

Foreign Account Tax Compliance Act (FATCA)

FATCA Checklist for Multinational Companies

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FATCA Overview

The looming deadline for compliance with the Foreign Account Tax Compliance Act (FATCA) is only months away and while FATCA has been a focus of foreign financial institutions (FFI's) for a number of years, many multi-national companies (MNC's) have only recently embarked on an implementation plan to become FATCA compliant.

MNCs that are non-financial U.S. companies are subject to rules regarding identification and potential withholding on U.S. payments made to foreign individuals and/or entities that are U.S. source income. In addition, nonfinancial entities may also need to provide their FATCA classification and documentation of ownership to entities for which they receive payments.

Multinational businesses that fail to meet the obligations required by FATCA face the potential of a 30% withholding for payments, plus penalties and interest. The failure to withhold for material liabilities could also require financial statement disclosure.

Foreign Financial Institution (“FFI”)

Many activities of nonfinancial businesses will trigger FATCA compliance obligations. Additionally, the definition of a Foreign Financial Institution (“FFI”) is a very broad term, and can include types of entities one might not intuitively expect, resulting in unwanted consequences if not considered. Although the rules provide various exceptions, every multinational company should look through its organizational chart and consider FATCA's extensive guidance on entity classifications and exceptions to determine how each entity will be treated under FATCA.

July 1st 2014 is the first of many milestone implementation dates for FATCA compliance.

FATCA applies to organizations in all industries.

Intergovernmental Agreements

In order to mitigate certain foreign legal impediments to FATCA compliance, intergovernmental agreements (IGAs) also have been negotiated between the Treasury and foreign governments. Under certain IGAs, information will be exchanged directly between the IRS and local governments. This requires companies in most IGA jurisdictions to report information to their government. The bilateral IGAs are in line with the global pressure by the OECD for greater transparency of taxpayers across national borders for an automatic exchange of information worldwide. Ultimately all FATCA compliance programs will need to consider future international disclosure obligations in addition to FATCA.

FATCA Compliance Program

Multinational corporations need a FATCA compliance program to ensure that all necessary FATCA classifications, documentation, monitoring and reporting are undertaken. This process ought to be documented in a series of policies and procedures ensuring that the process has controls that can be replicated and tested.

To assess FATCA's impact on MNCs, it is necessary to analyze the organization's corporate footprint, its payment flows, and the operational procedures of each of its entities. Successful FATCA compliance relies upon an organization's review of existing information reporting rules and withholding compliance processes and procedures under the Chapter 3 rules and Chapter 61. This type of assessment will be a good start to build upon and identify the areas on which an MNC needs to focus to ensure FATCA compliance, by entity and function.

For additional assistance related to FATCA please contact:

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Experis FATCA Assistance

Determining your status under FATCA can be a complicated process and complying with FATCA will be a significant undertaking, and while the deadline might seem a long way off, the effort and technical expertise needed may require additional resources.

Whether it's a FATCA impact assessment across different lines of business, managing compliance risk, or developing plan governance, Experis can provide you with the experience and expertise to help you bridge the gap to meet any global FATCA compliance requirements.

The following pages are some key considerations that all MNCs should address as part of a FATCA compliance program.

Review Organization Footprint

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- *Define and review entire organizational legal entity footprint.*
 - *Review all legal entities within organizational footprint and determine classification of each (FFI, NFFE or USWA).*
 - *As a result of classification determination, identify documentation required.*
 - *Determine if FFI is participating, deemed compliant etc. or NFFE exemptions and obtain documentation.*
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Every multinational company should look through its organizational chart and consider FATCA's extensive guidance on entity classifications and exceptions to determine how each entity will be treated under FATCA.

FATCA imposes obligations on withholding agents to withhold 30% on withholdable payments to FFIs not providing information on their US accounts and NFFEs not providing information on their substantial U.S. owners, consequently the classification of each entity is critical.

FFIs are generally required to enter into agreements with the IRS to perform substantial due diligence, information reporting and withholding on their account holders, or suffer 30% withholding.

MNCs will need to 1) obtain from the NFFE a certification that the beneficial owner of the payment does not have any substantial U.S. owners (directly or indirectly), or 2) report substantial US owners to the IRS, otherwise NFFE will be subject to 30% withholding.

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- *Consider statutory definition of FFI in legal entity analysis.*
 - *Determine "expanded affiliated group" definition if an FFI classification is determined.*
 - *If an FFI, is FATCA registration required?*
 - *If an FFI who will be authorized to act as the FFI's "responsible officer".*
 - *If an FFI, consider Governance requirements per the Regulations and steps for implementation.*
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While there are many exceptions, the rules must be carefully applied to any entity whose activities might involve investing, lending, funding, hedging, trading, leasing, or other "financial" type activity and may potentially trigger FFI status.

In addition, certain entities that meet the definition of FFI are specifically excluded by FATCA, such as certain holding companies, treasury centers, and specific captive finance companies that are part of a nonfinancial group. However, these exceptions have detailed requirements and are very narrow. Each entity's business lines, operations and capital structure should be reviewed and documented to ensure an exception applies.

An FFI that is a member of an "expanded affiliated group" (generally determined by treating affiliates connected through 50 percent ownership as part of the group) is not permitted to become a "participating FFI" unless every other FFI in its group complies.

Review Payment Streams

- Determine any “withholdable payments” that are in scope.
- Identify Foreign Payee versus U.S. Payee status and U.S. source income.
- Identify business units making and processing payments to foreign payees and review FATCA implications.
- Consider new documentation from new and existing counterparties and other entities making payments.
- Review accounts payable and other departments defining financial service payments not in the ordinary course of business.
- Inventory and review impact all cross border payments.
- Consider any intercompany payments made to affiliates since there is no FATCA exemption.
- If exempt and NFFE exceptions apply must file form W-8BEN-E.
- Consider required information to be captured with new forms e.g. Form 8966.

The term withholdable payment generally refers to the gross amount of U.S. source income paid to a foreign entity that is fixed or determinable annual or periodical (FDAP) unless

1. The payment is FATCA-exempt,
2. the payee is a FATCA-exempt beneficial owner, or
3. the payee is FATCA-excepted based on a valid withholding certificate or documentation

FATCA generally applies when a multinational business (regardless of whether the entity is a US or foreign person) makes a withholdable payment. From a practical perspective, a large range of payors can be impacted – just about any multinational business that makes payments falling within this definition will experience the impact of FATCA. Some typical examples of withholdable payments include:

- Bank and brokerage fees,
- Investment advisory fees and custodial fees
- Payments in connection with lending transactions
- Forward, futures, option or notional principal contracts
- Dividends on US securities
- Interest (with certain exclusions) and Original issue discount
- Certain lease payments (i.e., financing leases)
- Gross proceeds from the sale of U.S. properties that can produce interest or dividends from sources within the United States.

Certain types of payments are specifically excluded from the FATCA definition of “withholdable payment.” These include

- Payments for tangible goods
- Excluded nonfinancial payments – which includes: Transportation and freight, Software licenses, rent, lease payments on equipment, Interest on outstanding bills arising from services.

Companies should review their cross border payments and inventory and review all of their vendor contracts and service agreements with counterparties to see how they meet FATCA requirements or identify any gaps.

The withholding agent will report the U.S. substantial owner information to the IRS by completing Form 8966 annually, which will provide the name, address, and tax identification number of each substantial U.S. owner of the NFFE, and the total payments made to the NFFE.

Review Operational Procedures

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- *Determine Process and accuracy of any Pre-FATCA withholdings (Chapter 3) as a first step before conducting and FATCA gap analysis.*
 - *Consider new systems design and procedures required for reporting and withholding under FATCA.*
 - *Assess systems integration for Chapter 3 withholdings and for FATCA overlap including systems ability to capture and report documentation changes by FATCA.*
 - *Consider documentation needed to support payees FATCA status on forms e.g. W-8BEN.*
 - *Create education and communicate milestones applicable FATCA exemptions, documentation requirements and other FATCA impacts to internal personnel as well as foreign customers.*
 - *Develop procedures to share information on US account holders (FFIs) with foreign governments (e.g. IGAs).*
 - *Document process in a written manual, which will be required in the event of an IRS audit.*
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The emphasis of nonfinancial company whose focus is on FATCA compliance will more often be on payee documentation and payment reporting, versus withholding. The correct documentation enables the withholding agent to perform the required reporting and the correct reporting will eliminate any penalties. Hence, withholding will only be necessary only in situations where payees lack correct documentation.

FATCA will in essence be integrated with the same system of documentation, withholding and reporting that currently exists to document status for Chapter 3 (NRA rules) and backup withholding purposes since FATCA withholdable payments are largely U.S.-source FDAP income paid to foreign persons.

Thus, companies may already have withholding systems in place for payments made to non-U.S. residents, and those might serve as a good foundation for FATCA compliance

FATCA compliance project should be approached as part of overall withholding and reporting compliance. One of the three regimes is very likely to apply to any payment that you make, and you will need documentation to support your treatment of it; you will need to categorize it for reporting purposes; and you will need to track it for withholding, reporting, or both. Some payments may be exempt from FATCA withholding, but still be subject to chapter 61 or backup withholding. Most payments, especially payments to foreign payees, will be subject to some sort of reporting.

In addition to documentation generally identifying the payee, companies must also have additional documentation necessary to support a payee's particular FATCA status, such as identification of substantial U.S. owners of a nonfinancial foreign entity. The application of any such exception requires a factual analysis.

Entities qualifying for an exception are still required to provide to withholding agents a valid certification to establish the entity's exempt status in order to avoid the penalty withholding tax. Thus, even exempted FFIs and NFEs will likely be subject to FATCA reporting requirements if they receive withholdable payments.