

New FATCA requirements apply to U.S. and non-U.S. insurers and insurance brokers on January 1, 2015

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SUMMARY

New FATCA requirements that apply to U.S. and non-U.S. insurance brokers and insurance companies will take effect on January 1, 2015. Those requirements impose new information gathering and reporting rules when U.S. insurance and reinsurance premiums are sent outside the U.S.

Background

The Foreign Account Tax Compliance Act (FATCA)¹ is a U.S. federal law that affects virtually the entire financial services sector, including the insurance industry. It was enacted in 2010 in response to certain well-publicized cases of U.S. persons attempting to hide their U.S. income in offshore accounts (so as to avoid U.S. taxation). FATCA is intended primarily as an information-gathering law: it requires foreign financial institutions ("FFIs") (including many non-U.S. insurance companies and non-U.S. insurance brokers) to provide information to the IRS about their U.S. account owners (*i.e.*, their U.S. policyholders or, in the case of reinsurance transactions, the U.S. insurers). To give this requirement "teeth," FATCA requires certain U.S. insurance companies and U.S. insurance brokers (essentially, the last U.S. persons to touch insurance and reinsurance premiums that are sent outside the U.S.) to withhold 30 percent of the gross amount of such premiums when they are paid to non-compliant FFIs. As discussed below, transition rules delay the withholding requirement in some, but not all cases.

Because it is so large and complex, FATCA has been implemented on a "phased" basis. Parts of FATCA are already in effect, but more take effect on January 1, 2015. This Insurance Alert discusses FATCA rules taking effect in 2015, and outlines steps insurance companies and insurance brokers should take to comply with those impending rules.

New Forms W-8BEN-E and W-8IMY

Beginning on January 1, 2015, foreign beneficial owners of U.S. source payments must use Form W-8BEN-E both to obtain an exemption from "traditional" U.S. income tax withholding and to certify their FATCA status (so as to obtain an exemption from FATCA withholding). This form is longer and significantly more complex than the old Form W-8BEN, and U.S. payers and non-U.S. payees should be careful to ensure that the form is correctly completed. Foreign payment intermediaries, such as

1. I.R.C. §§ 1471-1474. Most of the operative rules are in Treasury Regulations issued under the statute.

non-U.S. insurance brokers, will need to use new Form W-8IMY, which is not as complex as Form W-8BEN-E. U.S. insurance brokers and U.S. insurance companies that make insurance and/or reinsurance premium payments to non-U.S. payees should make sure that any new payees provide them with the new Forms (W-8BEN-E or updated W-8IMY bundled with beneficial owners' Forms W-8BEN-E) starting on January 1, 2015.

U.S. payers who already have Forms W-8BEN in hand from non-U.S. beneficial owners may continue to rely on them through 2016 (unless there is another reason the form needs to be updated), provided that they obtain and keep in their files other documentation to certify the FATCA status of those non-U.S. payees. They will need to obtain new Forms W-8BEN-E from those payees by January 1, 2017.

New GIIN verification requirements

All FFIs are also required to obtain a Global Intermediary Identification Number (GIIN). The IRS maintains a comprehensive list of registered and approved FFIs, with their GIINs, and updates that list monthly.

Beginning on January 1, 2015, U.S. payers, including U.S. insurance brokers and U.S. insurance companies, must verify the GIIN of all FFI payees in order to avoid withholding. U.S. payers can verify the GIIN of any non-U.S. insurance company, broker, or other payee on the IRS website using the IRS "FFI List Search and Download" tool, which can be viewed at: <http://tinyurl.com/ph2l5ln>.

Which non-U.S. insurance companies are FFIs, and what must non-U.S. insurance companies do to comply with FATCA?

Not every non-U.S. insurance company automatically is an FFI. FATCA divides non-U.S. companies into two categories: "foreign financial institutions" (FFIs) and "non-financial foreign entities" (NFFEs). While even NFFEs have some compliance obligations under FATCA, FFIs bear the brunt of FATCA compliance. FFI is a broadly-defined term that includes, among others, any non-U.S. insurance company that issues or reinsures cash

surrender value life insurance policies or annuities. Independent insurance brokers that are not part of the same ownership group as insurance companies, and that do not themselves engage in any insurance business, generally are treated as NFFEs, though they may have obligations to report on the pass-through of premium payments to insurance companies.

A non-U.S. insurance company that is an FFI is required to take certain steps to determine whether its new clients (in FATCA terms, "account holders") are U.S. persons (or other FFIs), maintain documentation of its non-U.S. account holders' FATCA status, and provide certifications and reports regarding its account holders either to the IRS or (if there is a Model 1 intergovernmental agreement (IGA) in effect between the U.S. and its country of residence) to the applicable foreign taxing authority.

What must U.S. insurance brokers and U.S. insurance companies do to comply with FATCA?

U.S. insurance brokers are withholding agents, and they must collect information about the FATCA status of the non-U.S. insurance companies to whom they make premium payments on behalf of their customers. Similarly, U.S. insurance companies may be withholding agents, for instance if they make reinsurance or retrocession payments to non-U.S. reinsurers.

These domestic entities will need to collect information to certify the FATCA status of any foreign payee, in addition to the certification of non-U.S. status and of the application of any treaty to reduce non-FATCA withholding for any foreign payee. If they cannot obtain the necessary certifications, or if they are unable to verify GIINs beginning in 2015, they may be required to withhold 30 percent of all payments to the foreign payee and to report that withholding to the IRS.

Under transitional rules,² payments on "offshore obligations" not made through intermediaries will not be subject to FATCA

² See Treasury Decision 9657 (March 7, 2014); Temp. Reg. § 1.1471-1T(b)(88); Temp. Reg. § 1.1473-1T(a)(4)(vi); Temp. Reg. § 1.6049-5T(c)(1)(i).

withholding until 2017. "Offshore obligations" include insurance policies issued by non-U.S. insurers, and reinsurance agreements issued by non-U.S. reinsurers, out of their foreign offices. Thus, direct premium payments by an insured to an offshore insurer, or by an insurer to a reinsurer, should be treated as payments on "offshore obligations" and not subject to withholding until 2017. **This is a major exception, as many reinsurance payments do not involve the use of an intermediary.**

U.S. payers should still get certification of a foreign insurer's FATCA status and GIIN, and prepare for withholding in 2017. It appears that due to technical issues in the regulations, payments to or through non-U.S. insurance brokers do not qualify for the transitional rule, and thus **U.S. payers should obtain full FATCA documentation for payments to or through non-U.S. insurance brokers.**

FATCA reporting and withholding apply equally to related parties as to third parties. Thus, a domestic subsidiary of a foreign insurance group must obtain the required FATCA certifications

in order not to withhold on insurance or reinsurance payments, as well as on dividends or intra-group interest payments.

Saul Ewing attorneys have been following and will continue to monitor the changes with respect to the new FATCA requirements. For more information on these matters, please contact the authors or the attorney at the firm with whom you are regularly in contact.

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