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## **Background of the Foreign Account Tax Compliance Act (FATCA)**

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The Foreign Account Tax Compliance Act (FATCA) is a U.S. law enacted on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act of 2010, the primary focus of which is to identify non-compliance by U.S. taxpayers using offshore accounts. In a press release, Treasury described the law and its purpose as follows:

[FATCA is] a provision that targets the illicit activities of some wealthy individuals who use offshore accounts to evade millions of dollars in taxes. International tax evasion is illegal, adds to the federal debt, and contributes to the perception that the tax system is unfair because the wealthy can avoid the taxes other Americans pay.<sup>1</sup>

To achieve its goal, FATCA requires foreign financial institutions (FFIs) (a broadly defined term which includes both

traditional banks and a broad array of non-bank financial institutions including hedge funds) to disclose annually information about accounts held by U.S. individuals, or foreign companies in which U.S. individuals hold a substantial ownership interest. FFIs which refuse to provide such information about their customers to the United States will face a stringent penalty: withholding of 30% of all U.S.-source payments of interest, dividends, and the like. The withholding rules are essentially a mechanism to enforce new reporting requirements, and not a revenue-raising vehicle for the U.S. Treasury. While FATCA is technically a voluntary reporting regime, the threat of withholding on U.S.-source payments of funds essentially forces foreign financial institutions to cooperate if they wish to have access to U.S. capital markets, and substantially penalizes those that refuse to participate.

FATCA became fully effective on July 1, 2014. As of that date, over 80,000 foreign financial institutions had registered with the IRS and indicated their agreement to report information to the IRS pursuant to FATCA, and nearly 100 foreign countries had either formally signed treaties with the United States, or were actively negotiating such agreements, in order to implement FATCA's information sharing requirements.<sup>2</sup> FATCA is expected to provide the IRS with information regarding thousands of accounts held by U.S. taxpayers at financial institutions located around the globe. The implementation of FATCA signals a new era and arms the U.S. government with a powerful tool to detect offshore tax evasion. U.S. taxpayers with undeclared foreign accounts can no longer assume that they will remain undetected or protected by foreign banking secrecy laws. With the IRS and Justice Department continuing their unrelenting global crackdown on international tax evasion and bank secrecy laws, and full-scale implementation of FATCA now underway, the risk of detection is significantly increased and the threat of criminal prosecution is real.

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Tax Policy Underlying FATCA.....	1-3
Obligation to Report Worldwide Income and Disclose Foreign Bank Accounts and Certain Foreign Financial Assets .....	1-4
Figure 1-1: Form 1040, Schedule B.....	1-5
The Global Crackdown on Offshore Tax Evasion .....	1-7
FATCA Statutory Provisions.....	1-22
FATCA Guidance Issued by Treasury and the IRS .....	1-25
Options for Non-compliant Taxpayers.....	1-44

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## **Tax Policy Underlying FATCA**

### **Q 1.1 What is the tax policy behind FATCA?**

It is important to understand that despite its withholding provisions, FATCA is not intended to be a revenue-generating law. Instead, FATCA is primarily an information-reporting regime, imposing reporting obligations on foreign financial institutions in order to provide the IRS with additional data regarding the foreign activities of U.S. taxpayers. To that end, the preamble to final regulations issued by Treasury and IRS states as follows:

U.S. taxpayers' investments have become increasingly global in scope. FFIs now provide a significant proportion of the investment opportunities for, and act as intermediaries with respect to the investments of, U.S. taxpayers. Like U.S. financial institutions, FFIs are generally in the best position to identify and report with respect to their U.S. customers. Absent such reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts. To prevent this abuse of the U.S. voluntary tax compliance system and address the use of offshore accounts to facilitate tax evasion, it is essential in today's global investment climate that reporting be available with respect to both the onshore and offshore accounts of U.S. taxpayers. This information reporting strengthens the integrity of the U.S. voluntary tax compliance system by placing U.S. taxpayers that have access to international investment opportunities on an equal footing with U.S. taxpayers that do not have such access or otherwise choose to invest within the United States.<sup>3</sup>

## **Obligation to Report Worldwide Income and Disclose Foreign Bank Accounts and Certain Foreign Financial Assets**

### **Q 1.2 What are the U.S. tax and reporting obligations for taxpayers with offshore bank accounts?**

Since the 1970s, U.S. taxpayers with foreign banks accounts have been required to report annually their foreign bank account information to the Department of Treasury on a form titled “*Report of Foreign Bank and Financial Accounts*” (commonly known as the “FBAR” form).<sup>4</sup> In addition to requiring the filing of an FBAR, the United States, unlike many other jurisdictions in the world, taxes worldwide income, meaning that a U.S. taxpayer’s income is subject to tax regardless of where it is earned and regardless of whether the taxpayer lives in the United States or abroad. The failure to file an FBAR or to report foreign income can subject a taxpayer to significant civil, and even criminal, penalties.

#### **Q 1.2.1 What must be reported on a U.S. income tax return with respect to an offshore bank account?**

There is nothing improper about a U.S. taxpayer maintaining a bank account in a foreign country, even in so-called “bank secrecy” countries such as Switzerland, the Cayman Islands, and Singapore. Any taxpayer having such an account is required to report on his or her personal income tax return all income (interest, dividends, and capital gains) earned in that account and answer “yes” to a question on Schedule B of the return which asks whether the taxpayer maintained a foreign bank account during the year. An excerpt of the 2013 version of Form 1040, Schedule B, which sets forth the foreign bank account questions, is shown below.

**Figure 1-1**  
**Form 1040, Schedule B**

<b>Part III</b>		<b>Yes</b>	<b>No</b>
You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.			
<b>Foreign Accounts and Trusts</b>  (See instructions.)	<b>7a</b> At any time during 2017, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions . . . . .		
	If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements . . . . .		
	<b>b</b> If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ▶ _____		
	<b>8</b> During 2017, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions . . . . .		

**Q 1.2.2 Under what circumstances is a U.S. taxpayer required to file the FBAR form?**

Any U.S. taxpayer with a financial interest in, or signature or other authority over, a foreign bank account (which includes bank, security, and other types of financial accounts, including certain foreign life insurance policies) is required to file the FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (commonly known as the "FBAR" form), if the aggregate value of the account (or accounts) exceeded \$10,000 at any time during the preceding calendar year, subject to certain exceptions. The FBAR filing requirements apply to all types of taxpayers with offshore bank accounts, including individuals, corporations, partnerships, LLCs, trusts, and estates (with some exceptions). Corporate officers with signature authority over corporate bank accounts located in a foreign country must also file the FBAR form in their individual capacity.

Significant criminal and civil penalties may be imposed for the failure to timely file the FBAR form. Since 2014, all FBARs are required to be filed electronically through the Treasury Department's BSA E-Filing System, which can be accessed at <http://bsaefiling.fincen.treas.gov/main.html>.

In August 2015, Congress passed, and the President signed, a bill entitled “The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015.”<sup>5</sup> While this legislation was primarily directed at extending federal funding for transportation projects, buried within the bill were several tax-related provisions that changed key filing deadlines, including the FBAR filing deadline.

Practitioners and taxpayers alike have complained for years that the deadlines for filing tax returns (April 15 for individual taxpayers) and the FBAR (June 30 for all taxpayers) were not aligned, and that no extension of the FBAR deadline was available. Congress finally heeded these calls for change by passing the following short, but critical, provision:

The due date of FinCEN Report 114 (relating to Report of Foreign Bank and Financial Accounts) shall be April 15 with a maximum extension for a 6-month period ending on October 15 and with provision for an extension under rules similar to the rules in Treas. Reg. section 1.6081-5. For any taxpayer required to file such Form for the first time, any penalty for failure to timely request for, or file, an extension, may be waived by the Secretary.<sup>6</sup>

This provision applies to returns for taxable years beginning after December 31, 2015.

As a result of this new legislation, the FBAR filing deadline is April 15, starting with the 2016 tax year. Importantly, taxpayers are able to request a six-month extension of the FBAR filing deadline, to October 15. (As noted above, previously taxpayers were unable to request any extension of the FBAR deadline, even if their income tax return was placed on extension.) Note that the new April 15 FBAR filing deadline applies to all types of taxpayers, not just individuals. Thus, corporate taxpayers that file on March 15 will also have an April 15 deadline for filing their FBAR forms.

The legislation also provides the opportunity for penalty relief for first-time filers. This is significant because the FBAR statute provides for substantial penalties for taxpayers who fail to file, or file false, FBAR forms. Willful failure to file the FBAR is a felony that can subject the taxpayer to criminal prosecution and/or civil penalties in the amount of 50% of the highest balance of the unreported bank

account(s). Negligence penalties can also apply, at a rate of up to \$10,000 per unreported account per year.

**Q 1.2.3 Under what circumstances is a U.S. taxpayer required to report the existence of certain foreign assets?**

Since 2011, individual U.S. taxpayers with foreign assets valued in excess of certain dollar thresholds are also required to file a new reporting form with their personal tax returns called Form 8938, *Statement of Foreign Financial Assets*.<sup>7</sup> Civil and criminal penalties also apply to the failure to file this form, and the failure to file extends indefinitely the civil statute of limitations to assess taxes for the tax return that failed to report the foreign assets.<sup>8</sup>

In 2011, the Treasury Department published a proposed regulation setting forth the conditions under which a domestic entity would be required to report specified foreign financial assets. Reporting by domestic entities was deferred, however, due to issuance of Notice 2013-10, which provided that such obligation would not be effective until issuance of final regulations. After receiving comments, the Treasury Department published the final regulation for domestic entity reporting on February 23, 2016.<sup>9</sup> Certain closely held domestic entities are now required to file Form 8938 with their income tax returns if such entity was “formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets as if such entity were an individual.” The new rules are effective for tax years beginning after December 31, 2015.

## **The Global Crackdown on Offshore Tax Evasion**

**Q 1.3 What led the United States to enact FATCA?**

Since 2009, the U.S. government has waged an unprecedented global campaign to crack down on the use of secret, offshore bank accounts by U.S. taxpayers to evade taxes. A top priority for both the Internal Revenue Service and the U.S. Justice Department is combating the serious problem of non-compliance with U.S. tax laws by taxpayers using secret offshore bank accounts. According to a U.S. Senate

report issued in 2008, the use of secret offshore accounts to evade U.S. taxes costs the Treasury at least \$100 billion annually.<sup>10</sup> More recently, the same Senate subcommittee estimated that offshore tax schemes cost the U.S. \$150 billion annually in lost tax revenue.<sup>11</sup>

While there is nothing illegal about maintaining accounts in foreign countries, U.S. taxpayers are required annually to disclose their offshore accounts to the Internal Revenue Service on the FBAR form and to report all income generated by those holdings on their personal income tax returns. The failure to report foreign accounts can subject a taxpayer to substantial civil penalties and, in the case of willful conduct, criminal prosecution. Since 2009, over 54,000 U.S. taxpayers have come forward under special IRS voluntary disclosure programs to reveal that they have unreported bank accounts in countries such as Switzerland, India, Israel, and many others. During the same time period, the U.S. Department of Justice has brought criminal charges against numerous individual account holders and a substantial number of “enablers”—including bankers, attorneys, and investment advisors.<sup>12</sup>

*The UBS Deferred Prosecution Agreement.* The Internal Revenue Service and Justice Department initially trained their sights on UBS AG, Switzerland’s largest bank. After a whistleblower, UBS banker Bradley Birkenfeld, provided information to the IRS on his bank’s practice of aiding U.S. taxpayers in hiding funds in numbered bank accounts (and eventually received a \$104 million whistleblower reward), UBS admitted that it helped U.S. citizens hide money using undisclosed accounts, offshore corporations, family foundations, and other mechanisms designed to conceal the true identity of account holders. The United States also discovered that the sheer number of accounts held by Americans was staggering: in court filings, the Justice Department estimated that over 52,000 Americans held accounts at UBS alone.

UBS avoided criminal prosecution in the United States by paying \$780 million in fines and penalties to the U.S. government and by agreeing to turn over the names of U.S. customers of the bank that were suspected of committing tax fraud.<sup>13</sup> Under enormous diplomatic pressure from the U.S. government which ensued, Swiss legislators subsequently voted to weaken the country’s historic bank secrecy laws, paving the way for UBS to hand over additionally the names of

thousands of its U.S. depositors to the U.S. authorities. This result prompted the Justice Department to proclaim on its website that “fabled Swiss bank secrecy” had been dealt “a devastating blow.”<sup>14</sup>

Justice Department attorneys and IRS agents combed through mountains of information handed over by UBS, commenced more than 150 criminal investigations of account holders, and eventually brought criminal charges against the most egregious tax evaders. To date, scores of U.S. taxpayers holding accounts at UBS and other Swiss banks have faced criminal charges, along with dozens of “enablers”—such as bankers, attorneys, and financial advisors—who assisted account holders in hiding assets offshore.

The U.S. government’s crackdown on offshore tax avoidance and evasion did not end with UBS; the Justice Department subsequently opened criminal investigations of banks in Switzerland, India, and Israel, among other countries. Switzerland’s oldest bank, Wegelin & Co., was indicted in federal court in New York, had its correspondent bank accounts in the United States seized, and eventually pleaded guilty and paid fines and penalties in excess of \$70 million. The bank admitted to conspiring to defraud the United States by helping U.S. account holders hide assets from the IRS in undeclared accounts. A federal district court has also authorized the IRS to issue a “John Doe” summons that will allow the United States to determine the identity of U.S. taxpayers who may hold accounts at Wegelin and other banks based in Switzerland to evade federal income taxes.<sup>15</sup>

Between 2008 and April 2013, the Justice Department’s Tax Division criminally charged over thirty banking professionals and sixty account holders, resulting in five convictions after trial and fifty-five guilty pleas, including two trial convictions and sixteen guilty pleas in the first four months of 2013 alone.<sup>16</sup> In April 2013, a federal district court authorized the IRS to issue a “John Doe” summons seeking information about U.S. taxpayers who may hold undeclared offshore accounts at CIBC FirstCaribbean International Bank (FCIB), a Barbados-based bank with branches across the Caribbean.<sup>17</sup> The summons, issued to Wells Fargo N.A., sought records of U.S. taxpayers and financial institutions that used FCIB’s U.S. correspondent account at Wells Fargo to evade taxes.

*The Swiss Bank Program.* In August 2013, the Justice Department announced that it would offer a program for Swiss banks that are not currently under investigation to resolve their potential liability to the U.S. government for assisting U.S. taxpayers in evading their tax obligations.<sup>18</sup> Under the terms of the program, titled “Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks,” any Swiss bank not currently under criminal investigation could apply for admission to the program by no later than December 31, 2013.<sup>19</sup> Banks admitted to the program were eligible for a non-prosecution agreement or a non-target letter if they fully cooperated with the U.S. government’s ongoing investigations, provided information to the Justice Department regarding their U.S. accounts, and agreed to pay a penalty which was based upon the number of U.S. accounts maintained at the institution since 2008.<sup>20</sup> Of the more than 300 Swiss banks eligible to participate in this program, 106 sought to join the initiative.<sup>21</sup>

The Swiss Bank Program established four categories of Swiss financial institutions based upon their perceived liability for potential violations of U.S. laws. “Category 1” included Swiss banks already under investigation when the program was announced; such institutions were not eligible to participate in the program. Banks in this category included UBS AG, Credit Suisse AG, Wegelin & Co., and Zurcher Kantonalbank, among others.

“Category 2” was reserved for banks that advised the Justice Department by December 31, 2013, that they had reason to believe that they had committed tax-related criminal offenses in connection with undeclared U.S. related accounts. To obtain a non-prosecution agreement, Category 2 banks were required to make a complete disclosure of their cross-border activities, provide detailed information on accounts in which U.S. taxpayers have a direct or indirect interest, cooperate in treaty requests for account information, provide detailed information as to other banks that transferred funds into hidden accounts or that accepted funds when those secret accounts were closed, and cooperate in any related criminal and civil proceedings for the life of those proceedings. Category 2 banks were also required to pay financial penalties based upon the number of U.S. related accounts they serviced.

“Category 3” was designed for banks that established, with the assistance of an independent internal investigation of their cross-border business, that they did not commit tax or monetary transaction-related offenses and had an effective compliance program in place. Category 3 banks were required to provide the Justice Department with an independent written report that identified witnesses interviewed and a summary of each witness’s statements, files reviewed, and factual findings and conclusions. In addition, Category 3 banks were required to appear before the Justice Department and respond to any questions related to the report or their cross-border business, and to close accounts of account holders who failed to come into compliance with U.S. reporting obligations. Upon satisfying these requirements, Category 3 banks were entitled to receive a non-target letter.

“Category 4” was reserved for Swiss banks that were able to demonstrate that they met certain criteria for deemed-compliance under FATCA. Category 4 banks also were eligible for a non-target letter.

On May 19, 2014, Credit Suisse AG, Switzerland’s second largest bank, pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS.<sup>22</sup> As part of the plea agreement, Credit Suisse acknowledged that, for decades prior to 2009, it operated an illegal cross-border banking business that knowingly and willfully aided and assisted thousands of U.S. clients in opening and maintaining undeclared accounts and concealing their offshore assets and income from the IRS. According to the statement of facts filed with the plea agreement, Credit Suisse employed a variety of means to assist U.S. clients in concealing their undeclared accounts, including by:

- assisting clients in using sham entities to hide undeclared accounts;
- soliciting IRS forms that falsely stated, under penalties of perjury, that the sham entities were the beneficial owners of the assets in the accounts;
- failing to maintain in the United States records related to the accounts;
- destroying account records sent to the United States for client review;

- using Credit Suisse managers and employees as unregistered investment advisors on undeclared accounts;
- facilitating withdrawals of funds from the undeclared accounts by either providing hand-delivered cash in the United States or using Credit Suisse's correspondent bank accounts in the United States;
- structuring transfers of funds to evade currency transaction reporting requirements; and
- providing offshore credit and debit cards to repatriate funds in the undeclared accounts.<sup>23</sup>

The guilty plea was the result of a years-long investigation by U.S. law enforcement authorities that produced indictments of eight Credit Suisse executives since 2011. The plea agreement, along with agreements made with state and federal partners, required Credit Suisse to pay a total of \$2.6 billion: \$1.8 billion to the Department of Justice for the U.S. Treasury, \$100 million to the Federal Reserve, and \$715 million to the New York State Department of Financial Services. Earlier in 2014, Credit Suisse paid approximately \$196 million in disgorgement, interest, and penalties to the Securities and Exchange Commission for violating the federal securities laws by providing cross-border brokerage and investment advisory services to U.S. clients without first registering with the SEC. As part of the plea agreement, Credit Suisse further agreed to make a complete disclosure of its cross-border activities, cooperate in treaty requests for account information, provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed, and to close accounts of account holders who fail to come into compliance with U.S. reporting obligations. Credit Suisse has also agreed to implement programs to ensure its compliance with U.S. laws, including its reporting obligations under FATCA and relevant tax treaties, in all its current and future dealings with U.S. customers.

In December 2014, Bank Leumi, one of Israel's largest banks, admitted that it conspired to aid and assist U.S. taxpayers to prepare and present false tax returns to the IRS by hiding income and assets in offshore bank accounts in Israel, Switzerland, and Luxembourg.<sup>24</sup> Bank Leumi entered into a Deferred Prosecution Agreement that permitted

the bank to defer criminal prosecution on conspiracy charges. As part of its deal, Bank Leumi agreed to pay the U.S. government a total of \$270 million. According to a statement of facts filed in federal court, Bank Leumi engaged in the following conduct:

- surreptitiously sending private bankers from Israel and elsewhere around the world to the United States to meet secretly with U.S. clients at hotels, parks, and coffee shops to discuss their offshore account activity;
- assisting U.S. clients in using nominee corporate entities created in Belize and other foreign jurisdictions to hide their undeclared accounts by concealing the U.S. client as the true beneficial owner of the account;
- using the Bank Leumi Le-Israel Trust Company as a nominee account holder for U.S. clients with accounts in Israel to conceal the U.S. client as the true beneficial owner of the account;
- maintaining U.S. clients' undeclared offshore accounts under assumed names or numbered accounts to conceal the U.S. client as the true beneficial owner of the account;
- providing hold mail services so that correspondence and other account information would not go directly to the U.S. client to make it more difficult to connect the client to the secret offshore account;
- extending loans to U.S. clients from Bank Leumi USA that were collateralized by the assets in those clients' offshore accounts, so that the clients could leverage their offshore assets to obtain and use capital in the United States while keeping their foreign accounts secret and undetected from the U.S. government; and
- after the department's investigation into UBS and other Swiss banks' criminal conduct in aiding U.S. taxpayers to evade their taxes became public, the Bank Leumi Group opened and maintained accounts for U.S. taxpayers who left UBS and other Swiss banks due to the investigation in an effort to continue to avoid detection by the U.S. government.<sup>25</sup>

As part of its Deferred Prosecution Agreement, Bank Leumi turned over the names of more than 1,500 of its U.S. account holders, and agreed to continue to disclose information and cooperate with the Justice Department's ongoing offshore tax evasion investigations.

On January 27, 2016, the Justice Department's Tax Division marked an historic milestone in its ground-breaking Swiss Bank Program with its announcement of the final non-prosecution agreement for so-called "Category 2" banks participating in the program. All told, the eighty Category 2 Swiss banks that resolved their criminal tax exposure with the U.S. government agreed to pay more than \$1.36 billion in penalties. Perhaps even more importantly, every Category 2 bank in the Swiss Bank Program is required to cooperate in any future related criminal or civil proceedings, thereby ensuring that the Justice Department will have the complete assistance from each bank as the U.S. government pursues leads, and "follows the money," throughout the world.

By all accounts, the Swiss Bank Program appears to have been an unqualified success for the Justice Department, and the Internal Revenue Service, in their efforts to combat offshore tax evasion. Never before had the U.S. government offered an amnesty program to the entire banking industry in a particular country, and at the time the program was unveiled in 2013, it was not clear that the program would be a success or that Swiss banks would even be interested. But given the overwhelming demonstration of interest from Swiss banks, the substantial monetary penalties collected, and the wealth of information shared with the United States, the program can fairly be declared a significant win for the U.S. government. Investigators are pursuing the wealth of leads generated through the Swiss Bank Program, and following those leads to countries such as Belize, the British Virgin Islands, the Cayman Islands, the Cook Islands, India, Israel, Liechtenstein, Luxembourg, the Marshall Islands and Panama, among others. Combining these leads with the wealth of information generated through the other mechanisms, such as FATCA, "John Doe" summonses, treaty requests, and data generated from taxpayers participating in the Offshore Voluntary Disclosure Program and other disclosure programs, the U.S. government now has an unprecedented, and never before seen, window into the world of offshore tax evasion.

In announcing resolution of the “Category 2” portion of the Swiss Bank Program, then-Acting Assistant Attorney General Caroline D. Ciruolo of the Justice Department’s Tax Division warned that the fight against offshore tax evasion was far from over:

We remain committed to holding financial institutions, professionals and individual taxpayers accountable for their respective roles in concealing foreign accounts and assets, and evading U.S. tax obligations. Using the flood of information flowing from various sources, the department is investigating this criminal conduct, referring appropriate matters to the Internal Revenue Service for civil enforcement and pursuing leads in jurisdictions well beyond Switzerland. Individuals and entities engaged in offshore tax evasion are well advised to come forward now, because the window to get to us before we get to you is rapidly closing.<sup>26</sup>

In a subsequent speech, Acting Assistant Attorney General Ciruolo reiterated that warning:

The conclusion of the Category 2 agreements is a major milestone for the department and the IRS, but does not represent the conclusion of the program. Working with our colleagues in IRS-CI and the IRS Large Business & International Division, we have been reviewing the information obtained from the Swiss banks, treaty requests, whistleblowers and individuals and entities cooperating outside of the program and using this information to pursue criminal investigations and civil enforcement efforts. We are identifying and investigating accountholders and individuals, both domestic and foreign, who helped U.S. taxpayers conceal foreign accounts and evade their tax obligations. As discussed by Deputy Attorney General Sally Q. Yates in her memo last fall regarding Individual Accountability for Corporate Wrongdoing, one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Our investigations of both individuals and entities are well beyond Switzerland at this point, and *no jurisdiction is off limits*.<sup>27</sup>

On March 9, 2016, the Justice Department secured its first-ever conviction of a non-Swiss financial institution for tax evasion conspiracy, with the announcement that two Cayman Islands firms pleaded guilty in a U.S. court to conspiring to hide more than \$130 million

in Cayman bank accounts. The two financial institutions, Cayman National Securities Ltd. (CNS) and Cayman National Trust Co. Ltd. (CNT), admitted that they helped U.S. clients hide assets in offshore accounts, and agreed to provide files of non-compliant U.S. account holders to the U.S. government.

The Tax Division's announcement of guilty pleas by these two Cayman Islands financial institutions represents yet another milestone in the government's crackdown on offshore tax evasion, and confirms Ciraolo's warning that "no jurisdiction is off limits." Federal prosecutors and IRS agents are actively pursuing investigations across the globe, in countries such as Belize, the British Virgin Islands, the Cook Islands, India, Israel, Liechtenstein, Luxembourg, the Marshall Islands and Panama, among others. Foreign banks and financial institutions that serve U.S. customers would be well-advised to heed the lessons of the Swiss Bank Program and other Justice Department enforcement actions commenced to date. Foreign financial institutions with potential U.S. criminal tax liability can greatly mitigate their exposure by taking immediate actions, such as making voluntary disclosures of potential illegal activity to the Tax Division and implementing compliance measures to avoid further violations of U.S. tax law. At the same time, U.S. citizens and residents with unreported offshore accounts should take immediate action to resolve their non-compliance by taking advantage of one of the IRS voluntary disclosure programs, as the window of opportunity for self-reporting is rapidly closing. As the U.S. government's latest enforcement action involving the Cayman Islands demonstrates, inaction is not an option in the current environment.

On December 29, 2016, the Justice Department's Tax Division announced that it had reached final resolutions with the remaining "Category 3 and 4" Swiss banks that had enrolled in the Swiss Bank Program.<sup>28</sup> According to that announcement, between July and December 2016, four banks and one bank cooperative satisfied the requirements of Category 3, making them eligible for non-target letters. No banks qualified under Category 4 of the program. The Justice Department did not announce the names of any of the qualifying Category 3 banks, nor did it release the names of the banks which failed to qualify as Category 4 institutions. Earlier this year, Swiss bank Thurgauer Kantonalbank announced that it had received a non-target letter from the Justice

Department, thus qualifying as a Category 3 institution.<sup>29</sup> The identities of the remaining Category 3 banks have not yet been made public.

The Justice Department's announcement of final resolutions with Category 3 and 4 banks does not, however, mark the conclusion of the Swiss Bank Program. Instead, the program is now in what the Justice Department calls its "legacy phase," pursuant to which all participating Swiss banks are cooperating with ongoing civil and criminal investigations in the United States. The Swiss Bank Program is undoubtedly affording U.S. prosecutors and IRS agents a wealth of leads that they will use to "follow the money" around the globe and continue to seek to hold financial institutions, advisors, and account holders liable if they engage in evasion of U.S. tax laws.

The Justice Department reported that it has received data on 35,000 accounts as part of the Swiss Bank Program. The IRS Criminal Investigation Division announced, in its 2017 annual report, that fifty-eight investigative leads from Swiss Bank Program data had been sent to various criminal investigation field offices for criminal investigation. In addition, over 18,000 leads from Swiss Bank Program data that did not meet criminal investigation criteria were forwarded to the IRS for civil audits.<sup>30</sup>

Given the tremendous success of the Swiss Bank Program, it remains to be seen whether the Justice Department will offer a similar program to banks in other countries or regions. Regardless of whether a formal program akin to the Swiss Bank Program is announced, financial institutions around the globe would be well-advised to take affirmative steps to attempt to resolve any potential exposure they may have under U.S. criminal laws. The Justice Department has long said that it would entertain voluntary disclosures of potential criminal activity from any bank, and that such self-corrective action—assuming it is timely and constitutes a full and complete disclosure—would be viewed favorably by the government officials in determining whether criminal prosecution is warranted.

*John Doe Summonses.* As part of its crackdown on offshore tax evasion, the IRS continues to make frequent use of a relatively unknown information-gathering tool in its nearly decade-old crusade against offshore tax evasion: the "John Doe" summons. A "John Doe summons"

may be used to obtain information and records about an unidentified class of taxpayers if the IRS has a reasonable belief that such taxpayers are engaged in conduct violating U.S. laws. Because the identities of the targeted taxpayers are unknown, the summons is denoted with a “John Doe” moniker. Expressly authorized by Internal Revenue Code, a “John Doe” summons must first be approved by a federal judge before it can be served. To date, federal judges have authorized the IRS to issue sweeping “John Doe” summonses for information and records around the globe, including countries such as Switzerland, India, the Bahamas, Barbados, Belize, the Cayman Islands, Guernsey, Hong Kong, Malta, and the United Kingdom, among other countries.

Since 2009, the IRS (working hand-in-hand with the Justice Department) has worked aggressively to combat tax evasion by U.S. taxpayers making use of secret offshore bank accounts, and “John Doe” summonses have played a prominent role in that enforcement effort. In 2009, the IRS served a “John Doe” summons seeking the identities of U.S. taxpayers maintaining bank accounts at UBS in Switzerland. Two years later, the IRS received court approval to serve a “John Doe” summons seeking the identities of U.S. taxpayers maintaining undisclosed bank accounts at HSBC in India. In January 2013, a federal judge authorized the IRS to serve a “John Doe” summons seeking the names of account holders at Swiss bank Wegelin & Co. In September 2015, a federal court in Miami authorized the issuance of a “John Doe” summons seeking information about U.S. taxpayers who held offshore accounts at Belize Bank International Limited or Belize Bank Limited.

On January 25, 2017, a federal judge in Montana authorized the IRS to serve a “John Doe” summons seeking information about U.S. taxpayers who had been issued a debit card that could be used to access the funds in offshore accounts in such a manner as to evade their tax obligations, a common technique used to repatriate funds held in foreign accounts.<sup>31</sup> The summons specifically sought records regarding U.S. taxpayers who possessed a “Sovereign Gold Card” during the years 2005 to 2016 which could be used to access funds held in accounts established by Sovereign Management & Legal LTD, a Panamanian company (“Sovereign”). Sovereign is an offshore services provider alleged to have offered clients, among other things, the formation and administration of anonymous corporations and foundations. The IRS

believed that Sovereign's related services included the maintenance and operation of offshore structures, mail forwarding, availability of virtual offices, re-invoicing, and the provision of professional managers who appoint themselves directors of the client's entity while the client maintains ultimate control over the assets.

The IRS has long been concerned with the use of debit cards by U.S. taxpayers as a way to repatriate funds held in offshore accounts. In 2000, the IRS began investigating the use of offshore credit cards and served numerous "John Doe" summonses on major credit card companies. Based upon information gathered through that project, the IRS confirmed that the use of payment cards (including credit and debit cards) linked to offshore bank accounts is a common means of obtaining access to such funds. A U.N. report focused on money laundering similarly concluded that "[c]redit and debit cards are the way people who have laundered money draw ready cash without leaving a financial trail. As one advertisement for a bank put it, it is the best way to stay in touch with your offshore account."<sup>32</sup>

In its petition seeking court approval for the "John Doe" summons, the government alleged that Sovereign advertised various "packages" that afforded individuals the ability to hide assets offshore. These packages include corporations owned by other entities (including phony charitable foundations) which are held in the name of nominee officers provided by Sovereign. Sovereign would then open bank accounts for these entities and provide debit cards in the name of the nominee to the U.S. taxpayer. By using such debit cards, taxpayers could access their offshore funds without revealing their identities. Upon consideration of the government's petition, the court determined that the IRS had a reasonable basis for believing that U.S. taxpayers may be using Sovereign Gold Cards to evade their U.S. tax obligations.

The IRS investigation of Sovereign has been ongoing for several years, and was initiated as a result of information derived from a federal narcotics investigation. As part of an investigation of online marketplaces for drug trafficking, the Drug Enforcement Administration learned that traffickers frequently moved money through Panamanian bank accounts controlled by Sovereign using debit cards.

Using information generated through that drug investigation, the IRS sought, and obtained, court approval for several “John Doe” summonses in late 2014 requiring various courier delivery services and U.S. financial institutions to produce information about U.S. taxpayers who might be evading or have evaded federal taxes by using Sovereign’s services.<sup>33</sup> The IRS alleged that Sovereign used certain couriers to correspond with U.S. clients and certain money transmission services to transmit funds to and from clients in the United States. In addition, the IRS alleged that wire services operated by various financial institutions and U.S. correspondent bank accounts held for Sovereign’s banks in Panama and Hong Kong were believed to have records of financial transactions between Sovereign and its clients in the United States.

The IRS also relied upon information generated through its ongoing Offshore Voluntary Disclosure Program to support its latest application for the “John Doe” summons seeking debit card information. In a revenue agent’s affidavit submitted to the court, the IRS disclosed that its “voluntary disclosure program databases” revealed at least one taxpayer who acknowledged using Sovereign’s services to establish numerous offshore structures and twenty-one undeclared accounts, eleven of which were opened in Panama. During an IRS interview, that taxpayer stated that he discovered Sovereign through an Internet search and subsequently utilized Sovereign’s services to set up structures, establish offshore accounts, and open a Sovereign Gold Card to access funds in those accounts.

The most recent “John Doe” summons stands as yet another stern warning to non-compliant taxpayers that the era of bank secrecy and secret offshore accounts in tax haven jurisdictions is over. Indeed, in a Justice Department press release announcing the court’s approval of the latest “John Doe” summons, Tax Division Acting Assistant Attorney General David A. Hubbert stated that “[t]his John Doe summons is yet another example of how we are using all available tools to identify, investigate and hold accountable those who cheat our nation’s tax system by hiding money offshore, as well as those individuals and entities facilitating U.S. taxpayers engaged in this conduct.”<sup>34</sup> Hubbert further warned that “[t]he time to come forward and come into compliance is running short, and those who continue to violate U.S. tax and reporting laws will pay a heavy price.”

As this latest “John Doe” summons demonstrates, the IRS now has more access to information about the offshore activities of U.S. taxpayers than at any previous time in the tax agency’s history. With a wealth of information gathering tools at its disposal, including “John Doe” summonses, the IRS has the ability to command production of a vast array of documents relating to offshore tax evasion schemes and to uncover the identities of those involved. And the IRS can be expected to make full use of that information in undertaking enforcement activity against non-compliant taxpayers.

Despite the large numbers of individuals who have participated in various IRS voluntary disclosure programs over the past four years, it is nonetheless widely believed that many more U.S. taxpayers holding foreign accounts in countries around the world have failed to “come in from the cold.” The refusal of certain U.S. taxpayers to comply is presumably due to their belief that the U.S. government would never discover the existence of their accounts due to the bank secrecy laws of the countries where they maintain accounts or that those jurisdictions would never willingly give up the names of account depositors. The goal of FATCA is to ferret out undisclosed bank accounts and other assets and the like held by U.S. taxpayers at financial institutions around the globe and dismantle the ability of any U.S. taxpayer to hide behind the protection of bank secrecy laws in foreign countries.

#### **Q 1.4 What efforts have other countries undertaken to combat offshore tax evasion?**

The United States is not the only country taking aggressive action to crack down on offshore tax evasion. Following closely on the heels of FATCA, the United Kingdom adopted its own equivalent regime in 2014 (commonly referred to as “U.K. FATCA”). U.K. FATCA mandates the annual exchange of tax data between the United Kingdom and its ten Crown Dependencies and Overseas Territories, which consist of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey, Montserrat, and the Turks and Caicos Islands.

In addition, the Organisation for Economic Co-operation and Development (OECD) has been leading a global effort to implement an automatic exchange of tax information between countries on an

annual basis in order to fight tax evasion and ensure tax compliance. The OECD has promulgated a “Common Reporting Standard” (CRS) that sets forth the due diligence rules for financial institutions to follow in order to collect, and then report, tax data to other countries. Over fifty countries committed to adopt the CRS and commence the automatic exchange of tax data in 2017, and more than fifty additional countries committed to commence such exchange beginning in 2018. Notably, the United States has not agreed to adopt the CRS, instead relying upon its FATCA reporting regime.

## **FATCA Statutory Provisions**

### **Q 1.5 What are the FATCA statutory provisions contained in the Internal Revenue Code (“Code”)?**

The enactment of FATCA added chapter 4 of subtitle A of the Code, and new Code sections 1471 through 1474. Chapter 4 generally requires U.S. withholding agents to withhold tax on certain payments to FFIs that do not agree to report certain information to the IRS regarding their U.S. accounts, and on certain payments to certain nonfinancial foreign entities (referred to as “NFFEs”) that do not provide information on their substantial U.S. owners to withholding agents.

#### **Q 1.5.1 What does Code section 1471 require?**

Section 1471(a) requires any withholding agent to withhold 30% of any “withholdable payment” to an FFI that does not meet the requirements of section 1471(b). A withholdable payment generally includes (i) any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income (referred to generally as “FDAP” income), if such payment is from sources within the United States; and (ii) any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.<sup>35</sup>

An FFI meets the requirements of section 1471(b) if it either enters into an FFI agreement with the IRS to perform certain obligations or meets requirements prescribed by the Treasury Department and the

IRS to be deemed to comply with the requirements of section 1471(b). An FFI is broadly defined as any financial institution that is a foreign entity, and a “financial institution” is similarly defined broadly to include any entity that (i) accepts deposits in the ordinary course of a banking or similar business; (ii) as a substantial portion of its business, holds financial assets for the account of others; or (iii) is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.<sup>36</sup>

An FFI that enters into an FFI agreement with the IRS is considered to be a “participating FFI” and is required to identify its “U.S. accounts” and comply with verification and due diligence procedures prescribed by Treasury and the IRS.<sup>37</sup> A “U.S. account” is generally defined as any financial account held by one or more “specified United States persons” or “United States owned foreign entities.”<sup>38</sup> A U.S.-owned foreign entity is defined as any foreign entity that has one or more substantial U.S. owners.<sup>39</sup> The requirements of the FFI agreement shall apply to the U.S. accounts of the participating FFI and to the U.S. accounts of any other FFI that is a member of the same “expanded affiliated group.”<sup>40</sup>

FATCA requires a participating FFI to report certain information on an annual basis to the IRS with respect to each U.S. account maintained at its institution.<sup>41</sup> The information that must be reported with respect to each U.S. account includes: (i) the name, address, and taxpayer identifying number of each account holder who is a specified U.S. person (or, in the case of an account holder that is a U.S.-owned foreign entity, the name, address, and TIN of each specified U.S. person that is a “substantial U.S. owner” of such entity); (ii) the account number; (iii) the account balance or value; and (iv) the gross receipts and gross withdrawals or payments from the account. If foreign law would prevent the FFI from reporting the required information absent a waiver from the account holder, and the account holder fails to provide a waiver within a reasonable period of time, the FFI is required to close the account.<sup>42</sup>

FATCA further requires a participating FFI to withhold 30% of any “passthru [sic] payment” to a “recalcitrant account holder” or to an FFI that does not meet the requirements of section 1471(b) (referred

to as a “nonparticipating FFI”).<sup>43</sup> A “passthru payment” is defined as any withholdable payment or other payment to the extent attributable to a withholdable payment.<sup>44</sup> A “recalcitrant account holder” refers to any account holder that fails to provide the information required to determine whether the account is a U.S. account, or the information required to be reported by the FFI, or that fails to provide a waiver of a foreign law that would prevent reporting.<sup>45</sup>

**Q 1.5.2 What does section 1472 require?**

Section 1472 addresses U.S.-source payments made to NFFEs, which are defined as any foreign entity that is not a financial institution.<sup>46</sup> FATCA requires a withholding agent to withhold 30% if the payment is beneficially owned by the NFFE or another NFFE, unless the requirements of section 1472(b) are met with respect to the beneficial owner of the payment.<sup>47</sup> The requirements of section 1472(b) are met with respect to the beneficial owner of a payment if: (i) the beneficial owner or payee provides the withholding agent with either a certification that such beneficial owner does not have any substantial U.S. owners, or the name, address, and TIN of each substantial U.S. owner; (ii) the withholding agent does not know or have reason to know that any information provided by the beneficial owner or payee is incorrect; and (iii) the withholding agent reports the information provided to the IRS.

**Q 1.5.3 What does section 1473 require?**

Section 1473 sets forth definitions of key FATCA terms, including “withholdable payment,” “substantial United States owner,” “specified United States person,” “withholding agent,” and “foreign entity.”<sup>48</sup>

**Q 1.5.4 What does section 1474 require?**

Section 1474 provides a series of special rules applicable under FATCA, including liability for withheld tax, credit and refund procedures for withheld tax, confidentiality of information disclosed to the IRS, coordination with other withholding provisions in the Internal Revenue Code, and the treatment of tax withheld under an FFI agreement.<sup>49</sup>

## **FATCA Guidance Issued by Treasury and the IRS**

### **Q 1.6 What regulatory guidance regarding FATCA has been issued by Treasury and the IRS since enactment of the law in 2010?**

Since the passage of FATCA by Congress in 2010, Treasury and the IRS have issued thousands of pages of preliminary guidance, notices, revenue procedures, and regulations regarding implementation of FATCA's withholding and reporting provisions.<sup>50</sup> On February 15, 2012, Treasury and IRS published proposed regulations for implementation of the FATCA statutory provisions,<sup>51</sup> and on October 24, 2012, released Announcement 2012-42 which stated that certain provisions of the proposed regulations would be amended when final regulations were promulgated.

Following issuance of proposed regulations, Treasury and the IRS received significant comments from interested stakeholders. The bulk of the concerns focused on the costs and burdens associated with FATCA implementation and legal hurdles to compliance posed by foreign law. A public hearing was held on May 15, 2012, at which further comments were received by Treasury and IRS.

*Final regulations.* On January 17, 2013, Treasury and IRS issued a massive set of final regulations spanning 543 pages.<sup>52</sup> In a press release announcing the regulations, Treasury stated that “[t]hese regulations give the Administration a powerful set of tools to combat offshore tax evasion effectively and efficiently. The final rules mark a critical milestone in international cooperation on these issues, and they provide important clarity for foreign and U.S. financial institutions.”<sup>53</sup> In attempting to address compliance concerns expressed by stakeholders, the final regulations state that Treasury and IRS “carefully considered these comments and established three avenues for addressing the principal concerns regarding burdens, legal impediments, and technical implementation.”<sup>54</sup> First, the regulations utilize a risk-based approach to implementing FATCA. Second, the regulations allow for collaboration with foreign governments to develop an

alternative intergovernmental approach to streamline FATCA implementation and compliance. Third, the regulations attempt to simplify the process for registering and entering into an FFI agreement with the IRS in order to minimize operational costs associated with collecting and reporting FATCA information.<sup>55</sup>

Following publication of the final regulations, the Treasury Department and the IRS also issued additional FATCA guidance. Notice 2013-43 previewed the revised timelines for implementation of the FATCA requirements and provided additional guidance concerning the treatment of FFIs located in jurisdictions that have signed intergovernmental agreements (IGAs) but have not yet brought those IGAs into force.<sup>56</sup> In particular, Notice 2013-43 clarified that a jurisdiction would be treated as having in effect an IGA if the jurisdiction is listed on Treasury's website as a jurisdiction that is treated as having an IGA in effect. The notice provided that Treasury and the IRS intended to include on this list jurisdictions that have signed but have not yet brought into force an IGA. Notice 2013-69 further previewed some of the changes that Treasury and the IRS intended to make to the final regulations and published a draft of the agreement that an FFI may enter into with the IRS in order to satisfy its obligations and be treated as a participating FFI.<sup>57</sup> Revenue Procedure 2014-13 published the final FFI agreement.<sup>58</sup> Following publication of the final regulations in January 2013, Treasury and the IRS received numerous comments with respect to those regulations and continued active discussions with stakeholders in preparation for FATCA withholding.

*Temporary and coordination regulations.* On February 20, 2014, Treasury and the IRS released temporary regulations under chapter 4 that clarified and modified certain provisions of the final chapter 4 regulations, including incorporating the revised timeline for the implementation of FATCA set forth in Notice 2013-43.<sup>59</sup> The temporary chapter 4 regulations accordingly require that withholding agents (including participating FFIs, qualified intermediaries, withholding foreign partnerships, and withholding foreign trusts) begin withholding with respect to withholdable payments made on or after July 1, 2014, unless the withholding agent can reliably associate the payment with documentation upon which it is permitted to rely to treat the payment as exempt from withholding under chapter 4.

On February 20, 2014, Treasury and the IRS also released temporary regulations under chapters 3 and 61 of the Internal Revenue Code, and section 3406, to coordinate those regulations with the requirements provided in the final and temporary chapter 4 regulations.<sup>60</sup> These coordination regulations sought to harmonize the requirements contained in pre-FATCA rules under chapters 3 and 61 and section 3406 with those under FATCA. Chapter 3 contains reporting and withholding rules relating to payments of certain U.S.-source income (for example, dividends on stock of U.S. companies) to non-U.S. persons. Chapter 61 and section 3406 address the reporting and withholding requirements for various types of payments made to certain U.S. persons. The regulations coordinate these pre-FATCA regimes with the requirements under FATCA to integrate these rules, reduce burden (including certain duplicative information reporting obligations), and conform the due diligence, withholding, and reporting rules under these provisions to the extent appropriate in light of the separate objectives of each chapter or section.<sup>61</sup> In a press release, Treasury explained that the changes related to four key areas:

1. *Rules for Identification of Payees.* Documentation requirements are central to identification of payees under the chapter 3 and FATCA reporting and withholding regimes. The documentation requirements for withholding agents and FFIs under FATCA differ in certain respects from the corresponding documentation requirements for withholding agents under chapter 3. The regulations remove inconsistencies in the chapter 3 and FATCA documentation requirements (including inconsistencies regarding presumption rules in the absence of valid documentation) based, in part, on stakeholder comments.
2. *Coordination of the Withholding Requirements Under Chapter 3, Section 3406, and FATCA.* Chapter 3, section 3406, and FATCA require a payor to withhold under certain, potentially overlapping, circumstances. The temporary regulations provide rules to ensure that payments are not subject to withholding under both chapter 3 and FATCA, or under both I.R.C. § 3406 and FATCA.
3. *Coordination of Chapter 61 and FATCA Regarding Information Reporting with Respect to U.S. Persons.* FATCA generally requires FFIs to report certain information with respect to their U.S. accounts. In some cases, this reporting may be duplicative of the

information required to be reported on Form 1099 with respect to the same U.S. accounts when the holders of such accounts are U.S. non-exempt recipients or the benefits of Form 1099 reporting to increasing voluntary compliance is not outweighed by the burden of overlapping information reporting requirements with respect to the same accounts.

- Under existing FATCA regulations, certain FFIs may be able to mitigate duplicative reporting under FATCA and chapter 61 by electing to satisfy their FATCA reporting obligations by reporting U.S. account holders on Form 1099 instead of reporting the account holder on the Form 8966 as required under FATCA. This election, however, is not expected to relieve burden for FFIs that are required to report on U.S. accounts pursuant to local laws implementing a Model 1 IGA. As previewed in Notice 2013-69, to further reduce burdens and mitigate instances of duplicative reporting under FATCA and chapter 61, the temporary regulations generally relieve non-U.S. payors from chapter 61 reporting to the extent the non-U.S. payor reports on the account in accordance with the FATCA regulations or an applicable IGA.
- The regulations do not, however, provide a similar exception to reporting under chapter 61 for U.S. payors. While some of the information reported by FFIs under FATCA on Form 8966 and under chapter 61 on Form 1099 may overlap, there are also significant differences. Most notably, the requirement under chapter 61 to furnish a copy of Form 1099 to the payee facilitates voluntary compliance, and there is no equivalent requirement for payee statements under FATCA. Moreover, U.S. payors generally have well-established systems for reporting and are subject to reporting on a broader range of payments under chapter 61 than non-U.S. payors. In light of these differences, the benefits of chapter 61 reporting by U.S. payors to the voluntary compliance system outweigh the reduction in burden that would be achieved by eliminating this reporting for U.S. payors that report on the same account under FATCA or an applicable IGA.
- Today's regulations provide a new, limited exception to reporting under chapter 61 for both U.S. payors and non-U.S. payors that are FFIs required to report under chapter 4 or an applicable IGA with respect to payments that are

not subject to withholding under chapter 3 or I.R.C. § 3406 and that are made to an account holder that is a presumed (but not known) U.S. non-exempt recipient. FFIs that are required to report under chapter 4 or an applicable IGA will provide information regarding account holders who are presumed U.S. non-exempt recipients. Moreover, such presumed U.S. non-exempt recipients may not actually be U.S. persons for whom the recipient copy of Form 1099 would be relevant to facilitate voluntary compliance. As a result, the IRS and Treasury believe that reporting under chapter 61 should be eliminated on payments to account holders who are presumed U.S. non-exempt recipients and for whom there is FATCA reporting.

4. *Conforming Changes to the Regulations Implementing the Various Regimes.* The temporary regulations also make numerous conforming changes, including (i) revising the examples in chapters 3 and 61 to take into account that payments in those examples may now be subject to FATCA; (ii) ensuring that defined terms in the FATCA regulations that are used in chapters 3 and 61 are appropriately cross-referenced; and (iii) unifying definitions of terms used in chapters 3, 4 and 61.<sup>62</sup>

*Correcting regulations.* Treasury and the IRS subsequently published corrections to the final and temporary regulations on April 22, 2014,<sup>63</sup> and again on June 30, 2014.<sup>64</sup>

*2014/2015 “transition period.”* In response to numerous concerns from interested stakeholders requesting that the FATCA implementation timetable be delayed beyond July 1, 2014, the IRS announced on May 2, 2014, that calendar years 2014 and 2015 will be regarded as a “transition period” for purposes of enforcement and administration of FATCA.<sup>65</sup> In Notice 2014-33, Treasury and IRS stated that “[t]he transition period and other guidance described in this notice is intended to facilitate an orderly transition for withholding agent and FFI compliance with FATCA’s requirements, and responds to comments regarding certain aspects of the regulations under chapter 3 and chapter 4.”<sup>66</sup>

*Correcting amendment regarding preexisting accounts.* On November 18, 2014, Treasury and the IRS issued a correcting amendment to the previously issued FATCA regulations.<sup>67</sup> According to the preamble to the

correcting amendment, the change “affects FFIs that have entered into an agreement with the IRS to obtain status as a participating FFI and to, among other things, report certain information with respect to U.S. accounts that they maintain.” The preamble further sets forth why the correction was needed:

As published, the temporary regulations contain an error that is misleading with respect to the reporting requirements of participating FFIs (as defined in § 1.1471-1(b)(91)) maintaining U.S. accounts during the 2014 calendar year. This correcting amendment modifies the last date in the first sentence in § 1.1471-4T(d)(7)(iv)(B) to correct the relevant provision to meet its intended purpose.

Specifically, the amendment corrects Treasury Regulations section 1.1471-4T(d)(7)(iv)(B), and provides that “[w]ith respect to the 2014 calendar year, a participating FFI must report under paragraph (d)(3) or (5) of this section on all accounts that are identified and documented under paragraph (c) of this section as U.S. accounts or accounts held by owner-documented FFIs as of December 31, 2014 (or as of the date an account is closed if the account is closed prior to December 31, 2014), if such account was outstanding on or after the effective date of the participating FFI’s FFI agreement.” Prior to the correcting amendment, participating FFIs were only permitted to treat accounts as “preexisting” if they were opened prior to July 1, 2014. The amendment allows participating FFIs to treat accounts as preexisting if they were opened before the institution signed its FFI Agreement with the IRS. The change allows FFIs to have greater leeway in characterizing accounts as “preexisting,” particularly for those institutions which registered as participating FFIs and entered into FFI Agreements after July 1, 2014.

*IGA Relief.* On December 1, 2014, Treasury and the IRS issued Announcement 2014-38 which provides relief to those countries which have reached FATCA IGAs in substance, but have not signed such agreements. In 2012, Treasury and the IRS released Model 1 and Model 2 IGAs to implement the FATCA. Following the release of the model IGAs, many countries around the world expressed interest in entering into IGAs with the U.S. to facilitate the efficient implementation of FATCA’s requirements. Treasury has periodically updated the model IGAs since

their initial release, including by developing “standalone” versions of the nonreciprocal Model 1 IGA and the Model 2 IGA that can be implemented by jurisdictions with which the United States does not have a tax treaty or tax information exchange agreement. Treasury has also released new versions of each model IGA that have been updated to reflect the relevant timing of due diligence and transition rules for FFIs that will be the models for IGAs with jurisdictions reaching an agreement in substance after June 30, 2014, or signing an IGA after June 30, 2014, without having previously reached an agreement in substance, and to provide other clarifications.

All versions of the models are available on Treasury’s website.<sup>68</sup> Treasury and the IRS also publish a list identifying all countries that are treated as if they had Model 1 or Model 2 IGA in effect. This list is maintained on Treasury’s website<sup>69</sup> and the IRS’s website.<sup>70</sup> Treasury and the IRS include on this list jurisdictions that have signed, but may not yet have brought into force, an IGA, as well as a list of jurisdictions treated as if they had an IGA in effect because on or before June 30, 2014, they had reached agreements in substance with the United States on the terms of an IGA and consented to be included on the Treasury and IRS list of such jurisdictions, even though the jurisdiction had not yet signed the IGA.

In anticipation of FATCA’s effective date of July 1, 2014, Treasury and the IRS issued Announcement 2014-17 in order to provide certainty to FFIs and other stakeholders with respect to the status of FFIs in jurisdictions that reached an agreement in substance on the terms of an IGA on or before June 30, 2014, provided that the IGA is signed by December 31, 2014. FFIs that are resident in, or organized under the laws of, or are a branch located in, a jurisdiction that is included on the Treasury and IRS list as having reached an agreement in substance are permitted to register on the FATCA registration website consistent with their treatment under the relevant model IGA, and are permitted to certify their FATCA status to withholding agents consistent with that treatment. Announcement 2014-17 also provided that a jurisdiction that is treated as having an IGA in effect must sign the IGA by December 31, 2014, in order for the FATCA status of FFIs (or branches) in such jurisdiction to continue without interruption.

As of July 1, 2014, 101 jurisdictions were treated as if they have an IGA in effect; forty-eight of these agreements had been signed, and fifty-three remained unsigned. In light of the large number of IGAs that were agreed to in substance but have not yet been signed (and were not likely to be signed by December 31, 2014), many stakeholders expressed concerns to Treasury and the IRS about the practical challenges presented by the requirement that all of these IGAs be signed by December 31, 2014, in order for jurisdictions with an agreed-in-substance IGA to continue to be treated as if they had an IGA in effect. In particular, Announcement 2014-38 noted that:

The large number of jurisdictions that have reached agreements in substance demonstrates worldwide support for the IGA approach to effectively and efficiently implement FATCA, but it also raises concerns about the practicality of getting all of the agreed-in-substance IGAs signed by December 31, 2014.

Stakeholders have expressed concerns that FFIs located in jurisdictions with IGAs that are agreed in substance, but not yet signed, are unable to plan efficiently for FATCA compliance given the uncertainty regarding whether the IGA will be signed by December 31, 2014. More specifically, FFIs have expressed concern that if an IGA that is agreed in substance is not signed by December 31, 2014, and an FFI in that jurisdiction has already registered with an IGA-based registration status, it would have to change its registration status. Similarly, withholding agents have expressed concern about re-documenting the FATCA status of FFIs in a jurisdiction that misses the December 31, 2014, signing deadline, including in particular with respect to withholding agents' reliance on the special rule providing that GIINs of reporting Model 1 FFIs do not need to be obtained before January 1, 2015.

Stakeholders also have expressed concerns about whether jurisdictions that had not signed or reached an agreement in substance on the terms of an IGA on or before June 30, 2014, but that did make significant progress in their IGA discussions, will be able to sign the IGA prior to 2015 in light of the significant number of agreed-in-substance IGAs that are being finalized for signature.

In light of these well-founded concerns, Treasury and the IRS issued Announcement 2014-38 on December 1, 2014, to provide additional guidance with respect to jurisdictions that are treated as if they had

an IGA in effect pursuant to Announcement 2014-17 but that did not sign the IGA before December 31, 2014. Announcement 2014-38 also provided guidance with respect to certain jurisdictions that reached an agreement in substance on the terms of an IGA after June 30, 2014.

Announcement 2014-38 provided that a jurisdiction that is treated as if it had an IGA in effect, but that has not yet signed an IGA, retains such status beyond December 31, 2014, provided that the jurisdiction “continues to demonstrate firm resolve” to sign the IGA that was agreed in substance on or before June 30, 2014, as soon as possible. The announcement further provided that after December 31, 2014, Treasury will review the list of jurisdictions having an agreement in substance on a monthly basis to assess whether it continues to be appropriate to treat each jurisdiction included therein as if it had an IGA in effect or whether a jurisdiction should be removed from the list. According to the announcement:

This determination will be based on, among other factors, the responsiveness of a jurisdiction to communications from the United States regarding the IGA and whether the jurisdiction has raised concerns regarding its ability to sign or bring into force the text that was agreed to in substance. As stated in Notice 2013-43, a jurisdiction that has signed an IGA may also be removed from the list of jurisdictions that are treated as if they had an IGA in effect if Treasury determines that the jurisdiction is not taking the steps necessary to bring the IGA into force within a reasonable period of time.

The announcement further addressed the status of certain jurisdictions that were in advanced discussions on the text of an IGA prior to June 30, 2014, but were unable to complete all the necessary steps to reach an agreement in substance on the IGA on or before June 30, 2014. Several of these jurisdictions subsequently reached an agreement in substance with the United States on the terms of an IGA. Announcement 2014-38 provided that the following jurisdictions will be treated, as of November 30, 2014, as if they had a Model 1 IGA in effect: Angola, Cambodia, Greece, the Holy See, Iceland, Kazakhstan, Montserrat, the Philippines, Trinidad and Tobago, and Tunisia. In addition, Macao will be treated, as of November 30, 2014, as if it had a Model 2 IGA in effect. Any jurisdictions that are not included on the updated list of jurisdictions that are treated as if they had an IGA in

effect will not be treated as such until the IGA is signed. Based on the same criteria used for the jurisdictions that are treated as if they had an IGA in effect on or before June 30, 2014, Treasury will review this list on a monthly basis for whether these jurisdictions continue to demonstrate firm resolve to sign the IGA that was agreed in substance on or before November 30, 2014, or whether any should be removed from the list.

Announcement 2014-38 further provided that the text of the agreements in substance will not be published by the IRS or Treasury until the IGA is signed. Instead, the list will specify only whether the relevant IGA is a Model 1 or a Model 2 IGA, and the date on which the relevant jurisdiction is treated as if it had an IGA in effect. Until the IGA is signed, the jurisdiction will be treated as if it had in effect the relevant model provisions, including in the case of the additional jurisdictions listed above, the “determination date” referenced in the new Model Annex I, which for IGAs agreed in substance after June 30, 2014, will be November 30, 2014. This means that an FFI resident in, or organized under the laws of, or a branch located in, a jurisdiction that is listed on the Treasury and IRS websites as having reached an agreement in substance will be permitted to register on the FATCA registration website consistent with its treatment under the relevant model IGA and will be permitted to certify its status to a withholding agent consistent with that treatment.

The announcement further confirmed that Treasury maintained its policy of not deviating from the model IGA text except in limited circumstances in Annex II. As in Announcement 2014-17, any modifications made in the relevant IGA to the model Annex II categories of exempt beneficial owners, deemed-compliant FFIs, and accounts excluded from the definition of financial accounts will not be applicable until the IGA is signed.

If a jurisdiction is removed from the list of jurisdictions that are treated as if they had an IGA in effect, FFIs that are resident in, or organized under the laws of, that jurisdiction, and branches that are located in that jurisdiction, will, from the first day of the month following the month of removal, no longer be entitled to the status that would be provided under the IGA, and will be required to update their

status on the FATCA registration website accordingly. Such FFIs should also notify withholding agents and financial institutions with which they maintain financial accounts of their change in FATCA status.

*Revenue Procedures 2014-39 and 2014-47.* The IRS published Revenue Procedure 2014-39, entitled “Application Procedures and Overview of Requirements for Qualified Intermediary Status Under Chapter 3, Chapter 4, and 61 and Section 3406; Final Qualified Intermediary Agreement,” which provides guidance to entities seeking to enter into a qualified intermediary withholding agreement (QI agreement) with the IRS under Treasury Regulations section 1.1441-1(e)(5)(ii). The effective date of Revenue Procedure 2014-39 is June 27, 2014.

The IRS published Revenue Procedure 2014-47, entitled “Application Procedures and Overview of Requirements for Withholding Foreign Partnership or Withholding Foreign Trust Status Under Chapter 3 and Chapter 4; Final Withholding Foreign Partnership Agreement; Final Withholding Foreign Trust Agreement,” which provides guidance for entities seeking to enter into a withholding foreign partnership agreement (“WP agreement”) and a withholding foreign trust agreement (“WT agreement”) with the IRS under Treasury Regulations section 1.1441-5(c)(2)(ii) and (e)(5)(v). The effective date of Revenue Procedure 2014-47 is August 8, 2014.

*Notice 2014-59.* In October 2014, the IRS published Notice 2014-59, entitled “Modified Applicability Date of Certain Provisions Under Chapters 3 and 61.” In that notice, Treasury and the IRS announced that they intended to amend certain of the temporary coordination regulations to delay the applicability dates with respect to (1) standards of knowledge applicable to a withholding certificate or documentary evidence to document an entity payee under Treasury Regulations section 1.1441-7(b) for accounts opened, and obligations entered into, between July 1, 2014, and January 2, 2015; and (2) the rules under Treasury Regulations section 1.6049-5(c) providing the circumstances under which a withholding agent or payor may rely upon documentary evidence provided by a payee instead of a withholding certificate to document the foreign status of the payee for purposes of chapters 3 and 61 for accounts opened between July 1, 2014, and January 1, 2015.

*Notice 2015-66.* On September 18, 2015, the IRS published Notice 2015-66, which afforded partner jurisdictions more time to implement information exchange systems. Notice 2015-66 relaxed the September 30, 2015, deadline for countries which have signed Model 1 IGAs to hand over information regarding accounts held by U.S. taxpayers. Under the terms of the Model 1 IGA, once the agreement enters into force, information relating to calendar year 2014 was generally required to have been reported to the United States by September 30, 2015.

Treasury has released two versions of the Model 1 IGA. A Model 1A IGA provides for reciprocal information exchange between the United States and the partner jurisdiction. The obligation to exchange information generally begins after the IGA enters into force under Article 10(1) of the IGA and the competent authorities provide notification that each is satisfied that the other jurisdiction has in place the necessary safeguards to ensure that the information received will remain confidential and be used solely for tax purposes and the infrastructure necessary for an effective exchange relationship. A Model 1B IGA provides for information to be exchanged only by the partner jurisdiction. Under a Model 1B IGA, the obligation for a partner jurisdiction to exchange information with the United States begins when the IGA enters into force under Article 10(1) or Article 12(1) (as applicable) of the IGA.

Once an IGA has entered into force and any relevant notifications described above for the Model 1A IGA have been provided, Article 2 of both versions of the Model 1 IGA requires the partner jurisdiction to obtain and exchange specified information with respect to each U.S. reportable account. Under Article 3(5) of the Model 1 IGA, the partner jurisdiction is obligated to obtain and exchange information within nine months after the end of the calendar year to which the information relates. In the case of information required to be obtained and exchanged with respect to 2014 pursuant to a Model 1 IGA that is in force, the 2014 information should have been exchanged by the partner jurisdiction by September 30, 2015.

Notice 2015-66 recognizes that many countries that have signed IGAs, or have agreed to such in principle, are continuing to work through their internal procedures in order to bring the IGA into force. Such

countries are continuing to develop and implement systems needed for automatic 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 unable to exchange tax information with the United States. For these reasons, Treasury and the IRS decided to relax the September 30 reporting deadline.

For those Model 1 IGA jurisdictions where the obligation to exchange information has not yet taken effect, Notice 2015-66 provides that FFIs in that country will be treated as FATCA compliant, and not subject to withholding, so long as the jurisdiction “continues to demonstrate firm resolve to bring the IGA into force.” Under these circumstances, the deadline to exchange information for calendar year 2014 will be extended one full year, to September 30, 2016. Notice 2015-66 does not, however, change the deadline for FFIs to report information to their local tax authority, which remains governed by law of that country.

For those Model 1 IGA jurisdictions where the obligation to exchange is in effect now, Notice 2015-66 provides that FFIs in that country will be treated as FATCA compliant, and not subject to withholding, so long as the partner jurisdiction notifies the United States before September 30 that it requires more time, and “provides assurance that the jurisdiction is making good faith efforts to exchange the information as soon as possible.” Notice 2015-66 does not, however, change the deadline for FFIs to report information to their local tax authority, which remains governed by law of that country.

Notice 2015-66 provides a much-needed reprieve for Model 1 IGA countries and affords such jurisdictions more time to implement information exchange systems and, if necessary, legislation to implement IGAs. Unless the Model 1 IGA jurisdiction modifies its internal deadline for reporting, FFIs in those jurisdictions will still have to report information regarding their U.S. reportable accounts to their respective tax authorities irrespective of the relaxed deadlines in Notice 2015-66. Notice 2015-66 also provides a reprieve, of sorts, to non-compliant U.S. taxpayers who maintain financial accounts at FFIs in Model 1 IGA jurisdictions. The relaxation of the September 30 deadline for reporting to the United States affords such taxpayers additional time to take steps

to become compliant, by utilizing the various IRS voluntary disclosure programs such as the Offshore Voluntary Disclosure Program or the Streamlined Filing Compliance Procedures. Once a foreign jurisdiction turns over account information to the United States, non-compliant taxpayers generally cannot take advantage of the IRS disclosure programs and will be subject to audit or, worse, a criminal investigation.

*Notice 2015-10.* In April 2015, Treasury and the IRS issued Notice 2015-10, entitled “Guidance on Refunds and Credits Under Chapter 3, Chapter 4, and Related Withholding Provisions.” Treasury and the IRS published this notice to express concern about cases in which persons subject to withholding under Code sections 1441 through 1443 (chapter 3) or sections 1471 and 1472 (FATCA) are making or will make claims for refunds or credits in circumstances where a withholding agent failed to deposit the amounts withheld as required (or otherwise pay such amounts to Treasury). Treasury and the IRS are aware that withholding agents may not always be compliant with the requirement to deposit amounts withheld or reported as withheld on Form 1042-S. If a refund or credit is issued for an amount that has not been deposited, the IRS may not be able to recover that amount because the claimant and, in some cases the relevant withholding agent, may be outside the United States. The allowance of refunds or credits based on the amount reported as withheld on Form 1042-S subjects the Treasury Department to the risk that refunds or credits may be improperly granted for fictitious withholding or amounts that have not been deposited, for which collectability issues may arise. In light of these concerns, Treasury and the IRS stated their intention to issue regulations applicable to claims for refund or credit for amounts withheld under chapter 3 or FATCA. In general, these regulations will provide that an otherwise allowable claim for refund or credit made by a claimant that is the beneficial owner of a withheld payment is only available to the extent that the relevant withholding agent deposited the amount withheld.

*Notice 2016-08.* In January 2016, Treasury and the IRS issued Notice 2016-08, entitled “Timing of Submitting Preexisting Accounts and Periodic Certifications; Reporting of Accounts of Nonparticipating FFIs; Reliance on Electronically Furnished Forms W-8 and W-9.” In this notice, Treasury and the IRS announced their intention to amend the

FATCA regulations to adjust the deadlines for certain compliance certifications required to be submitted by certain FFIs and for reporting gross proceeds information. With regard to the compliance certifications, Notice 2016-08 extends the deadline for an FFI's FATCA Responsible Officer certification as to due diligence on preexisting accounts to July 1, 2018. Notice 2016-08 also extends an FFI's FATCA Responsible Officer first certification as to effective internal controls to July 1, 2018, in most cases.<sup>71</sup>

Notice 2016-08 also states that Treasury and the IRS intend to amend the FATCA regulations to provide that with respect to calendar year 2015, a participating FFI, reporting Model 2 FFI, or registered deemed-compliant FFI is not required to report gross proceeds paid to or with respect to an account held by a nonparticipating FFI. Finally, the notice states that Treasury and the IRS will amend the chapter 3 and FATCA regulations to specify the circumstances under which a withholding agent may rely upon electronically furnished Forms W-8 and W-9 collected by intermediaries and flow-through entities.

*Notice 2016-42.* In this notice, Treasury and the IRS published a proposed QI agreement which allows foreign persons to simplify their obligations as a withholding agent under chapter 3 and chapter 4 and as a payor under chapter 61 and section 3406 for amounts paid to their account holders. This proposed QI agreement was intended to replace the existing QI agreement scheduled to expire on December 31, 2016. Comments to this proposed agreement were requested by August 31, 2016.

*Announcement 2016-27.* In this announcement, published in July 2016, Treasury provided updated guidance regarding jurisdictions treated as if they had an IGA in effect. In particular, Treasury stated that on January 1, 2017, it would begin updating the list of IGA countries on its website to provide that certain jurisdictions that have not brought their IGA into force will no longer be treated as if they have an IGA in effect. Each jurisdiction with an IGA that is not yet in force and that wishes to continue to be treated as having an IGA in effect was required to provide to Treasury by December 31, 2016, a detailed explanation of why the jurisdiction had not yet brought the IGA into force and a step-by-step plan that the jurisdiction intended to follow in

order to sign the IGA (if it has not yet been signed) and bring the IGA into force, including expected dates for achieving each step. In evaluating whether a jurisdiction will continue to be treated as if it has an IGA in effect, Treasury said that would consider whether: (1) the jurisdiction has submitted the explanation and plan (with dates) described above; and (2) that explanation and plan, as well as the jurisdiction's prior course of conduct in connection with IGA discussions, show that the jurisdiction continues to demonstrate firm resolve to bring its IGA into force. With respect to the timing of the exchange of prior year information upon entry into force of a Model 1 IGA, Treasury said that it did not intend to find FFIs to be in significant non-compliance with the IGA as long as any information for prior years is exchanged before the next September 30 after the obligation under the IGA to exchange information has taken effect.

Jurisdictions that are initially determined to have demonstrated firm resolve to bring an IGA into force will not retain that status indefinitely. For example, failure to adhere to the expected timeline set out in the jurisdiction's explanation could result in a determination that the jurisdiction is no longer demonstrating firm resolve to bring its IGA into force and therefore will no longer be treated as if it has an IGA in effect.

In order to provide notice to FFIs, a jurisdiction will not cease to be treated as having an IGA in effect until at least sixty days after the jurisdiction's status on the IGA List is updated. FFIs in a jurisdiction that ceases to be treated as if it has an IGA in effect will no longer be able to rely on the IGA to be treated as complying with, and exempt from withholding under, FATCA. Unless they qualify for an exemption under the FATCA regulations, such FFIs generally will have to enter into FFI agreements in order to comply with their FATCA obligations, including reporting information to the IRS and withholding pursuant to the terms of the FFI agreement.

*2016 Final, Temporary, and Proposed Regulations.* On December 30, 2016, the Treasury Department released a widely anticipated set of final, temporary, and proposed FATCA regulations. These regulations consisted of the following:

- Final and Temporary Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities. This publication contained final and temporary regulations under chapter 4 regarding information reporting by FFI with respect to U.S. accounts and withholding on certain payments to FFIs and other foreign entities. This publication also finalized (with changes) certain proposed regulations under chapter 4, and withdrew corresponding temporary regulations. This publication also included temporary regulations providing additional rules under chapter 4. These regulations became effective on January 6, 2017.<sup>72</sup>
- Final and Temporary Regulations Regarding Withholding of Tax on Certain U.S.-Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment. This publication contained final and temporary coordination regulations regarding withholding of tax on certain U.S.-source income paid to foreign persons, information reporting and backup withholding with respect to payments made to certain U.S. persons, and portfolio interest paid to nonresident alien individuals and foreign corporations. This publication finalized (with minor changes) certain proposed regulations under chapters 3 and 61 and sections 871, 3406, and 6402 of the Internal Revenue Code, and withdrew corresponding temporary regulations. This publication also included temporary regulations providing additional rules under chapter 3. These regulations became effective on January 6, 2017.<sup>73</sup>
- Proposed Chapter 4, Regulations Relating to Verification and Certification Requirements for Certain Entities and Reporting by Foreign Financial Institutions. This publication contained proposed regulations under chapter 4 describing the verification requirements (including certifications of compliance) and events of default for entities that agree to perform FATCA due diligence, withholding, and reporting requirements on behalf of certain foreign financial institutions or the FATCA due

diligence and reporting obligations on behalf of certain non-financial foreign entities. These proposed regulations also describe the certification requirements and procedures for IRS review of certain trustees of trustee-documented trusts and the procedures for IRS review of periodic certifications provided by registered deemed-compliant FFIs. In addition, these proposed regulations describe the procedures for future modifications to the requirements for certifications of compliance for participating FFIs and also describe the requirements for certifications of compliance for participating FFIs that are members of consolidated compliance groups. Written or electronic comments and requests for a public hearing must be received by April 6, 2017.<sup>74</sup>

- Proposed Regulations Under Chapter 3 Regarding Withholding of Tax on Certain U.S.-Source Income Paid to Foreign Persons. In this notice of proposed rulemaking, Treasury proposed temporary chapter 3 coordination regulations regarding withholding of tax on certain U.S.-source income paid to foreign persons and requirements for certain claims for refund or credit of income tax made by foreign persons. Written or electronic comments and requests for a public hearing must be received by April 6, 2017.<sup>75</sup>

In addition, the IRS issued two revenue procedures that are relevant to the FATCA regime:

- Revenue Procedure 2017-16, Updated FFI Agreement. This revenue procedure sets forth the updated agreement entered into by an FFI with the IRS to be treated as a participating FFI. This revenue procedure also provides guidance to FFIs and branches of FFIs treated as reporting financial institutions under an applicable Model 2 IGA on complying with the terms of the FFI agreement, as modified by the Model 2 IGA. The FFI agreement previously set forth in Revenue Procedure 2014-38 expired on December 31, 2016. The updated FFI agreement in this revenue procedure applies to FFIs with an FFI agreement effective on or after January 1, 2017.

- Revenue Procedure 2017-15, Qualified Intermediary Agreement. This revenue procedure sets forth the final QI agreement. In general, the QI agreement allows foreign persons to enter into an agreement with the IRS to simplify their obligations as withholding agents under chapters 3 and 4 and as payors under chapter 61 and section 3406 for amounts paid to their account holders. The QI agreement also allows certain foreign persons to enter into an agreement with the IRS to act as qualified derivatives dealers and to assume primary withholding and reporting responsibilities on all dividend equivalent payments that they make.

*Revenue Procedure 2017-21.* In January 2017, the IRS issued a revenue procedure setting forth the withholding foreign partnership agreement (WP agreement) and withholding foreign trust agreement (WT agreement) which allow a foreign partnership or foreign trust to assume the withholding and reporting obligations under chapter 3 and chapter 4 for certain payments of U.S.-source income (such as interest, dividends, and royalties) made to its direct partners, beneficiaries, or owners, and in some cases, persons holding interests in the partnership or trust through one or more foreign intermediaries or flow-through entities. This revenue procedure also provides guidance to foreign partnerships and foreign trusts for how to apply to enter into, or renew, the WP or WT agreement. The WP agreement and WT agreement provided in prior Revenue Procedure 2014-47 were scheduled to expire on December 31, 2016, but on December 30, 2016, the Treasury Department and IRS announced in Revenue Procedure 2017-15 that the 2014 WP and WT agreements would be treated as in effect until the updated agreements were issued in January 2017.

In February 2017, the IRS announced the opening of its Qualified Intermediary, Withholding Foreign Partnership, and Withholding Foreign Trust Application and Account Management System (“QI/WP/WT System”) to create a more efficient and user-friendly method of applying for, as well as renewing and terminating, QI/WP/WT agreements.<sup>76</sup> The deadline for all agreement renewals was initially March 31, 2017, but was subsequently extended to May 31, 2017. All QI/WP/WT agreements in effect prior to January 1, 2017, were required to be

renewed by March 31, 2017, to continue in effect without interruption. All renewals and new applications must be completed and submitted using the new QI/WP/WT System.

*Notice 2017-46.* In this notice, the IRS and Treasury provided procedures for certain FFIs required to report U.S. taxpayer identification numbers (TINs) for certain accounts under a Model 1 IGA. If such FFIs comply with the procedures described in Notice 2017-16, the IRS will not determine that there is significant non-compliance with the obligations under a Model 1 IGA solely as a result of a failure to report U.S. TINs associated with the FFI's U.S. reportable accounts maintained as of the determination date specified in the applicable Model 1 IGA. Notice 2017-16 also stated that the IRS would maintain a list of jurisdictions that do not issue foreign TINs to their residents, and identified three jurisdictions which do not issue foreign TINs: Bermuda, the British Virgin Islands, and the Cayman Islands.<sup>77</sup> Notice 2017-46 also announced that Treasury and the IRS intend to amend certain provisions of the temporary chapter 3 regulations to provide limitations on, and a phase-in of, the requirement for certain withholding agents to obtain and report the taxpayer identification number issued by an account holder's jurisdiction of tax residence and, for an account holder that is an individual, the account holder's date of birth.

*Notice 2018-20.* In this notice, the IRS announced that it would expand the list of jurisdictions that do not issue TINs to their residents (as described in Notice 2017-46) to include jurisdictions that make a request to the U.S. competent authority to be included on such list. The notice further provided that Australia would be added to the previously announced list which included Bermuda, the British Virgin Islands, and the Cayman Islands.

## **Options for Non-compliant Taxpayers**

### **Q 1.7 What options exist for U.S. taxpayers with undisclosed offshore bank accounts?**

*Offshore Voluntary Disclosure Program.* Taxpayers who are not compliant with their prior year FBAR or income tax reporting obligations with respect to foreign bank accounts may wish to take advantage of

the IRS Offshore Voluntary Disclosure Program (OVDP), an amnesty program designed to encourage U.S. taxpayers with undisclosed foreign bank accounts to come into compliance with U.S. tax laws and avoid criminal prosecution. This program permits eligible taxpayers with undisclosed foreign bank accounts, and unreported income associated with those accounts, to avoid criminal prosecution in return for the payment of back taxes, interest, and penalties. Since OVDP's initial launch in 2009, more than 56,000 taxpayers have come into compliance voluntarily through the OVDP and predecessor programs, paying \$11.1 billion in back taxes, interest, and penalties. The number of taxpayer disclosures through OVDP peaked in 2011, when about 18,000 taxpayers came forward. The number of disclosures has since steadily declined, with only 600 disclosures occurring in 2017.<sup>78</sup>

On March 13, 2018, the IRS announced that the OVDP would formally close on September 28, 2018.<sup>79</sup> In making this announcement, Acting IRS Commissioner David Kautter stated that “[t]axpayers have had several years to come into compliance with U.S. tax laws under this program. All along, we have been clear that we would close the program at the appropriate time, and we have reached that point. Those who still wish to come forward have time to do so.” The IRS’s decision to end the OVDP was based on a number of factors, including declining participation in the program, advances in third-party reporting pursuant to FATCA, and increased awareness among U.S. taxpayers of their offshore tax and reporting obligations. The IRS also made clear that offshore tax enforcement remains a top priority, with Don Fort, Chief, IRS Criminal Investigation, stating that “[t]he IRS remains actively engaged in ferreting out the identities of those with undisclosed foreign accounts with the use of information resources and increased data analytics. Stopping offshore tax noncompliance remains a top priority of the IRS.”<sup>80</sup>

*Prior IRS Offshore Voluntary Disclosure Programs.* In 2009, shortly after UBS executed its deferred prosecution agreement and the Swiss government started divulging the identities of holders of secret accounts, the IRS announced a special amnesty program for offshore bank accounts. This program was prompted by the recognition that not everyone with a Swiss bank account was a tax cheat; indeed, many Americans inherited bank accounts in Switzerland—such as from

ancestors fleeing Nazi Germany—or maintained accounts in foreign countries for wholly legitimate reasons. Amnesty was only available, however, if the account holder came forward before the IRS obtained the individual’s account information; once the IRS learned of the taxpayer’s non-compliance, the voluntary disclosure program was no longer an option. Individuals who took advantage of that program were required to pay back taxes and substantial civil penalties in exchange for amnesty from criminal prosecution. This special program (which lasted for only six months) was such a huge success, with over 15,000 individuals coming forward to confess that they had unreported bank accounts, that the IRS reopened the program in 2011 and yet again in 2012.

In 2012, the IRS also announced the Streamlined Filing Compliance Procedure (the “Streamlined Procedure”) which was designed to provide an easier road to compliance for taxpayers who non-willfully failed to report their foreign accounts and income.<sup>81</sup> While originally hailed by then-IRS Commissioner Doug Shulman as a “series of common-sense steps,” the practical reality was that the qualifications for the Streamlined Procedure were very narrowly tailored to include only certain U.S. citizens residing abroad who owed little or no back taxes. Many taxpayers with non-willful conduct were ineligible to take advantage of the Streamlined Procedure, and in many instances, were forced to accept the strict penalties of the OVDP in order to come into tax compliance.

*Modifications to OVDP and Streamlined Program.* On June 18, 2014, the IRS announced significant changes to the OVDP and related programs, including modifications to the existing Streamlined Procedure.<sup>82</sup> According to IRS Commissioner John Koskinen, “[t]he new versions of our offshore programs reflect a carefully balanced approach to ensure that everyone pays their fair share of taxes owed. Through the changes we are announcing today, we provide additional flexibility in key respects while maintaining the central components of our voluntary programs.”<sup>83</sup> The modifications provide that taxpayers who can certify that their failure to file an FBAR and/or report income from an offshore bank account was non-willful may be eligible for a reduced penalty framework. On the other hand, taxpayers whose failure to file FBARs and reporting offshore income was willful can be subject to an

increased penalty, up to 50% of the maximum aggregate balance of their offshore holdings.

*Expansion of Streamlined Filing Compliance Procedures to all taxpayers with non-willful conduct.* The IRS expanded the Streamlined Procedure to provide more taxpayers with an easier way to voluntarily come into compliance.<sup>84</sup> Taxpayers residing in the United States are now eligible to use the Streamlined Procedure if they: (1) previously filed a U.S. tax return (if required) for each of the most recent three tax years; (2) failed to report gross income from a “foreign financial asset” and pay tax as required by U.S. law, and may have failed to file an FBAR and/or one or more international information returns (such as Forms 5471 or 8938) with respect to the “foreign financial asset”; and (3) such failures resulted from non-willful conduct. Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law. For these purposes, a “foreign financial asset” includes traditional bank accounts and securities accounts, as well as the broader group of assets that are required to be reported on a Form 8938 such as a real property lease with a foreign lessee.

Taxpayers residing outside the United States are eligible for the Streamlined Procedures if they: (1) meet the non-U.S. residency requirement (for joint return filers, both spouses must meet the non-residency requirement); and (2) have failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) with respect to a foreign financial account, and such failures resulted from non-willful conduct.

Unlike the old Streamlined Procedure, there is no requirement that the taxpayer have \$1,500 or less of unpaid tax per year and no requirement that the taxpayer live abroad. To participate in the new Streamlined Procedure, taxpayers meeting the above criteria will, among other requirements, be required to submit three years of amended tax returns and six years of FBARs, and sign a certification (under penalty of perjury) that the failure to report all income, pay all tax, and submit all required information returns (including FBARs) resulted from non-willful conduct.

Perhaps most importantly, under the new Streamlined Procedure, taxpayers living in the United States will only be subject to a miscellaneous offshore penalty equal to 5% of the foreign financial assets that gave rise to the tax compliance issue. This represents a significant decrease from the 27.5% penalty imposed by the 2012 OVDP. For taxpayers residing outside the United States, there is no penalty under the new Streamlined Procedure.

The Streamlined Filing Compliance Procedures have been enormously popular, with 48,000 taxpayers using these procedures to correct prior non-willful omissions and meet their federal tax obligations, paying approximately \$450 million in taxes, interest, and penalties as of January 2017.<sup>85</sup> The IRS announced updated figures in March 2018, revealing that approximately 65,000 taxpayers had utilized the Streamlined Filing Compliance Procedures.<sup>86</sup>

*Changes to the OVDP.* The IRS also reshaped the OVDP for certain taxpayers whose failure to comply is willful in nature, and therefore does not qualify for the Streamlined Procedure.<sup>87</sup> As of August 4, 2014, the offshore penalty percentage was increased from 27.5% to 50% if, before the taxpayer's OVDP preclearance request is submitted, it becomes public that a financial institution where the taxpayer holds an account or another party facilitating the taxpayer's offshore arrangement: (1) is under investigation by the IRS or Department of Justice, (2) is cooperating with the IRS or Department of Justice in connection with accounts beneficially owned by a U.S. person, or (3) has been identified in a court-approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a "John Doe summons") at the foreign financial institution.<sup>88</sup> The new 2014 OVDP program also eliminated the previous lower-tier penalties for certain non-willful taxpayers, and adopted new procedures for taxpayers who have failed to file an FBAR and/or information reporting form, but correctly reported all gross income on their tax returns.<sup>89</sup>

Since the OVDP terms were modified in 2014, the IRS has maintained a list of financial institutions and facilitators on its website that trigger the higher 50% penalty.<sup>90</sup> Initially, that list was comprised of a handful of foreign banks (mostly Swiss) which were the subject of U.S. government scrutiny, such as UBS, Credit Suisse, HSBC India, and

Bank Leumi, among others. Over time, that list grew steadily, as Swiss banks who participated in the Swiss Bank Program resolved their potential exposure for U.S. tax offenses and had their names added to the list. Eventually, the names of seventy-eight Swiss banks were added to the list, and taxpayers who had accounts at any of those institutions became subject to the 50% penalty. Other banks were added to the list as a result of the issuance of “John Doe” summonses, including institutions in Belize and the Cayman Islands.

In November 2016, forty-seven new names were added to the list, which consisted of forty individuals and seven entities. The new additions included some familiar and well-known names, including UBS whistleblower Bradley Birkenfeld and Swiss financial advisor Beda Singenberger. A large number of Swiss bankers are among the newly added individuals, including employees of UBS, Credit Suisse, Julius Baer, Wegelin, and smaller banks such as Zuercher Kantonalbank, Bank Frey, and Rahn & Bodner Banquiers. The list also included a number of professional advisors, such as attorneys and asset managers from Switzerland and Liechtenstein, and includes individuals who assisted U.S. taxpayers in moving funds out of larger Swiss banks like UBS and Credit Suisse into smaller financial institutions (the so-called “leavers” that are the subject of great interest by the IRS and Justice Department). The new additions to the facilitator list were not limited to Switzerland, however; other countries implicated by the additions include the Cayman Islands, Turks & Caicos, and Belize. The seven companies added to the list were from Belize and were utilized as part of securities and tax fraud schemes orchestrated by a Belize-based individual named Robert Bandfield, who pleaded guilty to money laundering conspiracy in federal court in Brooklyn.

In January 2017, an additional name was added to the list: Michael A. Behr. Mr. Behr was the recipient of a “John Doe” summons authorized by a federal court in Montana which sought information about U.S. taxpayers who may have held offshore accounts established by Sovereign Management & Legal LTD, a Panamanian entity.<sup>91</sup> In particular, the IRS sought records of U.S. taxpayers who, during the years 2005 to 2016, had been issued a “Sovereign Gold Card” debit card that could be used to access the funds in those accounts in such a manner as to evade their obligations under U.S. tax laws.

In August 2017, another name was added to the list: Prime Partners SA. Prime Partners SA is a Swiss asset management firm that entered into a non-prosecution agreement with the Justice Department and agreed to pay a \$5 million fine for assisting U.S. clients in opening and maintaining undeclared offshore bank accounts from 2001 through 2010.<sup>92</sup>

The total number of financial institutions and facilitators for which the 50% OVDP penalty applies now stands at 146.

*Assessment of “Willfulness.”* A critical issue that taxpayers and practitioners will now have to confront is whether the conduct in question was “willful.” The willfulness determination will dictate whether a taxpayer should proceed with the new Streamlined Procedures (designed for non-willful conduct) or the 2014 OVDP (designed for willful conduct). As noted, an individual choosing to proceed under the new Streamlined Procedures will be required to sign a certification, under penalty of perjury, that the “failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct.” Many factors that will have to be considered in determining if an individual’s failure to report a foreign bank account to the IRS was willful including, but not limited to, the following:

- Whether the offshore account was funded with unreported income;
- Whether the taxpayer employed a structure/entity to hold the offshore account;
- Whether the box on Line 7, Schedule B was checked “no” indicating that the taxpayer did not have a foreign bank account;
- Whether the taxpayer failed to advise the return preparer of the existence of the offshore account;
- Whether the taxpayer transferred the offshore funds to another institution to avoid detection;
- The sophistication of taxpayer; and
- Whether the taxpayer was “willfully blind” to the income tax and FBAR reporting obligations with respect to foreign bank accounts.

None of these factors is likely to be determinative, standing alone, on the question of willfulness, but each factor will certainly affect whether the taxpayer's behavior is ultimately deemed to be willful.

Individual taxpayers who still remain non-compliant now should proceed with caution in claiming that their conduct was non-willful. In a recent speech, a high-ranking Justice Department official warned that claims of non-willfulness will be highly scrutinized and may well be deemed not credible after so many years of high-profile enforcement activity by the IRS and Justice Department:

After three very well-publicized voluntary disclosure programs, nearly 200 criminal prosecutions, ongoing criminal investigations and the increasing assessment and enforcement of substantial civil penalties for failure to report foreign financial accounts, a taxpayer's claims of ignorance or lack of willfulness in failing to comply with disclosure and reporting obligations are, quite simply, neither credible nor well-received.<sup>93</sup>

*Other Voluntary Disclosure Options.* The IRS offers several other voluntary disclosure programs that can be utilized by non-compliant taxpayers. For taxpayers that have reported all of their income from offshore financial accounts, but have failed to file FBARs, the IRS offers a program called "Delinquent FBAR Submission Procedures."<sup>94</sup> Under this program, eligible taxpayers can avoid penalties if they file delinquent FBARs and provide a written statement of reasonable cause explaining why the FBARs are being filed late. Taxpayers participating in this program may be subject to audit.

Another option is a program entitled "Delinquent International Information Return Submission Procedures" which is designed for taxpayers that have reported all of their income but have omitted one or more international information returns such as Forms 5471, 3520, and 3520-A.<sup>95</sup> Under this program, eligible taxpayers can avoid penalties if they file amended income tax returns with the missing information returns attached and provide a written statement of reasonable cause explaining why the information returns are being filed late. As part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion. Taxpayers participating in this program may be subject to audit.

*Quiet Disclosures.* A final option available to non-compliant taxpayers is what is known as a “quiet disclosure.” A taxpayer making a quiet disclosure simply files amended returns that report previously unreported income and offshore accounts and pays the additional tax, without utilizing one of the formal IRS voluntary disclosure programs discussed above. The IRS generally discourages taxpayers from making quiet disclosures regarding offshore income and assets, but under appropriate circumstances, a quiet disclosure may well be the best option for a non-compliant taxpayer. The decision as to whether to make a quiet disclosure is inherently a facts-and-circumstances determination and competent tax counsel should be consulted before making any such disclosure.

## **Notes to Chapter 1**

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1. U.S. Treasury Department Office of Public Affairs, *Fact Sheet: FATCA Amendments and Coordination Regulations*, at 1 (Feb. 20, 2014).
2. See Treasury Notes, *Online Resources on the Foreign Account Tax Compliance Act* (July 2, 2014), [www.treasury.gov/connect/blog/Pages/FATCA-Resources.aspx](http://www.treasury.gov/connect/blog/Pages/FATCA-Resources.aspx).
3. Final Regulations, Preamble pt. II, T.D. 9610; 78 Fed. Reg. 5874 (Jan. 28, 2013).
4. See FinCEN Form 114, Report of Foreign Bank and Financial Accounts (previously known as Form TD F 90-22.1).
5. H.R. 3236, Pub. L. No. 114-41 (July 31, 2015).
6. *Id.* § 2006(d)(11).
7. I.R.C. § 6038D.
8. I.R.C. § 6501(c)(8).
9. 81 Fed. Reg. 8835 (Feb. 23, 2016).
10. United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Tax Haven Banks and U.S. Tax Compliance Staff Report*, at 1 (July 17, 2008).
11. United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts Majority and Minority Staff Report*, at 9 (Feb. 26, 2014).
12. See U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, [www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm).
13. U.S. Justice Department Press Release, UBS Enters Into Deferred Prosecution Agreement; Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay \$780 Million (Feb. 18, 2009).
14. U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, [www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm).
15. U.S. Attorney's Office, Southern District of New York, Press Release, Court Authorizes IRS to Seek Records from UBS Relating to U.S. Taxpayers with Swiss Bank Accounts (Jan. 28, 2013).
16. U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, [www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm).
17. U.S. Justice Department Press Release, Court Authorizes Service of John Doe Summons Seeking the Identities of U.S. Taxpayers with Offshore Accounts at CIBC FirstCaribbean International Bank (Apr. 30, 2013).
18. Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance (Aug. 29, 2013).

## FOREIGN ACCOUNT TAX COMPLIANCE ACT AB 2018

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19. *Id.*
20. *Id.*
21. David Voreacos, *Swiss Banks Seek Tax Amnesty as Third Accept U.S. Offer*, BLOOMBERG (Jan. 25, 2014).
22. U.S. Justice Department Press Release, *Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns* (May 19, 2014).
23. *Id.*
24. U.S. Department of Justice Press Release, *Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts* (Dec. 22, 2014).
25. *Id.*
26. Justice Department Press Release, *Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungen AG* (Jan. 27, 2016), [www.justice.gov/opa/pr/justice-department-announces-final-swiss-bank-program-category-2-resolution-hszh-verwaltungen](http://www.justice.gov/opa/pr/justice-department-announces-final-swiss-bank-program-category-2-resolution-hszh-verwaltungen).
27. Justice Department Press Release, *Acting Assistant Attorney General Caroline D. Ciralo Delivers Remarks at the Federal Bar Association Tax Law Conference* (Mar. 4, 2016) (emphasis added), [www.justice.gov/opa/speech/acting-assistant-attorney-general-caroline-d-ciralo-delivers-remarks-federal-bar](http://www.justice.gov/opa/speech/acting-assistant-attorney-general-caroline-d-ciralo-delivers-remarks-federal-bar).
28. *See* Department of Justice Press Release, *Justice Department Reaches Final Resolutions Under Swiss Bank Program* (Dec. 29, 2016).
29. *See* <https://www.tkb.ch/tkb/medien/medienmitteilungen.htm?go1CDlccbRxlYVr4qeDJyxIIAoxlk7CxJxlD> (last visited Feb. 1, 2017).
30. *See* IRS Criminal Investigation 2017 Annual Report at 18.
31. *See* In the Matter of the Tax Liabilities Of: John Does, Case No. CR 17-02-BU-BMM (D. Mont.).
32. United Nations, *Global Programme Against Money-Laundering, Office for Drug Control and Crime Prevention, "Financial Havens, Banking Secrecy and Money Laundering"* (1998).
33. *See* In the Matter of the Tax Liabilities Of: John Does, Case 1:14-mc-00417 (S.D.N.Y.).
34. U.S. Department of Justice Press Release, *Court Authorizes Service of John Doe Summons Seeking the Identities of U.S. Taxpayers Who Have Used Debit Cards in Furtherance of Tax Evasion* (Jan. 25, 2017).
35. I.R.C. § 1473(1).
36. I.R.C. § 1471(d)(5).
37. I.R.C. § 1471(b)(1)(A), (B).
38. I.R.C. § 1471(d)(1).
39. I.R.C. §§ 1471(d)(3), 1473(2).
40. I.R.C. § 1471(e), (e)(2).
41. I.R.C. § 1471(b)(1)(C), (E).
42. I.R.C. § 1471(b)(1)(F).
43. I.R.C. § 1471(b)(1)(D)(i).
44. I.R.C. § 1471(d)(7).
45. I.R.C. § 1471(d)(6).

46. I.R.C. § 1472(d).
47. I.R.C. § 1472(a).
48. I.R.C. § 1473.
49. I.R.C. § 1474.
50. See generally Notice 2010-60, 2010-37 I.R.B. 329; Notice 2011-34, 2011-19 I.R.B. 765; and Notice 2011-53, 2011-32 I.R.B. 124.
51. See 77 Fed. Reg. 9022 (Feb. 15, 2012).
52. See T.D. 9610 (Jan. 17, 2013); 78 Fed. Reg. 5874 (Jan. 28, 2013).
53. U.S. Department of the Treasury Press Release, Treasury and IRS Issue Final Regulations to Combat Offshore Tax Evasion (Jan. 17, 2013).
54. Final Regulations, Preamble pt. IV, T.D. 9610; 78 Fed. Reg. 5874 (Jan. 28, 2013).
55. *Id.* On September 10, 2013, Treasury and the IRS published corrections to the final regulations. See 78 Fed. Reg. 55,202 (Sept. 10, 2013).
56. 2013-31 I.R.B. 113.
57. 2013-46 I.R.B. 503.
58. 2014-3 I.R.B. 419.
59. T.D. 9657, 79 Fed. Reg. 12,812.
60. T.D. 9658, 79 Fed. Reg. 12,726.
61. U.S. Treasury Department Office of Public Affairs, *Fact Sheet: FATCA Amendments and Coordination Regulations* (Feb. 20, 2014).
62. *Id.*
63. 79 Fed. Reg. 22,378 (Apr. 22, 2014).
64. See 79 Fed. Reg. 37,175 (July 1, 2014); 79 Fed. Reg. 37,181 (July 1, 2014).
65. IRS Notice 2014-33, *Further Guidance on the Implementation of FATCA and Related Withholding Provisions* (May 2, 2014).
66. *Id.* at 1.
67. See T.D. 9657 (published in *Federal Register* Nov. 18, 2014).
68. See [www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx](http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx).
69. See [www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx](http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx).
70. See [www.irs.gov/Businesses/Corporations/Information-for-Foreign-Financial-Institutions](http://www.irs.gov/Businesses/Corporations/Information-for-Foreign-Financial-Institutions).
71. The certifications required to be submitted to the IRS by an FFI's FATCA Responsible Officer are discussed in detail in chapter 11.
72. T.D. 9809, 82 Fed. Reg. 2124 (Jan. 6, 2017).
73. T.D. 9808, 82 Fed. Reg. 2046 (Jan. 6, 2017).
74. REG-103477-14, 82 Fed. Reg. 1629 (Jan. 6, 2017).
75. REG-134247-16, 82 Fed. Reg. 1645 (Jan. 6, 2017).
76. See [www.irs.gov/businesses/corporations/qualified-intermediary-system](http://www.irs.gov/businesses/corporations/qualified-intermediary-system).
77. See <https://www.irs.gov/businesses/corporations/list-of-jurisdictions-that-do-not-issue-foreign-tins>.

## FOREIGN ACCOUNT TAX COMPLIANCE ACT AB 2018

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78. IR-2018-52, *IRS to End Offshore Voluntary Disclosure Program; Taxpayers with Undisclosed Foreign Assets Urged to Come Forward Now* (Mar. 13, 2018).

79. *Id.*

80. *Id.*

81. IR-2012-65, *IRS Announces Efforts to Help U.S. Citizens Overseas Including Dual Citizens and Those with Foreign Retirement Plans* (June 26, 2012).

82. IR-2014-73, *IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance* (June 18, 2014).

83. *Id.*

84. The new Streamlined Procedure rules are available at [www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures](http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures).

85. See IR-2017-35, *IRS Committed to Stopping Offshore Tax Cheating; Remains on "Dirty Dozen" List of Tax Scams for 2017* (Feb. 16, 2017).

86. IR-2018-52, *IRS to End Offshore Voluntary Disclosure Program; Taxpayers with Undisclosed Foreign Assets Urged to Come Forward Now* (Mar. 13, 2018).

87. The updated OVDP Frequently Asked Questions are available at [www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised](http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised).

88. A list of the foreign financial institutions or facilitators currently meeting the above criteria is available at [www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators](http://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators).

89. See [www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures](http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures) (delinquent FBAR submission procedures); [www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures](http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures) (delinquent international information return submission procedures).

90. See [www.irs.gov/businesses/international-businesses/foreign-financial-institutions-or-facilitators](http://www.irs.gov/businesses/international-businesses/foreign-financial-institutions-or-facilitators).

91. See U.S. Department of Justice Press Release, *Court Authorizes Service of John Doe Summons Seeking the Identities of U.S. Taxpayers Who Have Used Debit Cards in Furtherance of Tax Evasion* (Jan. 25, 2017).

92. U.S. Department of Justice Press Release, *Acting Manhattan U.S. Attorney Announces Agreement with Swiss Asset Management Firm to Resolve Criminal Tax Investigation* (Aug. 15, 2017).

93. U.S. Department of Justice, Acting Assistant Attorney General Caroline D. Ciraolo Delivers Remarks at the Federal Bar Association Tax Law Conference (Mar. 4, 2016) (emphasis added), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-caroline-d-ciraolo-delivers-remarks-federal-bar>.

94. See [www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures](http://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures).

95. See [www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures](http://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures).