

# **2013 TSG CONFERENCE**

**JANUARY 26 – 29, 2013**

**U.S. TAX SUMMARY FOLLOWING FISCAL  
CLIFFHANGER**

**THE PAN PACIFIC HOTEL,  
VANCOUVER, B.C.**

Panel  
U.S. TAX MORNING  
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1/28/2013



2013 TSG CONFERENCE

Estate and Gift Tax Provisions  
American Taxpayer Relief Act of 2012

Edward C. Northwood

# INDIVIDUAL INCOME TAX CHANGES

- Top rate now 39.6% on ordinary income over \$400K (\$450K joint)
- Long term capital gains and qualifying dividends tax rate now increased to 20% for same classes of taxpayers
- Itemized deductions and personal exemptions phased out or limited for those with income over \$250K (\$300K joint)
- Marriage penalty relief made permanent
- Various “middle class” tax credits made permanent
- NB – 3.8% additional tax on net investment income for taxpayers with income over \$200K (\$300K Joint) now in effect (under “Obamacare” law.)

## ESTATE & GIFT TAX RATES AND EXEMPTION AMOUNTS: 1975 - 2011

Year	Annual Gift Exclusion	Exemption Value of Unified Credit (Gift Exemption When Not Unified)	Threshold of Highest Statutory Tax Rate	Highest Statutory Tax Rate (Percent)
1975-1976	\$3,000	\$60,000 (\$30,000)	\$10,000,000	57.75 Gift: 77 Estate
1977	\$3,000	\$120,667	\$5,000,000	70
1978	\$3,000	\$134,000	\$5,000,000	70
1979	\$3,000	\$147,333	\$5,000,000	70
1980	\$3,000	\$161,563	\$5,000,000	70
1981	\$10,000	\$175,625	\$5,000,000	70
1982	\$10,000	\$225,000	\$4,000,000	65
1983	\$10,000	\$275,000	\$3,500,000	60
1984	\$10,000	\$325,000	\$3,000,000	55
1985	\$10,000	\$400,000	\$3,000,000	55
1986	\$10,000	\$500,000	\$3,000,000	55
1987-1997	\$10,000	\$600,000	\$3,000,000	55
1998	\$10,000	\$625,000	\$3,000,000	55
1999	\$10,000	\$650,000	\$3,000,000	55
2000-2001	\$10,000	\$675,000	\$3,000,000	55
2002	\$11,000	\$1,000,000	\$2,500,000	50
2003	\$11,000	\$1,000,000	\$2,000,000	49
2004	\$11,000	\$1,500,000 (\$1,000,000)	\$2,000,000	48
2005	\$11,000	\$1,500,000 (\$1,000,000)	\$2,000,000	47
2006	\$12,000	\$2,000,000 (\$1,000,000)	\$2,000,000	46
2007-2008	\$12,000	\$2,000,000 (\$1,000,000)	\$1,500,000	45
2009	\$13,000	\$3,500,000 (\$1,000,000)	\$1,500,000	45
2010	\$13,000	\$5,000,000 (\$1,000,000)	\$500,000	35
2011	\$13,000	\$5,000,000	\$500,000	35

# The Gift and Estate Tax Surprises - Part 2



## Changes Effective for 2013 until...

- ▶ Gift, Estate and GST Tax Exemption all = \$5M, Indexed for Inflation  
[2012 = \$5.12M; 2013 \$5.25M]
- ▶ Tax Rate for transfers over \$1M = 40%
- ▶ Portability for U.S. spouses
  - ▶ Essentially, unused exemption on first death may be used on second death
- ▶ All permanent (that is, no “sunset”)



## What did NOT change...

- ▶ Short-Term GRAT's still an option
- ▶ Valuation discounts for Family LP's and LLC's remain
- ▶ QDOT Laws still apply
- ▶ Canada/US Treaty applies to Increased Estate Tax Exemption and Death Tax Credits
- ▶ DOD Basis Bump remains applicable to all Decedents' Assets [both US citizens, US domiciliaries and NRA's]
- ▶ State estate taxes remain a deduction for federal purposes

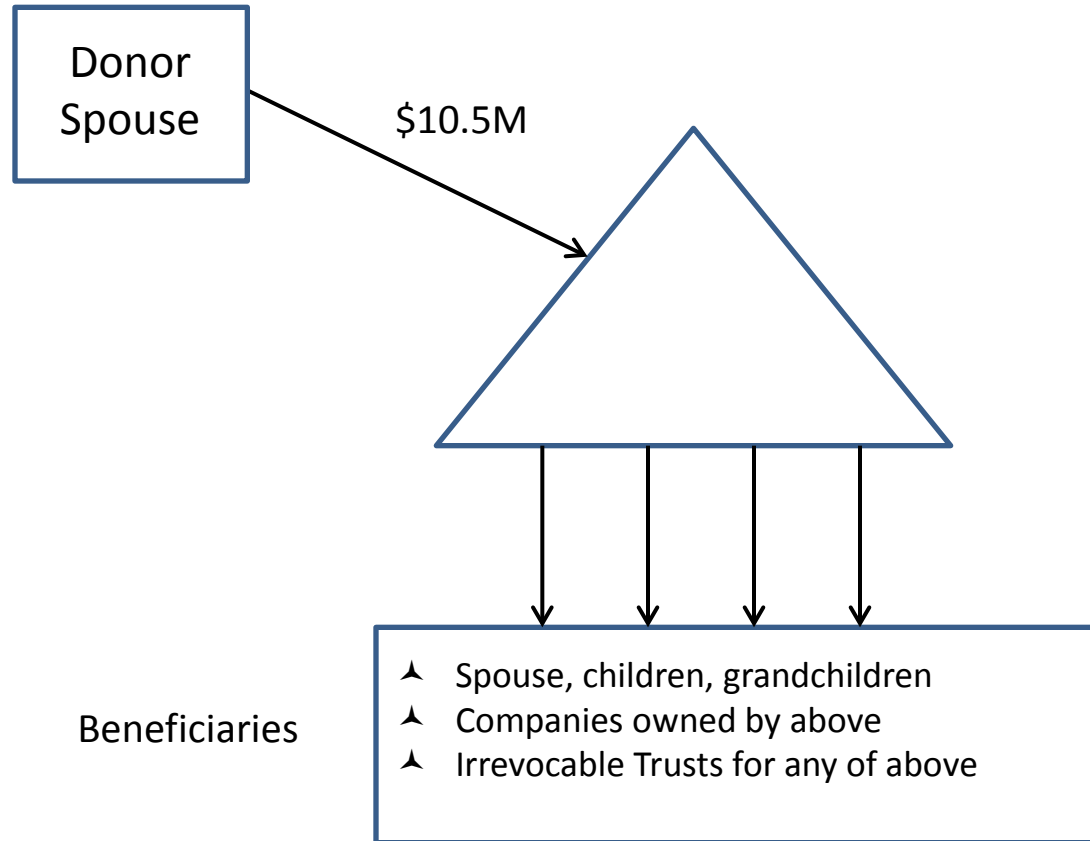
## Recommended Strategies

- ▶ Take advantage of gift tax and generation-skipping transfer tax exemption (for US citizen or domiciliary donors)
- ▶ Dynasty trusts that are taxable to donor
- ▶ Take advantage of valuation discounts (gift plus sale)
- ▶ Give assets sufficient to bring net worth below \$2M if expatriation desired
- ▶ Review all estate plans for impact of new exemptions; focus on formula clauses
- ▶ Split assets between US spouses despite portability

## Recommended Strategies, Cont.

- ▶ Inheritance Trusts for US Children remain important (possible reduction in exemption; creditor protection)
- ▶ US citizen with non-citizen spouse should make annual exclusion gifts (\$143,000; \$14,000)
- ▶ Consider large gift to asset protection trust with retained beneficial interest (but excluded from estate)

# Typical Dynasty Trust Strategy



## Terms:

- Spouse [or US resident?] = Trustee
- In order to “split” gift, spouse’s rights to cash must be very limited
- Spouse may have limited power of appointment
- Continuing lifetime trusts for children on spouse’s death

# Ways for U.S. Donor to Obtain “Grantor Trust” Status

- Make it a foreign trust (with any US beneficiary)
- Permit spouse to benefit
- Retain a right to substitute personal assets for trust assets at FMV
- Permit income to be used to pay life insurance premiums

# Business Tax Provisions of the American Taxpayer Relief Act of 2012

Stanley Abraham

## Topics to be Covered:

- ▶ Foreign Partnership Withholding
- ▶ Regulated Investment Companies
- ▶ Subpart F - Active Financing Income
- ▶ Subpart I – Certain Payments Between CFC's
- ▶ Depreciation Rules
- ▶ AMT Credit in Lieu of Bonus Depreciation
- ▶ Research Credits
- ▶ Individual AMT Rates
- ▶ Unchanged: Carried Interests and Corp. Tax Rates

# Increase in Maximum Individual Rate

- ▶ Many withholding amounts are driven by the highest tax bracket for individuals.
- ▶ Impacts:
  - ▶ Supplemental wages such as bonuses and high severance pay.
  - ▶ Partnership withholding.



# Partnership Withholding

- ▶ In order to avoid a second level of taxation, a partnership (or LLC under certain circumstances) may be the preferred investment vehicle.
- ▶ Federal withholding increases for individual investors from 35% to 39.6% (quarterly).
- ▶ State non-resident withholding is usually required (usually with return).
- ▶ Potential penalties for late payment of withholding.

# Regulated Investment Companies (“RICs”)

- ▶ The extension of RIC qualified investment entity treatment under FIRPTA.
- ▶ Under these rules, a foreign investor is subject to FIRPTA on the disposition of RIC shares only if the RIC itself was a U.S.R.P.H.C.
- ▶ Legislation extended a special exception for domestically controlled RICs and the RIC would not be subject to FIRPTA.

# RIC Characteristics

- ▶ Must satisfy distribution requirements to be taxed as a pass-through entity.
- ▶ Must be registered with the SEC.
- ▶ Must elect to become a RIC.
- ▶ At least 90% of its gross income is derived from dividends, interest payment with respect to certain security loans and capital gains.
- ▶ It meets certain diversification requirements.

## Subpart F – Active Financing Income

- ▶ Interest earned by a CFC is considered Subpart F income included in the U.S. shareholder's income subject to exceptions.
- ▶ Under IRC §954(h), there is an “active financing exception” to the Subpart F rules for a CFC which is engaged in the conduct of banking, financing, or similar business and conducts substantial activity to such business.
- ▶ Under the legislation, the exception is extended for the 2012 and 2013 tax years.

# Certain Payments Between CFCs

- ▶ Under §954(c)(6), dividends, interest, rent and royalties received or accrued from a CFC which is a related is not treated as Subpart F income to the extent attributable or properly allocable to non-Subpart F income of the related payor and to income of the payor that is not treated as effectively connected income.
- ▶ The provision has been extended through 2012 and 2013.

# Depreciation Provisions

- ▶ The 50% bonus depreciation rules are extended through 2013.
- ▶ The section 179 limitation is raised to \$500,000 and would be reduced if the cost of Section 179 property placed in service exceeds \$2 million for 2012 & 2013.
- ▶ The Section 179 rules apply to up to \$250,000 of the cost of qualified leasehold improvements, qualified restaurant equipment and qualified retail improvements.
- ▶ The special property listed above is subject to 15-year depreciation in 2013.

# AMT Credit in Lieu of Bonus Depreciation

- ▶ An election to accelerate some AMT and business credits in lieu of bonus depreciation for property placed into service in 2013.
- ▶ Allows an increase to the credits of 20% of the difference between the bonus depreciation deduction and regular depreciation deduction.

# Research Credits

- ▶ The research and experimentation credit expired at the end of 2011, has been retroactively extended through 2013.
- ▶ Certain changes to the credit:
  - ▶ Modification to the rules for calculating the credit when there is a change of ownership for a portion of the trade of business; and
  - ▶ Modification to the rules for aggregation of research expenses within a controlled group.



# Individual AMT Rates

- ▶ Increase the individual AMT exemption to \$50,600 for unmarried filers and \$78,750 for married fillers in 2012.
- ▶ Permanently index those exemption amounts for inflation beginning in 2013.
- ▶ Allow non-refundable personal credit against the AMT.

# Non-Changes: Corporate Tax Rates

- ▶ In February of 2012, Obama had discussed a reduction to the federal corporate tax rate from 35% to 28%.
- ▶ No action at this time.
- ▶ Combined federal and state tax rates of 39-40% vs. Canadian tax rates of about 13 points lower created significant base shifting (i.e. transfer pricing) opportunities.

# Non-Changes: Carried Interests

- ▶ In most private equity funds and certain partnership investments, a carried interest is provided to the GP or service provider in exchange for services.
- ▶ Under current law, the grant of the interest is a tax-free transaction (Rev. Proc. 93-27).
- ▶ Future gains are taxed at capital gains rate
- ▶ Legislation proposing a change to the character of the income began in 2007.
- ▶ The issue will likely be revisited.

# Catch-up Filings, Penalties, and ITIN Procedures

Dean Smith

# Topics

- General catch up filings
  - 2012 OVDP
  - Streamlined filing procedures
  - “Normal” IRS assessing policy
  - Do nothing - Impact of FATCA – over to Stan et al!
- Potential penalties associated with catch-up filings
- New ITIN procedures

# Current State of Catch-up Filings

- 2009 Offshore Voluntary Disclosure Program
- 2011 Offshore Voluntary Disclosure Initiative
- 2012 Offshore Voluntary Disclosure Program
  - Announced January 9, 2012, no announced ending date
  - 8 years worth of returns
  - Penalty - 27.5% of highest FBAR balance though possibility of reduced 12.5% and 5% penalties
  - No relief from income tax late filing, late payment and interest penalties
  - Additional 20% under reporting penalty

# Current State of Catch-up Filings

- IRS News Release IR 2012-64, June 26, 2012
  - Revenues (under the 3 OVDI/OVDP programs) has topped US \$ 5 billion
  - 33,000 taxpayers have come forward plus 1,500 applications pending (as of date of news release)
  - Remember – US Senate permanent subcommittee on Investigations estimated \$100 billion a year in offshore tax revenue was being lost to Treasury

# Current State of Catch-up Filings

- Streamlined Filing Procedures
  - Effective September 1, 2012
  - For U.S. taxpayers residing abroad since January 1, 2009 and have not filed tax returns for the same period
  - For “low risk” taxpayers
  - Requires 3 years worth of returns/forms
  - Required 6 years with of FBARs
  - Risk of no prosecution not guaranteed
  - No amended returns except to make late RRSP/RRIF treaty election (Form 8891)



# Current State of Catch-up Filings

- Streamlined Filings (cont'd)
  - All filings will be reviewed but the “intensity” of the review will vary depending on the level of compliance risk
  - Low risk – US tax liability of less than US \$1,500 for each year AND
  - No other indications of high risk (including but not limited to)
    - Material economic activity in U.S.
    - U.S. source income
    - If there are indications of sophisticated tax planning or avoidance

# Current State of Catch-up Filings

- Streamlined Filings (cont'd)
  - Expedited review
  - No penalties but need to pay any tax and interest
  - No follow up actions

# Current State of Catch-up Filings

- General IRS policy is for a delinquent filer to file the last 6 years of all returns
- IRS Published Fact Sheet FS-2011-13 (12/2011)
- Potentially subject to all “normal” income tax and FBAR filing penalties
  - Have not seen this applied (yet) but no guarantee that they will not be applied in future
  - Reasonably cause

# Current State of Catch-up Filings

- FATCA (next panel to discuss)
  - IRS Announcement 2012-42, Nov. 8, 2012
  - Puts off FFI (foreign financial institution) compliance until January 1, 2014
  - IRS negotiating country specific agreements – France, Germany, Italy, Spain and the UK

# Current State of Catch-up Filings

- Choices
  - File under 2012 OVDP ( 8 years)
  - File under streamlined filing procedure (3 years returns, 6 years FBARs)
  - File under general IRS policy (6 years returns, 6 years FBARs)
  - Do nothing – FATCA risk

# Potential Civil Penalties

- If taxes owed
  - Late filing penalty
    - 5% per month up to a maximum of 25% - IRC §6651(a)(1)
  - Late payment penalty
    - 0.5% per month up to a maximum of 25% - IRC §6651(a)(2)
  - Accuracy related penalty
    - 20% (or 40%) – IRC §6662
  - Fraud penalty – IRC §6651(f) or IRC §6663

# Potential Civil Penalties

- Even if no taxes owed
  - Form 5471, *“Information Return of U.S. Persons With Respect to Certain Foreign Corporations”*
  - Form 5472, *“Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business”*
  - Form 3520, *“Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts”*
  - Form 3520-A, *“Information Return of Foreign Trusts With a U.S. Owner”*

# Potential Civil Penalties

- Even if no tax (continued)
  - Form 8938, “*Statement of Specified Foreign Financial Assets*” (as of 2011)
  - Form 926, “*Return by a U.S. Transferor of Property to a Foreign Corporation*”
  - Form 8865, “*Return of U.S. Persons With Respect to Certain Foreign Partnerships*”



# Potential Civil Penalties

- Form TD F 90-22.1, “*Report of Foreign Bank and Financial Accounts*”
  - Imposed under Bank Secrecy Act (BSA) 31 U.S.C. §5321(a)(5)
  - Willful violation
    - Greater of US \$100,000 or 50% of the account balance per violation
  - Non-willful violation (not due to reasonable cause)
    - US \$10,000 per violation

# Potential Criminal Penalties

- Under the Internal Revenue Code
  - Tax Evasion – IRC §7201
    - Prison term of up to 5 years
    - Criminal penalties up to \$250,000
  - Filing a False Return – IRC §7206(1)
    - Prison term of up to 3 years
    - Criminal penalties up to \$250,000
  - Failure to File – IRC §7203
    - Prison term of up to 1 year
    - Criminal penalties up to \$100,000

# Potential Criminal Penalties

- Under the Bank Secrecy Act
  - Failure to File an FBAR
    - Prison term of up to 10 years
    - Criminal penalties up to \$500,000

# Penalty Relief

- “First offence” relief
- Request penalty abatement for reasonable cause
- Appeal level
  - IRS has the ability to abate all penalties but can not abatement interest
  - Will not abate 100% of the failure to pay penalty

# New I.T.I.N. Procedures

- Effective January 1, 2013
- Will not accept notarized documents but only original or those documents certified by the issuing agency (i.e., Passport Canada)
- New assigned I.T.I.N.s will expire in 5 years
- Documents may be certified at
  - IRS Taxpayer Assistance Centers (T.A.C.)
  - IRS Tax Attaché Offices
  - Certified Acceptance Agents (C.A.A.)

# New I.T.I.N. Procedures

- With the latest change, most individuals seeking an I.T.I.N. must now:
  - File a W-7 application, along with either
  - U.S. tax return (1040 NR), or
  - Qualify under an exception to the federal tax filing requirement (and provide documentation that said exception applies); and
  - Enclose Identification Documents with the W-7 application.

# New I.T.I.N Procedures

- Exceptions to the new procedures
  - Student Exchange Visitor Programs (S.E.V.P.);
  - Non-citizens that have approved 2011 (tax year) extensions to file their tax returns;
  - Nonresident aliens applying for an I.T.I.N. to claim treaty tax benefits; and
  - U.S. military spouses and military dependents.

# New I.T.I.N. Procedures

- Limitations
  - CAAs can not certify documents for dependent applications – new original documents or have the documents certified by the issuing office
  - Exceptions (from the requirement to file a tax return) for NRAs to claim a treaty benefit is limited.
    - Third party withholding
    - Information Reporting purposes



# Offshore Voluntary Disclosure

Roy Berg



Roundtable Discussion  
Foreign Account Tax Compliance Act  
(FATCA)

Andrew Mitchel, Bob Rinninsland,  
Stan Ruchelman

# FATCA

## Introduction/Base Case Issues

- Effective March 18, 2010 enacted as part of the HIRE Act.
- U.S. taxpayers with specified foreign financial assets that exceed certain thresholds must report (starting for 2012 returns) those assets to the IRS on Form 8938 attached to their federal income tax return, starting this tax filing season.
- Foreign financial institutions (FFI's) must report information about financial accounts held by U.S. taxpayers, or held by foreign entities in which U.S. taxpayers hold a substantial ownership interest.
- Immediate Questions arose regarding FATCA's legitimacy outside the U.S.
  - Bank secrecy laws
  - Sovereignty Concerns
  - Compliance issues
  - Limits of existing international treaty networks
  - Recriminations against U.S. individual, financial institutions and companies
  - Undue U.S. withholding

# FATCA: *Overview*

**Enacted in 2010 as part of Hiring Incentives to Restore Employment (“HIRE”) Act; Implemented per January 17, 2013 Final Regulations**

- **Foreign Financial Institutions (“FFI’s”) report to I.R.S. information about “financial accounts” held by:**
  - U.S. persons, or
  - Foreign entities in which U.S. persons hold a substantial ( $\geq 10\%$ ) ownership interest
- **Requires FFI’s to tell I.R.S. about offshore accounts controlled by U.S. persons if assets exceed \$50,000 in value**

# FATCA: *Withholding*

**FATCA extends the equivalent of domestic “Backup Withholding” to foreign “accounts” held by U.S. persons**

- **Unless exception applies, 30% FATCA withholding (new Chapter 4 withholding) *where*:**
  - FFI does not have FFI-EIN (i.e., new FATCA ID number), *or*
  - FFI-EIN is wrong (i.e., it does not match with I.R.S. published list)
- **FFI-EIN is now called GIIN, which stands for Global Intermediary Information Number**

# FATCA: *Participating FFI obligations*

## FFI Obligations

- **Due Diligence**
- **Reporting**
- **Withholding**
- **Globalization**

# FATCA: *Participating FFI obligations*

## **Due Diligence Procedures:**

- **Determine what accounts are owned by US persons & US owned foreign entities**
- **Different procedures depending upon:**
  - “Pre-existing” v. New Accounts
  - Individual v. Entity Accounts



# FATCA: *Due diligence (cont)*

## Individuals

### Preexisting Individual Accounts

- **Accounts ≤ \$50,000: No review needed**
- **Accounts > \$50,000: Review Electronic records**
  - Look for US indicia (e.g., address, place of birth)
  - If find US indicia, further inquiry required
- **Accounts > \$1MM: Review paper records**

### New Individual Accounts

- **Person must certify as to status**

## Entities

### Preexisting Entity Accounts

- **Account ≤ \$250,000: No review (until account balance exceeds \$1MM)**
- **Accounts > \$250,000: Must review**
  - Look at “information maintained for regulatory or customer relationship purposes”
    - AML/KYC Procedures

### New Entity Accounts

- **More detailed rules**

# FATCA: *FFI Reporting/Withholding*

## Reporting to IRS:

- Report to IRS information about accounts owned by U.S. persons & U.S. owned foreign entities
- The emphasis is placed on obtaining information from FFI's and NFFE's
- New W-8IMY Form and W-8BEN-E proposed for non-U.S. entities

# FATCA: *FFI Reporting/Withholding*

## Payments subject to withholding tax

- U.S. source FDAP
- Sales proceeds from the disposition of securities that produce U.S. source interest and dividends, and
- Pass-thru payments

# FATCA: *FFI Reporting/Withholding*

## **Withholding 30% tax on payment to an investor who is:**

- **Non Participating FFI (“NPFFI”)**
  - Investor is itself an FFI and chooses not to participate in FATCA reporting system *or*
- **Recalcitrant holder**
  - Investor in FFI who refuses to give requested information to the FFI is subject to withholding tax on pass-thru payments
  - Pass-thru Payment is a portion of payment to recalcitrant holder that is attributable to deployment of assets in the U.S. – Final definition is reserved at this time
  - Pass-thru payment concept makes NPFFI’s “radioactive” for PFFI’s with U.S. investments

# FATCA: *Timetable (updated for Ann. 2012-42)*

## January 1, 2013.

- FFI electronic application process expected to begin
- Grandfathered obligations. FATCA withholding not required on obligations outstanding on January 1, 2013 *unless* materially modified after that date

## January 1, 2014

- New accounts: Withholding agents (including PFFIs & registered deemed compliant FFIs) must implement “new” account opening procedures
  - USFI’s must withhold on U.S.-source FDAP payments to new accounts held by documented NPFFI’s and presumed FFI’s
  - PFFI’s must withhold on U.S. source FDAP payments to undocumented new accounts and new accounts held by NPFFI’s
- Preexisting Accounts: Accounts opened prior to January 1, 2014 are categorized as “pre-existing” and account due diligence must generally be completed prior to July 1, 2014 (for prima facie FFI) or by Dec. 31, 2014 (for high value individual accounts) or Dec. 31, 2015 (for other entity or individual accounts)
  - Withholding required after these deadlines

# FATCA: *Timetable*

## **July 1, 2014**

- For “preexisting” prima facie FFIs accounts, withholding must be imposed by USFIs & PFFIs *unless* documented that account holder is a PFFI, exempt FFI or not a FFI

## **January 1, 2015**

- For “preexisting” high value individual accounts, withholding must be imposed by PFFIs *unless* documented that they are not US accounts

## **March 31, 2015**

- PFFIs must file information reports for 2013 and 2014 calendar years

## **January 1, 2016**

- For other “preexisting” accounts, withholding must be imposed by USFIs & PFFIs *unless* documented that they are not US accounts
- Expiration of certain phase-in exceptions regarding a PFFI's expanded affiliated group with local law restrictions to compliance must now comply

# FATCA: *Timetable*

## **March 15, 2016**

- USFFI’s & PFFIs must report 2015 US-sourced FDAP and gross proceeds paid to non-US accounts

## **January 1, 2017**

- USFI’s begin withholding on gross proceeds from the sale of property that can produce U.S. source interest or dividends to all documented NPFFI’s and presumed FFI’s
- PFFI’s begin withholding on payments of gross proceeds from the sale of property that can produce U.S.-source interest or dividends to:
  - Preexisting, undocumented high value individual account holders, documented NPFFI’s, and prima facie FFI accounts
  - Undocumented new accounts and new accounts held by NPFFI’s
- Withholding on foreign pass-thru payments “may” begin

## **March 31, 2017**

- PFFI’s must report gross proceeds in addition to all data fields reported previously

# FATCA: *Globalization*

## **February 2012**

- Joint Statement from the U.S., France, Germany, Italy, Spain and the U.K. regarding an intergovernmental approach to improving international tax compliance and Implementing FATCA

## **June 2012**

- Joint Statement from the U.S. and Switzerland regarding implementation of FATCA
- Joint Statement from the U.S. and Japan regarding implementation of FATCA

## **July 2012**

- Joint Communiqué by France, Germany, Italy, Spain, the U.K. ,and the U.S. regarding the publication of the Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA

## **September 2012**

- 1<sup>st</sup> IGA to be signed: US-UK IGA

## **November 14, 2012**

- I.R.S. publishes Model 2 agreement that requires local FFI's to report directly to the I.R.S.



# FATCA: *Globalization-Cont'd*

January 2013

- **U.K draft legislation following up on its September 2012 IGA**
  - intended to clarify the status of certain entities as financial foreign entities (FFI) or non-financial foreign entities (NFFEs) and whether an institution operating in the UK is within the rules.
  - trusts that are not collective investment vehicles or managed by another investment entity are to be treated as NFFEs, and partnerships are considered UK residents if they are managed and controlled in the UK.
- **Bilateral agreements –U.S. and Mexico as well as U.S. and Denmark**

# FATCA: *Two versions of the Model Agreement*

## Reciprocal and Nonreciprocal Forms

- **Establish a framework for reporting by FFI's of certain financial account information to their respective tax authorities**
- **Automatic exchange of information under existing bilateral tax treaties or tax information exchange agreements**
- **Addresses the legal issues that had been raised in connection with FATCA and simplifies implementation for financial institutions**

# FATCA: *Reciprocal Model Agreement*

## Reciprocal Form

- **U.S. and partner country (“FATCA Partner”) exchange information relating to the other country's residents owning accounts with an FI in the reporting country**
  - The exchange is made on an automatic basis (See Article 2)
  - Used by U.K., Germany, France, Italy and Spain, who agreed to this approach on February 8
    - Other countries to follow
    - Applies only to jurisdictions with which the U.S. has an income tax treaty or tax information exchange agreement
  - Reporting is required even if the account produces only income that arises from sources outside the U.S.

# FATCA: *Reciprocal Model Agreement*

## Reporting requirements from FATCA Partner to I.R.S.:

- Name, address, and U.S. TIN of each Specified U.S. Person that is an Account Holder
- Account number
- Name and identifying number of the Reporting Financial Institution
- Account balance or value as of end of relevant calendar year

## U.S Reporting requirements to FATCA Partner:

- Name, address, and TIN of any person that is resident of FATCA Partner jurisdiction and is an Account Holder
- Account number
- Name & identifying number of Reporting U.S. Financial Institution
- Gross amount of U.S. source interest, dividends or other income paid or credited to the account

# FATCA: *Reciprocal Model Agreement*

## When must this information be given to the other country? Art. 3(5)

- **For reporting year 2013 information, not later than Sept. 30, 2015**
  - 1 year later than provided in the regulations
- **For information beginning from reporting year 2014, not later than 9 months of end of year**

# FATCA: *Due diligence*

**How does the FFI determine what accounts are owned by US persons or US owned foreign entity?**

- **Annex I to each Model Agreement contains 15 pages of procedures to follow to identify US reportable accounts**
  - Follows the approach of the Proposed FATCA Regulations published in February

# FATCA: *Additional Points*

## FATCA Partner FFI

- **Need not withhold or close accounts of recalcitrant holders as long as U.S. gets information about holder (Art. 4(2))**
  - However, the closing of accounts held directly or indirectly by U.S. persons is common
- **If FFI does not “significantly comply,” the U.S. notifies FATCA Partner (Art. 5(2))**
  - FATCA Partner contacts FFI to resolve problem
  - If problem not resolved within 18 months, FFI is categorized as a non-participating that becomes subject to FATCA withholding

# FATCA: *Non-reciprocal Model Agreement*

## **Non-Reciprocal**

- **Only FATCA Partner is obligated to supply information with respect to U.S. Reportable Accounts to the I.R.S. (See Article 2)**
  - Same reporting requirements imposed on the Foreign FATCA Partner
  - Participating Countries: To be announced



# FATCA: *A tour d'horizon*

## Model I IGA Agreements

### Reciprocal Agreement

### Two-way Street

- U.S. & FATCA Partner country exchange information relating to other country's residents owning accounts with an FI in reporting country

### Non-Reciprocal Agreement

### One-way Street

- Only FATCA Partner country is obligated to supply information with respect to US Reportable Accounts to IRS

# FATCA: *A tour d'horizon*

## Model II IGA Agreements

- Treasury also announced a 3<sup>rd</sup> form of IGA for Japan and Switzerland, which they called Model II
  - Non-reciprocal form of Agreement so only information is supplied to IRS
    - BUT FFI reports information directly to IRS and not to tax authorities in Japan or Switzerland
  - No form for this Agreement has yet been released

# FATCA: *Reciprocal Model Agreement*

**November 8, 2012**

Treasury announced that it is in discussion with 50 other countries to adopt I.G.A.s, and it expects several to be adopted by year's end.

## **Signed IGA countries**

- First I.G.A. signed was with the U.K.
  - Signed on September 14, 2012
  - Based on Model I reciprocal IGA
- Second I.G.A. signed was with Denmark
  - Signed on November 19, 2012
  - Based on the Model 1 reciprocal IGA
- Third I.G.A. was signed with Mexico
  - Signed on November 19, 2012
  - Based on the Model 1 reciprocal IGA
- Fourth I.G.A. was signed with Ireland
  - Signed on December 21, 2012
  - Based on the Model 1 reciprocal IGA

# FATCA: *The Next Steps (Despite Original Objections)*

- **Final FATCA regulations (Done)**
  - **Build on IGA's**
  - **Phase in time lines for due diligence, reporting and withholding**
  - **Expand and clarify the scope of payments not subject to withholding**
  - **Refine and clarify the treatment of investment entities**
  - **Clarify the compliance and verification obligations of FFI's**
- **FFI Agreement**
- **Updated Form W-8BENs and Instructions**
- **More IGAs**

# FATCA: *Final Regulations*

**January 17, 2013 Final Regs.-544 pages**

- F.F.I. Registration Portal to be Created by I.R.S.
  - Opens by July 15, 2013
  - F.F.I. must obtain a G.I.I.N. from the I.R.S. to eliminate withholding
    - Global Intermediary Identification Number
    - Can obtain it if resident of I.G.A. country or participating or registered deemed compliant F.F.I.
  - U.S. Withholding agents must check the G.I.I.N. against I.R.S. list in order to eliminate withholding
    - First list will be posted by Dec. 2, 2013
      - F.F.I. must apply for G.I.I.N. by October 25, 2013 to be on this list
    - FFIs not included in the December 2013 list may not be able to avoid withholding on January 1, 2014 for new accounts or contracts.

# FATCA: *Final Regulations (cont)*

- Expansion of Grandfathering Rules:
  - Exempt from FATCA all obligations outstanding on Jan. 1, 2014
- New Category of exempt entities
  - Passive entities that are not professionally managed are not treated as an F.F.I., but rather as an N.F.F.E. so they are not subject to burdensome rules
- Reduced due diligence burden for pre-existing accounts, which are held prior to Jan. 1, 2014:
  - Exempt if account is:
    - \$50,000 or less & held by individual
    - \$250,000 or less & held by entity or is cash value insurance or annuity contract
    - Insurance contract with account balance of \$50,000 or less
- Reduced due diligence for new entity accounts
  - Can rely on self-certification in most cases

# FATCA: *Final Regulations (cont)*

- Time allowed to review Pre-existing Accounts (pre-Jan. 1, 2014 accounts)
  - Until Dec. 31, 2015, *unless* the account holder is a prima facie F.F.I
- Phased Implementation of Reporting:
  - For 2013 & 2014 calendar years, due by March 31, 2015
- Phased implementation of Withholding on Pass-through payments & gross proceeds from sales :
  - Exempt if occurs before Jan. 1, 2017
- Many other details to be reviewed
- Next steps from the I.R.S.: Publication of
  - Revenue Procedure that will contain all the requirements applicable to an F.F.I., *and*
  - Revised Form W-8BEN-E and other forms as well as the instructions

# FACTA From the Client Perspective

- IGA awareness: Were clients aware of governments in the countries in which they operate intending to enter into an intergovernmental agreement with the IRS?
- Process revision: To what extent will clients revise their own client on-boarding, customer identification or documentation processes?
- Account identification requirements, documentation requirements and systems changes
- Existing program leverage: Leveraging of their AML/KYC compliance programs to help satisfy the FATCA requirements.



# FACTA From the Client Perspective- Cont'd

- Categorize the client within the FATCA framework
  - USWAs
  - FFIs
  - NFFE's
- Identify the expanded affiliated group subject to categorization
- Any changes in client's business models?
  - Exit from U.S. investments or individuals?
  - Sell or hold strategies?

# Circular 230 Statement

This presentation has not been written as a formal opinion of counsel. Accordingly, IRS regulations require us to advise you that any statement contained herein is not intended or written by us to be used, and cannot be used by the recipient of this communication, for the purpose of avoiding tax penalties.