

2016 Regulatory Updates of Prof. William H. Byrnes
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Anti-Money Laundering: Practical Guidance for Managing Regulatory Compliance
The Panama Papers and its Impact on the FinCEN Proposed Customer Due Diligence Rules,
and on Forms W-8BEN, -E, and W-9 Compliance

A live 120-minute Knowledge Group CLE/CPE with interactive Q&A
Wednesday, May 4, 2016 3:00pm-5:00pm EDT

The CLE/CPE today and its accompanying notes will explore the impact of the Panama Papers on the compliance officer, as well as offer guidance to navigate the intricacies of self-certification. Under U.S. federal tax law and proposed for FinCEN (and proposed Congressionally mandated) KYC/AML regulations, financial institutions must request a tax identification self-declaration Form W-8BEN, W-8BEN-E, or other applicable W-8 (foreign entities or individuals), or a Form W-9 (U.S. taxpayers), from the owner or owners of an account, and from payees of certain types of payments, such as FDAP payments.

To grossly simplify the impact of FATCA, it has pushed the burden of collection with some degree of verification of the tax identification self-declarations for U.S. purposes unto all financial institutions and financial firms of the 244 countries and dependencies of the world recognized by the U.S.' FATCA country protocols. Ironically, the U.S. has not accepted to be liable to collect the same information that has mandated from every other country. This situation will probably change in 2016 when FinCEN finalizes its 2014 proposed rule, which has popular support in Congress as evidenced by the February 26, 2016 proposed Incorporation Transparency and Law enforcement Assistance Act (ITLEA).

Some commentators state that the U.S. Treasury has deputized the global financial community to do its job, without compensation for the imposed burden. The U.S. Treasury states that the global cost is worth the benefits derived from tax compliance by U.S. citizens with foreign assets. Many foreign governments agree with the U.S. Treasury in relation to obtaining tax compliance from their own tax residents.

Compliance with FATCA is necessarily complex, best illustrated by the FATCA-amended W-8 series of forms that must be completed under statement of perjury by all customers of most financial institutions. By example, the W-8BEN-E form for entities has 30 separate parts over eight pages, with a U.S. Treasury estimated time of 21 hours to ponder and complete. Compliance officers of large first tier banks estimate that over the next three years, a minimum of 100,000,000 new forms of the W-8 series must be completed and verified.

Professor William Byrnes' 1,800 page 2016 edition of the Lexis FATCA compliance manual includes analysis and examples from 70 industry experts, and over four years has become a leading FATCA resource referred to by financial institutions and foreign governments. He is a bestselling author of ten current tax and compliance treatises and the Tax Facts titled series with sales in excess of 120,000 copies and over 2,000 organization subscribers.

William Byrnes has served in senior positions of international tax with Coopers and Lybrand and been commissioned by governments for tax and education policy initiatives, including a 200 page economic, social, and regulatory impact analysis of the UK's FATCA regime and previously a 900 page such analysis of the EU Savings Directive.

In 1994 he established an international tax program and then pioneered its online delivery. Professor Byrnes achieved the rank of tenured professor of law and the rank of Associate Dean. He is now a faculty member of Texas A&M University School of Law. He may be contacted about his presentation at williambyrnes@gmail.com. Links to PowerPoints of several of his presentations as well as many hundred tax articles are available on his blogs.

Knowledge Group attendee delegates may receive a **20% discount** for the industry best seller 2016 Edition **LexisNexis® Guide to FATCA Compliance** using the order code “**FATCA13**” when contacting the Lexis sales department
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1. ANALYSIS OF FORMS W-8BEN, W8BEN-E AND W-8IMY

Although the data reporting process has already begun, FFI’s are starting to face requirements for reporting due in 2016 along with the soon-to-come withholding and reporting due in 2017. These phases will push FATCA requirements across a larger population within the FFI’s portfolio thus; institutions will have to scrutinize data quality even greater. Typically, high valued accounts garner much more internal attention from the institution and therefore will have more information on file or, at least, correct and quality data. As an institution begins to dive further into the next rounds of reporting requirements, pre-existing data for entities can prove to have larger data quality gaps. Additionally, given the increased number of IGAs that have been negotiated, many institutions facing multi-jurisdictional reporting to various governmental agencies, will in fact, have to ensure data quality, maintenance and sustainability of data in lines with the specific reporting requirements against each jurisdiction.

In 2014, over 90 members of the Global Forum on Transparency and Exchange of Information for Tax Purposes committed to automatically exchange information beginning in 2017 or in 2018. In 2015, Panama, subject of this CLE today, and the Cook Islands joined these commitments, raising the total number to 96. Thus, all major financial centers are now part of the efforts to enhance international tax cooperation.¹ Nearly 100 countries have committed to the OECD’s automatic exchange of information.

Jurisdictions undertaking first exchanges by 2017: Anguilla, Argentina, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Cayman Islands, Colombia, Croatia, Curaçao, Cyprus, Czech Republic,

¹ See Press Release, OECD (October 30, 2015). Available at <http://www.oecd.org/newsroom/global-forum-on-tax-transparency-pushes-forward-international-co-operation-against-tax-evasion.htm> (October 31, 2015).

Denmark, Dominica, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montserrat, Netherlands, Niue, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Trinidad and Tobago, Turks and Caicos Islands, and United Kingdom.

Jurisdictions undertaking first exchanges by 2018: Albania, Andorra, Antigua and Barbuda, Aruba, Australia, Austria, The Bahamas, Belize, Brazil, Brunei Darussalam, Canada, Chile, China, Costa Rica, Ghana, Grenada, Hong Kong (China), Indonesia, Israel, Japan, Marshall Islands, Macao (China), Malaysia, Monaco, New Zealand, Panama, Qatar, Russia, Saint Kitts and Nevis, Samoa, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Sint Maarten, Switzerland, Turkey, United Arab Emirates and Uruguay.

Jurisdictions that have not indicated a timeline or that have not yet committed: Bahrain, Cook Islands, Nauru, and Vanuatu.

A Deloitte survey of 110 CFOs of large North American companies published August 12, 2014 in the Wall Street Journal, for which knowledge of and compliance with FATCA should be at its highest, found that only one-third of CFOs had begun the basic step of FATCA compliance - the classification of internal entities.² Only eight percent of CFOs had actually completed the necessary processes to comply with Chapter 4 withholding. Even in American banks, customer facing staff are largely unaware of FATCA and are unaware of U.S. reciprocity on FATCA.

A 2015 FATCA survey by Paystream Advisors and Avalara concluded that a substantial portion of U.S. paying entities still do not understand the impact of FATCA upon their payments to foreign payees. Of the payors surveyed, 61% replied that they do not have foreign payees that are classified as FFIs. But when responding to questions about the nature of the foreign payees' businesses, 66% replied the payees accept deposits as banking and financial businesses, 13% trade, manage or invest financial assets and hold financial assets on behalf of others, 12% act as a holding company in connection with an investment vehicle, and 10% qualify as foreign regulated insurance companies. It may be inferred that the U.S. payees do not have an accurate understanding of which foreign payees are characterized as FFIs by the regulations and by the IGAs. Moreover, the survey found that 71 percent of respondents did not have an automated system for collecting, validating and managing W-8 and W-9 forms.

Published in September 2015, a 2014 Democrats Abroad FATCA survey yielded 6,552 responses from Americans living across six continents and hailing from all 50 US states and the District of Columbia.³ It found that one in six respondents had financial accounts in FFIs closed due to FATCA. Two-thirds of the accounts reported closed were ordinary checking, savings and retirement accounts, accounts essential for managing everyday personal and household affairs. Over two-thirds (68%) of the checking accounts closed had a balance of less than \$10,000 when the account was closed, as did 40.4% of the savings accounts. Over half (58.9%) of the investment and brokerage accounts had a value of less than \$50,000, as did over two-thirds (69.3%) of the dedicated retirement accounts.

² *FATCA Deadline Leaves Uncertainty in Its Wake: CFO Survey*, CFO Journal, Wall Street Journal, August 12, 2014. Available at: http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_FATCA_Deadline_Leaves_Uncertainty_in_Its_Wake_081414.pdf (accessed November 9, 2014).

³ Democrats Abroad FAQs (September 2015) available at <https://www.democratsabroad.org/group/fbarfatca/fatca-faqs-september-2015> (accessed October 1, 2015).

Of those in the study who attempted to open a savings or retirement savings account, nearly one-quarter (22.5%) were unable to do so, nearly twice as many as those who attempted to open a checking account (10%). 22.4% of attempts to open investment accounts were unsuccessful. Nearly thirteen percent (12.7%) of all attempts to open an account (of any kind) failed.

2.4% of respondents with a partner reported changes in their relationship (divorce or separation), while 21% reported that they either no longer have joint accounts or are thinking of moving to separate accounts. Many more noted that the reporting requirements caused stress and conflict between them and a non-American spouse.

The Democrats Abroad survey also stated that its data suggests about one-fifth (19.6%) of overseas Americans are self-employed, while the others work in business. The FATCA reporting requirements on accounts on which Americans hold signatory authority has negatively and profoundly affected their ability to own their own businesses and to advance in their profession. 5.6% state that they were denied a position because of FATCA.

Over the previous year, the initial speculation of additional burden for FFI's due to FATCA along with the possibility or increase of account closures on persons with US indicia has been affirmed. According to recent studies published by a 2014 FATCA Research Project conducted by group Democrats Abroad, one in six Americans abroad are now affected by FATCA implications by the closure of an account.

The IRS estimated upwards of half a million institutions would eventually need to register on its FATCA Portal because such institutions are covered by the definition of a foreign financial institution. Many industry experts state the number of entities that fall under the definition of financial institutions is much higher. Over 350,000 legal entity identifiers (LEIs) have been issued since over the past five years, twice the number of GIINs by the IRS. Each of these financial institutions will be conducting FATCA CDD on their customers and counter-parties. Experts suggest this means 900,000,000,000 FATCA self-certifications will be necessary by 2018.⁴ What lessons may be derived from the QI regime in this regard?

QI was introduced in 2001. When QI was first introduced only 20% of the W8s held by QI institutions were valid, i.e., could be used as the basis for applying treaty relief. Thirteen years later and only 35% of W8s are estimated fit for purpose (valid). It takes an expert 90 minutes to fill out a W8 for their institution. On average, after a financial institution solicits a pre-existing customer for a new W-8, it takes between five to seven months for that W-8 to be submitted (valid or otherwise). The response rate of many non-financial foreign entities (NFFEs) is less than 10%.

The Form W-8BEN has been split into two forms. The [Form W-8BEN](#) (revision date 2014) is for use solely by foreign individuals, whereas the [Form W-8BEN-E](#) is for use by entities for 2014 (revision date 2014) to provide US withholding agents. The newest version of Form W-8BEN-E must be used by all entities that are beneficial owners of a payment, or of another entity that is the beneficial owner.

The IRS released the new [2014 Form W-8BEN-E \(2-2014\)](#) that coincides with FATCA and QI entity classification reporting requirements, and on April 30, 2014 the IRS followed up with the

⁴ See Haydon Perryman, chapter 4A, Lexis Guide to FATCA Compliance, 3rd Edition (2015).

new [Form W-8IMY](#) (read my analysis at “[Form W-8IMY](#)”), formally replacing its 2006 [predecessor](#) W-8IMY.

[Form W-8IMY](#) is submitted generally by a payment recipient (the “filer”) with non-beneficial owner status, i.e. an intermediary. Such intermediary can be a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Form W-8IMY requires a tax identification number. The new [Form W-8IMY](#) has 28 parts whereas the previous [August 2013 FATCA draft](#) W-8IMY only contained 26. The new 2014 [Form W-8IMY](#) is vastly different from the seven-part 2006 predecessor form.

Below is an analysis of how to fill out the 2014 [W-8BEN](#), [W-8BEN-E](#) and of [W-8IMY](#). The Form W8BEN instructions >[link is here](#)< and the Form W-8BEN-E Instructions [link is here](#). My 1,200 page Lexis FATCA [compliance manual link is here](#).

2. Analysis of the W-8BEN

Foreign individuals (non-resident aliens – NRAs) must use Form W-8BEN to document their foreign status and claim any applicable treaty benefits for chapter 3 purposes, including a foreign individual that is the single member of an entity that is disregarded for U.S. tax purposes.

The NRA must give the Form W-8BEN to the withholding agent or payer if he/she is the beneficial owner of an amount subject to withholding, or if he/she an account holder of an FFI then to the FFI to document his/her status as a nonresident alien. Note that a sole member of a “disregarded” entity is considered the beneficial owner of income received by the disregarded entity, and thus the sole member must provide a W-8BEN.

If the income or account is jointly owned by more than one persons, the income or account will be treated by the withholding agent as owned by a foreign person that is a beneficial owner of a payment only if Forms W-8BEN or W-8BEN-E are provided by EVERY owner of the account. If the withholding agent or financial institution receives a Form W-9 from any of the joint owners, then the payment must be treated as made to a U.S. person and the account treated as a U.S. account.

If any information on the Form W-8BEN becomes incorrect because of a change in circumstances, then the NRA must provide within 30 days of the change of circumstances the withholding agent, payer, or FFI with a new W-8BEN. By example, if an NRA has a change of address to an address in the United States, then this change is a change in circumstances that requires contacting the withholding agent or FFI within 30 days. Generally, a change of address within the same foreign country or to another foreign country is not a change in circumstances. However, if Form W-8BEN is used to claim treaty benefits of a country based on a residence in that country and the NRA changes address to outside that country, then it is a change in circumstances requiring notification within 30 days to the withholding agent or FFI.

A NRA (nonresident alien individual) is any individual who is not a citizen or resident alien of the United States. An foreign person (“alien”) meeting either the “green card test” or the “substantial presence test” for the calendar year is a resident alien. Any person not meeting either of these two tests is a nonresident alien individual. Additionally, an alien individual who is a bona fide resident of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa is a nonresident alien individual.

2.1 Taxpayer Identification Numbers

Line 5 requires a taxpayer identification number, which is the US social security number (SSN), or if not eligible to receive a SSN, then an individual taxpayer identification number (ITIN). The SSN may be applied for www.socialsecurity.gov/online/ss-5.html. TAS has received reports these SSNs are becoming increasingly difficult to obtain for U.S. persons residing abroad who do not already have them. This difficulty, caused in part by a limited number of locations where required interviews for obtaining an SSN can occur, only enhances the burden of FATCA withholding and increases the challenges to obtaining a credit or refund of the withholding in the future.

An ITIN may be applied for by [filing Form W-7](#) with the IRS. To claim certain treaty benefits, either line 5 must be completed with an SSN or ITIN, or line 6 must include a foreign tax identification number (foreign TIN).

IRS issues ITINs to foreign nationals and others who have federal tax reporting or filing requirements and do not qualify for SSNs. A non-resident alien individual not eligible for a SSN who is required to file a U.S. tax return only to claim a refund of tax under the provisions of a U.S. tax treaty needs an ITIN. IRS processes returns showing SSNs or ITINs in the blanks where tax forms request SSNs. IRS does not accept, and will not process, forms showing “SSA”, 205c”, “applied for”, “NRA”, & blanks, etc.

Other examples of individuals who need ITINs include:

- A nonresident alien required to file a U.S. tax return
- A U.S. resident alien (based on days present in the United States) filing a U.S. tax return
- A dependent or spouse of a U.S. citizen/resident alien
- A dependent or spouse of a nonresident alien visa holder

If a person does not have a SSN and is not eligible to obtain a SSN, but has a requirement to furnish a federal tax identification number or file a federal income tax return, then that person must apply for an ITIN. By law, an alien individual cannot have both an ITIN and a SSN.

2.1.1 Why Are ITIN Applications Falling, ITIN Application Rejections Increasing?

From January through October 2013, applicants filed only one million ITIN applications with returns, compared to 1.8 million during the same period in 2012. During this period, ITIN applications and accompanying returns declined nearly 50%, while the percentage of applications rejected by the IRS soared to 50.2%.

The Taxpayer Advocate [reports](#) that an explanation for these numbers is the burden caused by the new ITIN procedures.

ITIN applicants report problems, including a lack of communication about why the IRS suspended or rejected an application, an inability to speak with IRS employees, a lack of notice about the status of the application, the rejection of applications with legitimate supporting documents, and lost original documents. The IRS’s policy of generally accepting ITIN applications only during the filing season forces the IRS to process applications under short timelines and does not provide sufficient time to review them for potential fraud.

The IRS stated in response that it does not plan to pursue electronic filing of the ITIN application. The IRS provided several reasons why its Form W-7, *Application for IRS Individual Taxpayer Identification Number (ITIN)* is not a suitable candidate for electronic filing:

In order to strengthen the ITIN program, when requesting an ITIN taxpayers are required to submit documentation that supports the information provided on the Form W-7. The applicant can submit original documents or certified copies from the issuing agency. The attachment of an electronic copy of the documents, such as a .pdf version of the supporting documentation, will not allow IRS to authenticate the documents as outlined in IRM 3.21.263. In addition, taxpayers are required to submit their original tax return(s) for which the ITIN is needed with the W-7 attached. The Modernized e-File (MeF) system is not able to accept both the W-7 and associated tax return(s) in the same transaction.

2.1.2 IRS Cancelling Unused ITINs

Individual Taxpayer Identification Numbers (ITINs) will expire if not used on a federal income tax return for five consecutive years, the Internal Revenue Service announced today. To give all interested parties time to adjust and allow the IRS to reprogram its systems, the IRS will not begin deactivating ITINs until 2016.

The new, more uniform policy applies to any ITIN, regardless of when it was issued. Only about a quarter of the 21 million ITINs issued since the program began in 1996 are being used on tax returns. The new policy will ensure that anyone who legitimately uses an ITIN for tax purposes can continue to do so, while at the same time resulting in the likely eventual expiration of millions of unused ITINs.

ITINs play a critical role in the tax administration system and assist with the collection of taxes from foreign nationals, resident and nonresident aliens and others who have filing or payment obligations under U.S. law. Designed specifically for tax administration purposes, ITINs are only issued to people who are not eligible to obtain a Social Security Number.

Under the new policy:

- An ITIN will expire for any taxpayer who fails to file a federal income tax return for five consecutive tax years.
- Any ITIN will remain in effect as long as a taxpayer continues to file U.S. tax returns. This includes ITINs issued after Jan. 1, 2013. These taxpayers will no longer face mandatory expiration of their ITINs and the need to reapply starting in 2018, as was the case under the old policy.
- To ease the burden on taxpayers and give their representatives and other stakeholders time to adjust, the IRS will not begin deactivating unused ITINs until 2016. This grace period will allow anyone with a valid ITIN, regardless of when it was issued, to still file a valid return during the upcoming tax-filing season.
- A taxpayer whose ITIN has been deactivated and needs to file a U.S. return can reapply using [Form W-7](#). As with any ITIN application, original documents, such as passports, or copies of documents certified by the issuing agency must be submitted with the form.

2.2 US Exchange of Tax Information with Foreign Countries

Line 6 of Form W-8BEN requires a foreign tax identifying number (foreign TIN) issued by a foreign jurisdiction of residence when an NRA documents him or herself with respect to a financial account held at a U.S. office of a financial institution. However, if the foreign jurisdiction does not issue TINs or has not provided the NRA a TIN yet, then the NRA must enter a date of birth in line 8.

On December 29, 2014, the Treasury update Rev. Proc. 2012-24, Implementation of Nonresident Alien Deposit Interest Regulations, with Rev. Proc. 2014-64.⁵ This revenue procedure lists the countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of information pursuant to which the United States agrees to provide, as well as receive, information. This revenue procedure also lists, in Section 4, the countries with which the Treasury Department has determined that it is appropriate to have an automatic exchange relationship with respect to the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013. In the case of interest aggregating \$10 or more paid to a nonresident alien individual the payor is required to make an information return on Form 1042-S for the calendar year in which the interest is paid.

Countries of residence with respect to which the reporting requirement applies:

1. Antigua & Barbuda
2. Aruba
3. Australia
4. Austria
5. Azerbaijan
6. Bangladesh
7. Barbados
8. Belgium
9. Bermuda
10. Brazil
11. British Virgin Islands
12. Bulgaria
13. Canada
14. Cayman Islands
15. China
16. Colombia
17. Costa Rica
18. Croatia
19. Curacao
20. Cyprus
21. Czech Republic
22. Denmark
23. Dominica
24. Dominican Republic
25. Egypt
26. Estonia
27. Finland
28. France
29. Germany

⁵ Available at https://www.irs.gov/irb/2014-53_IRB/ar11.html (accessed October 31, 2015).

30. Gibraltar
31. Greece
32. Grenada
33. Guernsey
34. Guyana
35. Honduras
36. Hong Kong
37. Hungary
38. Iceland
39. India
40. Indonesia
41. Ireland
42. Isle of Man
43. Israel
44. Italy
45. Jamaica
46. Japan
47. Jersey
48. Kazakhstan
49. Korea (South)
50. Latvia
51. Liechtenstein
52. Lithuania
53. Luxembourg
54. Malta
55. Marshall Islands
56. Mauritius
57. Mexico
58. Monaco
59. Morocco
60. Netherlands
61. Netherlands island territories: Bonaire, Saba, and St. Eustatius
62. New Zealand
63. Norway
64. Pakistan
65. Panama
66. Peru
67. Philippines
68. Poland
69. Portugal
70. Romania
71. Russian Federation
72. Slovak Republic
73. Slovenia
74. South Africa
75. Spain
76. Sri Lanka
77. St. Maarten (Dutch part)
78. Sweden
79. Switzerland
80. Thailand

81. Trinidad and Tobago
82. Tunisia
83. Turkey
84. Ukraine
85. United Kingdom
86. Venezuela

Countries with which Treasury has determined that the automatic exchange of deposit interest information is appropriate:

1. Australia
2. Canada
3. Denmark
4. Finland
5. France
6. Germany
7. Guernsey
8. Ireland
9. Isle of Man
10. Italy
11. Jersey
12. Malta
13. Mauritius
14. Mexico
15. Netherlands
16. Norway
17. Spain
18. United Kingdom

2.3 W8 Series or Substitutes?⁶

The IRS specifically makes allowance for the use of substitute, albeit substantially similar, forms in place of the W-8s.⁷ The IRS' July 2014 revisions of the Instructions for the Requester of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY state:

You may develop and use your own Form ... if its content is substantially similar to the IRS's official Form ... and it satisfies certain certification requirements. You may develop and use a substitute form that is in a foreign language, provided that you make an English translation of the form and its contents available to the IRS upon request. You may combine Forms ... into a single substitute form. A form that satisfies these substitute forms requirements may be treated as a similar agreed form for purposes of an applicable Model 1 IGA, if the partner jurisdiction does not decline such treatment.

Thus, the substitute form, to be IRS compliant, should include the following aspects:

⁶ Derived from FATCA expert, and British banking compliance officer, Haydon Perryman's contributing to the forthcoming 3rd edition of the Lexis Guide to FATCA Compliance.

⁷ See <http://www.irs.gov/instructions/iw8/ch02.html#d0e564> (accessed on November 10, 2014).

(1) The substitute Form W-8BEN must contain all of the information required in Part I, lines 1 through 7, and line 8.

(2) The certifications in Part II must be included.

(3) Penalties of perjury statement.

(a) The design of the substitute Form W-8BEN must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form.

(b) Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: “The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a non-U.S. individual and, if applicable, obtain a reduced rate of withholding.”

(4) A non-IRS form for individuals must contain a signed and dated certification, made under penalties of perjury, that the information provided on the form is accurate and will be updated by the individual within 30 days of a change in circumstances that causes the form to become incorrect. However, the signed certification provided on a form need not be signed under penalties of perjury if the form is accompanied by documentary evidence that supports the individual’s claim to foreign status. Such documentary evidence may be the same documentary evidence that is used to support foreign status in the case of a payee whose account has U.S. indicia.

A non-IRS form for individuals must contain a signed and dated certification, made under penalties of perjury, that the information provided on the form is accurate and will be updated by the individual within 30 days of a change in circumstances that causes the form to become incorrect. However, the signed certification provided on a form need not be signed under penalties of perjury if the form is accompanied by documentary evidence that supports the individual’s claim to foreign status. Such documentary evidence may be the same documentary evidence that is used to support foreign status in the case of a payee whose account has U.S. indicia as described in Regulations sections.

There is considerable debate among financial institutions on the use of W8s within IGA Countries. There appear to be two camps.

Camp USA:

(1) It is a W8 world. The W8s existed before FATCA and serves more purposes than FATCA alone and is the de facto standard for tax self certification.

(2) US withholding agents will only accept W8s.

(3) The AEOI and the EU Savings Directive (“EUSD”) certifications will either:

- (a) Have to be modified to the W8 series, or
 - (b) Be used in addition to the EUSD declarations and the OECD's CRS ("CRS") certifications.
- (4) Use of substitutes would require expensive system changes.
- (5) The IRS has discounted the use of W8 substitutes, which means that if FFIs in IGA countries use substitutes, they may not comply with FATCA.

Camp IGA Partner:

- (1) Tax self-declarations are here to stay. A de facto standard has yet to emerge. The W8 series is a reasonable start but is too US centric to serve global needs.
- (2) US withholding agents were receiving W8s before FATCA. They will continue to receive them after FATCA. However, withholding agents who are not US Withholding Agents will use substitutes for the W8 series amongst themselves. Such substitutes will comply with the standard set out within the statutory instruments of the appropriate legal jurisdiction.
- (3) If the W8 series is to survive as the de facto standard, then the W8 will need to be modified so that they also meet the requirements of other regulators. For example, the W8 series establishes whether the account holder is a US national for tax purposes. To meet other regulations is also necessary to establish all the other jurisdictions under which the account holder falls for tax purposes. Customers should only be required to complete one form, not three: one for FATCA, another for the CRS, and yet another for the EUSD.
- (4) Expensive systems change a characteristic of FATCA. This is inevitable. The key is to harmonize the regulations and forms so as to minimize the implementation and compliance costs. Treating FATCA in isolation and ignoring what other jurisdictions are doing will not minimize costs.
- (5) Any FFI in an IGA Model 1 Country that is complying with the local FATCA statutory instrument(s) is FATCA compliant. If the Statutory instrument allows for W8 substitutes, then W8 substitutes are allowed.

The British sit in the Camp IGA Partner. "Special Relationship" or not, whilst we share the use of English with our American cousins, we use it very differently. For example, Part 1 of the W8 series contains the phrase "check". The word "check" in American English is not used the same was in Britain. In Britain the correct term is "tick". A trivial example but the point is that FATCA requires many more people to complete W8s (or equivalents) than was ever the case before. 99.9 percent of these will not be tax experts. As a matter of practicality, customers need to be able to understand the forms, and thus the forms must be the "plain" English of the country of the IGA partner. The W8 or its substitute should be as painless as possible for the customer to complete in order to obtain maximum compliance.

3. Analysis of W-8BEN-E Form

The W-8BEN-E form has thirty parts that can be catalogued into four sections. The filer's primary focus will be on Part I. By the way, the draft W-8BEN-E form only had twenty-seven, and the former W8BEN in use since 2006 has just four parts.

Identifying Information and Choice of Classification Part: All filers of the new W-8BEN-E must complete Parts I (Identifying Information and FATCA Classification). Part I of the W-8BEN-E requires general information, the QI status, and the FATCA classification of the filer. Question 4 of Part I requests the QI status. If the filer is a disregarded entity, partnership, simple trust, or grantor trust, and also is claiming benefits under a U.S. tax treaty, then the filer must complete Part III. Part I, Question 5 requests the FATCA classification of the filer, of which the form list thirty-one choices (see analysis below). The classification indicated determines which one of the Parts IV through XXVIII must be completed.

General Certification Part: All filers must complete Part XXIX (General Certification). Part XXIX requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee's behalf. This part of the final form also contains the following language that does not appear in the current form: "I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect."

FATCA Classification Certification Parts: Completion of the other parts of the form W-8BEN-E will depend upon the Part I, Question 5 FATCA classification of the filer (see list below). The classifications on the newest version [Form W-8BEN-E](#) maintain the classification of a Restricted Distributor (previously Part X of the draft form, but in the final form Part XI) (see the Rev. 2013 version of the W-8BEN-E).

Substantial US Owner Part: Note that if the filer is a passive NFFE, it must complete Part XXVI as well as Part XXX if it has substantial U.S. owners. For a Passive NFFE, a specified U.S. person is a substantial U.S. owner if the person has more than a 10 percent beneficial interest in the entity.

3.1 Who Must Provide W-8BEN-E?

A foreign entity must submit a Form W-8BEN-E to the withholding agent if it will receive a FATCA withholdable payment, receive a payment subject to chapter 3 withholding, or if it maintains an account with an FFI.

3.1.1 All Beneficial Owners

[Form W-8 BEN-E](#) must be provided by ALL the entities that are beneficial owners of a payment, or of another entity that is the beneficial owner. If the income or account is jointly owned by more than one person, then the income or account will be treated by the withholding agent as owned by a foreign beneficial owner only if Forms W-8BEN or W-8BEN-E are provided by EVERY owner of the account.

3.1.2 Treatment as US Account

If the withholding agent or financial institution receives a Form W-9 from any of the joint owners, then the payment must be treated as made to a U.S. person and the account treated as a U.S. account. An account will be treated as a U.S. account for FATCA by an FFI if any of the

account holders is a specified U.S. person or a U.S.-owned foreign entity (unless the account is otherwise excepted from U.S. account status for FATCA purposes).

3.1.3 Hybrids

Hybrid Entity: A hybrid entity should give Form W-8BEN-E on its own behalf to a withholding agent only for income for which it is claiming a reduced rate of withholding under an income tax treaty or to document its chapter 4 status for purposes of maintaining an account with an FFI requesting this form (when it is not receiving withholdable payments or payments subject to chapter 3 withholding).

Reverse Hybrid: A reverse hybrid entity should give Form W-8BEN-E on its own behalf to a withholding agent only for income for which no treaty benefit is being claimed or to establish its status for chapter 4 purposes (when required).

3.1.4 Who Should Not Use Form W-8BEN-E?

US Person: If the filer is a US person (including US citizens, resident aliens, and entities treated as US persons, such as a corporation organized under the law of a state), then submit [Form W-9](#), Request for Taxpayer Identification Number and Certification.

Foreign Insurance Company: A foreign insurance company that has made an election under section 953(d) to be treated as a U.S. person should submit Form W-9 to certify its “U.S. status” even if it is an FFI for FATCA purposes. Certain foreign insurance companies issuing annuities or cash value insurance contracts that elect to be treated as a U.S. person for federal tax purposes but are not licensed to do business in the United States are treated as FFIs for purposes of chapter 4. For purposes of providing a withholding agent with documentation for both chapter 3 and chapter 4 purposes, however, such an insurance company is permitted to use Form W-9 to certify its status as a U.S. person.

NRA: A nonresident alien individual must submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).

Disregarded: A U.S. person that is a single owner of a disregarded entity, and that is not also a hybrid entity claiming treaty benefits, should provide Form W-9. A foreign branch of a U.S. financial institution (other than a branch that operates as a qualified intermediary) that is treated as an FFI under an applicable IGA is permitted to use Form W-9 to certify its status as a U.S. person for chapter 3 and chapter 4 purposes.

But if the single owner is not a U.S. person, is not a branch of an FFI claiming FATCA status, and is not a hybrid entity claiming treaty benefits, it should provide either Form W-8BEN or Form W-8BEN-E as appropriate.

Intermediary: Form W-8IMY is submitted generally by a payment recipient with non-beneficial owner status, i.e. an intermediary. Such intermediary can be a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Read my analysis of W-8IMY and its instructions in my [June 24th article](#). An entity treated as a flow-through entity should generally provide Form W-8IMY for chapter 3 or chapter 4 purposes.

3.1.5 Expiration of Form W-8BEN-E.

Generally, a Form W-8BEN-E will remain valid for purposes of both chapters 3 and 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For example, a Form W-8BEN signed on September 30, 2014 remains valid through December 31, 2017. However, under certain conditions a Form W-8BEN-E will remain in effect indefinitely until a change of circumstances occurs.

3.1.6 Change in Circumstances.

If a change in circumstances makes any information on the Form W-8BEN-E incorrect for purposes of either chapter 3 or chapter 4, then the submitting person must notify the withholding agent or financial institution maintaining the account within 30 days of the change in circumstances and you must file a new Form W-8BEN-E (or other appropriate form as applicable).

3.1.7 Certification

Part XXIX requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee's behalf. This part of the final form also contains the following language that does not appear in the current form: "I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect."

3.2 Analysis of Part I – Identification of Beneficial Owner

Part I of the W-8BEN-E requires general information, the QI status, and the FATCA classification of the filer.

Question 1. A disregarded entity or branch enters the legal name of the entity that owns the disregarded entity (looking through multiple disregarded entities if applicable) or maintains the branch.

Question 2. A corporation must enter its country of incorporation. Any other type of entity must instead enter the country under whose laws it is created, organized, or governed.

Question 3. A disregarded entity receiving a payment should only enter its name on line 3 if it is receiving a withholdable payment or hold an account with an FFI and

- has registered with the IRS and been assigned a GIIN associated with the legal name of the disregarded entity;
- is a reporting Model 1 FFI or reporting Model 2 FFI; and
- is not a hybrid entity using this form to claim treaty benefits.

If not required to provide the legal name, then a disregarded entity receiving a payment or maintaining an account may instead enter its name on line 10.

Question 4 requests the QI status. If the filer is a disregarded entity, partnership, simple trust, or grantor trust, then the filer must complete Part III if the entity is claiming benefits under a U.S. tax treaty. See new [2014 QI agreement here](#).

Question 5 requests the FATCA classification of the entity. W-8BEN-E currently lists 31 FATCA classifications of which the entity must check only one box unless otherwise indicated.

Completion of the W-8BEN-E other parts depend upon the selection of the FATCA classification.

1. Nonparticipating FFI (including a limited FFI or an FFI related to a Reporting IGA FFI other than a registered deemed-compliant FFI or participating FFI).
2. Participating FFI.
3. Reporting Model 1 FFI.
4. Reporting Model 2 FFI.
5. Registered deemed-compliant FFI (other than a reporting Model 1 FFI or sponsored FFI that has not obtained a GIIN).
6. Sponsored FFI that has not obtained a GIIN. Complete Part IV.
7. Certified deemed-compliant nonregistering local bank. Complete Part V.
8. Certified deemed-compliant FFI with only low-value accounts. Complete Part VI.
9. Certified deemed-compliant sponsored, closely held investment vehicle. Complete Part VII.
10. Certified deemed-compliant limited life debt investment entity. Complete Part VIII.
11. Certified deemed-compliant investment advisors and investment managers. Complete Part IX.
12. Owner-documented FFI. Complete Part X.
13. Restricted distributor. Complete Part XI.
14. Nonreporting IGA FFI (including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA). Complete Part XII.
15. Foreign government, government of a U.S. possession, or foreign central bank of issue. Complete Part XIII.
16. International organization. Complete Part XIV.
17. Exempt retirement plans. Complete Part XV.
18. Entity wholly owned by exempt beneficial owners. Complete Part XVI.
19. Territory financial institution. Complete Part XVII.
20. Nonfinancial group entity. Complete Part XVIII.
21. Excepted nonfinancial start-up company. Complete Part XIX.
22. Excepted nonfinancial entity in liquidation or bankruptcy. Complete Part XX.
23. 501(c) organization. Complete Part XXI.
24. Nonprofit organization. Complete Part XXII.
25. Publicly traded NFFE or NFFE affiliate of a publicly traded corporation. Complete Part XXIII.
26. Excepted territory NFFE. Complete Part XXIV.
27. Active NFFE. Complete Part XXV.
28. Passive NFFE. Complete Part XXVI as well as Part XXX if substantial U.S. owners*.
29. Excepted inter-affiliate FFI. Complete Part XXVII.
30. Direct reporting NFFE.
31. Sponsored direct reporting NFFE. Complete Part XXVIII

**For a Passive NFFE, a specified U.S. person is a substantial U.S. owner if the person has more than a 10 percent beneficial interest in the entity.*

3.3 FFIs Covered by an IGA and Related Entities

A reporting IGA FFI resident in, or established under the laws of, a jurisdiction covered by a Model 1 IGA should check “Reporting Model 1 FFI.” A reporting FFI resident in, or established under the laws of, a jurisdiction covered by a Model 2 IGA should check “Reporting Model 2 FFI.”

If the FFI is treated as a registered deemed-compliant FFI under an applicable IGA, it should check “Nonreporting IGA FFI” rather than “registered deemed-compliant FFI” and provide its GIIN in Part XII, line 26.

An FFI that is related to a reporting IGA FFI and that is treated as a nonparticipating FFI in its country of residence should check nonparticipating FFI in line 5. An FFI that is related to a reporting IGA FFI and that is a participating FFI, deemed-compliant FFI, or exempt beneficial owner under the U.S. Treasury regulations or an applicable IGA should check the appropriate box for its chapter 4 status.

3.4 Requirement to Provide a GIIN

If the entity is in the process of registering with the IRS as a participating FFI, registered deemed-compliant FFI, reporting Model 1 FFI, reporting Model 2 FFI, direct reporting NFFE, or sponsored direct reporting NFFE, but has not received a GIIN, it may complete this line by writing “applied for.” However, the person requesting this form must receive and verify the GIIN within 90 days.

For payments made prior to January 1, 2015, a Form W-8BEN-E provided by a reporting Model 1 FFI need not contain a GIIN. For payments made prior to January 1, 2016, a sponsored direct reporting NFFE or sponsored FFI that has not obtained a GIIN must provide the GIIN of its sponsoring entity.

3.5 Part X – Owner-Documented FFI

Line 24a. An owner-documented FFI must check the box to certify that it meets all of the requirements for this status and is providing this form to a U.S. financial institution, participating FFI, reporting Model 1 FFI, or reporting Model 2 FFI that agrees to act as a designated withholding agent with respect to the FFI identified on line 1. Then select either 24b or 24c.

Line 24b. Check this box to certify that the documentation set forth in the certifications has been provided (or will be provided), including the owner reporting statement described in this line 24b, or

Line 24c. Check this box to certify that the auditor’s letter has been provided (or will be provided).

3.6 Part XXI – 501(c) Organization

Only foreign entities that are tax-exempt under section 501 should check the 501(c) organization “Tax-exempt organization” box. Such organizations should use Form W-8BEN-E only if they are claiming a reduced rate of withholding under an income tax treaty or a code exception other than section 501. If claiming an exemption from withholding under code section 501, then it must submit Form [W-8EXP](#) to document the exemption and chapter 4 status.

3.7 Part XXII – Non-Profit Organizations Covered by an IGA

A non-profit entity that is established and maintained in a jurisdiction that is treated as having in effect a Model 1 IGA or Model 2 IGA, and that meets the definition of Active NFFE under Annex I of the applicable IGA, should not check a box for its status on line 5.

3.8 Entities Providing Certifications Under an Applicable IGA

In lieu of the certifications contained in Parts IV through XXVIII of Form W-8BEN-E, a reporting Model 1 FFI or reporting Model 2 FFI in certain cases may request alternate certifications to document its account holders pursuant to an applicable IGA or it may otherwise provide an alternate certification to a withholding agent.

A withholding agent that is an FFI may provide a chapter 4 status certification other than as shown in Parts IX through XXVIII in order to satisfy its due diligence requirements under an applicable IGA. In such a case, attach that alternative certification to this Form W-8BEN-E in lieu of completing a certification otherwise required in Parts IV through XXVIII provided that

- 1) the certification accurately reflects the chapter 4 status or under an applicable IGA; and
- 2) the withholding agent provides a written statement that it has provided the certification to meet its due diligence requirements as a participating FFI or registered deemed-compliant FFI under an applicable IGA.

An applicable IGA certification may be provided with the W-8BEN-E if determining chapter 4 status under the definitions provided in an applicable IGA and that certification identifies the jurisdiction that is treated as having an IGA in effect and describes the status as an NFFE or FFI in accordance with the applicable IGA.

However, if under an applicable IGA the entity's status is determined to be an NFFE, it must still determine if it is an excepted NFFE under the FATCA Regulations. Additionally, the entity must comply with the conditions of its status under the law of the IGA jurisdiction.

3.9 W-8BEN-E's 30 Parts

Part I Identification of Beneficial Owner

Part II Disregarded Entity or Branch Receiving Payment.

Part III Claim of Tax Treaty Benefits (if applicable). (For chapter 3 purposes only)

Part IV Sponsored FFI That Has Not Obtained a GIIN

Part V Certified Deemed-Compliant Nonregistering Local Bank

Part VI Certified Deemed-Compliant FFI with Only Low-Value Accounts

Part VII Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle

Part VIII Certified Deemed-Compliant Limited Life Debt Investment Entity

Part IX Certified Deemed-Compliant Investment Advisors and Investment Managers

Part X Owner-Documented FFI

Part XI Restricted Distributor

Part XII Nonreporting IGA FFI

Part XIII Foreign Government, Government of a U.S. Possession, or Foreign Central Bank of Issue

Part XIV International Organization

Part XV Exempt Retirement Plans
Part XVI Entity Wholly Owned by Exempt Beneficial Owners
Part XVII Territory Financial Institution
Part XVIII Excepted Nonfinancial Group Entity
Part XIX Excepted Nonfinancial Start-Up Company
Part XX Excepted Nonfinancial Entity in Liquidation or Bankruptcy
Part XXI 501(c) Organization
Part XXII Non-Profit Organization
Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation
Part XXIV Excepted Territory NFFE
Part XXV Active NFFE
Part XXVI Passive NFFE
Part XXVII Excepted Inter-Affiliate FFI
Part XXVIII Sponsored Direct Reporting NFFE
Part XXIX Certification
Part XXX Substantial U.S. Owners of Passive NFFE

3.10 Substitute Form

- (1) The substitute Form W-8BEN-E must contain all of the information required in Part I, lines 1 through 6, and lines 8 and 9.
- (2) The certifications in Part II must be included.
- (3) Penalties of perjury statement.
 - (a) The design of the substitute Form W-8BEN must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form.
 - (b) Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: “The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a non-U.S. individual and, if applicable, obtain a reduced rate of withholding.”

4. Analysis of the Form W-8IMY

Part I of the W8-IMY Form adds FATCA classification. Part I of the form requires general information, the Chapter 3 QI status, and the Chapter 4 FATCA classification of the filer.

Question 4 of Part I requests the QI status:

If the filer is a Qualified Intermediary, then the filer must complete Part III Qualified Intermediary. If the filer is a Nonqualified Intermediary, then the filer must complete Part IV Nonqualified Intermediary.

Territory Financial Institutions complete Part V. U.S. Branches complete Part VI.

Withholding Foreign Partnership or Withholding Foreign Trusts complete Part VII.

Nonwithholding Foreign Partnership, Nonwithholding Foreign Simple Trust, and Nonwithholding foreign grantor trusts must complete Part VIII.

Question 5 requests the FATCA classification of the filer. The classification indicated determines which one of the Parts IX through XXVII must be completed.

Part II of this form is to be completed if the entity is a disregarded entity or a branch receiving payment as an intermediary. Part II only applies to branches of an FFI outside the FFI's country of residence.

4.1 Statement of General Certification

Part XXVIII requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee's behalf. Finally, the form contains the following language: "I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect."

4.2 Who Must File W-8IMY?

An entity should provide Form W-8IMY when receiving a reportable amount or withholdable payment on behalf of another person or as a flow-through entity.

A foreign person, or a foreign branch of a U.S. person, to establish that it is a qualified intermediary that is not acting for its own account, to represent that it has provided or will provide a withholding statement, as required, or, if applicable, to represent that it has assumed primary withholding responsibility under chapters 3 and 4 of the Code and/or primary Form 1099 reporting and backup withholding responsibility.

A foreign person to establish that it is a nonqualified intermediary that is not acting for its own account, to certify its chapter 4 status (if required), to certify whether it reports U.S. accounts under chapter 4 (if required), and to indicate, if applicable, that it is using the form to transmit withholding certificates and/or other documentary evidence and has provided, or will provide, a withholding statement, as required. A U.S. person cannot be a nonqualified intermediary.

A U.S. branch that is acting as an intermediary to represent that the income it receives is not effectively connected with the conduct of a trade or business within the United States and either that it is using the form (a) to evidence it is treated as a U.S. person under Regulations section [1.1441-1\(b\)\(2\)\(iv\)\(A\)](#) with respect to any payments associated with the Form W-8IMY, or (b) to certify to its chapter 4 status and to transmit the documentation of the persons for whom it receives a payment and has provided, or will provide, a withholding statement, as required.

A financial institution incorporated or organized under the laws of a U.S. territory that is acting as an intermediary or is a flow-through entity to represent that it is a financial institution (other than an investment entity that is not also a depository institution, custodial institution, or specified insurance company) and either that it is using the form (a) to evidence it is treated as a U.S. person under Regulations section [1.1441-1\(b\)\(2\)\(iv\)\(A\)](#) with respect to any payments associated with the Form W-8IMY, or (b) to certify that it is transmitting documentation of the persons for whom it receives a payment and has provided, withholding statement, as required.

A foreign partnership or a foreign simple or grantor trust to establish that it is a withholding foreign partnership or withholding foreign trust under the regulations for sections 1441 and 1442 and to certify its chapter 4 status (if required).

A foreign partnership or a foreign simple or grantor trust to establish that it is a nonwithholding foreign partnership or nonwithholding foreign simple or grantor trust for purposes of sections 1441 and 1442, to certify to its chapter 4 status (if required), and to represent that the income is not effectively connected with a U.S. trade or business, that the form is being used to transmit withholding certificates and/or documentary evidence, and that it has provided or will provide a withholding statement as required.

A foreign partnership or foreign grantor trust to establish that it is an upper-tier foreign partnership or foreign grantor trust for purposes of section 1446 and to represent that the form is being used to transmit withholding certificates and/or documentary evidence and that it has provided, or will provide, a withholding statement, as required.

A flow-through entity (including a foreign reverse hybrid entity) transmitting withholding certificates and/or other documentary evidence to claim treaty benefits on behalf of its owners, to certify its chapter 4 status (if required), and to certify that it has provided, or will provide, a withholding statement, as required.

A nonparticipating FFI acting as an intermediary or that is a flow-through entity using this form to transmit a withholding statement and withholding certificates or other documentation for exempt beneficial owners described in Regulations section 1.1471-6.

A QSL certifying to a withholding agent that it is acting as a QSL with respect to U.S. source substitute dividends received from the withholding agent pursuant to a securities lending transaction (as described in Notice 2010-46).

A foreign intermediary or flow-through entity not receiving withholdable payments or reportable amounts that is holding an account with a participating FFI or registered deemed-compliant FFI providing this form for purposes of documenting the chapter 4 status of the account holder. However, no withholding statement is required to be provided along with Form W-8IMY if it is being provided by an FFI solely to document such an account when no withholdable payments or reportable amounts are made to the account. Also note that the entity may instead provide Form W-8BEN-E when it is not receiving withholdable payments or reportable amounts to document its status as an account holder.

4.3 Partnership Allocations

Form W-8IMY may be submitted and accepted to satisfy documentation requirements for purposes of withholding on certain partnership allocations to foreign partners under section 1446. Section 1446 generally requires withholding when a partnership is conducting a trade or business in the United States and allocates income effectively connected with that trade or business (ECI) to foreign persons that are partners in the partnership. Section 1446 can also apply when certain income is treated as effectively connected income of the partnership and is so allocated.

4.4 Chapter 3 and Chapter 4 Status Certification

Chapter 3 and Chapter 4 status certification by the filer is required with applicable documentation.

In general, intermediaries and flow-through entities receiving reportable amounts will be required to provide both their chapter 3 status and the chapter 3 status of persons for whom they receive such payments.

An intermediary or flow-through entity receiving a withholdable payment will also be required to provide its chapter 4 status and the chapter 4 status of persons for whom it receives a withholdable payment when required for chapter 4 purposes.

4.5 Parts III – VIII: Chapter 3 Status Certifications

Parts III – VIII of this form address the QI Status of the entity. Part III is to be completed if the entity is a QI, and requires the entity to certify that it is a QI and has provided appropriate documentation. Part IV is to be completed if the entity is a Nonqualified Intermediary (NQI), and requires the entity to certify that it is a NQI not acting for its own account.

Part V is to be completed if the entity is a Territory Financial Institution. Part VI is to be completed by a U.S. branch only if the branch certifies on the form that it is the U.S. branch of a U.S. bank or insurance company, and that the payments made are not effectively connected to a U.S. trade or business. Part VII is to be completed if the entity is a Foreign Withholding Partnership (WP) or a Withholding Foreign Trust (WT). Part VIII is to be completed if the entity is either a Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust.

4.6 Parts III – VIII of this form address the QI Status of the entity.

Part III Qualified Intermediary

Part IV Nonqualified Intermediary

Part V Territory Financial Institution

Part VI Certain U.S. Branches

Part VII Withholding Foreign Partnership (WP) or Withholding Foreign Trust (WT)

Part VIII Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust

Part III is to be completed if the entity is a QI, and requires the entity to certify that it is a QI and has provided appropriate documentation. Part IV is to be completed if the entity is a Nonqualified Intermediary (NQI), and requires the entity to certify that it is a NQI not acting for its own account. Part V is to be completed if the entity is a Territory Financial Institution. Part VI is to be completed by a U.S. branch only if the branch certifies on the form that it is the U.S. branch of a U.S. bank or insurance company, and that the payments made are not effectively connected to a U.S. trade or business. Part VII is to be completed if the entity is a Foreign Withholding Partnership (WP) or a Withholding Foreign Trust (WT). Part VIII is to be completed if the entity is either a Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust.

4.7 Parts IX – XXVI: Chapter 4 Status Certifications

Parts IX – XXVI of this form address the filer certifying the FATCA Status of the entity. These classifications include the new classification of a Restricted Distributor (Part XVI), but do not include the new classification of a Reporting NFFE. Each of these parts begins with a check the box selection of “I certify that ...”, followed by the definition components of each classification. These classifications include the new classification of a Restricted Distributor (Part XVI), but do not include the new classification of a Reporting NFFE.

Part IX Nonparticipating FFI with Exempt Beneficial Owners

Part X Sponsored FFI That Has Not Obtained a GIIN

Part XI Owner-Documented FFI

Part XII Certified Deemed-Compliant Nonregistering Local Bank

Part XIII Certified Deemed-Compliant FFI with Only Low-Value Accounts

Part XIV Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle

Part XV Certified Deemed-Compliant Limited Life Debt Investment Entity

Part XVI Restricted Distributor

Part XVII Foreign Central Bank of Issue

Part XVIII Nonreporting IGA FFI

Part XIX Exempt Retirement Plans

Part XX Excepted Nonfinancial Group Entity

Part XXI Excepted Nonfinancial Start-Up Company

Part XXII Excepted Nonfinancial Entity in Liquidation or Bankruptcy

Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation

Part XXIV Excepted Territory NFFE

Part XXV Active NFFE

Part XXVI Passive NFFE

Part XXVII Sponsored Direct Reporting NFFE

Part IX is not required to be completed unless the filer is a nonparticipating FFI providing documentation on behalf of an exempt beneficial owner (by example, a local qualifying retirement fund).

Part XI – An owner-documented FFI should only complete Form W-8IMY if it is a flow-through entity receiving income allocable to its partners, owners, or beneficiaries. An owner-documented FFI is not permitted to act as an intermediary with respect to a withholdable payment.

Part XVIII – A nonreporting FFI pursuant to an IGA must indicate that it is to be treated as such under an applicable IGA, including an entity treated as a registered deemed-compliant FFI under an applicable IGA. The nonreporting IGA FFI must identify the applicable IGA by entering the name of the jurisdiction that has the applicable IGA in effect with the United States. It must also provide the withholding agent with the class of entity described in Annex II of the IGA applicable to its nonreporting FFI IGA status. If the nonreporting FFI IGA is claimed

pursuant to a Model 2 IGA, then the FFI treated as a registered deemed-compliant FFI under that applicable Model 2 IGA must provide a GIIN in the space provided.

If the filer is a sponsored FFI in a Model 1 IGA jurisdiction or other nonreporting FFI in a Model 1 IGA jurisdiction that is required to report an account, it is not currently required to provide a GIIN in this Part. However, a future version of this form may require it to provide a GIIN.

4.8 Entities Providing Certifications Under an Applicable IGA

A withholding agent that is an FFI may provide a chapter 4 status certification other than as shown in Parts IX through XXVII in order to satisfy its due diligence requirements under an applicable IGA. In such a case, attach the alternative certifications to this Form W-8IMY in lieu of completing a certification otherwise required in Parts IX through XXVII provided that the withholding agent:

- determine that the certification accurately reflects the status for chapter 4 purposes or under an applicable IGA; and

- the withholding agent provides a written statement that it has provided the certification to meet its due diligence requirements as a participating FFI or registered deemed-compliant FFI under an applicable IGA.

The filer may also provide with this form an applicable IGA certification if it determines its chapter 4 status under the definitions provided in an applicable IGA and that certification identifies the jurisdiction that is treated as having an IGA in effect and describes the filer status as an NFFE or FFI in accordance with the applicable IGA. However, if the filer determines its status under an applicable IGA as an NFFE, it must still determine if it is an excepted NFFE under the regulations in order to complete this form. Additionally, it is required to comply with the conditions of its chapter 4 status under the law of the IGA jurisdiction if it determines its status under an applicable IGA.

4.9 Entities Providing Alternate Certifications Under Regulations

If the filer qualifies for a chapter 4 status that is not shown in Part I, line 5, of this form, it may attach applicable certifications for such status from any other Form W-8 on which the relevant certifications appear.

For example, if the filer is a certified deemed-compliant investment advisor or investment manager described in Regulations section 1.1471-5(f)(2)(v) that is a flow-through entity, it may instead attach the certifications found in Part IX of Form W-8BEN-E.

If the applicable certifications do not appear on any Form W-8 (if, for example, new regulations provide for an additional chapter 4 status and this form has not been updated) then the filer may provide an attachment certifying that it qualifies for the applicable status described in a particular Regulations section in lieu of checking a box in Part I, line 5. The filer must also include a citation to the applicable provision in the Regulations.

4.10 Final Statement of Certification

Part XXVIII requires certification, under penalty of perjury, by the payee or a person authorized to sign on the payee's behalf. Finally, the form contains the following language: "I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect."

4.11 Expiration of Form W-8IMY

Generally, a Form W-8IMY remains valid until the status of the person whose name is on the certificate is changed in a way relevant to the certificate or there is a change in circumstances that makes the information on the certificate no longer correct. The indefinite validity period does not extend, however, to any other withholding certificates, documentary evidence, or withholding statements associated with the certificate.

4.12 Change in Circumstances.

If a change in circumstances makes any information on the Form W-8IMY (or any documentation or a withholding statement associated with the Form W-8IMY) have submitted incorrect for purposes of chapter 3 or chapter 4 (when relevant), the intermediary must notify the withholding agent within 30 days and file a new Form W-8IMY or provide new documentation or a new withholding statement (as applicable).

The information associated with Form W-8IMY must be updated as often as is necessary to enable the withholding agent to withhold at the appropriate rate on each payment and to report such income.

(See Regulations sections [1.1441-1\(e\)\(4\)\(ii\)\(D\)](#) for the definition of a change in circumstances for purposes of chapter 3. See Regulations section [1.1471-3\(c\)\(6\)\(ii\)\(E\)](#) for the definition of a change in circumstances for purposes of chapter 4.)

4.13 Structure of New [Form W-8IMY](#)

Part I Identification of Entity

Part II Disregarded Entity or Branch Receiving Payment.

Chapter 3 Status Certifications

Part III Qualified Intermediary

Part IV Nonqualified Intermediary

Part V Territory Financial Institution

Part VI Certain U.S. Branches

Part VII Withholding Foreign Partnership (WP) or Withholding Foreign Trust (WT)

Part VIII Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust

Chapter 4 Status Certifications

Part IX Nonparticipating FFI with Exempt Beneficial Owners

Part X Sponsored FFI That Has Not Obtained a GIIN

Part XI Owner-Documented FFI

Part XII Certified Deemed-Compliant Nonregistering Local Bank

Part XIII Certified Deemed-Compliant FFI with Only Low-Value Accounts

Part XIV Certified Deemed-Compliant Sponsored, Closely Held Investment Vehicle

Part XV Certified Deemed-Compliant Limited Life Debt Investment Entity

Part XVI Restricted Distributor
Part XVII Foreign Central Bank of Issue
Part XVIII Nonreporting IGA FFI
Part XIX Exempt Retirement Plans
Part XX Excepted Nonfinancial Group Entity
Part XXI Excepted Nonfinancial Start-Up Company
Part XXII Excepted Nonfinancial Entity in Liquidation or Bankruptcy
Part XXIII Publicly Traded NFFE or NFFE Affiliate of a Publicly Traded Corporation
Part XXIV Excepted Territory NFFE
Part XXV Active NFFE
Part XXVI Passive NFFE
Part XXVII Sponsored Direct Reporting NFFE

5. ANALYSIS OF FORM 1042 FOR FATCA WITHHOLDING

The IRS has released the [Instructions](#) for [2014 Form 1042](#): Annual Withholding Tax Return for U.S. Source Income of Foreign Persons to correspond to FATCA (Chapter 4 of the Internal Revenue Code).

A withholding agent must use Form 1042 to report the tax withheld on certain income of foreign persons, including nonresident aliens, foreign partnerships, foreign corporations, foreign estates, and foreign trusts, or 2% excise tax due on specified foreign procurement payments.

The IRS has provided the final 2014 version of the Form 1042 at this time for informational purposes in order to provide time for withholding agents and intermediaries to implement the new requirements of FATCA. The 2014 version of the Form 1042 reflects the new FATCA requirements and will be filed by taxpayers in 2015 to report with respect to 2014. See link for the [2013 Form](#).

5.1 What Changed?

The Form 1042 for 2014 has been modified from the previous Form 1042 primarily for withholding agents to report payments and amounts withheld under FATCA chapter 4 of the Code (chapter 4) in addition to those payments and amounts required to be reported under chapter 3 of the Code (chapter 3).

The 2014 Form 1042:

1. adds lines for reporting of the tax liability under chapters 3 and 4,
2. includes separate chapter 3 and 4 status codes for withholding agents, and
3. provides for a reconciliation of U.S. source fixed or determinable annual or periodical (FDAP) income payments that are withholdable payments for chapter 4 purposes.

Withholding agents that make nonfinancial payments generally will not be affected by the new requirements under chapter 4.

5.2 When is Form 1042 Due?

Form 1042 is a calendar year tax return. The Forms 1042 and 1042-S must be filed by March 15 of the year following the calendar year in which the income subject to reporting was paid. Thus, for the 2014 year, the filing date is Monday, March 16, 2015 (because March 15th is a Sunday).

5.3 Who Must File?

Every withholding agent or intermediary who has control, receipt, custody, disposal or payment of any fixed or determinable, annual or periodic U.S. source income must file an annual return for the preceding calendar year on Form 1042.

A withholding agent or intermediary must file Form 1042 if:

- required to file Form(s) 1042-S (whether or not any tax was withheld or was required to be withheld),
- Is a qualified intermediary (QI), withholding foreign partnership (WP), withholding foreign trust (WT), participating foreign financial institution (FFI), or reporting Model 1 FFI making a claim for a collective refund under the respective agreement with the IRS,
- pays gross investment income to foreign private foundations that are subject to tax under section 4948(a), or
- pays any foreign person specified federal procurement payments that are subject to withholding under section 5000C.

6. ANALYSIS OF 1042-S

6.1 Who Must File?

Every withholding agent must file an information return on Form 1042-S to report amounts paid during the preceding calendar year.

However, withholding agents who are individuals are not required to report a payment on Form 1042-S if they are not making the payment as part of their trade or business and no withholding is required to be made on the payment.

For example, an individual making a payment of interest that qualifies for the portfolio interest exception from withholding is not required to report the payment if the portfolio interest is paid on a loan that is not connected to the individual's trade or business. However, an individual who is a withholding agent paying an amount that actually has been subject to withholding is required to report the payment. Also, an individual paying an amount on which withholding is required must report the payment, whether or not the individual actually withholds.

6.2 Who is a Withholding agent?

A withholding agent is any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding under chapter 3, who can disburse or make payments of an amount subject to withholding, or who makes a withholdable payment under chapter 4.

The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity. The term withholding agent also includes, but is not limited to, a qualified intermediary (QI), a nonqualified intermediary (NQI), a withholding foreign partnership (WP), a

withholding foreign trust (WT), a flow-through entity, a U.S. branch, a territory FI, a nominee under section 1446, and an authorized agent. A person may be a withholding agent even if there is no requirement to withhold from a payment or if another person has already withheld the required amount from a payment.

In most cases, the U.S. person who pays (or causes to be paid) the item of U.S. source income to a foreign person (or to its agent) must withhold. However, other persons may be required to withhold. For example, if a payment is made by a QI (whether or not it assumes primary withholding responsibility) and the QI knows that withholding was not done by the person from which it received the payment, then that QI is required to do the appropriate withholding. In addition, withholding must be done by any QI that assumes primary withholding responsibility under chapters 3 and 4, a WP, a WT, a U.S. branch that agrees to be treated as a U.S. person, or an authorized agent.

Finally, if a payment is made by an NQI or a flow-through entity that knows, or has reason to know, that withholding was not done, that NQI or flow-through entity is required to withhold since it also falls within the definition of a withholding agent.

6.3 What's New for the 2014 [Form 1042-S](#)?

The Form 1042-S for 2014 has been modified to accommodate reporting of payments and amounts withheld under FATCA (chapter 4) in addition to those amounts required to be reported under chapter 3. Form 1042-S requires the reporting of an applicable exemption to the extent withholding under chapter 4 does not apply to a payment of U.S. source fixed or determinable annual or periodical (FDAP) income (including deposit interest) that is reportable on Form 1042-S.

When a financial institution reports a payment made to its financial account, Form 1042-S also requires the reporting of additional information about a recipient of the payment, such as the recipient's account number, date of birth, and foreign taxpayer identification number, if any.

For withholding agents, intermediaries, flow-through entities, and recipients, Form 1042-S requires that the chapter 3 status (or classification) and, when the payment reported is a FATCA withholdable payment, the chapter 4 status be reported on the form according to a code for each type of income.

For withholding agents that report amounts withheld by another withholding agent, Form 1042-S requests the name and EIN of the withholding agent that withheld the tax. This information is optional for 2014.

Electronic filing requirement for financial institutions. Beginning January 1, 2014, financial institutions that are required to report payments made under chapters 3 or 4 must electronically file Forms 1042-S (regardless of the number of forms to file).

6.4 Form 1042-S Uses

Use Form 1042-S to:

- report income described under Amounts Subject to Reporting on Form 1042-S, later, and to report amounts withheld under chapter 3 or chapter 4.

- report specified Federal procurement payments paid to foreign persons that are subject to withholding.
- report distributions of effectively connected income by a publicly traded partnership or nominee.

Do not use Form 1042-S to report an item required to be reported on any of the following forms:

- Form W-2 (wages and other compensation made to employees (other than compensation for dependent personal services for which the beneficial owner is claiming treaty benefits), including wages in the form of group-term life insurance).
- Form 1099.
- FIRPTA: Dispositions by Foreign Persons of U.S. Real Property Interests, or Form 8805 Foreign Partner's Information Statement of Section 1446 Withholding Tax.
- Form 8966, FATCA Report. Foreign financial institutions (FFIs) and withholding agents are required to report on Form 8966 certain account holders and payees. However, an FFI or withholding agent may also be required to file Form 1042-S to report payments of U.S. source FDAP income made to such persons and to report tax deducted and withheld, if any.

6.5 Amounts Subject to Reporting on Form 1042-S

Amounts subject to reporting on Form 1042-S are amounts from U.S. sources paid to foreign persons (including persons presumed to be foreign) or included in a U.S. payee pool that are reportable under chapters 3 and 4, even if no amount is deducted and withheld from the payment because of a treaty or Code exception to taxation or if any amount withheld was repaid to the payee. Amounts subject to reporting are amounts from sources within the United States that constitute:

- (a) fixed or determinable annual or periodical (FDAP) income (including deposit interest);
- (b) certain gains from the disposal of timber, coal, or domestic iron ore with a retained economic interest; and
- (c) gains relating to contingent payments received from the sale or exchange of patents, copyrights, and similar intangible property.

A payment is also subject to reporting if withholding under chapter 4 is applied (or required to be applied) to the payment. Amounts subject to reporting on Form 1042-S include, but are not limited to, the following amounts to the extent from U.S. sources:

- (a) Interest on deposits paid to certain nonresident aliens. Interest described in section 871(i)(2)(A) aggregating \$10 or more paid with respect to a deposit if such interest is paid to a nonresident alien individual who is a resident of a country identified, in [Revenue Procedure 2012-24](#) (or a superseding Revenue Procedure) as of December 31, prior to the calendar year in which the interest is paid.

A payor may elect to report interest described above paid to any nonresident alien individual by reporting all such interest. See Revenue Procedure 2012-24 (or a superseding Revenue Procedure) for the current list of countries with which the United

States has in effect an income tax or other convention or bilateral agreement relating to exchange information within the meaning of section 6103(k)(4).

- (b) Corporate distributions. The entire amount of a corporate distribution (whether actual or deemed) must be reported, regardless of any estimate of the part of the distribution that represents a taxable dividend. Any distribution, however, that is treated as gain from the redemption of stock is not an amount subject to withholding.
- (c) Interest. This includes the part of a notional principal contract payment that is characterized as interest.
- (d) Rents.
- (e) Royalties.
- (f) Compensation for independent personal services performed in the United States.
- (g) Compensation for personal services performed in the United States (but only if the beneficial owner is claiming treaty benefits).
- (h) Annuities.
- (i) Pension distributions and other deferred income.
- (j) Most gambling winnings.
- (k) Cancellation of indebtedness. Effectively connected income (ECI).
- (l) Notional principal contract income.
- (m) Insurance premiums.
- (n) REMIC excess inclusions.
- (o) Students, teachers, and researchers. However, amounts that are exempt from tax under section 117 are not subject to reporting.
- (p) Amounts paid to foreign governments, foreign controlled banks of issue, and international organizations.
- (q) Foreign targeted registered obligations.
- (r) Original Issue Discount (OID) from the redemption of an OID obligation.
- (s) Certain dispositions of U.S. real property interests.
- (t) Other U.S.-source dividend equivalent payments
- (u) Guarantee of indebtedness.
- (v) Specified Federal procurement payments.

6.6 Amounts That Are Not Subject to Reporting on Form 1042-S

- Interest and OID from short-term obligations.
- Registered obligations targeted to foreign markets. Reporting will be required on interest paid on any registered obligation (regardless of whether targeted to foreign markets) if the registered obligation is issued after December 31, 2015.

- Bearer obligations targeted to foreign markets. Withholding is required on interest paid on any bearer obligations targeted to foreign markets if the obligation is issued after March 18, 2012.
- Notional principal contract payments that are not ECI.
- Accrued interest and OID.
- Certain withholdable payments. Withholdable payments not subject to reporting for chapter 3 purposes (other than bank deposit interest paid to certain nonresident aliens) are not required to be reported if withholding is not applied (or required to be applied) under chapter 4.

6.7 How Are Disregarded Entities Reported?

If a U.S. withholding agent makes a payment to a disregarded entity (other than a limited branch of an FFI) that is not a hybrid entity making a treaty claim, and receives a valid Form W-8BEN-E or W-8ECI from a foreign person that is the single owner of the disregarded entity, the withholding agent must file a Form 1042-S in the name of the foreign single owner. The taxpayer identifying number (TIN) on the Form 1042-S, if required, must be the foreign single owner's TIN.

Example. WA, a withholding agent, makes a withholdable payment of interest to LLC, a foreign limited liability company that is not an FFI. LLC is wholly-owned by FC, a foreign corporation that is an excepted non-financial foreign entity. LLC is treated as a disregarded entity. WA has a Form W-8BEN-E from FC on which it states that it is the beneficial owner of the income paid to LLC. WA reports the interest payment on Form 1042-S showing FC as the recipient. The result would be the same if LLC was a domestic entity.

6.8 How Are Amounts paid to a NQI or Flow-Through Entity Reported?

If a U.S. withholding agent makes a payment to an NQI or a flow-through entity (other than a nonparticipating FFI) with respect to a withholdable payment, it must complete a separate Form 1042-S for each recipient on whose behalf the NQI or flow-through entity acts as indicated by its withholding statement and the documentation associated with its Form W-8IMY.

Example. WA, a withholding agent, makes a withholdable payment of interest to FFI 1, a reporting model 1 FFI. FFI 1 provides WA with a valid Form W-8IMY with which it associates a withholding statement that allocates 80% of the payment to FFI 2, a participating FFI, and 20% of the payment to a pool of nonparticipating FFIs. FFI 1 also provides WA with FFI 2's Form W-8IMY with which it associates a withholding statement that allocates 100% of the payment to recalcitrant pool-no U.S. indicia. WA must complete a Form 1042-S for the interest allocated to a pool of nonparticipating FFIs with FFI 1 as the recipient and must complete another Form 1042-S for the interest allocated to a pool of recalcitrant account holders-no U.S. indicia with FFI 2 as the recipient.

7. Treasury's Notice 2014-33 Grants Temporary Reliefs

Treasury released [Notice 2014-33](#) on May 2. [Notice 2014-33](#) provides aspects of temporary relief for five areas of FATCA compliance:

1. 6 month extension (from July 1, 2014 until December 31, 2014) for characterizing as “pre-existing” the obligations (including accounts) held by an entity
2. soft-enforcement transition period 2014 and 2015 for good-faith actors
3. modification to the “standards of knowledge” for withholding agents under [§1.1441-7\(b\)](#)[1] for accounts documented before July 1, 2014
4. revision to the definition of a “reasonable explanation” of foreign status in [§1.1471-3\(e\)\(4\)\(viii\)](#)[2]
5. additional guidance for an FFI (or a branch of an FFI, including a disregarded entity owned by an FFI) that is a member of an expanded affiliated group of FFIs to be treated as a limited FFI or limited branch, *including the requirement for a limited FFI to register on the FATCA registration website.*

7.1 Six Month Extension To Characterize Entity Accounts As Pre-Existing Obligations

Treasury stated that industry comments indicate that the release dates of the final Forms W-8 (click on the links for analysis of the April 2014 releases of the new [W-8IMY](#) and [W-8BEN-E](#)) and accompanying instructions present practical problems for both withholding agents and FFIs to implement new account opening procedures beginning on July 1, 2014.

Thus, obligations (including accounts) held by an entity - opened, executed, or issued from July 1, 2014 until December 31, 2014 - may be treated as preexisting obligations by a withholding agent or FFI for purposes of sections 1471 and 1472 (subject to certain modifications described in section IV of [Notice 2014-33](#)).

7.2 Transition Period For Enforcement And Administration Of Compliance

The IRS will regard 2014 and 2015 as a transition period for purposes of its enforcement and administration of the due diligence, reporting, and withholding provisions under chapter 4, as well as the provisions under chapters 3 and 61, and section 3406, *to the extent these rules were modified by the temporary coordination regulations.*

During this transition period, the IRS will take into account the extent of good faith efforts to comply with the requirements of the chapter 4 regulations and the temporary coordination regulations by

- a participating or deemed-compliant FFI,
- direct reporting NFFE,
- sponsoring entity,
- sponsored FFI,
- sponsored direct reporting NFFE, or
- withholding agent.

The IRS will take into account whether a withholding agent has made reasonable efforts during the transition period to modify its account opening practices and procedures to document the chapter 4 status of payees, apply the standards of knowledge provided in chapter 4, and, in the absence of reliable documentation, apply the presumption rules of [§1.1471-3\(f\)](#).^[3]

Additionally, for example, the IRS will consider the good faith efforts of a participating FFI, registered deemed-compliant FFI, or limited FFI to identify and facilitate the registration of each other member of its expanded affiliated group as required for purposes of satisfying the expanded affiliated group requirement under [§1.1471-4\(e\)\(1\)](#).

The IRS will not regard calendar years 2014 and 2015 as a transition period with respect to the requirements of chapters 3 and 61, and section 3406, that were not modified by the temporary coordination regulations. For example, the IRS will not provide transitional relief with respect to its enforcement regarding a withholding agent's determinations of the character and source of payments for withholding and reporting purposes.

7.3 Modification To The Standards Of Knowledge For Withholding Agents

Treasury intends to amend the temporary coordination regulations to provide that a direct account holder will be considered documented pursuant to the requirements of §1.1441-1(e)(4)(ii)(A)[5] prior to July 1, 2014, without regard to whether the withholding agent obtains renewal documentation for the account holder on or after July 1, 2014. Therefore, a withholding agent that has documented a direct account holder prior to July 1, 2014, is not required to apply the new reason to know standards relating to a U.S. telephone number or U.S. place of birth until the withholding agent is notified of a change in circumstances with respect to the account holder's foreign status other than renewal documentation or reviews documentation for the account holder that contains a U.S. place of birth.

The temporary coordination regulations also provide a transitional rule to allow a withholding agent that has previously documented the foreign status of a direct account holder for chapters 3 and 61 purposes prior to July 1, 2014, to continue to rely on such documentation without regard to whether the withholding agent has a U.S. telephone number or U.S. place of birth for the account holder. The withholding agent would, however, have reason to know that the documentation is unreliable or incorrect if the withholding agent is notified of a change in circumstances with respect to the account holder's foreign status or the withholding agent reviews documentation for the account holder that contains a U.S. place of birth.

7.4 Revision Of The Definition Of Reasonable Statement

Commentators have noted that the description of a reasonable explanation of foreign status in the final chapter 4 regulations differs from the description provided in the temporary coordination regulations. Treasury and the IRS intend to amend the final chapter 4 regulations to adopt the description of a reasonable explanation of foreign status provided in the temporary coordination regulations, which permit an individual to provide a reasonable explanation that is not limited to an explanation meeting the requirements of §1.1471-3(e)(4)(viii)(A) through (D).

(viii) Reasonable explanation supporting claim of foreign status. A reasonable explanation supporting a claim of foreign status for an individual means a written statement prepared by the individual (or the individual's completion of a checklist provided by the withholding agent), stating that the individual meets one of the requirements of paragraphs (e)(4)(viii)(A) through (D).

(A) The individual certifies that he or she—

- (1) Is a student at a U.S. educational institution and holds the appropriate visa;
- (2) Is a teacher, trainee, or intern at a U.S. educational institution or a participant in an educational or cultural exchange visitor program, and holds the appropriate visa;
- (3) Is a foreign individual assigned to a diplomatic post or a position in a consulate, embassy, or international organization in the United States; or

- (4) Is a spouse or unmarried child under the age of 21 years of one of the persons described in paragraphs (e)(4)(viii)(A) through (C) of this section;
- (B) The individual provides information demonstrating that he or she has not met the substantial presence test set forth in § [301.7701\(b\)-1\(c\)](#) of this chapter (for example, a written statement indicating the number of days present in the United States during the 3-year period that includes the current year);
- (C) The individual certifies that he or she meets the closer connection exception described in § [301.7701\(b\)-2](#), states the country to which the individual has a closer connection, and demonstrates how that closer connection has been established; or
- (D) With respect a payment entitled to a reduced rate of tax under a U.S. income tax treaty, the individual certifies that he or she is treated as a resident of a country other than the United States and is not treated as a U.S. resident or U.S. citizen for purposes of that income tax treaty.

7.5 Limited FFIs And Limited Branches

While Treasury stands ready and willing to negotiate IGAs based on the published models, commentators have expressed practical concerns about the status of FFIs and branches of FFIs in jurisdictions that are slow to engage in IGA negotiations and that have legal restrictions impeding their ability to comply with FATCA, including the conditions for limited FFI or limited branch status under the chapter 4 regulations. Specifically, comments have noted that the restrictions imposed by the final chapter 4 regulations on a limited branch or limited FFI on opening any account that it is required to treat as a U.S. account or as held by a nonparticipating FFI hinders the ability of an FFI to agree to the conditions of limited status due, for example, to requirements under local law to provide individual residents with access to banking services or to the business needs of the FFI to secure funding from another FFI in the same jurisdiction with similar impediments to complying with the requirements of FATCA.

Treasury and the IRS intend to amend the final chapter 4 regulations to permit a limited FFI or limited branch to open U.S. accounts for persons resident in the jurisdiction where the limited branch or limited FFI is located, and accounts for nonparticipating FFIs that are resident in that jurisdiction, provided that the limited FFI or limited branch does not solicit U.S. accounts from persons not resident in, or accounts held by nonparticipating FFIs that are not established in, the jurisdiction where the FFI (or branch) is located and the FFI (or branch) is not used by another FFI in its expanded affiliated group to circumvent the obligations of such other FFI under section 1471. This modification is consistent with the treatment of related entities and branches provided in the model IGAs.

Registration of Limited FFIs

Commentators have also stated that certain jurisdictions are explicitly prohibiting an FFI resident in, or organized under the laws of, the jurisdiction from registering with the IRS and agreeing to any status, including status as a limited FFI, regardless of whether the FFI would otherwise be able to comply with the requirements of limited FFI status.

Treasury and the IRS intend to amend the final chapter 4 regulations to provide that, if an FFI is prohibited under local law from registering as a limited FFI, the prohibition will not prevent the members of its expanded affiliated group from obtaining statuses as participating FFIs or registered deemed-compliant FFIs if the first-mentioned FFI is identified as a limited FFI on the FATCA registration website by a member of the expanded affiliated group that is a U.S. financial institution or an FFI seeking status as a participating FFI (including a reporting Model 2 FFI) or reporting Model 1 FFI.

In order to identify the limited FFI, the member of the expanded affiliated group will be required to register as a Lead FI with respect to the limited FFI and provide the limited FFI's information in Part II of the FATCA registration website. If the Lead FI is prohibited from identifying the limited FFI by its legal

name, it will be sufficient if the Lead FI uses the term “Limited FFI” in place of its name and indicates the FFI’s jurisdiction of residence or organization.

By identifying a limited FFI in the FATCA registration website, the Lead FI is confirming that:

(1) the FFI made a representation to the Lead FI that it will meet the conditions for limited FFI status,

(2) the FFI will notify the Lead FI within 30 days of the date that such FFI ceases to be a limited FFI because it either can no longer comply with the requirements for limited status or failed to comply with these requirements, or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI and will separately register, to the extent required, to obtain its applicable chapter 4 status, and

(3) the Lead FI, if it receives such notification or knows that the limited FFI has not complied with the conditions for limited FFI status or that the limited FFI can comply with the requirements of a participating FFI or deemed-compliant FFI, will, within 90 days of such notification or acquiring such knowledge, update the information on the FATCA registration website accordingly and will no longer be required to act as a Lead FI for the FFI.

In the case in which the FFI can no longer comply or failed to comply with the requirements of limited FFI status, the Lead FI must delete the FFI from Part II of the FATCA registration website and must maintain a record of the date on which the FFI ceased to be a limited FFI and the circumstances of the limited FFI’s non-compliance that will be available to the IRS upon request.

8. Notice 2015-66 Postpones Deadlines

On September 18, 2015 Notice 2015-66 postponed several deadlines via Treasury announcing its intention to amend the regulations under chapter 4 (sections 1471-1474) to extend the period of time that certain transitional rules will apply.⁸ Specifically, the amendments will postpone the following dates:

- (1) the date for when withholding on gross proceeds and foreign passthru payments will begin;
- (2) the use of limited branches and limited foreign financial institutions (limited FFIs); and
- (3) the deadline for a sponsoring entity to register its sponsored entities and re-document such entities with withholding agents.

In addition, in order to reduce compliance burdens on withholding agents that hold collateral as a secured party, this notice announces that Treasury and the IRS intend to amend the regulations under chapter 4 to modify the rules for grandfathered obligations with respect to collateral. Finally, this notice provides information on the exchange of information by Model 1 IGA jurisdictions with respect to 2014.

8.1 Extension of Dates for when Withholding Begins for Payments of Gross Proceeds and Passthru Payments

Many U.S. and foreign financial institutions, foreign governments, Treasury, the IRS, and other stakeholders dedicated substantial resources to implementing FATCA withholding on withholdable payments which (subject to certain exceptions) began on July 1, 2014, as well as for the first U.S. account reporting under FATCA which was due for certain FFIs starting in March 2015. At the same time, 112 jurisdictions are now treated as if they have an IGA in effect, which allows for the information reporting goals of FATCA to be satisfied for FFIs covered by such IGAs.

⁸ Available at <https://www.irs.gov/pub/irs-drop/n-15-66.pdf> (accessed October 31, 2015).

In order to continue to facilitate an orderly phase-in of FATCA withholding, Treasury announced that it intends to amend the chapter 4 regulations under section 1473 to extend the start date of gross proceeds withholding by providing that the definition of the term withholdable payment means any payment of U.S. source FDAP income, and for sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income.

Additionally, Treasury and the IRS intend to amend the regulations under section 1471 to extend the start date of withholding on foreign passthru payments to provide that a participating FFI is not required to withhold tax on a foreign passthru payment made to a recalcitrant account holder or a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the Federal Register of final regulations defining the term foreign passthru payment.

8.2 Extension of Limited Branch and Limited FFI Statuses

Currently, 112 jurisdictions are treated as if they have an IGA in effect, which highlights the overwhelming support of FATCA partner jurisdictions in implementing the information reporting goals of FATCA. FFIs and other stakeholders continue to express strong support for IGAs as a way to facilitate effective and efficient FATCA implementation while avoiding conflicts with local law. While Treasury remains open to entering into IGA discussions based on the published models, there may be jurisdictions that have not been able or willing to agree to an IGA and that continue to impose legal restrictions that prevent FFIs resident or organized there, or branches located there, from complying with the terms of an FFI agreement. If an FFI that is not covered by an IGA has a branch located in, or an FFI affiliate subject to the laws of, a jurisdiction that prohibits compliance with the terms of an FFI agreement, that FFI will no longer be able to obtain or maintain status as a participating or deemed-compliant FFI once limited branch and limited FFI status expire.

To provide FFIs and other stakeholders additional time to determine whether to continue operating in jurisdictions where limited branches or limited FFIs exist, Treasury and the IRS intend to amend the regulations under section 1471 to provide that the availability of limited branch and limited FFI statuses will terminate on January 1, 2017. A limited FFI or limited branch that becomes able to comply with the terms of the FFI agreement or becomes a participating FFI or deemed-compliant FFI pursuant to an applicable IGA should amend its registration to reflect its modified status.

FFIs that continue to operate after December 31, 2016, in jurisdictions where they cannot comply with the terms of an FFI agreement due to local law will jeopardize the chapter 4 status of participating FFIs and registered deemed-compliant FFIs (other than FFIs covered by an IGA) in the group. Branches that continue to operate after December 31, 2016, in jurisdictions where they cannot comply with the terms of an FFI agreement due to local law will jeopardize the participating FFI status of the FFI of which the branch is part (as well as jeopardize any branches of the FFI that have participating FFI status under the FFI agreement), subject to the terms of an applicable IGA.

After December 31, 2015, all limited FFI and limited branch registrations will be placed in “registration incomplete” status on their online FATCA account. Limited FFIs and limited branches that seek to continue such status during the 2016 calendar year will be required to edit and resubmit their registrations after December 31, 2015, on the FATCA registration website.

8.3 Extension of Time to Register Sponsored Entities and Extension of Reliance on Sponsoring Entity GIINs

As previewed in Notice 2013-69 (2013-46 I.R.B. 503), the IRS is developing a streamlined process for sponsoring entities to register their sponsored entities on the FATCA registration website. The IRS anticipates that this registration process will be available in the coming months and intends to update the FATCA registration user guide to include this process. In order to provide sufficient time for sponsored entity registration, Treasury and the IRS intend to amend the regulations under sections 1471 and 1472 to provide that sponsoring entities must register their sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs by January 1, 2017. Beginning on such date, sponsoring entities must use the GIIN of the sponsored entity when reporting with respect to the sponsored entity on Form 8966 (FATCA Report) and must provide the GIIN to withholding agents making payments to the sponsored entity.

Sponsored investment entities and sponsored controlled foreign corporations covered by Annex II of a Model 1 IGA will maintain their deemed-compliant status as long as they are registered by the sponsoring entity on or before the later of December 31, 2016, and the date that is 90 days after a U.S. reportable account is first identified. Sponsored investment entities and sponsored controlled foreign corporations covered by Annex II of a Model 2 IGA will maintain their deemed-compliant status as long as they are registered by the sponsoring entity on or before December 31, 2016.

In addition, Treasury and the IRS intend to amend the regulations under section 1471 to provide that withholding agents can continue to rely on withholding certificates from sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs that have only the sponsoring entity's GIIN for payments made prior to January 1, 2017. For a payment made on or after January 1, 2017, a withholding agent will be required to obtain the GIIN of a payee that is a sponsored registered deemed-compliant FFI or a sponsored direct reporting NFFE by obtaining either:

- (1) a withholding certificate from the payee that includes its GIIN, or
- (2) if the withholding agent already has on file a withholding certificate for the payee that includes the GIIN of the sponsoring entity, oral or written confirmation of the payee's GIIN (such as by e-mail).

If a withholding agent obtains oral or written confirmation of the payee's GIIN, it will be required to retain a record of such information, which will become part of the withholding certificate. Whether the withholding agent receives the GIIN through a new withholding certificate, or by oral or written confirmation, the withholding agent will have 90 days from the date it obtains the GIIN to verify its accuracy against the published IRS FFI list. Because withholding agents will be required to obtain the GIIN of each sponsored entity for payments made after December 31, 2016, sponsoring entities should consider registering to obtain GIINs well in advance of January 1, 2017, in order to give withholding agents sufficient time to complete this requirement (and thereby avoid being withheld upon).

8.4 Timing of Exchange of 2014 Information under a Model 1 IGA

8.4.1 Model 1 IGAs for which the Obligation to Exchange Has Not Taken Effect

Many partner jurisdictions that have signed IGAs or reached an agreement in substance on the text of an IGA continue to work through their internal procedures to bring the IGA into force. Pursuant to its authority under section 1471(b)(2)(B), and consistent with Announcement 2014-38, for Model 1 IGAs that have not yet entered into force on September 30, 2015, Treasury announced that it intends to continue

to treat FFIs covered by the IGA as complying with, and not subject to withholding under, FATCA so long as the partner jurisdiction continues to demonstrate firm resolve to bring the IGA into force and any information that would have been reportable under the IGA on September 30, 2015, is exchanged by September 30, 2016, together with any information that is reportable under the IGA on September 30, 2016.

8.4.2 Model 1 IGAs for which the Obligation to Exchange Is in Effect for Model 1B

IGA jurisdictions that have an IGA in force pursuant to Article 10(1) or Article 12(1) (as applicable) of the IGA, and for Model 1A IGA jurisdictions for which the obligation to exchange information has taken effect pursuant to Articles 3(9) and 10(1) of the IGA, Article 3(5) of the IGA requires the partner jurisdiction to exchange information on U.S. reportable accounts with respect to 2014 by September 30, 2015. Treasury and the IRS understand that partner jurisdictions are continuing to develop and implement the systems needed for automatic information exchange and may not have those systems in place by September 30, 2015. In addition, several partner jurisdictions are in the process of enacting legislation to implement their IGAs, without which they are not able to exchange information with the United States.

Consistent with treating 2014 and 2015 as a transition period, Treasury and the IRS will treat FFIs covered by an IGA as complying with, and not subject to withholding under, FATCA even if the relevant partner jurisdiction has not exchanged 2014 information by September 30, 2015, as long as the partner jurisdiction notifies the U.S. competent authority before September 30, 2015, of the delay and provides assurance that the jurisdiction is making good faith efforts to exchange the information as soon as possible. This notice does not affect the timing of when FFIs should report information to a partner jurisdiction, which remains governed by local law.

8.5 Treatment of Collateral Under the Grandfathered Obligation Rule

8.5.1 Modifications to Pro Rata Rule for Pooled Collateral

In order to ease administrative burdens when collateral secures both grandfathered obligations and obligations that are not grandfathered, the secured party should be permitted either to withhold on all collateral or to apply the pro rata approach with respect to such collateral. Therefore, Treasury and the IRS intend to amend §1.1471-2(b)(2)(i)(A)(3) to provide that the pro rata rule is not mandatory.

8.5.2 Substitute Payments Made with Respect to a Grandfathered Obligation

A substitute payment made with respect to a grandfathered obligation that has been posted as collateral should also be treated as a payment made under a grandfathered obligation, and therefore not subject to withholding under section 1471 or section 1472. Therefore, Treasury and the IRS intend to amend the definition of grandfathered obligation in §1.1471-2(b)(2)(i)(A) to include any obligation that gives rise to substitute payments and that is created as a result of the payee posting collateral that is otherwise treated as a grandfathered obligation under §1.1471-2(b)(2)(i)(A)(1).

9. FATCA FFI List Analysis by Country and by IGA from June through January 2015

The June 2, 2014 GIIN list contained 77,353 registrations from 205 countries and jurisdictions.²¹³ Of the June registrations, 74% were from Model 1 IGAs that had been either signed or recognized as agreed in substance by the IRS. Approximately 20 percent of these total registrations were from Cayman Islands firms, and 37% of the total from the U.K. and its Crown dependencies and overseas territories.

The November 2014 list saw a jump in registration, led by the United Kingdom, achieving a total of 116,104 FFIs and branch registrations.²¹⁸ 43% of all registered GIIN are from the U.K. and her Crown Dependencies and Overseas Territories. The final GIIN list released before submission for publication, December's, grew by only 6,000 registrations, to 122,881, of which only 6,094 were from non-IGA countries. Such a stunted growth in FFI registration is foreboding of the remaining, significant compliance challenges.

A year later, the November 1, 2015 GIIN list contains 177,147 registrations from 226 countries and jurisdictions.⁹ Of these November 2015 registrations 84 percent were from Model 1 IGAs that had been either signed or recognized as agreed in substance by the IRS. Approximately 19% (33,348) of these total registrations of 177,147 were from Cayman Islands firms, and 45% of the total from the U.K. and its Crown dependencies and overseas territories.

Origin	Registrations (November 1, 2014)	Registrations (November 1, 2015)
Model 1A IGA	66,619	107,048
Model 1B IGA	25,847	43,134
Model 2 IGA	16,902	19,099
U.S. & U.S. Territories	777	998
Non-IGA	5,959	6,868
Total	116,104	177,147

The difference from the number of LEI issued versus GIINs issued is interesting because theoretically it should be relatively close to the same number of registrations. As of September 19, 2015, over 393,872 entities from 189 countries had obtained LEIs, twice as many as GIINs as of November 1, 2015.

The IRS stated that "... the full FFI list is expected to be less than 500,000 records."²¹⁹ Based on upon industry discussions and a review of industry literature of financial institution compliance officers, the Big 4, and upon revenue authority estimates, it is reasonable to state that approximately 500,000 entities are impacted by Chapter 4 withholding and need to register for a GIIN.

Many U.K. financial industry compliance officers, agree with the HMRC's estimate of 75,000 entities

²¹³ See <http://apps.irs.gov/app/fatcaFfiList/flu.jsf> (accessed November 9, 2014). For a detailed June analysis, see <http://profwilliambyrnes.com/2014/06/25/5-new-igas-with-3-business-days-to-go-until-30-fatca-withholding-on-remaining-167-countries-begins/> (accessed November 9, 2014).

²¹⁸ This is the last GIIN list available at the time of submission of November 10, 2014 of this 3rd edition for publication. See <http://lawprofessors.typepad.com/intfinlaw/2014/11/novembers-published-fatca-giin-list-analysis.html> (accessed November 9, 2014).

⁹ See <http://apps.irs.gov/app/fatcaFfiList/flu.jsf> (accessed November 1, 2015).

²¹⁹ IRS FFI List FAQs, FFI List Q7. Available at <http://www.irs.gov/Businesses/Corporations/IRS-FFI-List-FAQs> (accessed November 9, 2014).

requiring registration for a GIIN. Thus, it is reasonable to infer that as of this webinar of November 12, 2015, approximately two-thirds of U.K. FFIs still must register to obtain a GIIN. Based on the mere increase of FFI registrations of approximately 60,000 to 177,147 since November 1, 2014 and upon industry discussions, upon the IRS and U.K. revenue authority estimates, it is reasonable to conclude that global FATCA registration compliance is at the time of publication less than 30 percent.

But for the Cayman Islands (33,348), FATCA registration remains low in nearly every country relative to the number of potential entities for registration. Only 5,047 Swiss entities, up from 4,586 last year, have registered, which when contrasted to Cayman Islands and the U.K. seems measly.

The BRIC countries have picked up FFI registration steam over the past year. India and China are well behind Brazil though with only 400 FFIs registering from China moving it from 609 to 1,082, and 600 additional FFI registrations from India moving it from 393 to 910. Brazil experienced the largest amount of registrations, jumping approximately 3,000 from 2,841 to 5,709, whereas less than 400 Russian entities registered (from 961 to 1,306).

NAFTA has not fared better than the BRIC block given the closer relationship to the U.S. Canada's November 1 GIIN list of 4,549 represents an additional 1,500 registrations since last year (3,043), whereas Mexico's 80 additional registrations since last year moved it from only 522 FATCA registered institutions to 605. Only 6,868 of these total 177,147 registrations are from the 131 non-IGA countries.

FATCA IGA Scenarios	Nov 2015 GIINs	Oct 2015 GIINs	Sept 2015 GIINs	Jurisdictions
Model 1A IGA	107,048	106,151	104,755	90
Model 1B IGA	43,134	42,663	42,041	8
Model 2 IGA	19,099	18,978	18,884	14
No IGA	6,868	6,756	6,676	131
US	924	922	911	1
US Territory	74	73	79	6
Total	177,147	175,543	173,346	250

Breaking down the 177,147 current GIIN registrations by region:

- EMEA 93,128 (53 percent)
- AMER 60,425 (34 percent)
- APAC 22,633 (13 percent)
- "Other" 961 (1 percent)

It would appear that APAC, the Middle East and Africa are underrepresented in terms of GIIN registrations. BRIC Countries represent 5 percent of the total and NAFTA represents 3 percent of the total. The 34 OECD Members represent 47 percent of the overall total.

The number of jurisdictions treated as having an IGA place in accordance with US Treasury rules remains at 112.

Only 6,868 of these 177,147 registrations are from the 131 countries that have not had an IGA announced with the U.S. Recipients of withholdable payments in these countries and jurisdictions have thus borne

the 30 percent withholding of Chapter 4. Albeit for the many countries and jurisdictions that do not have a double tax agreement with the U.S., and considering the phase in applicability of Chapter 4 withholding upon grandfathered obligations and upon gross proceeds, the actual Chapter 4 withholding has little impact at this moment. When Chapter 4 applies to all the portfolio interest of currently grandfathered obligations and upon gross proceeds, neither upon which Chapter 3 withholding applies, then presumably FFI GIIN registration and FATCA compliance will sharply jump. Some analysts forecast a divestment from the U.S. by these countries. But even if that case scenario comes to pass, the impact of such divestment relative to the size of the U.S. foreign direct investment (“FDI”) based upon U.S. liquidity, perceived stability, and investor protection, will likely be *de minimis*.

Consequently, global FATCA registration compliance is, as of November 1, 2015, only approximately 20 percent. But for the Cayman Islands (33,348), FATCA registration is low in every country relative to the number of potential entities for registration. Only 5,047 Swiss entities have registered this year, up from 4,586 (November 1, 2014), which when contrasted to Cayman Islands and the U.K. seems measly.

GIIN List (2014)	Total Registrations
June	77,354
July	82,994
August	95,239
September	99,861
October	104,344
November	116,104
December	122,881
January 2015	147,043
February	153,797
March	156,276
April	160,010
May	162,610
June	165,461
July	168,239
August	171,109
September	173,346
October	175,543
November	177,147

9.1 What is the Definition of Financial Institution?

The definition of ‘financial institution’ is very broad. Thus, entities and firms that may not traditionally (such as a banking enterprise or investment fund) be considered a financial institution are subject to FATCA registration and reporting – such as trust companies, certain insurance companies, holding companies, treasury centers. Moreover, the industry, especially the trust industry, is experiencing some

confusion over which entities must register as an FFI, and which do not need to register, or are instead an NFFE.

FFIs are primarily banking and financial institutions, as well as certain investment entities, which are defined by FATCA and separated into three broad categories: (i) primarily traditional banks that accept deposits and perform related banking services in their ordinary course of business, (ii) entities a substantial part of the business of which involves holding financial assets for others, and (iii) entities engaged in the business of investing, reinvesting, and trading in securities, partnership interests, commodities, derivatives, and other passive financial assets.

The first category of FFI describes traditional banks. This FFI is defined as a financial institution that accepts deposits in the ordinary course of a banking or similar business. An entity is engaged in a “banking or similar business” if the entity:

- accepts deposits or similar investments of funds;
- makes personal, mortgage, industrial, or other loans;
- provides credit extension;
- purchases, sells, discounts, or negotiates account receivables, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- issues letters of credit and negotiates drafts drawn on accounts;
- provides trust or fiduciary services;
- finances foreign exchange transactions; or
- enters into, purchases, or disposes of finance leases or leased assets.

The second category of FFI captures “asset holding” companies. This type of FFI holds financial assets for the account of others as a “substantial” portion of its business. An entity is an asset holding company if more than 20 percent of its gross income is from holding financial assets and related financial services during a three-year period ending on December 31 of the year preceding that in which the determination is made (or the period of the entity’s existence, if shorter).

The final category of FFI captures “investment funds”, and is broadly defined. Thus, this category includes certain securitization vehicles, certain pension funds, and can potentially include certain other private structures that hold investments such as trusts and underlying holding companies. This category of FFI is primarily engaged in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including futures or forward contracts or options). An investment entity is primarily engaged in one or more of the following activities:

- trading in money market instruments, foreign currency, foreign exchange, interest rates, index instruments, transferable securities, or commodity futures;
- managing individual or collective portfolios;
- investing, administering or managing funds, money, or financial assets on behalf of others; or
- functioning as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle.

An entity is primarily engaged in these activities if more than 50% of its gross income is from such activities during a three-year period.

Example of an Investment Advisor. A Fund Manager is an investment entity that organizes and manages various types of funds including Fund A. Fund A invests primarily in equities. An Investment Advisor (a foreign entity) is hired by the Fund Manager to advise and provide discretionary management of a portion of the financial assets held by Fund A. More than 50% of the Investment Advisor’s gross income was earned for the last three years from providing similar services. The Investment Advisor is an investment entity as described in this section and an FFI as well since it primarily conducts a business of managing financial assets on behalf of clients.

Example of a Trust managed by a Trust Company. On January 1, 2013, a Trust (a nongrantor foreign trust) was formed by X (an individual) for the benefit of his or her children. The Trustee (a Trust Company) was appointed by X to act as the Trustee. A Trust Company is an FFI. Under the terms of the Trust Instrument, the Trust Company manages the assets of the Trust as Trustee for the benefit of X's children. Because the Trust is managed by a FFI (the Trust Company), the Trust is an investment entity, and an FFI.

Trust compliance and FATCA expert [Peter Cotorceanu](#) (and [Lexis FATCA Compliance Guide](#) author) has raised four interesting issues with the last example, being:

1. Is the “Managed By” test met if some but not all a trust managers are depository institutions, custodial institutions, specified insurance companies, or Type A IEs, e.g., a trust with a commercial trust company serving a co-trustee with an individual?
2. Is the “Managed By” test met if some but not all of a trust’s investments are managed by depository institutions, custodial institutions, specified insurance companies, or IEs, e.g., a trust with one account managed by a bank and other accounts managed by an individual?
3. How is a trust classified if it meets the “Managed By” test for only part of a year, e.g., because a commercial trust company is replaced by an individual as trustee, or a bank is replaced by an individual as asset manager?
4. Does a trust holding, its only asset the share of an underlying company (“UC”), meet the “Managed By” test if the UC’s assets are professionally managed but the trust is not (i.e., the trustee is an individual)?

10. Update on Globalization of FATCA (“GATCA”) by Common Reporting Standards (“CRS”)

The AEOI and its component, the Common Reporting Standard (CRS), are often referred to (informally) as “GATCA” (Global FATCA). The Standard and Guidance are now published. More than 90 jurisdictions have signed up to the AEOI or committed to sign up. Interestingly, the USA is the only member of the OECD neither to have signed, nor committed to sign up to the AEOI. According to the [The Tax Justice Network](#), the USA is the 6th largest Financial Secrecy jurisdiction. The same source [reports that](#), “The U.S. protects itself from foreign tax havens, while remaining a tax haven for foreigners.”

G20 governments have mandated the OECD-hosted [Global Forum on Transparency and Exchange of Information for Tax Purposes](#) to monitor and review implementation of the standard. More than 60 countries and jurisdictions of the 121 [Global Forum members](#) have now committed to early adoption of the standard, and additional [members](#) are expected to join this group in the coming months. See the link for [Country Peer Reviews](#) and the [Global Forum list of ratings chart](#).

On October 15, 2015 the OECD launched its new portal on Automatic Exchange of Information (AEOI).⁹ It provides a comprehensive overview of the work of the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes in the area of the automatic exchange of information, in particular with respect to the Standard for Automatic Exchange of Financial Account Information in Tax Matters (also referred to as the Common Reporting Standard or CRS). This new site equips tax administrations and financial institutions with the necessary information and legal, administrative and IT tools to implement this new Standard.

The OECD CRS Portal provides an overview of forum members’ jurisdictions domestic rules governing the issuance, structure, use and validity of Tax Identification Numbers (“TIN”) or their functional equivalents. The jurisdiction-specific information the TINs is split into a section for individuals and a section for entities. Each jurisdiction has provided the OECD Secretariat with input on its current rules in

⁹ Available at <http://www.oecd.org/tax/automatic-exchange/> (accessed October 31, 2015).

relation to the issuance, structure, use and validity of its TINs. The Global Forum reports that it has made significant strides in 2015 towards a major increase in tax transparency have been made since last year.

Over 96 members of the Global Forum on Transparency and Exchange of Information for Tax Purposes have committed to automatically exchange information, beginning in 2017 or 2018, and as of November 4, 2015 90 countries have signed the OECD Multilateral Convention on Mutual Assistance in Tax Matters. With these commitments, all major financial centers are now part of the efforts to enhance international tax cooperation. Global Forum members resolved to intensify the ongoing efforts to ensure that developing countries are able to fully benefit from participation in the advances in transparency.

Through its [Africa Initiative](#), it will continue to focus on greater engagement with African countries and also work with other developing countries to build capacity to improve cross border taxation through effective use of exchange of information, both on request, and automatic.

The timely and effective implementation of these commitments was a key theme during the October 29-30 meeting of the Global Forum held in Bridgetown, Barbados which brought together delegates from the Global Forum's 128 member jurisdictions, as well as representatives of international organizations. Underscoring the continued importance of the work on the standard of exchange of information on request, the Global Forum adopted changes in the standard to include a requirement for beneficial ownership for all legal entities for its new round of reviews scheduled to be launched in 2016.

The Global Forum has proposed a real-time monitoring process to keep track of the delivery of the commitments made and to identify areas where support is needed, as well as started to assess the confidentiality standards and data safeguards in all the committed jurisdictions. However, there does not appear to be any jurisdiction with cyber-secure technology or trained personnel to support such a complex process. The Global Forum will continue work in the areas of monitoring, implementation assistance, and reviews.

As part of completion of the ongoing round of peer reviews, 16 new peer review reports were published in late 2015. The Phase 1 reports on [Azerbaijan](#), [Gabon](#), [Romania](#) and [Senegal](#) which assessed their legal and regulatory frameworks concluded that these were in place to enable them to move to Phase 2 of the review process, which will assess exchange of information practices. Five Phase 2 reviews of exchange of information practices were also published concluding that the overall compliance rating assigned for [Colombia](#) is "Compliant", for [Latvia](#) and [Liechtenstein](#) "Largely Compliant," and for [Costa Rica](#) and [Samoa](#) "Partially Compliant." The Global Forum has now completed 215 peer reviews and assigned [compliance ratings](#) to 86 jurisdictions that have undergone Phase 2 reviews.

Jurisdictions continue to request supplementary reviews to demonstrate changes made following recommendations of the Global Forum. Supplementary reports of three jurisdictions, [Brunei Darussalam](#), [Dominica](#) and [Panama](#), that were originally blocked from Phase 2 concluded that they are now ready to move to the next stage. Supplementary reports were also approved for [Cyprus](#), [Luxembourg](#) and the [Seychelles](#) that had been previously been rated as Non-Compliant and in each case, following significant changes to their legal frameworks or practices, the new overall rating of Largely Compliant was assigned.

10.1 Common Reporting and Due Diligence Standards ("CRS")

February 13 the OECD released the [Standard for Automatic Exchange of Financial Account Information Common Reporting Standard](#).

The CRS calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions. Part I of the report gives an overview of the standard. Part II contains the text of the Model Competent Authority Agreement (CAA) and the Common Reporting and Due Diligence Standards (CRS) that together make up the standard.

Presenting the new standard back in February 2014, OECD Secretary-General Angel Gurría said: “This is a real game changer. Globalisation of the world’s financial system has made it increasingly simple for people to make, hold and manage investments outside their country of residence. This new standard on automatic exchange of information will ramp up international tax co-operation, putting governments back on a more even footing as they seek to protect the integrity of their tax systems and fight tax evasion.”

10.2 What Are The Main Differences Between The CRS And FATCA?

The CRS consists of a fully reciprocal automatic exchange system from which US specificities have been removed. For instance, it is based on residence and unlike FATCA does not refer to citizenship. Terms, concepts and approaches have been standardized allowing countries to use the system without having to negotiate individual Annexes.

Unlike FATCA the CRS does not provide for thresholds for pre-existing individual accounts, but it includes a residence address test building on the [EU savings directive](#). The CRS also provides for a simplified indicia search for such accounts. Finally, it has special rules dealing with certain investment entities where they are based in jurisdictions that do not participate in the automatic exchange under the standard.

10.3 Single Global Standard For Automatic Exchange (“GATCA”)

Under GATCA jurisdictions obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. Part I of this report gives an overview of the standard. Part II contains the text of the Model Competent Authority Agreement (CAA) and the Common Reporting and Due Diligence Standards (CRS) that together make up the standard.

The Report sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

To prevent taxpayers from circumventing the CRS it is specifically designed with a broad scope across three dimensions:

1. The financial information to be reported with respect to reportable accounts includes all types of investment income (including interest, dividends, income from certain insurance contracts and other similar types of income) but also account balances and sales proceeds from financial assets.
2. The financial institutions that are required to report under the CRS do not only include banks and custodians but also other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies.
3. Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.

The CRS also describes the due diligence procedures that must be followed by financial institutions to identify reportable accounts.

11. EU Council Announces March 2014 Adoption of Expanded EU Savings Directive

On Saturday, March 22, 2014 the EU Council's General Secretariat [announced](#) that it will adopt major amendments to the EU Directive on taxation of savings income. That Monday, March 24, the EU Commission adopted amendments to expand the application of the EU Savings Directive. The amendments address the current loopholes, such as application to trusts, to foundations, and to investment income that is comparable to interest income. By January 2016 each EU State must adopt national legislation enacting the directive within its system, and implement the directive by January 1, 2017. See the [EU Commission's Presentation Powerpoint](#).

11.1 Brief Background on EU Savings Directive

The liberalization of capital markets and the free movement of capital within the EU borders revealed how important it was to establish cooperation with a view to preventing, in the direct taxation area, fraud and evasion linked to cross-border financial investments. The problem with taxpayers moving their investments to Member States which did not impose taxation at source while the taxpayers simultaneously under-reported to their respective State of residence (or not reporting at all) the income earned. The [EU Savings Directive](#) was adopted to address this situation, coming into effect in 2005.

The mechanism of the Directive works by imposing an obligation to any paying agent in an EU Member State which makes a payment to an individual resident in the other Member State which is the beneficial owner of the income, to report that payment of interest to the competent tax authorities of the Member State in which the paying agent is established. The competent tax authorities of that (source) State in turn transfer the information collected to the competent tax authority of the residence of the beneficial owner. Based on the information received it is possible for the State of residence of the beneficial owner to verify if the amount is declared for tax purposes and to tax the corresponding income.

11.2 Loopholes Reported in 2008

In his 2004 *Report on the Regulatory, Competitive, Economic and Socio-Economic Impact of the European Union Code of Conduct on Business Taxation and Tax Savings Directive* to the United Kingdom Foreign and Commonwealth Office and the Overseas Territories of The Virgin Islands (British), Turks & Caicos Islands, Anguilla and Montserrat, Professor William Byrnes undertook an in-depth analysis of the EU Savings Directive identifying several loopholes that would require later amendments for it to achieve its objectives.

The Savings Directive loopholes include:

- Territorial scope: It is limited to intra-community situations in which a paying agent from one Member State pays to an individual resident in another Member State. It does not apply to payments from outside the EU, i.e. when the paying agent is located in a third (non-EU) State or to payments to beneficial owners who reside in third States.

- Personal scope: it does not apply to persons other than individuals, in particular payments made to legal entities. This limitation provides individuals with opportunities to circumvent the Savings Directive by using an interposed legal person or arrangement.
- Material scope: it does not cover other forms of savings like insurance products, pensions, some tailored investment funds, return on derivative contracts, structured products, etc.

These and other loopholes have been formally reported by the European Commission since 2008. The main findings of a [report produced by the Commission](#) identified as a major problem lack of “consistent treatment of other comparable situations”. Pursuing this aim of consistency requires that interest payments obtained by an individual through intermediate vehicles are consistently put on an equal footing with interest payments directly received by the individual. This consistency of coverage is required not only to ensure the effectiveness of the Directive, but also compliance with the rules of the internal market and fair competition between comparable financial products and structures.

A [proposal was submitted to the Council](#) which aimed at extending the scope of the Directive.

11.3 European Council Announces Amended Savings Directive Adoption in March 2014

On March 22, 2014 the European Council reported in a [press release](#) that (emphasis added):

The European Council welcomes the Commission’s report on the state of play of negotiations on savings taxation with European third countries (Switzerland, Liechtenstein, Monaco, Andorra and San Marino) and calls on those countries to commit fully to implementing the new single global standard for automatic exchange of information, developed by the OECD and endorsed by the G20, and to the early adopters initiative.

The European Council calls on the Commission to carry forth the negotiations with those countries swiftly with a view to concluding them by the end of the year, and invites the Commission to report on the state of play at its December meeting. If sufficient progress is not made, the Commission’s report should explore possible options to ensure compliance with the new global standard.

The European Council invites the Council to ensure that, with the adoption of the Directive on Administrative Cooperation by the end of 2014, EU law is fully aligned with the new global standard.

12. US RECIPROCITY FOR IGA COUNTRIES ?

12.1 What About the US’ As a Haven for Foreign Taxpayers?

The US has a highly successful international financial service industry that is important to the US economy, exemplified by, firstly, the international financial centers such as Miami and New York of over a half trillion dollars of foreign deposits of high net wealth individuals whom many experts allege are not tax and exchange control compliant in their home countries. Secondly, over 900,000 Delaware companies is the second to Hong Kong, and ahead of British Virgin Islands (BVI is actually third in the world). Thirdly, the US territories' offshore regimes, like US Virgin Islands, reduce the effective US corporate and income tax rates below 3.5 percent.

In 2011, 133,297 businesses incorporated in Delaware. Delaware has more corporate entities than people, reports Leslie Wayne of the New York Times — 945,326 to 897,934. These absentee corporate residents account for a quarter of Delaware’s total budget, roughly \$860 million in taxes and fees in 2011. Moreover, the economic spill over impact for Delaware includes substantial employment and professional fees to Delaware business participating in the incorporation and advisory industry. Delaware

is just behind China's Hong Kong in number of annual incorporations and overall incorporations, and well ahead of the UK's Virgin Islands (British) both in terms of offshore business and the dollars earned from that offshore business. The State of Delaware does not maintain a corporate registry of beneficial owners.

12.2 New FinCEN CDD Requirements

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued a [Notice of Proposed Rulemaking \(NPRM\)](#) to amend existing Bank Secrecy Act (BSA) regulations to help prevent the use of anonymous companies to engage in or launder the proceeds of illegal activity in the U.S. financial sector. See Proposed Rules and New Beneficial Ownership Form (Appendix A) [here](#).

The proposed rule would clarify and strengthen customer due diligence obligations of banks and other financial institutions (including brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities).

The proposed amendments would ***add a new requirement that these entities know and verify the identities of the real people (also known as beneficial owners) who own, control, and profit from the companies they service.***

The United States has collaborated with foreign governments to enter into intergovernmental agreements that facilitate the effective and efficient implementation of these requirements. Pursuant to many of these agreements, the United States has committed to pursuing reciprocity with respect to collecting and reporting to the authorities of the FATCA partner information on the U.S. accounts of residents of the FATCA partner. A general requirement for U.S. financial institutions to obtain beneficial ownership information for AML purposes advances this commitment, and puts the United States in a better position to work with foreign governments to combat offshore tax evasion and other financial crimes.

The new rule will facilitate reporting and investigations in support of tax compliance, and advancing international commitments made to foreign counterparts in connection with the provisions commonly known as the Foreign Account Tax Compliance Act (FATCA).

12.2.1 Required Due Diligence by US Financial Institutions

The rulemaking clarifies that customer due diligence includes four core elements:

1. identifying and verifying the identity of customers;
2. identifying and verifying the beneficial owners of legal entity customers;
3. understanding the nature and purpose of customer relationships; and
4. conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.

The proposed requirement to identify and verify the identity of beneficial owners is addressed through the proposal of a new requirement for covered financial institutions to collect beneficial ownership in a standardized format.

Those financial institutions will have to identify and verify any individual who owns 25% or more of a legal entity, and an individual who controls the legal entity.

12.2.2 Determining Beneficial Ownership

The second element of CDD requires financial institutions to identify and verify the beneficial owners of legal entity customers. FinCEN proposes a new requirement that financial institutions identify the natural persons who are beneficial owners of legal entity customers, subject to certain exemptions.

The definition of “beneficial owner” proposed herein requires that the person identified as a beneficial owner be a natural person (as opposed to another legal entity). A financial institution must satisfy this requirement by obtaining at the time a new account is opened a standard certification form (Appendix A of Proposed Rules) directly from the individual opening the new account on behalf of the legal entity customer.

Financial institutions would be required to verify the identity of beneficial owners consistent with their existing CIP practices. However, FinCEN is not proposing to require that financial institutions verify that the natural persons identified on the form are in fact the beneficial owners. In other words, the requirement focuses on verifying the identity of the beneficial owners, but does not require the verification of their status as beneficial owners. This proposed requirement states minimum standards.

In order to identify the beneficial owner, a covered financial institution must obtain a certification from the individual opening the account on behalf of the legal entity customer (at the time of account opening) in the form of Appendix A. The form requires the individual opening the account on behalf of the legal entity customer to identify the beneficial owner(s) of the legal entity customer by providing the beneficial owner’s:

- name,
- date of birth,
- address and
- social security number (for U.S. persons).

This information is consistent with the information required under the CIP rules for identifying customers that are natural persons. The form also requires the individual opening the account on behalf of the legal entity customer to certify, to the best of his or her knowledge, that the information provided on the form is complete and correct. Obtaining a signed and completed form from the individual opening the account on behalf of the legal entity customer shall satisfy the requirement to identify the beneficial owners.

This section also requires financial institutions to verify the identity of the individuals identified as beneficial owners on the certification form. The procedures for verification are to be identical to the procedures applicable to an individual opening an account under the existing CIP rules.

Accordingly, the financial institution must verify a beneficial owner’s identity using the information provided on the certification form. For foreign persons, the form requires –

- a passport number and country of issuance, or
- other similar identification number (name, date of birth, address, and social security number (for U.S. persons), etc.)

according to the same documentary and non-documentary methods the financial institution may use in connection with its customer identification program (to the extent applicable to customers that are individuals), within a reasonable time after the account is opened.

A financial institution must also include procedures for responding to circumstances in which it cannot form a reasonable belief that it knows the true identity of the beneficial owner, as described under the CIP rules.

12.2.3 Definition of Beneficial Owner

The proposed definition of “beneficial owner” includes two independent prongs:

- (a) an ownership prong and
- (b) a control prong.

A covered financial institution must identify each individual under the ownership prong (i.e., each individual who owns 25% or more of the equity interests), in addition to one individual for the control prong (i.e., any individual with significant managerial control).

If no individual owns 25% or more of the equity interests, then the financial institution may identify a beneficial owner under the control prong only. If appropriate, the same individual(s) may be identified under both criteria.

12.2.4 Purpose of New CDD Rules

Clarifying and strengthening CDD requirements for U.S. financial institutions, including an obligation to identify beneficial owners, advances the purposes of the BSA by:

- Enhancing the availability to law enforcement, as well as to the federal functional regulators and SROs, of beneficial ownership information of legal entity customers obtained by U.S. financial institutions, which assists law enforcement financial investigations and regulatory examinations and investigations;
- Increasing the ability of financial institutions, law enforcement, and the intelligence community to identify the assets and accounts of terrorist organizations, money launderers, drug kingpins, weapons of mass destruction proliferators, and other national security threats, which strengthens compliance with sanctions programs designed to undercut financing and support for such persons;
- Helping financial institutions assess and mitigate risk, and comply with all existing legal requirements, including the BSA and related authorities;
- Facilitating reporting and investigations in support of tax compliance, and advancing international commitments made to foreign counterparts in connection with the provisions commonly known as the Foreign Account Tax Compliance Act (FATCA); and
- Promoting consistency in implementing and enforcing CDD regulatory expectations across and within financial sectors.

12.2.5 Cost of New Compliance?

FinCEN believes that there are approximately eight million such accounts opened annually by covered financial institutions. Based on the total number of covered financial institutions, this would result in each covered financial institution opening approximately 368 such accounts per year, or 1.5 per day.

Estimating an average time for a covered financial institution to receive the certification and verify the information of 20 minutes and an average cost of \$20 per hour, this results in a cost of approximately \$54 million.