on the checklist.
  • A checklist prepared by a withholding agent would provide a safe harbor from IRS scrutiny of the reasonableness of an individual’s explanation.
IRS Notice 2014-33: withholding

• Notice 2014-33 does **not** mean that there will be no FATCA withholding on foreign entities before 1/1/2015

• **FATCA withholding would apply from July 1st to pre-existing obligations if:**
  • An entity provides documentation indicating it is a non-participating FFI before the end of the due diligence period
  • A PFFI in a non-IGA country elects to be withheld based on a pool of recalcitrant individual accounts
  • An entity provides documentation indicating it is a passive NFFE but does not provide an ownership certification
IRS Notice 2014-33: due diligence for entities

- For entity accounts opened or obligations entered into before 1/1/2015:
  - If the entity is identified as a prima facie FFI, obtain FATCA revised Forms W-8 before 2015
    - Means that FATCA revised Form are not required at account opening
    - Means that a shorter and shorter period of time to document prima facie FFI accounts opened later in the year
  - If the entity is not a prima facie FFI, obtain FATCA revised Forms W-8 by July 1, 2016
  - If Form W-8 on file expires before the end of the due diligence period, obtain renewal of expiring Form W-8 before December 31

- Monitoring for changes in circumstances
  - During the due diligence period for pre-existing accounts, changes that affect the foreign status of the account apply for purposes of chapter 3 or chapter 61 but not for purposes of FATCA
  - Changes in circumstance do not trigger FATCA withholding during the due diligence period
  - New U.S. indicia (U.S. telephone number) does not apply to the renewal expiring Forms W-8
A good faith compliance effort for 2014-2015 means that the withholding agent has made “reasonable efforts” during the transition period to:

- modify its account opening practices and procedures to document the FATCA status of payees,
- apply the current standards of knowledge and
- in the absence of reliable documentation, apply the presumption rules.
- Identify and register each FFI member of the affiliated group

No transition relief will be given from compliance with chapters 3 and 61 and section 3406 rules that were not modified by the coordination rules

- For example, the determination of the character and source of payments for withholding and reporting purposes
IGAs signed in the EMEA area: an overview

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Model of IGA (Model I or II)</th>
<th>Date Signed or Announcement Made</th>
<th>Date Implemented into Law</th>
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<tr>
<td>Austria</td>
<td>Model II</td>
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<td>Belgium</td>
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<td>Expected 1 July 2014 with supporting executive orders</td>
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<tr>
<td>Finland</td>
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<td>Ireland</td>
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<td>Implementation legislation in draft</td>
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<td>Italy</td>
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<td>Luxembourg</td>
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<td>The Netherlands</td>
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<td>Norway</td>
<td>Model I</td>
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<td>Implementation legislation in draft</td>
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<td>Spain</td>
<td>Model I</td>
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<td>Parliamentary approval done</td>
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<tr>
<td>Switzerland</td>
<td>Model II</td>
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<tr>
<td>United Kingdom</td>
<td>Model I</td>
<td>12 September 2012</td>
<td>Implementing legislation in force 1 September 2013</td>
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Last update June 17, 2014
IGAs “in substance” in the EMEA area: an overview

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<th>Jurisdiction</th>
<th>Model of IGA (Model I or II)</th>
<th>Date of Announcement</th>
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<td>Czech Republic</td>
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<td>Israel</td>
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<td>Kuwait</td>
<td>Model I</td>
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<td>Poland</td>
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<td>Portugal</td>
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<td>Qatar</td>
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<td>Romania</td>
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<td>Slovakia</td>
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<td>South Africa</td>
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<td>9 June 2014</td>
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<td>Sweden</td>
<td>Model I</td>
<td>24 April 2014</td>
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<td>Turkey</td>
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<td>3 June 2014</td>
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<tr>
<td>UAE</td>
<td>Model I</td>
<td>23 May 2014</td>
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Last update June 17, 2014
Final Reg countries in the EMEA area: an overview

Algeria
Bahrain
Cameroon
Congo
Egypt
Gabon
Greece

Ivory Coast
Jordan
Kazakhstan
Kenya
Lebanon
Morocco
Nigeria

Pakistan
Russia
Senegal
Tanzania
Tunisia
Uganda
Ukraine

Last update June 17, 2014
New FATCA regulation (published March 6, 2014)

- New regulations released on February 20, 2014 and published in the federal register on March 6, 2014

- Two sets of provisions:
  - Revisions to the FATCA Final Regulations: final and temporary regulations
  - FATCA coordination regulations
New FATCA regulation (March 2014)

- Definition of withholdable payments: relief on certain collateral until January 1, 2017

- Direct reporting NFFE, sponsored direct reporting NFFE, and sponsoring entity
  Comments requested an election providing NFFE's with the ability to report information about their substantial U.S. owners directly to the IRS rather than to withholding agents.

- Excepted NFFE
  The new regulation modifies the definition of excepted NFFE in order to include, among other things, a direct reporting NFFE and a sponsored direct reporting NFFE, a qualified intermediary (QI), a withholding foreign partnership (WP) or withholding foreign trust (WT)
New FATCA regulation (March 2014)

- Standardized industry coding system
  These temporary regulations remove the term standardized industry code and replace it with the term standardized industry coding system. The term standardized industry coding system in these temporary regulations is substantially similar to the term standardized industry code in the final regulations, except that it focuses on a coding system used by the withholding agent to classify account holders, rather than a specific code that is part of such a coding system.

- Provisions for coordination of definitions / harmonization with IGAs

- Grandfathered obligations--determination by withholding agent of grandfathered treatment
  The temporary regulations modify the final regulations to provide that a withholding agent, other than the issuer of the obligation (or an agent of the issuer), is required to treat a modification of an obligation as material only if the withholding agent has actual knowledge that a material modification has occurred.

- Withholding and reporting : identification of US person
  These temporary regulations modify the final regulations to allow withholding agents (other than a participating FFI or registered deemed-compliant FFI) to treat the payee of a payment with respect to a preexisting obligation as a U.S. person if the withholding agent has previously classified the payee as a U.S. person for purposes of chapters 3 or 61 and established (through documentation or the application of the rules in §1.6049-4(c)(1)(ii)) that the payee is an exempt recipient for purposes of chapter 61.
New FATCA regulation (March 2014)

- Clarify
  - The identification of Participating FFIs and Registered Deemed-Compliant FFIs
  - The identification of Excepted NFFEs
  - FFI Agreement: coordination between backup withholding and withholding
  - Account reporting in specific cases

- Expanded affiliated group requirements
  Comments noted that some FFIs within an expanded affiliated group will have the status of an exempt beneficial owner and requested that the regulations be modified to allow for such FFIs to be excluded from this requirement. The temporary regulations modify the final regulations to adopt this comment.

- These proposed regulations have to be further analysed to detect the remaining issues
Registration and the FATCA registration system

- Citi is fully committed to be FATCA compliant in due time

- Citi entities have already been registered as part of the group. (Expanded Affiliated Group)

- FIs can register as
  - Participating Foreign Financial Institution (PFFI)
  - Registered Deemed-Compliant FFI (RDCFFI)
  - Limited FFI (Limited FFI)
  - Sponsoring Entity

- Four steps:
  - Account creation
  - Registration
  - Submission
  - Approval

- Issuance of a FATCA ID by IRS

- Type of registration
  - FIs can register as a Single, Lead, Member or Sponsoring Entity
FATCA terminology: specified US person

- A specified US person is any U.S. person other than:
  - A corporation the stock of which is regularly traded on one or more established securities markets, as described in §1.1472-1(c)(1)(i); Where the account holder is a specified US person, the PFFI transfers to the IRS information concerning the account holder’s ID and the account balance (end of the year balance)
  - Any corporation that is a member of the same expanded affiliated group as a corporation described in §1.1472-1(c)(1)(i);
  - Any organization exempt from taxation under section 501(a) or an individual retirement plan as defined in section 7701(a)(37); H
  - The United States or any wholly owned agency or instrumentality thereof
  - Any State, the District of Columbia, any U.S. territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing
  - Any bank as defined in section 581
  - Any regulated investment company as defined in section 851 or any entity registered with the Securities Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a- 64)
  - Any common trust fund as defined in section 584(a);
  - Any trust that is exempt from tax under section 664(c) or is described in section 4947(a)(1);
  - A dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State
  - A broker
  - Any tax exempt trust under a section 403(b) plan or section 457(g) plan
FATCA terminology: what is a FFI?

- The term “foreign financial institution” includes investment entities and certain holding companies as well as traditional financial institutions.

- Any non-U.S. entity that falls into one of the following categories:
  - Depositary banks
  - Custodial banks or brokerage firms
  - Insurance companies that issue policies having cash value or annuities
  - Investment Entities, including
    - Entities that conduct the following activities as a business on behalf of customers
      - Trading in financial assets
      - Portfolio management
      - Investing, administering, or managing money or financial assets
    - Collective investment vehicles, mutual funds, hedge funds, and private equity funds
  - Holding company or treasury center that
    - Is part of an expanded affiliated group (EAG) that includes another FFI
    - Is formed in connection with or availed of by certain investment entities
- US treasury: FATCA page

- IRS: FATCA page

- IRS: registration

- IRS: FATCA documents

- HMRC: guidance and other documents
  - http://www.hmrc.gov.uk/fatca/

- French Finance Ministry
  - http://www.economie.gouv.fr/signature-accord-fatca

- OECD
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