

## **Announcement 2012-42: Timelines for Due Diligence and Other Requirements under FATCA**

### **I. PURPOSE**

This announcement outlines (i) certain timelines for withholding agents and foreign financial institutions (FFIs) to complete due diligence and other requirements and (ii) certain additional guidance concerning gross proceeds withholding and the status of certain instruments as grandfathered obligations under sections 1471 through 1474 of the Internal Revenue Code (Code). The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to incorporate the rules described in this announcement in final regulations under sections 1471 through 1474.

### **II. BACKGROUND**

On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847), added sections 1471 through 1474 (chapter 4) to Subtitle A of the Code. These provisions are commonly referred to as the Foreign Account Tax Compliance Act, or FATCA. Chapter 4 requires withholding agents to withhold 30 percent of certain payments to an FFI unless the FFI has entered into an agreement (FFI agreement) with the IRS to, among other things, report certain information with respect to U.S. accounts. Chapter 4 also imposes on withholding agents certain withholding, documentation, and reporting requirements with respect to certain payments made to certain other foreign entities.

On February 15, 2012, the Treasury Department and the IRS published proposed regulations under chapter 4 in the Federal Register (REG-121647-10, 77 Fed. Reg. 9022) (proposed regulations). On May 15, 2012, the IRS held a public hearing on the proposed regulations. On July 26, 2012, the Treasury Department released a model for bilateral agreements with other jurisdictions (in both reciprocal and nonreciprocal versions) under which FFIs would satisfy their chapter 4 requirements by reporting information about U.S. accounts to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States. The model agreement outlines time frames for FFIs in partner jurisdictions to complete the necessary due diligence to identify U.S. accounts. On June 21, 2012, the Treasury Department announced its intent to develop a second model agreement, under which financial institutions in the partner jurisdiction would report specified information directly to the IRS in a manner consistent with the FATCA regulations, supplemented by government-to-government exchange of information on request. The Treasury Department intends to conclude bilateral agreements (“Intergovernmental Agreements”) based on the model agreements.

The Treasury Department and the IRS have received comments identifying

certain practical issues in implementing the chapter 4 rules within the time frames prescribed in the proposed regulations. In particular, comments have noted that the chapter 4 status of entity account holders may change during 2013 as FFIs enter into FFI agreements with the IRS, with the result that withholding agents that put in place new account opening procedures by January 1, 2013, could be required to undertake duplicative efforts to verify an FFI's status as a participating, deemed-compliant, or nonparticipating FFI. Furthermore, comments have indicated that global financial institutions intend to implement uniform due diligence procedures for all affiliates. Accordingly, these comments have suggested aligning the timelines for due diligence for U.S. withholding agents, FFIs in countries with Intergovernmental Agreements, and FFIs in countries without Intergovernmental Agreements in order to significantly reduce administrative burden.

In addition, the Treasury Department and the IRS have received comments requesting that obligations that may give rise to foreign passthru payments, but not to withholdable payments, be treated as grandfathered obligations if such obligations are executed prior to the issuance of final regulations that define foreign passthru payments. Comments also have requested that an obligation to make payments with respect to collateral posted in connection with a grandfathered derivative transaction be treated as a grandfathered obligation. Finally, comments have expressed concern over the treatment of existing financial transactions that may begin to give rise to withholdable payments for purposes of chapter 4 due to the promulgation of regulations under section 871(m) (treating certain payments on notional principal contracts and certain other financial instruments as U.S. source dividends).

In consideration of these comments, the Treasury Department and the IRS intend to issue regulations that modify the rules set forth in the proposed regulations as follows. Unless otherwise defined, terms used in this announcement have the meanings set forth in the proposed regulations.

### **III. DUE DILIGENCE TIMELINES**

#### **A. Timeline for Implementing New Account Opening Procedures and the Definition of Preexisting Obligations**

Withholding agents, including participating FFIs and registered-deemed compliant FFIs, generally will be required to implement new account opening procedures by January 1, 2014. Accordingly, the definition of the term "preexisting obligation" (currently set forth in Prop. Reg. §1.1471-1(b)(48)) will be modified in the final regulations to include:

- **With respect to a withholding agent other than a participating FFI or a registered deemed-compliant FFI:** any account, instrument, or contract maintained or executed by the withholding agent prior to January

1, 2014;

- **With respect to a participating FFI:** any account, instrument, or contract maintained or executed by the participating FFI prior to the later of January 1, 2014, or the date that the participating FFI's FFI agreement becomes effective (the final regulations will provide that an FFI agreement entered into prior to January 1, 2014, will have an effective date of January 1, 2014); and
- **With respect to a registered deemed-compliant FFI:** any account, instrument, or contract maintained or executed by the FFI prior to the date on which the FFI implements its required account opening procedures. A registered deemed-compliant FFI must implement any required account opening procedures by the later of January 1, 2014, or the date on which the FFI registers as a deemed-compliant FFI.

## **B. Transition Rules for Completing Due Diligence on Preexisting Obligations**

### **1. Withholding and Documentation for Prima Facie FFIs**

**Withholding Agents other than Participating FFIs.** With respect to preexisting obligations, the final regulations will provide that withholding agents, other than participating FFIs, will be required to document payees that are prima facie FFIs by June 30, 2014. Accordingly, the rule set forth in Prop. Reg. §1.1471-2(a)(4)(ii) will be modified in the final regulations to provide that a withholding agent will not be required to withhold on payments made to a prima facie FFI with respect to a preexisting obligation prior to July 1, 2014, unless the withholding agent has documentation establishing the payee's status as a nonparticipating FFI. Beginning on July 1, 2014, a withholding agent will be required to treat a payee that is a prima facie FFI as a nonparticipating FFI until the date the withholding agent obtains documentation sufficient to establish a different chapter 4 status of the payee.

**Participating FFIs.** With respect to a preexisting obligation, the final regulations will provide that a participating FFI will be required to perform the requisite identification procedures and obtain the appropriate documentation to determine whether a prima facie FFI payee is itself a participating FFI, deemed-compliant FFI, or nonparticipating FFI within six months after the effective date of its FFI agreement (that is, by June 30, 2014, for any FFI that enters into an FFI agreement on or before December 31, 2013). The rule set forth in Prop. Reg. §1.1471-4(c)(3) will be modified accordingly. In addition, the final regulations will provide that the presumption rules set forth in Prop. Reg. §1.1471-3(f) will begin to apply to a prima facie FFI payee with respect to a preexisting obligation six months after the effective date of the payor FFI's FFI agreement.

## **2. Withholding and Documentation for other Preexisting Entity Obligations**

**Withholding Agents other than Participating FFIs.** With respect to preexisting obligations, the final regulations will provide that withholding agents, other than participating FFIs, will be required to document payees that are entities other than prima facie FFIs by December 31, 2015. Accordingly, the rules set forth in Prop. Reg. §§1.1471-2(a)(4)(ii) and 1.1472-1(b) will be modified to reflect this change. Beginning on January 1, 2016, a withholding agent will be required to treat any undocumented payee that is treated as a foreign entity but that is not a prima facie FFI as a nonparticipating FFI until the date the withholding agent obtains documentation sufficient to establish a different chapter 4 status of the payee.

**Participating FFIs.** The final regulations will modify the rule set forth in Prop. Reg. §1.1471-4(c)(3) to provide that a participating FFI will be required to perform the requisite identification procedures and obtain the appropriate documentation to determine whether an entity, other than a prima facie FFI, is itself a participating FFI by the later of December 31, 2015, or the date that is two years after the effective date of its FFI agreement. In addition, the final regulations will provide that a participating FFI will not be required to apply the presumption rules (currently set forth in Prop. Reg. §1.1471-3(f)) to such accounts until the day after the date (described above) by which the participating FFI is required to perform the identification procedures and obtain the appropriate documentation.

## **3. Withholding and Documentation Requirements of Participating FFIs for Preexisting Individual Accounts**

**Preexisting High-Value Accounts.** A participating FFI must perform the requisite identification procedures and obtain the appropriate documentation to identify preexisting individual accounts that are high-value accounts (as described in Prop. Reg. §1.1471-4(c)(8)(i)) by the later of December 31, 2014, or the date that is one year after the effective date of the FFI's FFI agreement. Accordingly, the final regulations will modify the rule set forth in Prop. Reg. §1.1471-5(g)(3)(i)(B) to provide that after the date described above, a participating FFI must treat any preexisting account that is a high-value account as held by a recalcitrant account holder unless the participating FFI has performed the requisite identification procedures and obtained the appropriate documentation.

**Preexisting Accounts other than High Value Accounts.** A participating FFI must perform the requisite identification procedures and obtain the appropriate documentation to identify preexisting individual accounts (other than high-value accounts) prior to the later of December 31, 2015, or the date that is two years after the effective date of the FFI's FFI agreement. Accordingly, the final

regulations will modify the rule set forth in Prop. Reg. §1.1471-5(g)(3)(i)(A) to provide that after the date described above, a participating FFI must treat any preexisting individual account, other than a high-value account, as held by a recalcitrant account holder unless the participating FFI has performed the requisite identification procedures and obtained the appropriate documentation.

#### **IV. DUE DATE FOR FIRST REPORT OF A PARTICIPATING FFI WITH RESPECT TO U.S. ACCOUNTS**

The final regulations will modify the rule set forth in Prop. Reg. §1.1471-4(d)(7)(v)(B) to provide that a participating FFI will be required to file the information reports with respect to the 2013 and 2014 calendar years not later than March 31, 2015.

#### **V. GROSS PROCEEDS WITHHOLDING**

The final regulations will modify the rule set forth in Prop. Reg. §1.1473-1(a)(1)(ii) to provide that the term “withholdable payment” includes gross proceeds from any sale or other disposition occurring after December 31, 2016, of any property of a type that can produce interest or dividends that are U.S. source FDAP income.

#### **VI. CLARIFICATION OF THE SCOPE OF GRANDFATHERED OBLIGATIONS**

The final regulations will modify the grandfathered obligation rules to cover the following additional categories of obligations. First, the rule set forth in Prop. Reg. §1.1471-2(b)(2) will be amended to provide that the term “grandfathered obligation” includes any obligation that produces or could produce a foreign passthru payment and that cannot produce a withholdable payment, provided that the obligation is outstanding as of the date that is six months after the date on which final regulations defining the term “foreign passthru payment” are filed with the Federal Register. Second, the term “grandfathered obligation” will include any instrument that gives rise to a withholdable payment solely because the instrument is treated as giving rise to a dividend equivalent pursuant to section 871(m) and the regulations thereunder, provided that the instrument is outstanding on the date that is six months after the date on which instruments of its type first become subject to such treatment. Finally, the term “grandfathered obligation” will include any obligation to make a payment with respect to, or to repay, collateral posted to secure obligations under a notional principal contract that is a grandfathered obligation.

#### **DRAFTING INFORMATION**

The principal author of this announcement is Tara Ferris of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact John Sweeney at (202) 622-3840 (not a toll-free call).