

Foreign Financial Institution Reporting: Are You Ready for the 2016 FATCA Deadlines?

FFI Reporting Under Model II IGAs, Completing Due Diligence, Filing Form 8957 and More

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Foreign Financial Institution Reporting:

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GRAY REED & MCGRAW, P.C.
CARTER LEDYARD & MILBURN LLP

Presenters

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Overview

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What is FATCA?

- FATCA is a U.S. law requiring foreign financial institutions (“FFIs”) to discover and disclose their U.S.-owned account, equity, and debt holders to the IRS.
- FATCA, which will be implemented in the next several years, subjects certain categories of U.S. source payments (such as interest, dividends, rents and later gross proceeds from sales, which are referred to as “Withholdable Payments” or “WP”) made by payors that are considered “Withholding Agents” to: (i) FFIs (such as banks, funds, investment entities, depositories and insurance companies) and (ii) certain Passive non-financial foreign entities (NFFE are entities that do not fall under the “Financial Institution” definition and Passive NFFE are NFFE earning more than 50% as passive income) to a 30% U.S. withholding tax on certain types of payments.

Who bears the burden of FATCA?

- The burden of complying with FATCA falls on both the recipient/payee of the WP, which must certify its FATCA status (and in some circumstances, comply with certain other requirements, depending on its FATCA status) on specified IRS Forms (discussed below), and on the payor of such WPs, which is required to obtain certain certifications from the payees in order not to withhold.

Foreign Financial Institutions

- FATCA generally requires FFIs to provide information to the IRS regarding their U.S. accounts.
- A “Foreign Entity” for this purpose is any entity not organized under the laws of the United States.
- The term “Financial Institution” means any entity that:
 - (i) accepts deposits in the ordinary course of a banking or similar business; (ii) holds, as a substantial portion of its business, financial assets for the account of others; (iii) is an “Investment Entity;” or (iv) is a “Specified Insurance Company.

Withholdable Payments (“WP”)

- Under FATCA, the payor of US Source FDAP Income may have to withhold 30% on Withholdable Payments (“WP”) that are defined in section 1473(1) as: (1) Any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income (“FDAP income”), if such payment is from sources within the US; and (2) Beginning 2020, gross proceeds from the sale or disposition of any property of a type which can produce interest or dividends from sources within the U.S.

WP (cont.)

- The term “U.S. source” means derived from sources within the United States. A payment is derived from sources within the United States if it is income treated as derived from sources within the United States under sections 861 through 865 and other relevant provisions of the Code.
- July 1st 2015 was the first day of withholding on U.S. source FDAP for accounts identified as non-participating FFIs (generally new accounts and pre-existing accounts documented as non-FATCA compliant).

Overview of FATCA Requirements

- Register as an FFI in the Portal and receive a GIIN
- Maintain due diligence procedures to identify “U.S. Accounts” (which should have been done by June 30, 2015 for accounts over \$1M, and June 30, 2016 for all other accounts).
- Determine U.S. or non-U.S. status of each account holder (over the threshold numbers).
- Report information regarding U.S. Accounts to the IRS on an annual basis (First report was due on June 30, 2015, and the next ones each March 31st for the previous tax year).

FATCA Requirements (cont.)

- Provide the IRS with additional information regarding U.S. Accounts upon request.
- Withhold 30% tax on certain payments made by non-compliant account holders (withholding is already in effect for interest, dividends, etc., and will begin 2020 for gross proceeds).
- Exit the relationship if the account holder does not comply.

Responsible Officer

- The Responsible Officer (“RO”) will be the point of contact for the entity.
- The RO will be the person who signs the registration form, oversea that the procedures discussed herein are in place, and sign the annual reports to the IRS (discussed herein).
- The RO must periodically review the procedures in place and make sure the system is up and running with respect to FATCA.

RO (cont.)

- The RO will be the point of contact at the entity with which the IRS can discuss further compliance (or noncompliance) issues.
- If withholding is needed, the RO will be responsible to verify the necessity of withholding and that the amounts withheld are being sent to the IRS.
- Every 3 years, the RO must certify to the IRS that the FATCA compliance program is in place and running, and whether there were any failures in the program.

FFI Registration

- The registration steps are as follows:
 - To register online, the RO will go to www.irs.gov/fatca-registration.
 - The RO will first have to obtain a PIN and create a password in order to create an account. This PIN is only for purpose of creating the account and register. It is not your GIIN.
 - After creating an account, the RO will complete the registration form online and submit it for approval by the IRS.
 - When its application is approved, the FFI will receive a notice of registration acceptance and will be issued a GIIN.

Retention of Documents/Tracking Expiration Dates

- The FFI's computerized systems must be updated to retain either an original, certified copy, or photocopy of the FATCA-related documentation collected for as long as it may be relevant for the FATCA related compliance (i.e., due diligence, reporting and withholding).
- The system will note the date on which and by whom the document was received and reviewed.
- The system must be able it to keep track of the expiration dates of the documentary support for FATCA status.
- Any documentation that is stored electronically must be made available in hard copy form to the IRS upon request during an examination.

Recent Developments

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Notice 2015-66

- On 9/18/15, the IRS and Treasury published Notice 2015-66, to extend the timeline for application of certain FATCA transitional rules and to provide guidance to jurisdictions for the exchange of information for tax year 2014.
- The Notice (1) postpones withholding on gross proceeds to payments made after 12/31/18; (2) extends reporting deadlines on gross proceeds to 2020 (with respect to 2019); (3) delays implementation of withholding and reporting on “foreign passthru payment;” (4) extends the availability of limited branch and limited FFI statuses from 12/31/15 to 12/31/16; and (5) extend the deadline for registration of sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs from 1/1/16 to 1/1/17.

Notice 2015-66: Withholding

- Currently - 30% U.S. withholding tax will apply to payments of certain U.S. source FDAP income (e.g., dividends, interest, insurance premiums) made to FFIs, unless the FFI establishes by registration that it is (1) a PFFI, including FFIs in Model 2 IGA; (2) An FFI in a jurisdiction with a Model 1 IGA treated as in effect, or (3) A low-risk FFI
- Beginning 1/1/19 - 30% U.S. withholding tax will apply to any gross proceeds from the sale or other disposition after December 31, 2018 of any property of a type that can produce the U.S. source income described above.

Notice 2015-66: Registration

- Beginning 1/1/16:
 - All limited FFI and limited branch registrations were placed in registration incomplete status on their online FATCA account after 12/31/15. Limited FFIs and limited branches that seek to continue such status during 2016 must edit and resubmit their registrations after 12/31/15, on the FATCA registration website.
 - Sponsoring entities must register their sponsored investment entities and sponsored controlled foreign corporations (CFCs) covered by Annex II of a Model 1 IGA on or before the later of 12/31/16, and the date that is 90 days after a U.S. reportable account is first identified. Sponsoring entities must register their sponsored investment entities and sponsored CFCs covered by Annex II of a Model 2 IGA on or before 12/31/16.

Notice 2015-66 Registration (cont.)

- Beginning 1/1/17
 - Sponsoring entities must register their sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs by 1/1/17.
 - Sponsoring entities should consider registering to obtain GIINs well in advance of 1/1/17, in order to give withholding agents sufficient time to complete the verification requirement.

Notice 2015-66: Reporting

- 3/31/16 - FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions.
- 9/30/16 - FFIs in Model 1 IGA jurisdictions: Report (with respect to 2015) (1) Account holder's name (For passive NFFE, the name(s) of any substantial U.S. owners); (2) Account holder's U.S. TIN (For passive NFFE, only the TIN(s) of any substantial U.S. owner(s)); (3) Account holder's address (For passive NFFE, only the address(es) of substantial U.S. owner(s)); (4) Account number; (5) Account balance or value; (6) For accounts held by recalcitrant/non-consenting account holders, report aggregate number and balance or value; (7) Income paid (except certain gross proceeds from the sale or redemption of property).

Notice 2016 Reporting (cont.)

- 3/31/17 - FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions
- 9/30/17 - FFIs in Model 1 IGA jurisdictions: Report (with respect to 2016) everything reported in (1) through (7) above.
- 2018-19 - continues the same as 2016-17.
- 2020– adding reporting on gross proceeds.

Notice 2016-08

- The IRS has recently released Notice 2016-08 providing relief with respect to some upcoming deadlines as well as guidance on the ability to accept electronically collected documentation from intermediaries.
- 2015 Gross Proceeds Reporting for NPFFI Accounts Eliminated
- Participating FFIs, reporting model 2 FFIs and registered deemed compliant FFIs do not need to report gross proceeds paid to, or with respect to, an account held by an NPFFI for calendar year 2015.
- Preexisting Account Certification Deadline Extended for PFFIs and Model 2 FFIs.

Notice 2016-08: Preexisting Account Certification

- The required preexisting account certification must be submitted to the IRS at the same time that the participating FFI or reporting Model 2 FFI is required to submit its first periodic certification of compliance.
- This certification must be submitted on or before July 1 of the calendar year following the certification period, instead of no later than six months following the end of the certification period.
- This means that both certifications will be due to the IRS by July 1, 2018.

Notice 2016-08: Certification Requirements for Registered Deemed Compliant FFIs

- The Notice establishes clear timeline parameters, with definitive start and end points, for the periodic certification by Registered Deemed Compliant FFIs.
- The first certification period will begin on the later of June 30, 2014 or the date the FFI registered as deemed compliant and end at the close of the calendar year of the third full calendar year after the start of the certification period.

Notice 2016-08: Guidance on accepting electronic tax forms

- The Notice provides guidance on the acceptance of beneficial owner tax Forms W-8 and W-9 that are collected electronically by an intermediary or pass-through.
- The Regulations will be amended to state that Withholding Agents may rely on such forms as long as they obtain a written statement confirming that the electronic documentation was generated from a system that meets the requirements in §1.1441-1(e)(4)(iv), §1.1471-3(c)(6)(iv), or Announcement 98-27, as applicable and the withholding agent does not have actual knowledge that such statement is incorrect.

Intergovernmental Agreements ("IGAs")

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IGA History

- In 2012, Treasury released the Model 1 IGA and the Model 2 IGA to facilitate the implementation of FATCA and address foreign legal impediments that otherwise would limit an FFI's ability to comply with FATCA.
- On 4/2/14, Treasury and the IRS published Announcement 2014–17, providing that jurisdictions treated as having an IGA in effect would include jurisdictions that, before 7/1/14, reached agreements in substance with the US on the terms of an IGA and consented to be included on the list of such jurisdictions, in addition to jurisdictions that had already signed IGAs.
- An FFI that is resident in, or organized under the laws of, a jurisdiction that is treated as having an IGA in effect is permitted to register on the FATCA registration website and to certify to a withholding agent its status as an FFI covered by an IGA.

History (cont.)

- On 12/1/14, Treasury and the IRS published Announcement 2014–38, providing that certain jurisdictions that reached an agreement in substance after 6/30/14, and before 11/30/14, also would be treated as having an IGA in effect.
- Furthermore, Announcement 2014–38 provided that jurisdictions that are treated as if they have an IGA in effect would retain such status, provided that the jurisdiction continues to demonstrate firm resolve to sign the IGA as soon as possible.
- Notice 2016-66 extended some deadlines (see below).

FFI Registration in an IGA Jurisdiction

- FFIs that are treated as Reporting Financial Institutions under a Model 1 IGA continue to register as “Registered Deemed-Compliant Foreign Financial Institutions.”
- FFIs that are treated as Reporting Financial Institutions under a Model 2 IGA continue to register as “Participating Foreign Financial Institutions.”

IGA counterparties' compliance with FATCA

- An IGA generally requires the partner jurisdiction to exchange information on U.S. reportable accounts with respect to 2014 by 9/30/15, in the case of Model 1B IGA jurisdictions that have an IGA in force, and Model 1A IGA jurisdictions for which the obligation to exchange information has taken effect.
- However, as of today, many of the jurisdictions that have either signed a Model 1 IGA, or are accepted by the US as having done so in principle, are not yet ready to begin reporting.
- Several of them have not even enacted the legislation to implement their IGAs, without which they are legally unable to exchange tax information with the US.

Notice 2015-66: Exchange of Information for Tax Year 2014













- Treasury will treat FFIs under Model 1 IGAs which have not been signed by 9/30/15, as complying with FATCA, provided the partner jurisdiction of the respective FFI continues to “demonstrate firm resolve to bring the IGA into force and any information that would have been reportable under the IGA on 9/30/15, is exchanged by 9/30/16, together with any information that is reportable under the IGA on 9/30/16.
- For countries with Models 1A or 1B IGAs for which the obligation to exchange is in effect, Treasury and the IRS understand that automatic exchange systems and necessary enacting legislation may not be in place to meet the information exchange deadline of 9/30/15.

Notice 2015-66 (cont.)

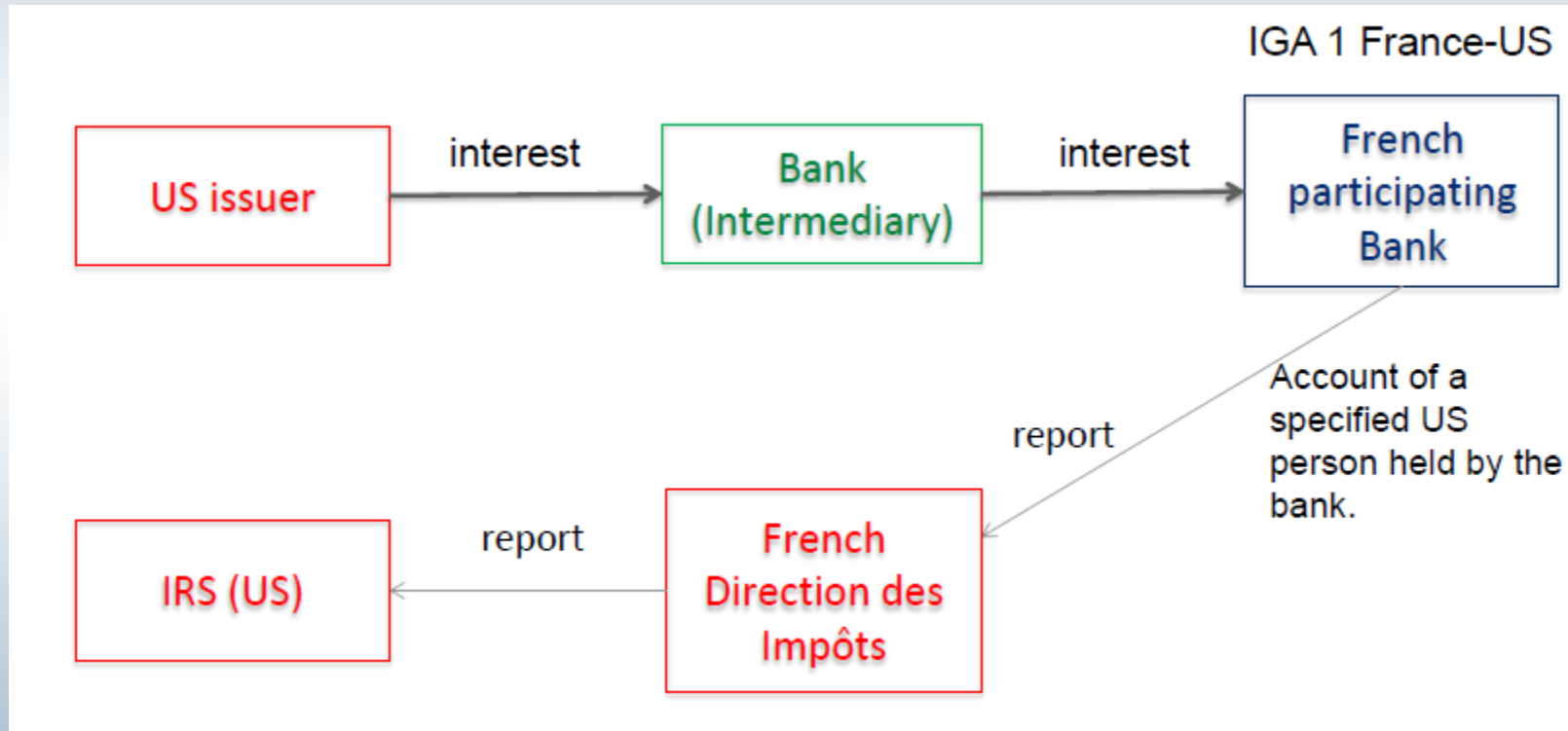
- In such cases, FFIs covered by an IGA will be treated as complying with FATCA “as long as the partner jurisdiction notifies the US competent authority before September 30, 2015, of the delay and provides assurances that the jurisdiction is making good faith efforts to exchange the information as soon as possible.”

Recent IGAs

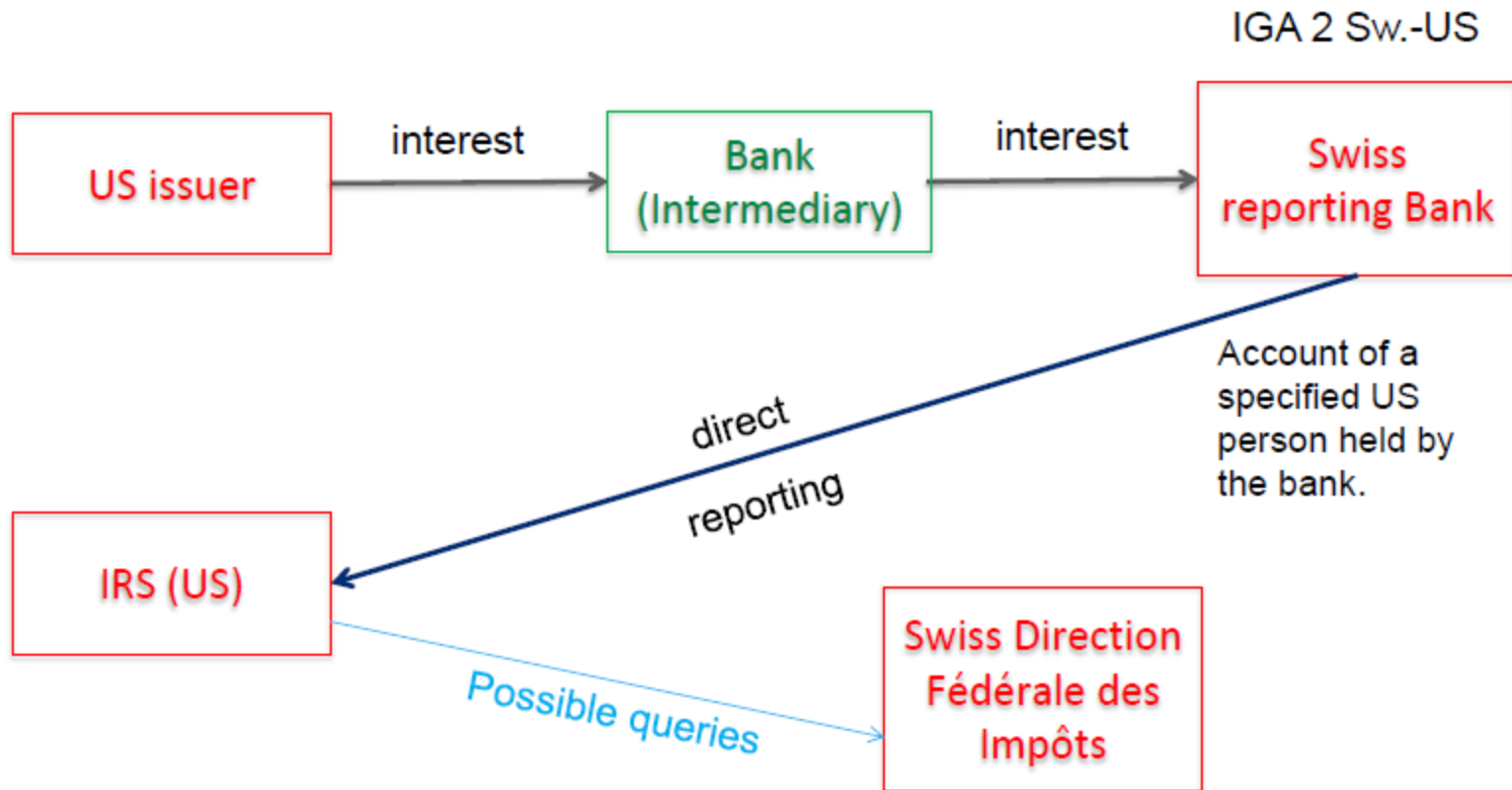
Current Count: 112 as of January 29, 2016

		<u>Model Type</u>	<u>Date Signed</u>
	<u>Saint Lucia</u>	1	19-Nov-15
	<u>Angola</u>	1	9-Nov-15
	<u>San Marino</u>	2	28-Oct-15
	<u>Algeria</u>	1	13-Oct-15
	<u>Cambodia</u>	1	14-Sep-15
	<u>Azerbaijan</u>	1	9-Sep-15
	<u>Montserrat</u>	1	8-Sep-15
	<u>Saint Kitts and Nevis</u>	1	31-Aug-15
	<u>Saint Vincent and the Grenadines</u>	1	18-Aug-15
	<u>Portugal</u>	1	6-Aug-15
	<u>Slovakia</u>	1	31-Jul-15
	<u>Turkey</u>	1	29-Jul-15

IGA Diagram: Model 1



IGA Diagram: Model 2



International Developments

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UK CDOT

- Beginning 2016, the UK has implemented a number of similar automatic exchange of information agreements with its Crown Dependencies (“CDs”) and Overseas Territories (“OTs”).
 - OTs: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Turks and Caicos Islands
 - CDs: Guernsey, Isle of Man and Jersey
- UK CDOT impacts FIs located in the UK, CDs and OTs unlike US FATCA which impacts all FIs globally.
- All UK FIs must Identify financial accounts held by Jersey, Guernsey, Isle of Man, or Gibraltar specified persons and report where required.
- All CD/OT FIs must Identify financial accounts held by UK specified persons and report where required.

The Common Reporting Standard (“CRS”)

- CRS is a global initiative led by OECD to increase tax transparency within a global network of agreements between 93+ jurisdictions.
- The CRS is the standard for automatic exchange of financial account information (“AEOI”) developed by the OECD.
- CRS is a broad reporting regime that draws extensively on the intergovernmental approach to implement FATCA
- Financial institutions will face the CRS reporting challenge starting in 2017 if they are residents in any of the jurisdictions known as “Early Adopters”.
- Accounts in counterparty jurisdictions will be reported on an annual basis to local governments.

CRS (cont.)

- Thus, reporting will increase significantly for financial institutions located in the jurisdictions that have adopted CRS.
- Similar to FATCA, CRS requires financial institutions resident in participating Jurisdictions to implement due diligence procedures, to document and identify reportable accounts under CRS, as well as establish a wide-ranging reporting process.

Differences between CRS and FATCA

- FATCA requires a financial institution to find US persons; however, with more than 90 countries currently committed, CRS requires a much broader scope.
- Under CRS, the definition of a “reporting financial institution” is different. So, even if you are not required to report on financial accounts under FATCA, you may be under CRS.
- There is currently no de minimis limit under CRS. FATCA, by contrast, only kicks in for individual accounts with balances exceeding \$50,000 – companies have different limits.
- Same Country Exception for CRS but not for FATCA

Example One

- FFI is in a non-IGA country.
- FFI is a participating FFI and thus registered with the IRS in respect of FATCA.
- Client has an existing account there. The account has a US address and phone number on file.
- The account value is 4 million USD.
- FFI identifies client as a US person after conducting due diligence by the address and phone number on record.
- Client refuses to provide a W-9 or W-8BEN certifying his status as a US or foreign person. He also refuses to waive bank secrecy laws.

Example One: FATCA Rules Applied

- Client is a “recalcitrant account holder” and will be subject to FATCA withholding.
- FFI must also close account.

Example Two

- Client is a shareholder of a privately held foreign corporation. The foreign corporation makes investments in various projects. One investment is in the equity interest of a US corporation.
- US corporation distributes a dividend to the foreign corporation on or after July 1, 2014.

Example Two: FATCA Rules Applied

- The US corporation is a US withholding agent and must comply with regular withholding and FATCA withholding.
- The dividend is from US sources.
 - It must collect a form W8BEN-E from the foreign corporation which will certify:
 - Whether it is subject to a reduced treaty rate; and
 - Whether it is subject to FATCA withholding.

Example Three

- FFI is in a non-IGA country.
- FFI is a participating FFI and thus registered with the IRS in respect of FATCA.
- Client was appointed as trustee of a foreign trust in his capacity as an individual. The trust has four equal beneficiaries, one who is a US individual.
- On July 1, 2014, Client is contemplating making investments in newly issued mortgage backed securities. Before making this investment strategy, recalling the financial crisis, he solicits investment advice from financial advisors in the form of memorandum. The memorandum advises that MBS securities are currently undervalued.
- Client ultimately decides to make the investment through a new account in the name of the trust through the FFI.
- The FFI gives him Form W-8BEN-E and asks him to verify the trust's FATCA status as FFI or NFFE.

Example Three: FATCA Rules Applied

- The trust is not an FFI.
- Merely soliciting investment advice does not cause “professional management” causing FFI status.
- The trust is a passive NFFE.
- The trust may have to disclose its substantial US owner (*i.e.*, the US beneficiary).

Example Four

- Same facts as Example 3, but in this example the Client is an employee of an Asset Management Company (which is an FFI), an affiliate of a large financial institution. The management company is responsible for managing the trust's assets.

Example Four: FATCA Rules Applied

- Although the client merely solicited investment advice from outside advisors, since the trust's assets are professionally managed by an FFI, then the trust is derivatively also an FFI.