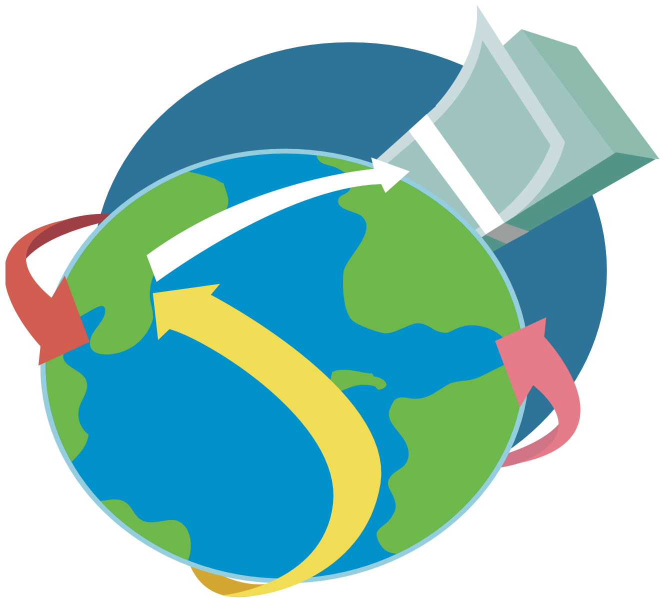
Foreign Account Tax Compliance Act (FATCA)



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Why do we have FATCA?

- For many years, some US investors successfully hid their identity or created offshore entities to hold US investments
  - Evading US withholding taxes
  - Failing to pay tax on income
  - Failing to comply with US tax reporting and disclosure rules

US Response to Tax Evasion

- IRS
  - Foreign Bank Account Reporting (“FBAR”)
    - Voluntary Disclosure Program
    - Civil Penalties
    - Criminal Prosecution
- Congress
  - FATCA

Birth of FATCA

- Enacted March 18, 2010
- Effective January 1, 2013
- Requires reporting to IRS for offshore accounts and investments held by foreign persons

FATCA's Objective

- Smoke out US taxpayer evaders who make investments and receive payments from US through offshore structures
- Enforce US disclosure goals by imposing 30% withholding tax on certain payments to certain *foreign persons* unless foreign person provides information regarding US owners and accountholders

Impacted Business Units and Functions

- Investment Banking
- Private Wealth/Banking
- Retail Banking
- Custody
- Asset management
- Insurance
- Corporate Tax
- Tax Operations
- Compliance
- On-boarding and customer data
- Information Technology
- Finance
- Relationship Management
- Payment Processing Settlement

Key Definitions

- FFI
- PFFI
- NFFE
- Financial Account
- US Account
- Specified US Person and US Person
- Substantial US Owner
- Recalcitrant Account Holder
- Withholdable Payment
- Pass through payment

30% Withholding Tax

- FATCA provides for 30% withholding tax on "withholdable payments to certain foreign persons unless:
  - Exception applies
  - Grandfather transition rules are met
  - New reporting requirements satisfied

Withholdable Payments

- Any US source payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensation, and other fixed or determinable annual or periodical gains, profits, and income
- Any gross proceeds from sale of disposition of any property that can produce US-sourced interest or dividends

Withholding Agent

- Any person (whether US person or a foreign person) having control, receipt, custody, or payment of any withholdable payment

Reporting

- FATCA has two reporting regimes on two classes of entities
  - FFIs
  - NFFEs
    - Broad exceptions from NFFE status under Notice 2010-60

FFIs

- Who is an FFI?
  - Any foreign entity that:

1) Accepts deposits in ordinary course of 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, partnership interests, commodities, or any interest (including futures or forward contract or option) in such securities, partnership interests of commodities)

Scope of FFI

- Covers all types of Investment Funds
  - Private Equity Fund
  - Hedge Fund
  - Venture Capital Funds
  - UCITs
  - Exemptions – deemed compliant

Burden of Being an FFI

- Unless exception applies, FFIs must enter into agreements with IRS under which FFI agrees to comply with FATCA reporting
- Otherwise 30% tax withheld

NFFEs -- Any foreign entity that is not a financial institution

- NFFE Requirements: Unless exception applies, NFFEs must provide the withholding agent with:
  1) Certification that the NFFE does not have any substantial US owners, or
  2) Name, address, and TIN of each substantial US owner of NFFE

Otherwise 30% tax must be withheld

US Persons

- US person: US citizens (irrespective of place of residence) and US residents

- Broader than SEC Rule 902 -- US Person is any natural person resident in the US

Substantial US Owner

- Specified US person that owns directly or indirectly more than 10% of 1) Stock of a corporation (by vote or value), or 2) Profits or capital interests in partnership
  - Is treated as owner of any portion of trust under grantor trust rules
  - Is treated as owning, directly or indirectly more than 10% of beneficial interests in trust, or
  - Owns, directly or indirectly, any portion of a foreign entity that is engaged or holds itself out as being engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, interests, or commodities

Specified US Person

- Publicly traded corporation or member of the affiliated group of a publicly traded corporation
- Tax exempt organization or IRA
- US or State Government or any subdivision or wholly-owned agency or instrumentality
- Bank, REIT, RIC, common trust fund, or exempt charitable trust

How to Determine Investor Status

- Pre-existing Individual Accounts
  - General rule: $50,000 or less exemption
  - High value accounts ($500,000 or more)
  - Private Banking Accounts/Relationship
  - Multi-step process

Step 1

- Low Value Accounts $50k or less – no worries

Step 2

- Private Banking Accounts
  - Search beyond electronic database
  - Search for recurring/ask questions
    - Identification of holder as a US citizen or resident
    - US place of birth
    - US address
    - Standing instructions to transfer funds to US account
    - Hold mail or c/o address as sole address
    - Power of attorney / signatory authority given to US person

Step 3

- Electronic Database Search for US Indicia (but do not have to search PDF or scanned docs)
  - ID of holder as US citizen/resident
  - US place of birth
  - US address
  - Standing instructions to transfer funds to US account
  - Hold mail or c/o address as sole address
  - Power of Attorney/signatory authority given to US person

Step 4

- High Value Account ($500,000 or more)
- Review must go beyond electronic database and include review of account files

Step 5

- Annual retesting – required in the third year following the effective date of FFI

Relationship of FATCA to Existing Withholding Scheme

- FATCA requirement and withholding is intended to be integrated with existing foreign withholding scheme (but does not double the tax)
  - i.e. if 30% FATCA withholding required no additional withholding tax is imposed under the previously existing foreign withholding scheme

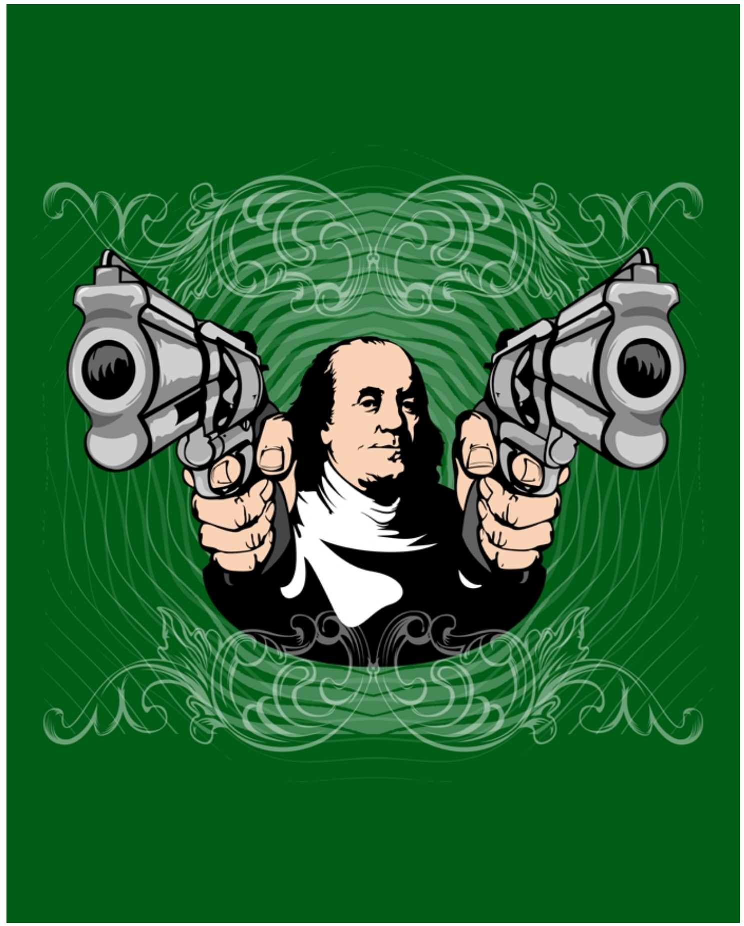
Effective Date

- Generally rules apply to withholdable payments made after 12/31/2013 (or later)
- FATCA generally not applicable to:
  - Certain obligations outstanding on 3/18/12
  - Gross proceeds from the disposition of such obligations

Passthru payments

- Participating FFI must deduct and withhold a tax equal to 30 % of any "passthru payment" made to a recalcitrant account holder or nonparticipating FFI

Recalcitrant Holder



Recalcitrant Holder

- Holder who fails to:
  - Comply with reasonable requests for information necessary to determining if account is US account
  - Provide name, address, and TIN of each specified US person and each substantial US owner
  - Provide waiver of any foreign law that would prevent FFI from reporting required information

What is a passthru payment?

- Passthru payment is any withholdable payment or other payment to the extent attributable to a withholdable payment
- Notice 2011-34 – highlights complexity of term and burden placed on funds
- Payment is a passthru payment to the extent of:
  - Withholdable payments plus
  - Portion that is not a withholdable payment multiplied by passthru payment percentage (or PP%) of payee FFI (or use PP% for custodial payments)

Passthru Payment Percentage

- Based on FFI's assets
  - PP% - US assets/Total assets
  - Tested quarterly, with 4 most recent quarters averaged
  - Use gross assets on financial statements
  - Look thru rule for lower-tier FFI
  - Must publish quarterly (if do not then PP% is 100%

Passthru Payment Percentage Example

- Fund A is a fund of funds with $100 million in assists consisting of :
  1) $20m interest in Fund B, nonparticipating FFI
  2) $30m interest in Fund C, participating FFI with 50% PP%
  3) $10m interest in Fund D, participating FFI that did not publish PP%
  4) 40m interest in Fund 3, domestic corp.

What is Fund A’s Percentage?

- Fund A’s percentage is 65%:
  - US assets $65m
    - Fund B = 0
    - Fund C =$15m
    - Fund D=$10m
    - Fund E =$40m

Total Assets $100m

What to do ?

- Assess Infrastructure
  - Can you ID US persons?
  - Can you ID US-sourced income?
- Assess Exposure
  - How many US investors? Amount of holdings?
  - How much portfolio investments result in US-sourced income? Alternatives?
- Minimize the Burden