



Getting Prepared For FATCA

YOUR NEW FATCA WITHHOLDING TAX OBLIGATIONS

The FATCA legislation (summarized at right) sets forth new U.S. withholding tax obligations for U.S. and non-U.S. companies, both financial and non-financial institutions. Congress has given Treasury and the IRS broad regulatory authority to provide details on how to comply with these obligations. While the regulation drafting process likely will take many months, now is the time to take action and ensure that you are ready to comply with FATCA's looming January 1, 2013, deadline.

Your obligations under FATCA will vary depending on whether you are:

- A Non-U.S. Financial Institution (either a Qualified Intermediary or a Nonqualified Intermediary),
- A U.S. Withholding Agent,
- A U.S. Multinational Corporation, or
- A Non-U.S., Non-Financial Entity.

The obligations of each of these types of entities are discussed below.

Non-U.S. Financial Institutions - Qualified Intermediaries ("QIs") and Nonqualified Intermediaries ("NQIs")

Non-U.S. financial institutions, both QIs and NQIs, must determine whether they will enter into an agreement with the IRS to identify U.S. account holders (i.e., a "good" FFI) or be subject to 30% withholding on withholdable payments (i.e., a "bad" FFI). A good FFI must: (1) identify U.S. accounts; (2) comply with ongoing due diligence rules; (3) provide an annual report to the IRS; (4) provide

What is FATCA?

FATCA refers to a major revamp of the U.S. withholding tax system that imposes a new 30% withholding tax on certain U.S. source payments made to Foreign Financial Institutions ("FFIs") and Non-financial Foreign Entities ("NFFEs") that refuse to identify U.S. account holders and investors, even if such U.S. persons directly or indirectly hold only non-U.S. bank and securities accounts. The new rules affect not just the financial industry, but all withholding agents, including U.S. operating companies. Failure to comply with the new rules has the potential to give rise to significant withholding tax liability on withholding agents.

The FATCA provisions were recently enacted as part of the Hiring Incentives to Restore Employment ("HIRE") Act. The provisions are widely known as FATCA because they originated in the Foreign Accounts Tax Compliance Act, introduced in October 2009. The FATCA provisions can be found in new Internal Revenue Code sections 1471 - 1474, and go into effect on January 1, 2013.

Unlike the current section 1441/NRA withholding regime, the FATCA withholding tax applies to "withholdable payments," meaning payments of both U.S. source income and gross proceeds from the sales of securities that could pay U.S. source interest and dividends. To avoid withholding, FFIs will be required to enter into an agreement with the IRS to identify their U.S. account holders, and NFFEs must disclose their substantial U.S. owners to payors of withholdable payments.

The FATCA rules are intended to act as a filter to the existing section 1441/NRA withholding rules. That is, even if the 30% FATCA withholding does not apply, withholding agents will still be required to comply with the existing documentation, withholding, and reporting rules.

the IRS with any additional information requested; (5) withhold on uncooperative account holders; and (6) if necessary, request waivers from U.S. account holders to allow their names to be disclosed to the IRS.

To make the determination of whether to be a good FFI, an FFI must review its current systems and processes to determine what identifying information it collects from account holders, and where and how that information is stored. FFIs will need to assess what organizational, system, and process improvements will need to be made to ensure the FFIs' compliance with the FATCA obligations, and also to ensure their continued compliance with the section 1441/NRA withholding rules. FFIs should consider telling their respective industry groups and the IRS their views on how they can comply with FATCA as a practical matter.

These considerations will vary depending on the FFI's product offerings and client base, and whether the FFI is a QI or NQI. The IRS will expect QIs to agree to the good FFI obligations, likely amending the QI Agreements accordingly. A QI must assess whether it operationally can accept the additional FATCA burdens, whether it should eliminate its U.S. client base, or whether it should even give up its QI status and divest from the U.S. market. Withholding QIs will need to consider what systemic changes will be required for withholding, not only on U.S. source FDAP payments, but also on gross proceeds. For NQIs, the issue is one of strategy. An NQI should assess its customer composition, its potential operational obligations, and the market pressures and consequences of being a good versus bad FFI. NQIs too may consider divestment of U.S. customers and/or U.S. investment.

U.S. Withholding Agents ("USWAs")

USWAs will be required to identify customers who are FFIs and determine whether they are good or bad FFIs. USWAs must also be able to identify customers who are NFFEs and verify whether they have any substantial U.S. owners. USWAs must be able to withhold on bad FFIs and NFFEs who refuse to provide information about U.S. owners and also on any "passthru payments" to good FFIs who have "bad" clients and elect not to do withholding themselves. Withholding systems must be capable, for the first time, of withholding 30% on proceeds from the sale of U.S. securities. Additionally, USWAs must be able report information to the IRS regarding the substantial U.S. owners of NFFEs.

USWAs will need to develop processes and procedures for identifying good and bad FFIs and NFFEs. USWAs' systems will need to be enhanced to manage FFI status, NFFEs, and the corresponding withholding and reporting requirements.

U.S. Multinational Corporations ("MNCs")

MNCs should determine whether and what type of U.S. source vendor and other payments are made to non-U.S. entities. MNCs should also determine if any withholdable payments are made to NFFEs subject

TALK NOW TO TREASURY AND THE IRS

The FATCA legislation leaves to Treasury and the IRS the development of regulations that will set forth specific rules regarding the interpretation and implementation of FATCA. This presents an opportunity for those affected by the legislation to work with Treasury and the IRS to help them develop practical procedures that minimize the compliance burden. BSM has already begun talking to the regulation writers. BSM can help you determine how best to inform Treasury and the IRS of your particular circumstances. Treasury and the IRS have little time to draft the regulations given the January 1, 2013, deadline. Time is of the essence for discussing your concerns. Contact us if you would like us to facilitate discussions on your behalf with Treasury and the IRS.

to the FATCA rules, and if so, request those NFFEs to identify any substantial U.S. owners. Payments that are “effectively connected income” of the recipient are exempt from FATCA. MNCs will also need to determine if any withholdable payments are made to FFIs (e.g., interest on a loan), and if so, whether the FFI is a good or bad FFI. MNCs will have to withhold the

Get Started Now

Objectives

- Understand the tax rules.
- Assess operations/systems/staff changes.
- Understand how FATCA affects client base and product offerings.
- Make your case to the IRS.
- Monitor developments as 2013 approaches.
- Create a contingency plan based on likely outcomes in the final regulations.



Action Items

- ❑ Discuss FATCA's requirements with senior management and business unit leaders.
- ❑ Assemble a comprehensive project team including tax, operations, IT, and legal expertise.
- ❑ Assign a senior level person to serve as a Process and/or Technology Champion from each business unit.
- ❑ Analyze your client base/shareholders/payees to identify U.S. accounts, FFIs, and NFFEs.
 - ❑ Assess current client onboarding process and account information to determine how best to identify U.S. accounts, FFIs, and NFFEs.
- ❑ Assess U.S. source payments.
 - ❑ FFIs should assess extent of investments in U.S. securities.
 - ❑ U.S. MNCs should determine the types of U.S. source payments it makes.
- ❑ Assess the limitations of your current technology to determine gaps. Can core systems handle additional data elements, withholding and reporting changes?
- ❑ Work with industry groups and peers to coordinate approach toward the IRS.
- ❑ Educate the IRS regarding your business and implementation issues.
- ❑ Develop a preliminary two to three year operational, technology and communications plan.

FATCA 30% tax on any NFFEs who fail to provide U.S. owner information and on any bad FFIs. MNCs that act as their own transfer agent will also need to identify NFFE shareholders and either obtain information regarding substantial U.S. owners or withhold at 30% on withholdable payments.

MNCs will need to develop processes and procedures for identifying withholdable payments and good and bad NFFEs, and also for providing U.S. ownership information to the IRS. MNCs should review the withholding capabilities of their current systems and determine what systems enhancements and operational changes will be required to comply with FATCA.

Non-U.S., Non-Financial Entities

NFFEs will need to determine whether they will disclose their substantial U.S. owners, if any, or be subject to 30% withholding on withholdable payments. The affected NFFEs are not just those that have investment accounts with a financial institution but also those that provide services in the U.S., license patents, trademarks and copyrights (e.g., software) in the U.S., or receive payments of rents on property in the U.S. NFFEs receiving only income effectively connected with a U.S. trade or business do not fall under the FATCA rules.

NFFEs who do not want to be subject to withholding (i.e., good NFFEs) must establish appropriate controls, systems, and processes to identify substantial U.S. owners (generally, those with more than 10% ownership unless the NFFE is an investment company, in which case, any U.S. owners), and also to report the identifying information about those owners to the IRS.

How We Can Help

Burt, Staples & Maner, LLP (“BSM”), and its related technology firm, Compliance Technologies International, LLP (“CTI”), are uniquely qualified to help you understand your FATCA obligations and develop a strategy for compliance.

BSM is an international law firm with offices in Washington and London specializing in every aspect of U.S. and international taxation. The firm is known worldwide for its expertise in tax withholding and information return reporting rules and related tax issues. BSM has been representing the European banking industry in its discussions on FATCA with the U.S. authorities. Additionally, the Firm’s lawyers bring to the practice their government and inter-governmental experience in tax policy, administration and litigation acquired at the IRS and related agencies, as well as their experience at Big Four accounting firms.

CTI is the source for tax withholding and information return reporting compliance needs. CTI has a strong team of highly experienced international and domestic tax professionals, ranging from lawyers and accountants to software engineers and operations experts, located in Boston, Los Angeles, New York, Washington, and London. CTI is the leader in cutting edge global tax technology, consulting and outsourcing services specializing in tax withholding and information return reporting.

BSM and CTI together offer an unparalleled breadth of services. These services include:

- Representation on your behalf in discussions with the IRS regarding the development of regulations that provide for practical procedures that minimize your compliance burden.
- Tax technical advice regarding the FATCA legislation and future regulations and other guidance.
- Analysis of your current processes and procedures to identify the enhancements you require to manage the FATCA requirements from tax technical, operations, and systems perspectives.
- Designing, building, and testing of documentation, withholding and reporting solutions to meet FATCA requirements.
- Expansion of CTI’s **1441 Compliance System™** solutions to encompass the FATCA requirements, including updates to CTI’s **QI, Vendor Payment and USWA Compliance Guides** (procedure and training manuals), **MD³** (document validation tool), **Withholding Module**, and the **Tax Reporting** application.
- Outsourcing of due diligence reviews of U.S. account documentation, reporting regarding U.S. accounts, and 30% FATCA withholding.

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