

# **Revised Timeline and Other Guidance Regarding the Implementation of FATCA**

## **Notice 2013-43**

### **I. PURPOSE**

This notice provides: (i) revised timelines for implementation of the requirements of sections 1471 through 1474 of the Internal Revenue Code (Code), commonly referred to as the Foreign Account Tax Compliance Act, or FATCA; and (ii) additional guidance concerning the treatment of financial institutions located in jurisdictions that have signed intergovernmental agreements for the implementation of FATCA (IGAs) but have not yet brought those IGAs into force. The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) intend to amend the regulations under sections 1471 through 1474 to adopt these rules. Prior to the issuance of those amendments, taxpayers may rely on the provisions of this notice regarding expected amendments to the regulations.

### **II. BACKGROUND**

#### **A. FATCA Regulations**

On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847), added chapter 4 (sections 1471 through 1474) to Subtitle A of the Code. Chapter 4 requires withholding agents to withhold 30 percent of certain payments to a foreign financial institution (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 non-financial foreign entities (NFFEs).

On February 15, 2012, Treasury and the IRS published proposed regulations under chapter 4 in the Federal Register (REG-121647-10, 77 Fed. Reg. 9022) (proposed regulations). On January 17, 2013, Treasury and the IRS published final regulations under chapter 4 (TD 9610, 78 Fed. Reg. 5873) (final regulations). The final regulations provided for a phased implementation of the requirements of FATCA, beginning on January 1, 2014, and continuing through 2017. In particular, the final regulations provided that withholding agents (including participating FFIs (PFFIs), qualified intermediaries (QIs) that assume withholding responsibility, withholding foreign partnerships (WPs), and withholding foreign trusts (WTs)) would be required to begin withholding with respect to withholdable payments made after December 31, 2013 (with an exception for “grandfathered obligations” outstanding on January 1, 2014, and associated collateral). Due diligence for documenting payees and account holders by U.S. withholding agents and PFFIs would be phased in during 2014 and 2015. Annual reporting by PFFIs would be phased in starting in 2015 (with respect to information related to the 2013 and 2014 calendar years), with reporting of the full scope of FATCA information required beginning in 2017.

#### **B. Model IGAs**

On July 26, 2012, Treasury released a model (Model 1) for bilateral agreements with other jurisdictions (in both reciprocal and nonreciprocal versions) under which FFIs (reporting Model 1 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. On November 14, 2012, Treasury released a second model agreement (Model 2), under which FFIs (reporting Model 2 FFIs) would report specified information directly to the IRS in a manner consistent with the final regulations, supplemented by government-to-government exchange of information on request. Treasury has concluded a number of bilateral IGAs based on the model agreements (Model 1 IGAs and Model 2 IGAs, respectively). Treasury has periodically updated the model IGAs since their initial release, including an update to both model IGAs on May 9, 2013, to incorporate certain modifications arrived at through intergovernmental discussions, as well as modifications to the due diligence procedures to reflect improvements adopted in the final regulations following the initial release of the model IGAs.

The model IGAs outline time frames for FFIs in jurisdictions with IGAs in force (partner jurisdictions) to complete the necessary due diligence to identify U.S. accounts and to perform reporting on U.S. accounts that are identified. The timelines and other provisions contained in the model IGAs interact with the final regulations in various ways. The model IGAs, and all IGAs that have been concluded to date, contain a provision, colloquially referred to as the “most-favored nation” provision, providing that, with respect to certain terms of the IGA, including the due diligence rules applicable to reporting Model 1 FFIs and reporting Model 2 FFIs, a partner jurisdiction is entitled to the benefit of any more

favorable provision agreed to in a comparable IGA with another partner jurisdiction, subject to certain conditions. Model 1 IGAs and Model 2 IGAs also contain a coordination provision providing that a partner jurisdiction may permit its FFIs to use a definition in the relevant U.S. Treasury Regulations in lieu of a corresponding definition in the IGA, provided that such application would not frustrate the purposes of the IGA. With respect to the due diligence procedures, Model 1 IGAs and Model 2 IGAs provide that a partner jurisdiction may permit its FFIs to apply the due diligence procedures described in the relevant U.S. Treasury Regulations in lieu of the due diligence procedures in the IGA to establish the status of account holders and payees. In addition, paragraph 6 of Article 4 of the Model 1 IGA coordinates the time by which the parties must obtain and exchange information with the time by which PFFIs must report similar information to the IRS under the relevant U.S. Treasury Regulations.

### **C. Registration Process**

In the preamble to the final regulations, Treasury and the IRS announced their intent to create a FATCA registration website, which would serve as the primary way for FFIs to interact with the IRS to complete the required registration, agreements, and certifications. The preamble stated that the FATCA registration website would be accessible to FFIs no later than July 15, 2013. After approval of its registration, each PFFI and registered deemed-compliant FFI would be assigned a global intermediary identification number (GIIN), which would be used both for reporting purposes and to identify the FFI's status to withholding agents. The preamble provided that the IRS would

electronically post the first list of PFFIs and registered deemed-compliant FFIs (IRS FFI List) on December 2, 2013, and would update the list on a monthly basis. To ensure inclusion on the December 2013 IRS FFI List, FFIs would need to register by October 25, 2013.

#### **D. Modification of Phased Timeline for Implementation**

Comments have indicated that certain elements of the phased timeline for the implementation of FATCA present practical problems for both U.S. withholding agents and FFIs. In addition, while comments from FFIs overwhelmingly supported the development of IGAs as a solution to the legal conflicts that might otherwise impede compliance with FATCA and as a more effective and efficient way to implement cross-border tax information reporting, some comments noted that, in the short term, continued uncertainty about whether an IGA will be in effect in a particular jurisdiction hinders the ability of FFIs and withholding agents to complete due diligence and other implementation procedures. In consideration of these comments, and to allow for a more orderly implementation of FATCA, Treasury and the IRS intend to amend the final regulations to postpone by six months the start of FATCA withholding, and to make corresponding adjustments to various other time frames provided in the final regulations, as described in section III below.

In addition, as described in section IV below, Treasury and the IRS intend to provide a list of jurisdictions that will be treated as having in effect an IGA, even though that IGA may not have entered into force as of July 1, 2014.

Unless otherwise defined, terms used in this notice have the meanings set

forth in the final regulations.

### **III. REVISED FATCA IMPLEMENTATION TIMELINE**

#### **A. Timeline for Withholding**

Withholding agents generally will be required to begin withholding on withholdable payments made after June 30, 2014, to payees that are FFIs or NFFEs with respect to obligations that are not grandfathered obligations, unless the payments can be reliably associated with documentation on which the withholding agent can rely to treat the payments as exempt from withholding. The definition of grandfathered obligation will be revised to include obligations outstanding on July 1, 2014 (and associated collateral). This notice does not affect the timing provided in the final regulations for withholding on gross proceeds, passthru payments, and payments of U.S. source FDAP with respect to offshore obligations by persons not acting in an intermediary capacity.

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

Withholding agents generally will be required to implement new account opening procedures by July 1, 2014, or, in the case of a PFFI, by the later of July 1, 2014 or the effective date of its FFI agreement. Accordingly, the definition of the term “preexisting obligation” will be modified to mean:

- **With respect to a withholding agent other than a PFFI or a registered deemed-compliant FFI:** any account, instrument, or contract maintained, executed, or issued by the withholding agent that is outstanding on June 30, 2014;

- **With respect to a PFFI:** any account, instrument, or contract maintained, executed, or issued by the PFFI that is outstanding on the effective date of the FFI agreement; and
- **With respect to a registered deemed-compliant FFI:** any account, instrument, or contract maintained, executed or issued by the FFI prior to the later of July 1, 2014, or the date on which the FFI registers as a deemed-compliant FFI and receives a GIIN.

Treasury intends to include a similar change to the definition of the term “Preexisting Account” in both model IGAs. Thus, it is expected that future IGAs will define the term “Preexisting Account” to mean a Financial Account maintained as of June 30, 2014. For IGAs in force that contain the previous definition of the term “Preexisting Account,” the partner jurisdiction will be permitted under the coordination provision of the IGA to permit its FFIs to substitute the definition of the term “preexisting account” from the amended final regulations for the definition of the term “Preexisting Account” in the IGA. For IGAs concluded before the coordination provision was added, the coordination provision will apply through the operation of the most-favored nation provision once an IGA containing the coordination provision is in force.

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

The FFI Agreement of a PFFI that registers and receives a GIIN from the IRS on or before June 30, 2014, will have an effective date of June 30, 2014, effectively resulting in a six-month postponement of the deadlines for completing

due diligence on preexisting obligations. For withholding agents other than PFFIs, the deadlines for completing due diligence on preexisting obligations will be postponed by six months. Thus, for example, a withholding agent other than a PFFI will be required to document payees that are prima facie FFIs by December 31, 2014, instead of by June 30, 2014.

Account balance or value will be measured initially as of June 30, 2014, for purposes of determining whether an account is exempt from review, subject only to an electronic search for indicia, or subject to enhanced review. An account with a balance or value that was initially \$1,000,000 or below, and with respect to which there has been no change in circumstances, will not be subject to enhanced review unless the account balance or value exceeds \$1,000,000 as of the end of 2015 or any subsequent calendar year. Thus, the obligation to monitor the account balance or value of preexisting accounts to determine whether enhanced review is required is deferred by one year.

Treasury intends to provide for a similar six-month delay in the due diligence procedures included in Annex I of IGAs concluded after the issuance of this notice, which will generally apply automatically to previously-signed IGAs through the operation of the most-favored nation provision in those IGAs once those later signed agreements are in force.

#### **D. Due Date for First Report of a PFFI with respect to U.S. Accounts**

The final regulations provide that a PFFI will be required to file information reports on its U.S. accounts with respect to the 2013 and 2014 calendar years no later than March 31, 2015. Treasury and the IRS intend to modify these rules to



require reporting on March 31, 2015, only with respect to the 2014 calendar year (for U.S. accounts identified by December 31, 2014). Through the operation of paragraph 6 of Article 4 of the Model 1 IGAs, this modification to the required reporting will apply automatically in the context of Model 1 IGAs as well. For IGAs concluded before paragraph 6 of Article 4 was added, the rules of paragraph 6 of Article 4 will apply through the operation of the most-favored nation provision once an IGA containing paragraph 6 of Article 4 is in force. As a result, once an IGA containing paragraph 6 of Article 4 is in force, partner jurisdictions will not be obligated to obtain and exchange information with respect to the 2013 calendar year. Instead, the information exchanged by partner jurisdictions in 2015 will be required to include only information related to the 2014 calendar year.

#### **E. Timeline For Registration**

The FATCA registration website is projected to be accessible to financial institutions on August 19, 2013. Other key dates for registration, however, will be extended by six months. Thus, after the FATCA registration website opens, a financial institution will be able to begin the process of registering by creating an account and inputting the required information for itself, for its branch operations, and, if it serves as a “lead” financial institution, for other members of its expanded affiliated group. All input information will be saved automatically in the registration system and associated with the financial institution’s account. For the period from the opening of the FATCA registration website through December 31, 2013, a financial institution will be able to access its account to

modify or add registration information, including to indicate the appropriate registration status, as such status is established, for example, by the signing of an IGA. Prior to January 1, 2014, however, any information entered into the system, even if submitted as final, will not be regarded as a final submission, but will merely be stored until the information is submitted as final on or after January 1, 2014. Thus, financial institutions can use the remainder of 2013 to get familiar with the registration process, to input preliminary information, and to refine that information. On or after January 1, 2014, each financial institution will be expected to finalize its registration information by logging into its account on the FATCA registration website, making any necessary additional changes, and submitting the information as final.

Consistent with this 6-month extension, the IRS will not issue any GIINs in 2013. Instead it expects to begin issuing GIINs as registrations are finalized in 2014. The IRS will electronically post the first IRS FFI List by June 2, 2014, and will update the list on a monthly basis thereafter. To ensure inclusion in the June 2014 IRS FFI List, FFIs would need to finalize their registration by April 25, 2014.

As provided in the final regulations, subject to certain exceptions for preexisting obligations and for offshore obligations, a withholding agent generally may treat a payee as a PFFI or registered deemed-compliant FFI only if the withholding agent has a withholding certificate identifying the payee as a PFFI or registered deemed-compliant FFI and verifies the GIIN contained on that withholding certificate against the IRS FFI List. For payments made prior to January 1, 2015, however, verification of a GIIN is not required with respect to

payees that are reporting Model 1 FFIs. This provision will continue to apply following the changes described in this notice. As a result, while reporting Model 1 FFIs will be able to register and obtain GIINs beginning on January 1, 2014, they will have additional time beyond July 1, 2014, to register and obtain a GIIN in order to ensure that they are included on the IRS FFI list before January 1, 2015.

#### **F. Treatment of Expiring Chapter 3 Documentation**

For purposes of chapter 3 withholding, withholding certificates and documentary evidence generally expire on the last day of the third calendar year following the year in which the withholding certificate is signed or the documentary evidence is provided to the withholding agent. Withholding certificates and documentary evidence that would otherwise expire on December 31, 2013, will expire instead on June 30, 2014, unless a change in circumstances occurs that would otherwise render the withholding certificate or documentary evidence incorrect or unreliable.

#### **G. Automatic Extension of Expiring QI, WP, and WT Agreements**

All QI, WP, or WT agreements that would otherwise expire on December 31, 2013, will be automatically extended until June 30, 2014.

#### **H. Extension of Foreign-Targeted Registered Obligation Rules**

Notice 2012-20 provided as a limited transition rule that a withholding agent paying interest on an obligation issued in registered form after March 18, 2012, and before January 1, 2014, may apply the foreign-targeted registered obligation rules of §1.871-14(e) if the obligation satisfies the requirements of

those rules. The end of this transition period was intended to coincide with the implementation of the chapter 4 rules. As a result, this transition rule will be extended to obligations issued in registered form after March 18, 2012 and before July 1, 2014.

#### **IV. Treatment of Financial Institutions Operating in Jurisdictions That Have Signed an Intergovernmental Agreement to Implement FATCA**

A jurisdiction will be treated as having in effect an IGA if the jurisdiction is listed on the Treasury website as a jurisdiction that is treated as having an IGA in effect. In general, Treasury and the IRS intend to include on this list jurisdictions that have signed but have not yet brought into force an IGA. The list of jurisdictions that are treated as having an IGA in effect is available at the following address:

<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>.

A financial institution resident in a jurisdiction that is treated as having an IGA in effect will be permitted to register on the FATCA registration website as a registered deemed-compliant FFI (which would include all reporting Model 1 FFIs) or PFFI (which would include all reporting Model 2 FFIs), as applicable. In addition, a financial institution may designate a branch located in such jurisdiction as not a limited branch. A jurisdiction may be removed from the list of jurisdictions that are treated as having an IGA in effect if the jurisdiction fails to perform the steps necessary to bring the IGA into force within a reasonable period of time. If a jurisdiction is removed from the list, financial institutions that

are residents of that jurisdiction, and branches that are located in that jurisdiction, will no longer be entitled to the status that would be provided under the IGA, and must update their status on the FATCA registration website accordingly.

**DRAFTING INFORMATION**

The principal author of this notice 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).