The Foreign Account Tax Compliance Act and Notice 2010-60

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On March 18, 2010, the Foreign Account Tax Compliance Act ("FATCA"), Subtitle A of Title V of Public Law 111-147, was enacted into law. The provisions of FATCA are intended, as the title indicates, to promote compliance with U.S. law requiring U.S. persons to report income from offshore accounts. The section of FATCA that has received most attention is 501(a), which adds a new Chapter 4 (sections 1471 – 1474) to Subtitle A of the Internal Revenue Code ("the Code"). Chapter 4 imposes withholding, documentation, and reporting requirements with respect to certain payments made to foreign financial institutions and other foreign entities. This article offers a summary of Chapter 4 and enriches it with references to Notice 2010-60, which was published on August 27, 2010 to provide preliminary guidance regarding issues involving Chapter 4 implementation. As will be clear, FATCA is a statute of very broad reach that will present substantial challenges for taxpayers and tax administration alike.


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I. WITHHOLDING REQUIREMENTS WITH RESPECT TO CERTAIN PAYMENTS MADE TO FOREIGN FINANCIAL INSTITUTIONS AND OTHER FOREIGN ENTITIES

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The core idea in Chapter 4 is that "withholdable payments"[1] to foreign financial institutions ("FFIs") and non-financial foreign entities ("NFFEs") will be subject to 30 percent withholding unless certain steps are taken. In the case of an FFI, the steps involve agreeing with U.S. tax authorities to ascertain whether certain U.S. persons hold financial accounts[2] with the institution and, if they do, to report with respect to those accounts. In the case of an NFFE, the beneficial owner or payee must provide the withholding agent with either a certification that the owner has no "substantial United States owners" or information with respect to them. In both cases, foreign entities must comply with the new provisions or face withholding on amounts having no necessary connection with offshore accounts or investments of U.S. persons. The 30 percent withholding is refundable upon a showing that a lesser amount of tax is due (for example, by reason of a treaty), but as a practical matter withholding will create substantial competitive im-balances between those foreign in-stitutions that enter into agreements with the Revenue Service and thus escape the with-holding requirement, and those that do not. Withholding here is a club.

II. DEFINITION OF FINANCIAL INSTITUTION

Notice 2010-60 expands on the Chapter 4 definition of "financial institution" by providing factors to be considered in the analysis and examples of entities that would meet the definitions and sub-definitions.

Under Chapter 4, a financial institution is any entity that accepts deposits in the ordinary course of a banking or similar business. Pursuant to Notice 2010-60, factors that are relevant (but not determinative) include whether the entity is subject to banking and credit laws in the United States or a foreign country or to supervision and examination by agencies having regulatory oversight of banking and similar institutions. Examples of entities meeting this definition include entities that would qualify as banks under Code section § 585(a)(2), savings banks, commercial banks, savings and loan associations, thrifts, credit unions, building societies and other cooperative banking institutions.

A financial institution also includes an entity that holds financial assets for the account of others as a substantial portion of its business. Factors that are relevant (but not deter-minative) include whether the entity was subject to the banking and credit laws or broker-dealer regulations of the United States or a foreign country or to supervision and examination by agencies having regulatory oversight of banking and similar institutions. Examples of entities meeting this definition include broker-dealers, clearing organizations, trust companies, custodial banks, and entities acting as custodians with respect to the assets of employee benefit plans.

Finally, an entity is a financial institution if it is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interest, or commodities. The Notice specifically differentiates the concept of "trade or business" used in other Code sections from the analysis required under Chapter 4.

The analysis for the latter purpose must be based on the relevant facts and circumstances, and isolated transactions that might not give rise to a trade or business for other purposes may cause an entity to be engaged primarily in the business of investing, reinvesting, or trading in securities for purposes of Chapter 4 depending on such factors as the magnitude and importance of the transaction in comparison to the entity's other activities. Examples of entities that may be treated as financial institutions include mutual funds (or their foreign equivalent), funds of funds, exchanged-traded funds, hedge funds, private equity and venture capital funds, other managed funds, commodity pools, and other investment vehicles.

1. Certain Financial Institutions treated as Not Financial Entities

Notice 2010-60 provides specific circumstances under which a foreign entity that meets the definition of a financial institution will not be considered a financial institution for purposes of Chapter 4.

In order to qualify for this exclusion, the sole reason for the foreign entity meeting the definition of financial institution must have been that it is primarily engaged in investing, reinvesting, or trading in securities. Next, the entity must fall within one of the following four classes of foreign entities:

(1) Certain Holding Companies. A foreign entity whose primary purpose is to act as a holding company for subsidiaries engaged in a trade or business other than that of a financial institution. This does not include foreign entities designed to acquire or fund the start-up of companies and then hold those companies for investment purposes for a limited period of time (*e.g.*, private equity funds, venture capital funds, leveraged buyout funds).

(2) Certain Start-up Companies. A foreign start-up entity that intends to engage in a business other than that of a financial institution and that is not a venture or investment fund that invests in start-up entities. This exception only exempts a foreign entity for the first 24 months of its organization.

(3) Certain entities that are liquidating or emerging from reorganizations or bankruptcy. A foreign entity that is in the process of liquidating its assets or reorganizing and that was a non-financial institution prior to such process and intends to continue or recommence operations as a non-financial institution.

(4) Certain Finance Subsidiaries. A foreign entity that primarily engages in financing and hedging transactions with or for members of its expanded affiliated group of companies that are not FFIs and are primarily engaged in non-FI business. The foreign entity must also not provide such services to non-affiliates.

As explained in Section IV below, these foreign entities will be treated as excepted NFFEs and thus exempt from withholding as well as the documentation and reporting requirements under Chapter 4.

2. Insurance Companies

Notice 2010-60 concludes that insurance companies generally will meet the definition of a financial institution for Chapter 4 purposes. The Notice, however, provides only limited guidance on the treatment of insurance companies. It does state that those insurance companies that solely issue insurance or reinsurance contracts with no cash value (*e.g.*, property and casualty insurance or reinsurance contracts or term life insurance contracts) will be treated as non-financial institutions because they do not give rise to the type of concerns to which Chapter 4 is addressed. As an NFFE such an entity would still be subject to Chapter 4 withholding and reporting unless it independently met an exception or future guidance created an applicable exception.

3. U.S. Branches of FFIs

The Notice makes it clear that U.S. branches of FFIs are not exempt from the Chapter 4 regime. Generally, unless all withholdable payments received by the U.S. branch are exempt from withholding under the effectively connected income exclusion, the branch must execute an FFI Agreement to avoid being subject to 30 percent withholding.

The Notice indicates that Treasury may consider permitting such a branch to document account holders under the rules applicable to U.S. financial institutions (*see* Annex II) when it receives withholdable payments in its capacity as an intermediary.

III. REQUIREMENTS IMPOSED ON FFIs TO AVOID 30 PERCENT WITHHOLDING

1. Participating FFIs

FFIs may avoid withholding on "withholdable amounts" paid to them if they comply with certain documentation and reporting requirements. FFIs that agree to undertake these responsibilities are referred as participating FFIs.

Participating FFIs are enjoined to obtain information that will permit a determination whether "specified United States persons"[3] hold accounts with them. They must comply with verification and due diligence procedures relating to the identification of such accounts and must report information with respect to existing accounts to U.S. authorities. Regarding the verification and due diligence procedures, Notice 2010-60 provides detailed guidance that is summarized in Annex I below.

Participating FFIs must deduct and withhold 30 percent from payments to "recalcitrant account holders"[4] and must comply with requests from the Revenue Service for additional information with respect to U.S. accounts.

Notice 2010-60 mentions that Treasury and the IRS intend to require a participating FFI to report (*i*) the number and aggregate value of financial accounts held by both recalcitrant account holders and related or unrelated non-participating FFIs; and (*ii*) the number and aggregate value of financial accounts held by recalcitrant account holders that have U.S. indicia.

If there is a foreign law that would prevent the reporting of account information, participating FFIs are to seek a waiver of that law from holders of accounts or, failing in that effort, must close the accounts.

All of these requirements are in addition to those imposed on qualified intermediaries.

A list of participating FFIs may be published, presumably for the convenience of withholding agents. In this regard, Notice 2010-60 contemplates the issuance of employer identification numbers (EINs) to facilitate the identification of FFIs. Participating FFIs will use these EINs to identify themselves to withholding agents. Until withholding agents are able to verify the status of FFIs with the IRS, withholding agents (including participating FFIs) will be permitted to rely on certifications provided by FFIs as to their status as participating FFIs, unless the withholding agent knows or has reason to know that a certification is incorrect.

2. Deemed-compliant FFIs

At the discretion of the Revenue Service there are certain potential exceptions for institutions that do not maintain U.S. accounts and that meet IRS requirements with respect to accounts maintained with them by other FFIs. In addition, the Service may create exceptions for institutions of a class that, in its view, need not execute an agreement. FFIs that fall under any of these exceptions are referred as deemed-compliant FFIs.

According to Notice 2010-60, Treasury and the IRS intend to issue guidance under which certain foreign entities that are considered FFIs solely because they are primarily engaged in the business of investing, reinvesting, or trading in securities would be treated as deemed-compliant FFIs if the withholding agent (1) identifies all the direct and indirect owners of the entity that are individuals, specified United States persons, or exempt NFFEs (excepted NFFEs, described below), (2) obtains documentation from such persons and (3) reports to the IRS information regarding any specified U.S. person that is a direct or indirect shareholder in the entity.[5] The effect of this alternative regime is to shift the administrative burden of compliance from the FFI to the relevant withholding agent.

On the other hand, the Notice makes it clear that FFIs that are also Controlled Foreign Corporations (CFCs) will not be treated as deemed-compliant FFIs and must enter an FFI Agreement in order to avoid withholding. Treasury will coordinate the Chapter 4 reporting of CFCs that are FFIs with other U.S. tax reporting obligations in order to avoid duplicative reporting.

3. Entities described in section 1471(f)

There are also exceptions for certain payments. Thus, 30 percent withholding will not apply to any payment to the extent that the beneficial owner of such payment is any of the entities described in section 1471(f), that is, any foreign government, political subdivision of a foreign government, international organization, foreign central bank of issue, or any other class of persons identified by the Secretary as posing a low risk of tax evasion.

Notice 2010-60 anticipates that foreign retirement plans will be identified as posing a low risk of evasion provided they (1) qualify as a retirement plan under local law, (2) are sponsored by a non-U.S. employer, and (3) exclude U.S. participants or beneficiaries other than employees who worked in the country where the plan is established during the period the benefits accrued. Payments beneficially owned by qualifying retirement plans will be exempt from withholding.

IV. REQUIREMENTS IMPOSED ON NFFEs TO AVOID WITHHOLDING

With respect to NFFEs, the statute seeks a certification that there are no "substantial United States owners" or, if there are, their names, addresses, and taxpayer identifying numbers. A "substantial United States owner" is any specified U.S. person owning at least 10 percent, by vote or value, in a corporation, or owning at least 10 percent of the profits or capital interest of a partnership (or a commensurate beneficial interest in a non-grantor trust, or any portion of a grantor trust).

1. Excepted NFFEs

Except as otherwise provided by IRS, there are exceptions for any corporation whose stock is regularly traded or which is a member of an affiliated group in which there is a member whose stock is regularly traded, a possessions entity, a foreign government, political subdivision, agency, or instrumentality, or an international organization, foreign central bank of issue, or any other class of persons identified by the Service. Those entities are referred as excepted NFFEs.

According to Notice 2010-60, certain financial institutions treated as non-financial entities for purposes of Chapter 4 (see Section II above) will be treated as excepted NFFEs.

V. EFFECTIVE DATE

All these new rules are effective for payments made after December 31, 2012, but there is an exception from withholding for payments on any obligation, or on the proceeds from the disposition of any obligation, that is outstanding on March 18, 2012.

Notice 2010-60 defines the term "obligation" for purposes of this grandfather rule as any legal agreement that produces or could produce withholdable payments. An obligation will not include any instrument treated as equity or any legal agreement that lacks a definitive expiration or term (*e.g.*, savings deposits, demand deposits, and other similar accounts). Further, a withholdable payment arising from a legal agreement in the nature of brokerage accounts, custodial and similar agreements to hold financial assets for the account of others, and to make and receive payments of income and other amounts with respect to such assets will not benefit from this exemption.

The Notice explains that obligations subject to material modification will be deemed "newly issued" as of the date of such modification. As a result, obligations that have been materially modified after March 18, 2012 will not be exempt from Chapter 4 withholding. If the obligation constitutes indebtedness for U.S. tax purposes, a "material modification" is any significant modification of the debt instrument as defined in Treasury Regulations section 1.1001-3. In all other cases, whether a modification of an obligation is material will be determined based on all relevant facts and circumstances.

The foregoing is but a summary of rules that, at various junctures, are considerably more detailed. The summary should be sufficient to demonstrate that Chapter 4 is legislation of enormous reach and serious depth, with a potentially substantial impact on foreign investment in the United States. The wonder is that it sailed through Congress with relatively little debate or apparent objection.

ANNEX I

DUE DILIGENCE AND REPORTING REQUIREMENTS FOR PARTICIPATING FFIs

Reliance on Existing Documentation and Issuance of FFI EINs. When identifying their account holders, participating FFIs will be permitted to rely on Forms W-9 (Request for Taxpayer Identification Number and Certification) collected for other U.S. tax purposes (*i.e.* for purposes of Chapters 3 and 61 of the Code). As for the identification of account holders that are participating FFIs, as above mentioned, Treasury and the IRS contemplate the issuance of EINs that will facilitate this process.

I. Individual Accounts

A participating FFI must determine whether preexisting and new individual accounts will be treated as:

(*i*) U.S. Accounts,

(*ii*) Accounts of recalcitrant account holders, or

(*iii*) Other Accounts.

a. Preexisting Individual Accounts

Preexisting individual accounts are financial accounts held by individuals as of the date that the FFI Agreement of a participating FFI becomes effective.

To determine the treatment to be provided to those accounts, participating FFIs are required to follow the steps below:

(1) Small Account Holders Treated as Other Accounts. Calculate the average of the month-end balances or values during the calendar year preceding the entry into force of the FFI Agreement of all depository accounts held by the account holder at the FFI.

- If the result is less than $50,000, the FFI may treat the account as other than a U.S. account.
- If the result is more than $50,000, go to Step 2.

A participating FFI may elect not to apply this step. If applied, the step needs to be completed within one year of the effective date of the FFI Agreement.

(2) Documented U.S. Persons Will Have U.S. Accounts. Determine whether account holders are documented as U.S. persons for other U.S. tax purposes.

- If Yes, the holders will be treated as specified U.S. persons, and those account holders' financial accounts will be treated as U.S. accounts.
- If Not, go to Step 3.

This step must also be completed within one year of the effective date of the FFI Agreement.

(3) ***Accounts That Do Not Have Indicia of Potential U.S. Status Are Other Accounts.*** Determine whether the electronically searchable information maintained by the FFI and associated with the account (*e.g.*, customer information kept for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements) include any of the following indicia of potential U.S. status: (*i*) identification of the account holder as a U.S. resident or U.S. citizen; (*ii*) a U.S. address associated with the account holder (whether a residence address or a correspondence address); (*iii*) a U.S. place of birth for an account holder; (*iv*) an "in care of" address, a "hold mail" address, or a P.O. address that is the sole address on file with respect to the account holder; (*v*) a power of attorney or signatory authority granted to a person with a U.S. address; or (*vi*) standing instructions to transfer funds to an account maintained in the United States, or directions received from a U.S. address.

- If Not, the FFI shall treat an account as other than a U.S. account.
- If Yes, go to Step 4.

This step must also be completed within one year of the effective date of the FFI Agreement.

(4) Additional Due Diligence for Accounts With Indicia of Potential U.S. Status. Notice 2010-60 describes certain documentation that the participating FFI must obtain to establish whether the account is a U.S. account. A participating FFI would be permitted to rely on documentation maintained in an account holder's files and would be required to obtain additional documentation from an account holder only when the required documentation was not previously collected. A participating FFI will be entitled to rely on documentation received from account holders unless it knows or has reason to know that the information contained in the documentation is unreliable or incorrect.

This step must also be completed within one year of the effective date of the FFI Agreement.

(5) Non-Responsive Individual Will Be a Recalcitrant Account Holder. Account holders that have not provided appropriate documentation within one year from the date of a request will be classified as recalcitrant account holders until the date on which appropriate documentation is received.

(6) Periodic Verification of "Other Than U.S. Account" Status. If, under the procedures described above, a preexisting individual account is treated as other than a U.S. account, the account will be regularly subject to additional requirements to determine whether it should continue to be treated as other than a U.S. account.

b. New Individual Accounts

New individual accounts are accounts opened by individuals after the date that a FFI Agreement becomes effective. This will also include new account relationships established by an individual having a preexisting account.

For new individual accounts the participating FFI must follow the steps below:

(1) Small Account Holders Treated as Other Accounts. This step is the same Step 1 required for preexisting individual accounts. A participating FFI may still elect out of applying Step 1.

(2) Documented U.S. Person Will Have U.S. Accounts. This step is the same Step 2 required for preexisting individual accounts.

(3) Additional Due Diligence for Remaining Accounts. Request and examine documentry evidence establishing U.S. or non-U.S. status.

- If new individual accounts are identified as held by U.S. persons, the FFI will treat them as U.S. accounts.
- If new individual accounts are not identified as held by U.S. persons, go to Step 4.

(4) Accounts That Do Not Have Indicia of Potential U.S. Status Are Other Accounts. This step is the same Step 3 required for preexisting individual accounts, but, there are stricter due diligence requirements. A participating FFI is required to look to all other (not just electronically searchable) information collected in connection with the new account (*e.g.*, information collected for purposes of maintaining the account, corresponding with the account holder, or complying with regulatory requirements).

(5) Additional Due Diligence for Accounts With Indicia of Potential U.S. Status. This Step is the same Step 4 required for preexisting individual accounts.

An FFI will be required to repeat steps 4 and 5 each time the FFI knows or has reason to know that circumstances affecting the correctness of the classification of an account have changed.

II. Entity Accounts

With respect to financial accounts held by persons other than individuals, a participating FFI will be required to determine whether such accounts are to be treated as

(*i*) U.S. accounts,

(*ii*) accounts of participating FFIs,

(*iii*) accounts of deemed-compliant FFIs,

(*iv*) accounts of non-participating FFIs,

(*v*) accounts of entities described in section 1471(f),

(*vi*) accounts of recalcitrant account holders,

(*vii*) accounts of excepted NFFEs,

(*viii*) accounts of other NFFEs, or

(*ix*) other accounts

a. Preexisting Entity Accounts

With respect to preexisting entity accounts, the analysis must be made according to the steps described below:

(1) A Documented U.S. Person Will Have U.S. Accounts. Determine whether account holders have already been treated as U.S. persons for other U.S. tax purposes.

- If Yes, the participating FFI will treat the entities as U.S. persons but will permit them to provide documentation establishing that they are not specified U.S. persons for purposes of Chapter 4. Any U.S. person that does not provide such documentation within one year after an FFI Agreement enters into effect will be classified as a specified U.S. person for purposes of Chapter 4 until such documentation is received.
- If Not, go to Step 2.

(2) Presumption For Account Holder Having Indicia of U.S. Entity Status; Others Treated as Foreign Entities. Identify whether the information maintained by the participating FFI in its electronically searchable files indicates that the entity account holder is a U.S. entity (*e.g.*, a place of incorporation in the United States).

- If Yes, such entities will be presumed to be U.S. entities but the participating FFI will permit them to present documentation establishing that they are not specified U.S. persons for purposes of Chapter 4. The FFI will be required to request such documentation within one year of the effective date of the FFI Agreement. Any entity that has not presented such documentation prior to the date that is one year after the date of the FFI's request will be classified as a specified U.S. person for purposes of Chapter 4 until such documentation is received. An account holder treated as a specified U.S. person under this step 2 will be treated as a recalcitrant account holder until the FFI receives the information it is required to report with respect to the account holder.
- If Not, entity account holders will be presumed to be foreign entities (go to Step 3).

(3) Preliminary Presumption that Foreign Entity Is an FFI. All entities not classified as U.S. persons in Step 1 or 2 are presumed to be foreign entities. Determine whether the entity's name (or other information readily available to the participating FFI in its electronically searchable files) clearly indicates that the entity is an FFI.

- If Yes, the participating FFI will tentatively classify the entity as an FFI and will request that the entity provide the participating FFI with the entity's FFI EIN and certification of its participating FFI status.
  - Upon receipt of the FFI EIN and certification of participating FFI status, the participating FFI will treat the entity as a participating FFI, subject to confirmation with the IRS that the FFI EIN is valid.
  - If the entity does not provide a valid FFI EIN and certification of participating FFI status within nine months after the FFI Agreement became effective, the participating FFI will, within one year after the Agreement became effective, request documentation from the entity indicating its status.
    - An entity account holder that does not present such documentation prior to the date that is one year after the date of the FFI's request will be treated as a non-participating FFI from such date until the date on which appropriate documentation is received from the entity account holder by the participating FFI. During the interim period (*i.e.*, prior to the time that the entity account holder is treated as a non-participating FFI), the entity account holder will be considered an excepted NFFE, and its account will be treated as other than a U.S. account. The entity will be treated as a non-participating FFI for the entire period if its name is identified on an IRS published list.
- If Not, go to Step 4.

(4) Entity With an Active Trade or Business Is an Excepted NFFE. Examine the account file for evidence that the entity is engaged in an active trade or business (other than an FI business). Appropriate evidence in this regard may include statements of business activities, physical assets used in business activities, persons employed in business activities, and receivables and payables related to business activities. For this purpose, Treasury and the IRS are considering permitting FFIs to rely in part on information obtained from third-party credit databases.

- If Yes, that is, if the entity account holder is identified as engaged in an active trade or business, it will be treated as an excepted NFFE and an account of such an entity will be treated as other than a U.S. account for purposes of Chapter 4.
- If Not, the participating FFI will permit entity account holders to present documentation showing or certifying their status. The participating FFI will be permitted to rely on existing documentary evidence in its account files for this purpose, unless the participating FFI knows or has reason to know that the documentation is unreliable or incorrect. If the participating FFI does not have existing

documentary evidence on which it can rely for this purpose, the participating FFI will request documentation to show or certify the status of the entity account holder within one year after the FFI Agreement enters into effect.

- Unresponsive Entity Is a Non-Participating FFI. If the entity account holder does not present the documentation required by this step, the entity account holder will be treated as a non-participating FFI from the date that is one year after the date of the FFI's request for documentation and until the date appropriate documentation is received by the participating FFI.

- Additional Due Diligence if the Account Holder Is an NFFE But Not an Excepted NFFE. If the documentation provided by the account holder indicates that the account holder is an NFFE, the participating FFI must either obtain documentary evidence (or rely on existing documentary evidence in its account files) that the NFFE is an excepted NFFE, or the FFI must (*i*) specifically identify each individual and each other specified U.S. person that has an interest in such entity, and (*ii*) if a specified U.S. person is identified in (*i*), treat the account as a U.S. account and obtain with respect to each such person the documentation that the participating FFI would be required to obtain from such person if such person were a new account holder and report any such specified U.S. person to the IRS. If the participating FFI is unable to obtain the documentation required by this paragraph with respect to a specified U.S. person identified in (*i*), the account holder will be treated as a recalcitrant account holder from the date that is two years after the date on which the FFI Agreement entered into effect until the date appropriate documentation is received from the account holder.

b. New Entity Accounts

For new financial accounts held by persons other than individuals and opened after the date on which the FFI Agreement enters into effect, the participating FFI will be required to determine how to treat such accounts by following procedures similar to the procedures described above with regard to preexisting accounts. However, with respect to new entity accounts, an FFI must use all information collected (*e.g.*, for purposes of opening and maintaining the account, corresponding with the account holder, and complying with regulatory requirements, including anti-money laundering/know-your-customer ("AML/KYC") requirements), regardless of whether the information is available in electronically searchable files.

Annex II

Due Diligence and reporting requirement for U.S. Financial Institutions (USFIs)

The due diligence and reporting requirements mandatory for USFIs adopted by Notice 2010-60 are very similar to the requirements established for participating FFIs. This reflects an effort to ensure consistency between USFI and FFI reporting. Specifically, Treasury and the IRS will require USFIs to determine whether their foreign entity account holders are NFFEs or FFIs subject to withholding under Chapter 4 by applying procedures similar to the procedures described above for preexisting and new entity accounts, rather than the certification procedures required in Chapter 4 with respect to payments made to NFFEs.

Under the Notice a USFI must determine whether to treat a Preexisting or New Entity account holder as:

(*i*) U.S. persons,

(*ii*) participating FFIs,

(*iii*) deemed-compliant FFIs,

(*iv*) non-participating FFIs,

(*v*) entities described in section 1471(f),

(*vi*) excepted NFFEs, or

(*vii*) other NFFEs.

a. Preexisting Foreign Entity Accounts

With respect to withholdable payments made by a USFI to financial accounts opened before January 1, 2013 and held by persons other than individuals, Treasury and the IRS intend to require the USFI to perform the steps described below:

(1) Determine whether the entity account holder has already been identified as a U.S. person for purposes of Chapters 3 or 61 of the Code.

- If yes, the USFI will treat the account holder as a U.S. person.
- If Not, the account holder will be treated as a foreign entity (go to step 2).

(2) This step is very similar to Step 3 that is required of participating FFIs for preexisting entity accounts.[6]

(3) This step is very similar to Step 4 that is required of participating FFIs for preexisting entity accounts.[7]

b. New Foreign Entity Accounts

For financial accounts that are opened at a USFI on or after January 1, 2013 and held by persons other than individuals, a USFI will be required to determine the treatment to be provided by following procedures similar to the procedures described for USFIs with regard to preexisting entity accounts. However, with respect to new USFI accounts held by foreign entities, USFIs must identify foreign entities using all information collected by the USFI, regardless of whether such information is available in electronically searchable files.

1. A "withholdable payment" includes U.S. source fixed or determined annual or periodic gains, profits and income, specifically including interest paid by a foreign branch of a bank or savings institution. Most significantly, it also includes gross proceeds from the sale of any property of a type that produces U.S. source dividends or interest. Thus, the concept of "withholdable payment" extends beyond normal U.S. source and FDAP concepts.

2. A "financial account" includes a depository account, a custodial account, and any equity or debt interest in a financial institution unless that interest is regularly traded. Depository accounts maintained by natural persons in an amount less than $50,000 may be excluded if a particular institution so chooses (which an institution might decline to do in order to reduce its compliance burden).
3. A "specified United States person" is any U.S. person except for a corporation whose stock is regularly traded or a member of an affiliated group in which there is a corporation whose stock is regularly traded. The term also excludes an exempt organization, a government or government agency, a bank, a real estate investment trust, a regulated investment company, a common trust fund, and an exempt trust.
4. A "recalcitrant account holder" is any account holder who refuses to comply with requests for information or to provide a waiver of foreign law.
5. The Notice does not identify the scope of investment funds that fall under this exemption but it does indicate that the exemption is intended to lower the administrative burden for investment funds and other entities having only a small number of account holders all whom are individuals or non-financial foreign entities that will not be subject to withholding or reporting under Chapter 4. The Notice explains that a small family trust settled and funded by a single person for the sole benefit of his or her children would be among the entities eligible for this exemption.
6. The only differences are the deadlines for the account holder tentatively classified as an FFI to provide a valid FFI EIN and other documentation requested by the USFI. Specifically, such account holder is required to provide a valid FFI EIN by December 31, 2013 (rather than 9 months from the effective date of the FFI Agreement). Also, it has until December 31, 2014 to provide requested documentation to the USFI (rather than one year from the date of the request); otherwise it will be classified as a non-participating FFI until such information is received.
7. Here, there are two distinct differences which involve timing but also the treatment applicable to certain account holders. The foreign entity account holder has until December 31, 2014 to produce requested documents to the USFI (rather than one year from the date of a request); otherwise it will be classified as a non-participating FFI until such information is received. Also, specified U.S. persons holding an interest in an NFFE that is not an excepted NFFE have until December 31, 2014 (rather than 2 years from the effective date of the FFI Agreement) to provide the required documentation to a USFI; otherwise the USFI must apply withholding under 1472(a) until the documentation is received (rather than treat the specified U.S. person as a recalcitrant account holder).