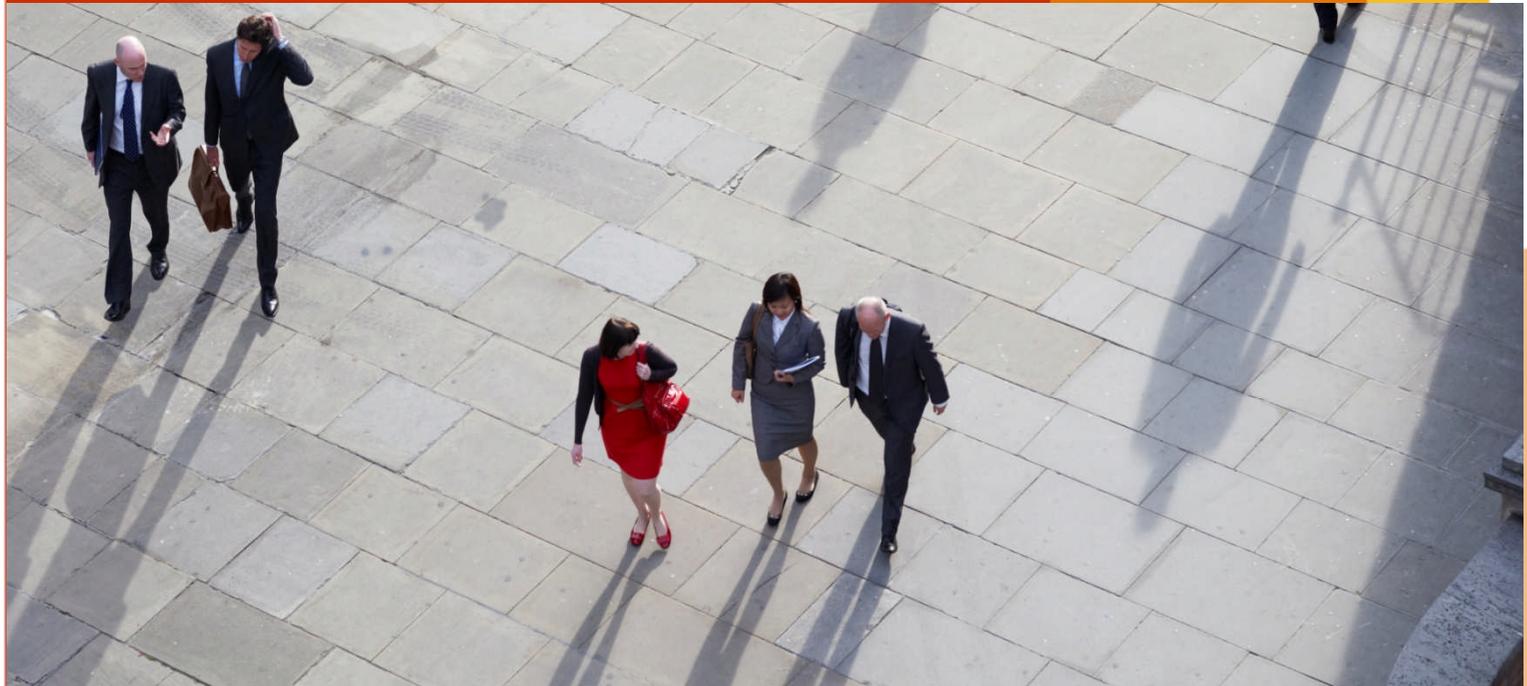


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Boardroom Professional Development - US regulatory & FATCA update

Non-
Executive
Director
programme

March 2012



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The weight of new rules and regulation.....

Solvency II

IMF Financial Activities Tax

Prospectus Directive

VAT on financial services

PRIPs

The Dodd Frank Act

OCERPs

EU Market Infrastructure Directive

Basel III

Volcker Rule

Alternative Investment Fund Managers Directive

International code of conduct

Central counter party clearing – OTC Derivatives

EU Savings Directive II

Pro- consumer regulation – banking and insurance

EU Corporate Governance in tax matters

MiFiD

OECD Exchange of Information Agreements

FATCA

Pro-cyclical capital buffers

UCITS V

UK Bribery Act

International Enhanced Engagement

Deferred tax asset write offs v Tier 1

Bank payroll tax

Pay to Play

UCITS IV

Financial Transaction Tax

Chris Stuart

The Dodd-Frank Act

Impact on Non US Investment Advisers

Overview of impact on non US investment advisers

The new regulatory and compliance reality

Even the most well-intentioned firms are likely to have significant interaction with regulators in the coming years.

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd- Frank or the Act) on July 21, 2010.

- The Act contained 16 titles dealing with various financial services industry matters and other industries. Many of the provisions have an extraterritorial effect.

Overview of impact on non US investment advisers

Why is it important?

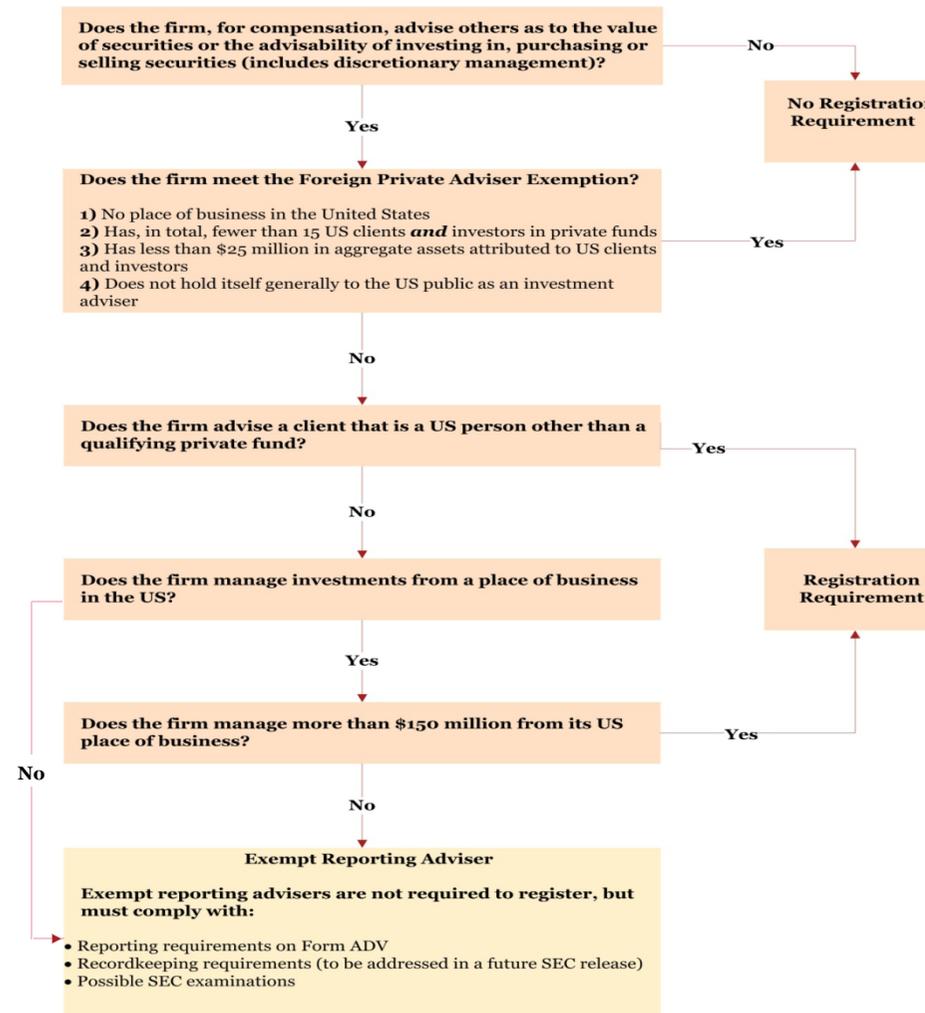
- Eliminated the existing “private investment adviser” exemption which many Non US Investment advisers relied upon.
 - Hedge Funds
 - Private equity and real estate
 - Traditional and retail managers
- Registration requirements must be completed during **Q1 2012**. This is a very short deadline and the process of preparing is a significant undertaking.

Registration requirements for non US investment advisers : Summary of registration rules

Who must register with the SEC?	Date
Investment Advisers using US means, including advisers to private funds; such as advisers of hedge funds, private equity funds, and real estate funds to the extent that they invest in securities.	Full registration March 2012
<i>Foreign Private Advisers Exemption</i> <ul style="list-style-type: none">• Non-US advisers with no place of business in the US; and• < 15 US clients or investors, and• <\$25 million AUM for US clients or investors; and• it cannot hold itself out generally to the public in the USA as an adviser.	Not Applicable
<i>Private Fund Advisers Exemption</i> <ul style="list-style-type: none">• Advisers to private funds with <\$150 million AUM;• Managed from a US place of business; and• No US clients other than Private Funds.	Exempt Reporting Adviser March 2012
<i>Venture capital fund advisers Exemption</i> <ul style="list-style-type: none">• Invest in equity securities of private companies• Not borrow or otherwise incur leverage• Represent itself as a venture capital fund to investors	Exempt Reporting Adviser March 2012

Registration requirements for non US investment advisers

Key impact for asset managers – SEC registration



Insight from US Asset Managers

- Clearly the industry is being impacted by increased regulations globally
- CI clients affected by regulations in many jurisdictions
- SEC first to really crank up the regulatory expectations
- Insight into how US Asset Managers are being impacted

Registration with the SEC

Registration with the SEC may be quite daunting and involves numerous requirements

- The transition to being an SEC registered adviser may involve many onerous and resource-consuming requirements in order to comply with the Advisers Act. Some of these requirements are highlighted below:
- **206(4)-7 “Compliance Rule”** – This rule requires Non US Investment advisers to:
 - Designate a chief compliance officer who is responsible for administering the policies and procedures of the adviser;
 - Adopt and implement written policies and procedures; and
 - No less than annually, conduct a review of the adequacy of those policies and procedures
- **Code of Ethics** – A registered adviser is required to adopt a written code of ethics setting forth a standard of conduct for its employees
- **Monitoring and Surveillance Procedures** – Surveillance procedures to adequately monitor activity within the firm for violations of law and the adviser’s specific policies
- **Books and Records** – A registered adviser is required to maintain and preserve the appropriate books and records of the firm, per Rule 204-2 of the Advisers Act

Registration with the SEC

Registration with the SEC may be quite daunting and involves numerous requirements

- **Form ADV** – Upon registration, an adviser must complete and file form ADV, which identifies certain aspects of the adviser’s business, including a statement of the adviser’s policies and procedures, any noted conflicts of interest, biographies of key employees, etc. These will be filed at least annually, and upon material changes to the covered information
- **Custody** – The new Custody Rule, which generally applies to accounts that contain securities over which the investment adviser has custody, will need to be adhered to.
- **Use of Marketing Material** – Alterations around the use of marketing materials should be reviewed by Non US Investment advisers. For instance, if information regarding performance is contained in marketing materials, this information must be supported by the appropriate books and records to support those numbers, as required by the books and records Rule 204-2.
- **Valuation** – Valuations have always been important, but especially when illiquid assets are held. Particularly, the methodologies for valuing direct and indirect investments in debt and equity will be critical in determining the value of an adviser’s holdings when seeking exemptions, but also as part of an SEC examination.
- **Affiliated broker-dealer** – Certain Non US investment advisers, particularly those who distribute shares or units in non-traded products, may conduct business through an affiliated broker-dealer. Any conflicts of interest stemming from these relationships must be considered and, if necessary, properly disclosed.

Top compliance risks

At a minimum, some level of review must be performed, and incorporated into a regular compliance program, to ensure compliance with your current status as either a registered or non-registered investment adviser.

Top compliance risks:

- Safety of investor assets
- Valuation
- Institutional conflicts
- Personal conflicts
- Insider trading
- Market manipulation
- Marketing practices
- Regulatory reporting
- Risk disclosures
- Investment guidelines and restrictions
- Pay-to-play

Reality of Registration with the SEC

- Asset Managers were at different stages = different level of help required
- SEC's expectations
 - the examination process
 - time commitment
 - focus on “hot button areas”
 - principals based, not tick box mentality
- What did I take away from this?
 - expectation of regulator and oversight is at a completely different level
 - minimise likelihood of exam but maximise readiness for exam
 - SEC focus is on investors, not understanding practical difficulties
- Full Registration v's Exempt Reporting Advisors

Impact of non-compliance

Failure to register

- Significant civil and criminal penalties for not registering – may include individual penalties, interagency communications and enterprise liability.

Examinations and enforcement

- **Examination** – Advisers are subject to examinations by the SEC “at any time, or from time to time”. Advisers’ compliance programs are expected to address critical compliance risk areas, and to detect, correct and prevent any violations.
 - Deficiency letters related to oversight and documentation
 - Referrals to enforcement
 - 18 month examination
- **Enforcement** – The SEC may bring enforcement actions for violations, and has created a special unit within the Enforcement Division to investigate and bring cases against asset management firms, including alternatives investments managers.
 - Fines and barred from US industry

Impact of non-compliance

Whistleblower Program – a new tool

- SEC adopted a final rule to implement the whistleblower program mandated by Dodd Frank.
 - Awards between 10% - 30% of the penalties collected in an action.
- Impact : More whistleblower complaints, more follow-on investigations.

Channel Island Implications

- Focus on ERA's (some work for full SEC's with focus on custody rule impacts)
- Initial impact analysis (whether caught and if so which entity is the ERA)
- Assistance with completing ADV forms
- GAP analysis – is the compliance function fit for ERA requirements?
- What are the implications for offshore GP's v's onshore Advisors
- Looking forward to impact of AIFMD

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Foreign Account Tax Compliance Act 'FATCA'

A practical approach
March 2012

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Agenda

The basic proposal

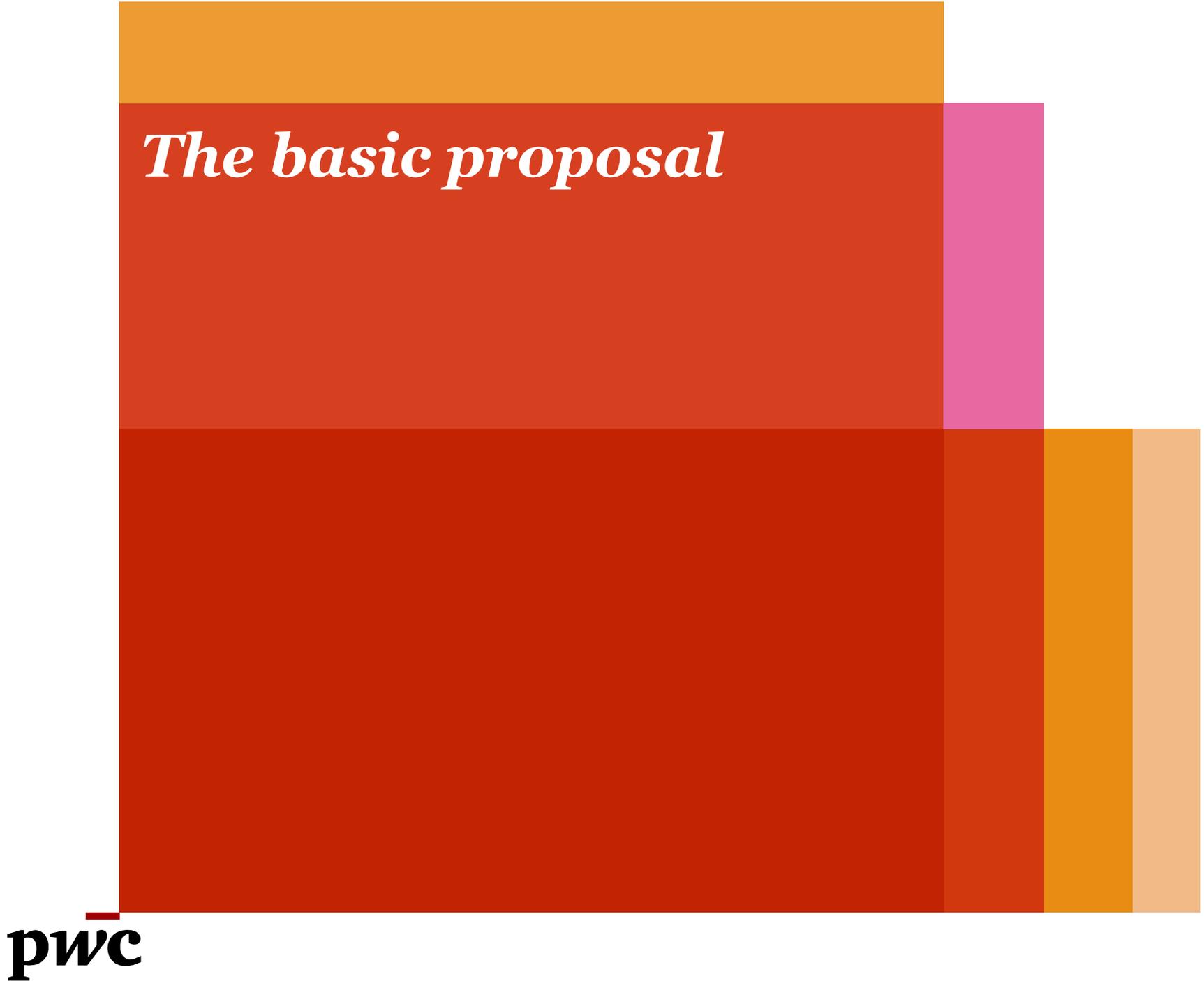
Account classification

Practical considerations

Industry specific commentary

What can be done now?

Practical challenges

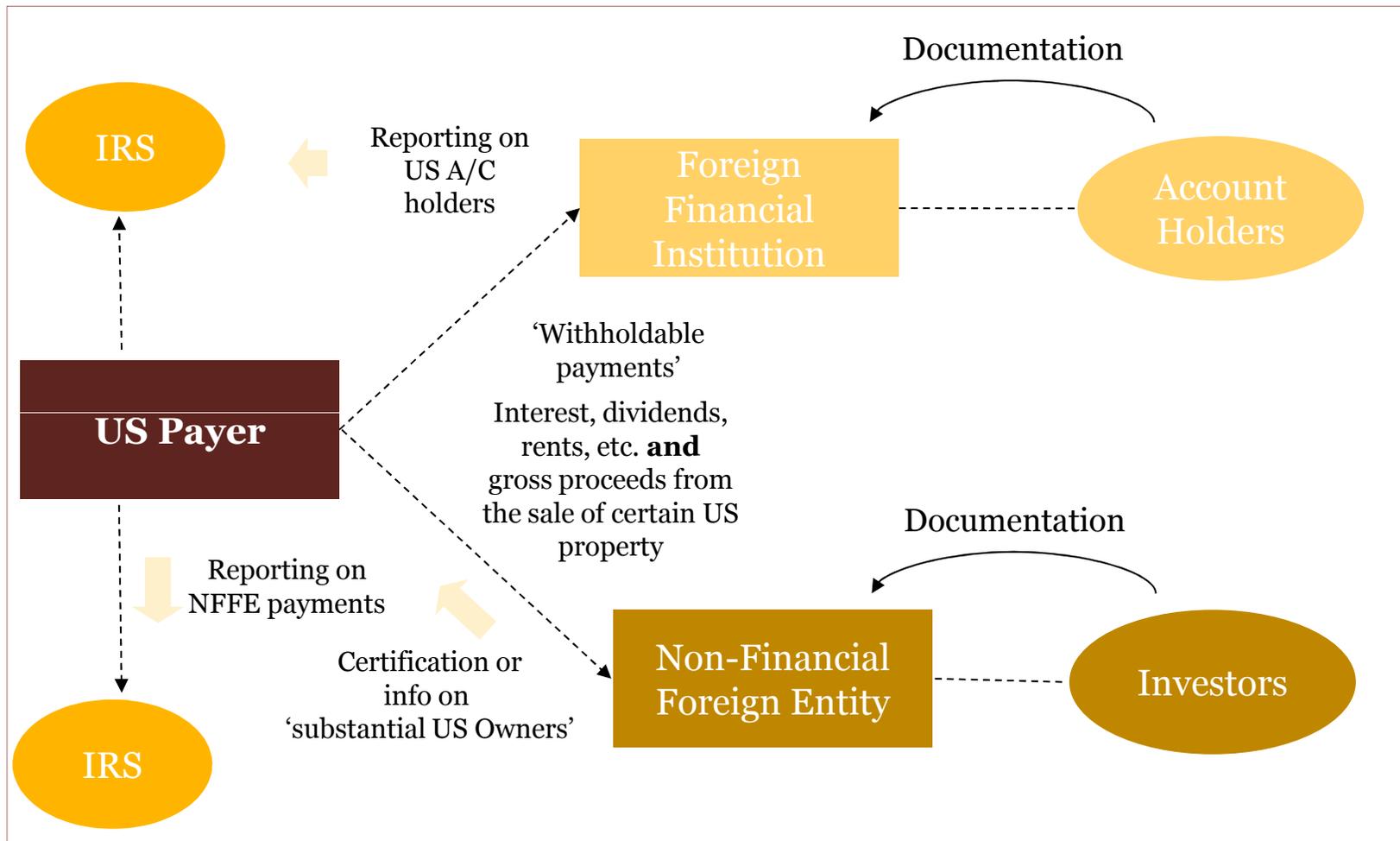


The basic proposal

The Basis Proposal

FATCA's primary goal is to provide the IRS with an increased ability to detect US tax evaders concealing their assets in foreign accounts and investments by encouraging Foreign Financial Institutes (FFI) and Non Foreign Financial Institutes to comply with a new set of tax information reporting and withholding rules, or suffer the consequences of non compliance, primarily being subject to withholding tax on withholdable payments or pass thru payments.

The basic proposal



Key Technical Aspects of FATCA's Withholding & Reporting Requirements

A Foreign Financial Institution (“FFI”) is a foreign entity that either:		Examples:
<ul style="list-style-type: none"> Accepts deposits in the ordinary course of a banking or similar business 	<ul style="list-style-type: none"> Commercial banks Savings and Loan Associations 	<ul style="list-style-type: none"> Credit unions Co-operative banking institutions
OR		
<ul style="list-style-type: none"> Holds financial assets for the account of others, as a substantial portion of its business 	<ul style="list-style-type: none"> Broker Dealers Clearing Organizations Trust Companies 	<ul style="list-style-type: none"> Custodial banks Custodian of Employee Benefit Plan
OR		
<ul style="list-style-type: none"> Is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities, or any interest in such assets (including derivatives such as forwards, futures or options) 	<ul style="list-style-type: none"> Mutual Funds Funds of Funds ETFs Hedge Funds Private Equity Funds Venture Capital Funds Sovereign Wealth Funds 	<ul style="list-style-type: none"> Commodity Pools Managed Funds Collective Investment Vehicles Life Insurance companies/products
<p>A non-financial foreign entity (“NFFE”) is any foreign entity which is not an FFI</p>		

Key Technical Aspects of FATCA's Withholding & Reporting Requirements *(continued)*

FATCA's New Withholding & Reporting Requirements

- A **30% U.S. withholding tax** on any **Withholdable Payment** and any **Pass-thru Payment** paid to any offshore fund or other type of **Foreign Financial Institution ("FFI")** unless the FFI has entered into an **FFI Agreement** obligating it to **report and withhold** with respect to certain **accounts** (see below).
- A **30% U.S. withholding tax** on any **Withholdable Payment** paid to any **Non-financial Foreign Entity ("NFFE")** unless the NFFE identifies each **Substantial U.S. Owner** that owns a direct or indirect interest or certifies that it has no such Substantial U.S. Owners.
- The term "Withholdable Payment" includes **gross proceeds** from the sale of U.S. stocks and securities, payments on certain **U.S. equity swaps**, and U.S.-source dividends, interest, rents, royalties, etc.
- The term "Pass-thru Payment" means any Withholdable Payment or other payment to the extent attributable to a Withholdable Payment which is paid by an FFI to another FFI.
- FATCA withholding and reporting requirements apply in addition to, and not in replacement of, the current U.S. withholding tax rules (e.g., the U.S.-recipient, NRA and QI withholding and reporting rules).

Key Technical Aspects of FATCA's Withholding & Reporting Requirements (continued)

FFI's Withholding & Tax Documentation Responsibilities to Avoid 30% Withholding Tax:

- **Obtain information** on account holders **necessary to determine** which accounts are **U.S. accounts** (looking for U.S. indicia).
- Perform required **due diligence/verification procedures**.
- **Seek a waiver of applicable bank secrecy, confidentiality, data collection** or other information disclosure prohibitions from the U.S. account holder that might otherwise prohibit or limit FATCA reporting, and **close accounts** in certain circumstances.
- **Report** information on U.S. accounts.
- **Deduct and withhold a 30% tax** on any “pass thru payment” to any recalcitrant account holders or non-compliant FFIs.
- **Calculate and publish its Pass thru Payment Percentage** quarterly.
- **Comply** with IRS information requests.

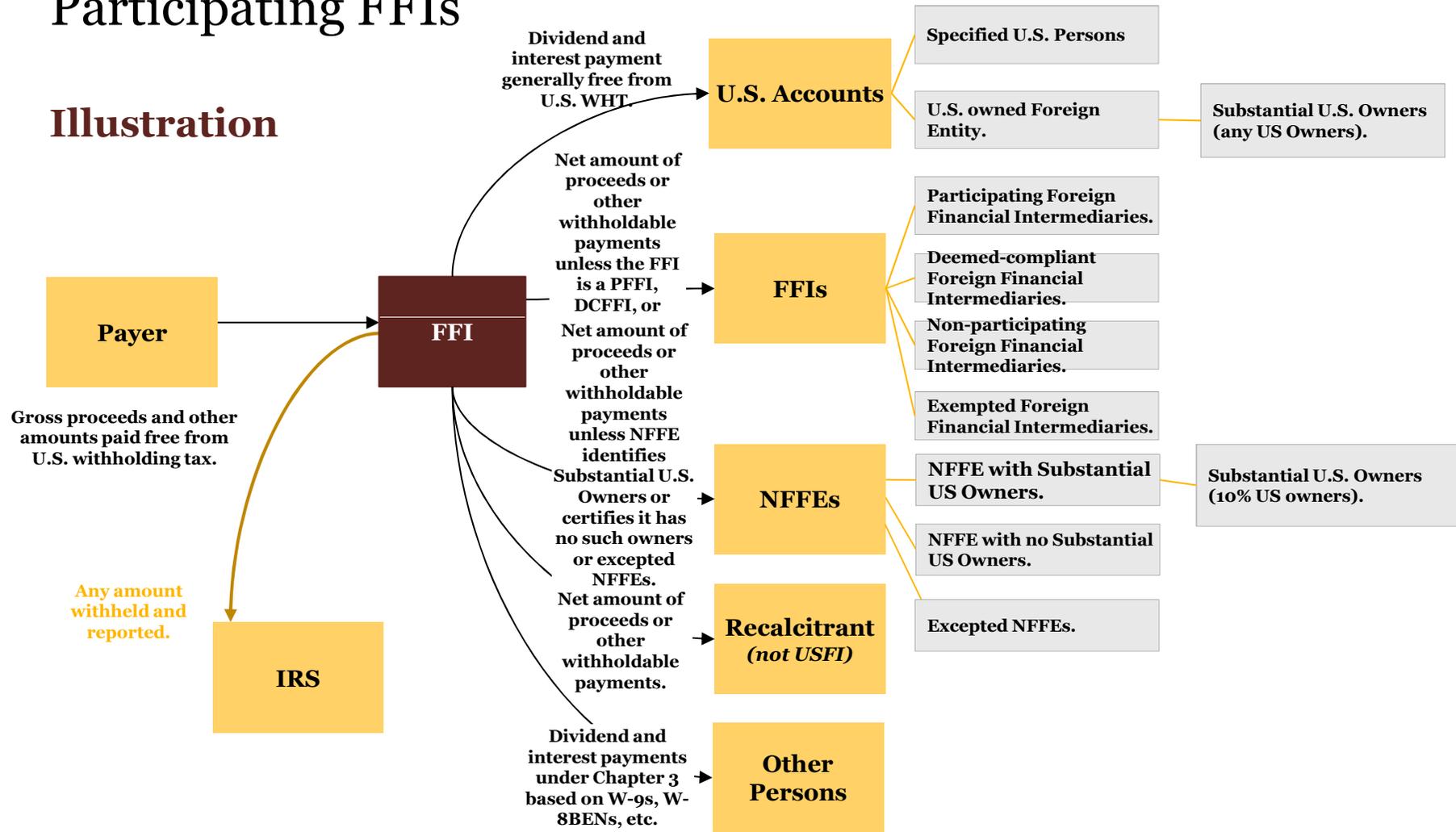
NFFE's Tax Documentation Responsibilities to Avoid 30% Withholding Tax:

- General rule: a 30% withholding tax applies to any withholdable payment made to any NFFE, unless either:
 - NFFE certifies that it does not have any Substantial U.S. Owners (i.e., a U.S. person that owns, directly or indirectly, a greater-than-10% interest), or
 - NFFE provides the IRS with the name, address and TIN of each Substantial U.S. Owner.
 - The withholding agent does not know or have reason to know that any information provided by the NFFE is incorrect; and
 - The withholding agent reports the name, address and TIN of each substantial U.S. owner to the IRS.
- **Exception for “active NFFE”** (i.e. less than 50% of gross income is passive income and less than 50% of assets produce dividends, interest, rent, royalties, annuities or other passive income)

Key Technical Aspects of FATCA's Withholding & Reporting Requirements

Participating FFIs

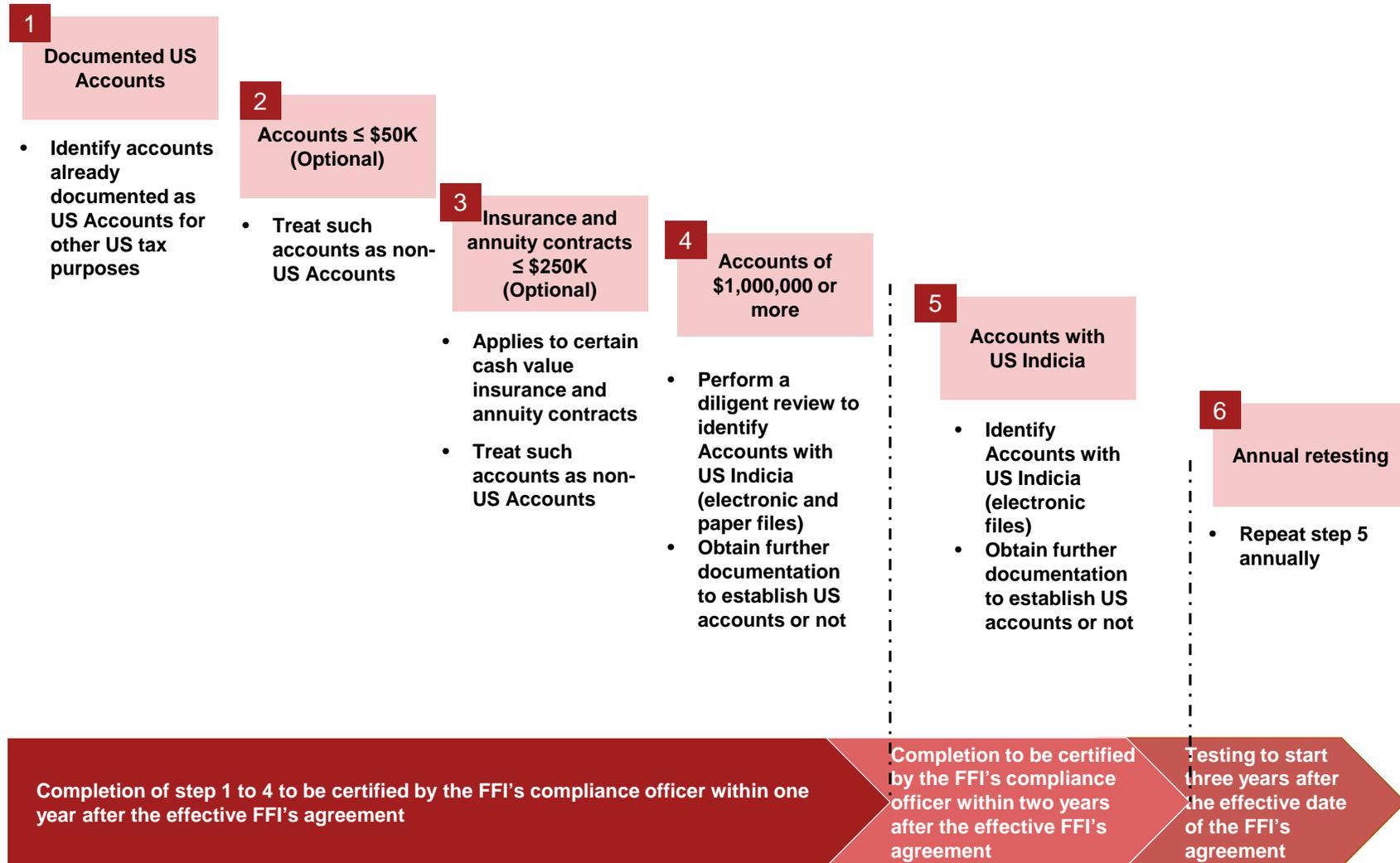
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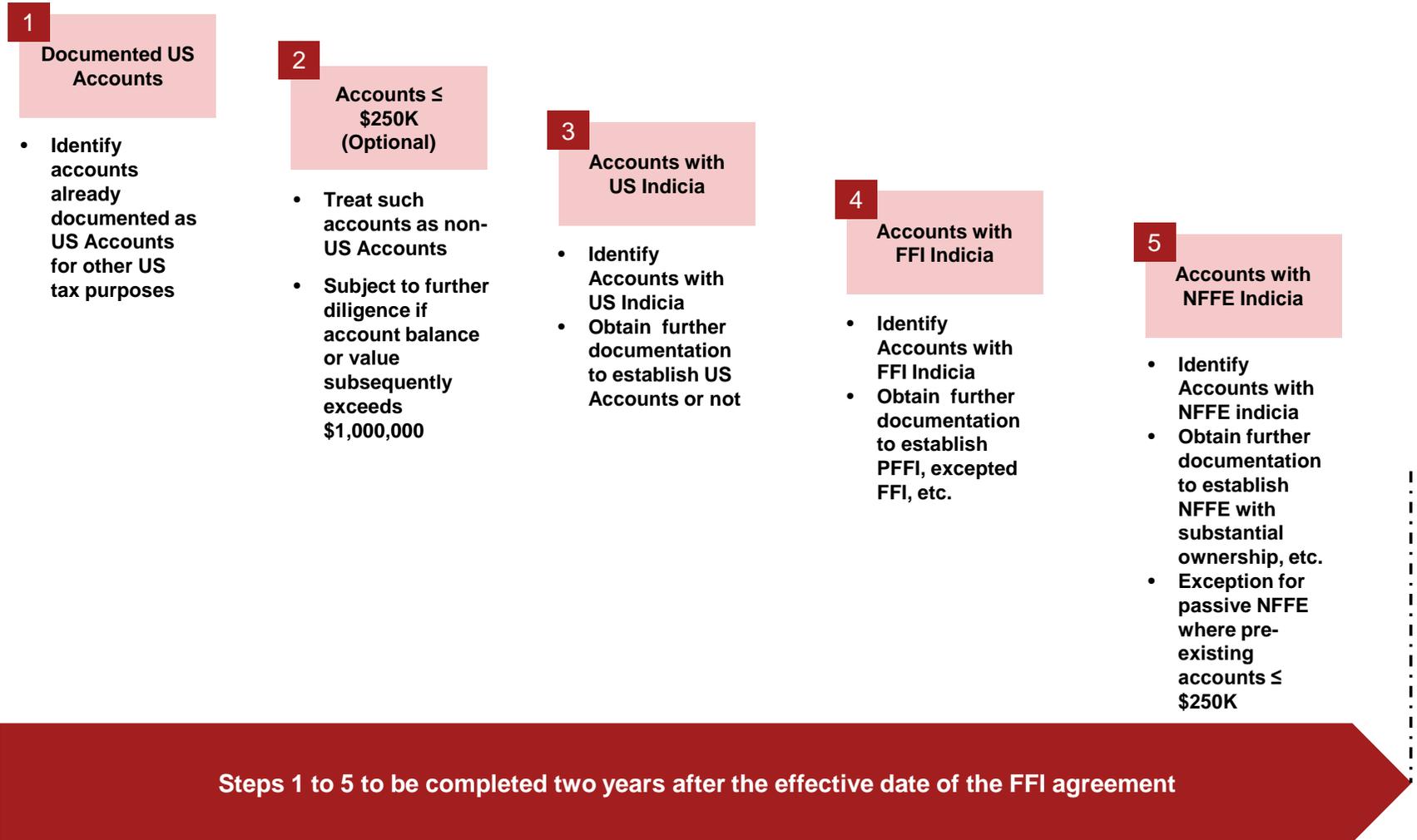


Account classification

Classification of individual accounts



Classification of entity accounts



Key Technical Aspects of FATCA's Withholding & Reporting Requirements

Due Diligence– Indicia of Potential U.S. Status

Indicia	Required Documentation*
a) US citizenship or lawful permanent resident (green card holder)	<ul style="list-style-type: none"> • Form W-9
b) US place of birth	<ul style="list-style-type: none"> • Form W-9 and obtain wavier (if applicable) or • Form W-8BEN and <ul style="list-style-type: none"> • Non US passport or similar government-issued document establishing client's citizenship in a country other than US (if applicable) and • Written explanation regarding client's renunciation of US citizenship or reason why client did not acquire US citizenship at birth (if applicable)
c) Residence address or correspondence address in the US (including US post office box)	<ul style="list-style-type: none"> • Form W-9 or • Form W-8BEN and non US passport or similar government-issued document establishing client's citizenship in a country other than the US (if applicable)
d) Standing instructions to transfer funds to an account maintained in the US or US telephone number	<ul style="list-style-type: none"> • Form W-9 establishing US status or • Form W-8BEN and documentary evidence establishing non-US status of client (if applicable)
e) "In care of" or "hold mail" address that is the sole address with respect to the client	<ul style="list-style-type: none"> • For W-9 establishing US status or • Form W-8BEN and documentary evidence establishing non-US status of individual account holder (if applicable)
f) Power of attorney or signature authority granted to a person with a US address	<ul style="list-style-type: none"> • Form W-9 establishing US status or • Form W-8BEN and documentary evidence establishing non-US status of individual account holder (if applicable)

****Participating FFI is entitled to rely on the documentation received from account holder unless it knows or has reason to know that the information contained in such documentation is unreliable or incorrect.***

Recent updates

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Proposed regulations issued February 2012

- On 8 February 2012 the Department of Treasury and IRS issued the long awaited proposed regulations covering the implementation of various provisions under FATCA
- The Proposed Regulations appear to try to mitigate some of the operational burden imposed on Financial Institutions. Treasury and the IRS appear to have listened, and made an effort to address, comments received from many stakeholders.
- The IRS has recognised the need to provide sufficient lead time for systems development and process changes by further postponing the imposition of withholding tax on US source income and (certain) passthru payments
- The IRS have requested comments on a number of issues, such as certifying compliance with an FFI agreement and the administration of passthru payment withholding
- A public hearing has been scheduled for 15 May 2012. The IRS has requested that comments be submitted by 30 April 2012
- Although proposed regulations provide a great deal of detailed guidance, some gaps remain

Proposed regulations issued February 2012

1. Additional categories of Deemed compliant FFI's

- Concept of “Registered deemed compliant FFI” and “certified deemed compliant FFI”
- Registered deemed compliant FFI categories include “certain qualified investment vehicles” and “restricted funds”
- Conditions for deemed compliant status focus on the nature of the investor (e.g. PFFI or exempt beneficial owners) as well as the distribution relationship
- Deemed compliance status still does not eliminate all of the administrative burden associated with FATCA (ongoing monitoring and information gathering required)

2. Flow through entities

- Partnerships and certain Trusts may elect to be treated as disregarded entities in respect of FDAP income (i.e. income will be treated as paid to partners at the time the income is paid to the partnership or trust).
- For non FDAP income, the foreign fund is treated as recipient and normal FATCA rules apply

Proposed regulations issued February 2012

3. Due diligence for identification of accounts

- Increases threshold for manual reviews to \$1,000,000 for pre existing individual accounts
- Provides guidance on scope of “diligent review” of paper (i.e. non electronically searchable) account records (e.g. paper search)
- Provides \$250,000 de minimis rule for pre existing entities, and extends reliance on information collated during KYC/AML procedures
- Eliminates special rules from prior guidance for “private banking accounts” and replaces with “high value accounts” listed above

4. Transition rule for Affiliates with Legal Prohibitions

- Two year transition rule (until 1 January 2016) for certain members of expanded affiliated group to become a participating or deemed compliant FFI
- Only applies to FFI’s located in jurisdictions that have laws that prohibit the tax withholding or reporting required under FATCA
- FFI will still need to perform due diligence to identify US accounts and maintain records during the transition period

Proposed regulations issued February 2012

5. Extended compliance date for Passthru Payments

- Draft regulations extend the date on which FATCA withholding and reporting begins on foreign passthru payments from 1 January 2015 to 1 January 2017
- During the interim period FFI must report the aggregate amount of certain payments to each non participating FFI to reduce incentive for non participating FFI's to use participating FFI's to block application of FATCA

6. Grandfathered obligations for FATCA withholding

- Include obligations outstanding on 1 January 2013 (previously 18 March 2012)
- Identified certain obligations (such as debt instruments, revolver credit facilities, lines of credit, certain life insurance contracts, term-certain annuity contracts and derivatives under an ISDA master agreement) as eligible for grandfathered status (i.e. not within scope of FATCA withholding)

7. Guidance on procedures to verify compliance

- Responsible officer of an FFI will be expected to certify that the FFI complied with the terms of the FFI agreement
- Verification of compliance through third party audit is not required

Joint Statement on implementation of FATCA

- Joint statement from the US, France, Germany, Italy, Spain and the UK was released alongside the FATCA proposed regulations on 8 February 2012
- States that they are exploring a common approach to FATCA implementation through domestic reporting (US persons) and reciprocal automatic information exchange
- In practice this is likely to mean that FFI's in these countries will be able to report the information required to be compliant under FATCA to their local government agencies as opposed to the IRS directly.
- No indication that the information will be any different than that required under FATCA, the information gathering FFI's need to undertake will likely remain a significant challenge
- How does this impact on Guernsey? Can or should Guernsey enter into such an agreement on the operation of FATCA?

Key deadlines – Revised for proposed regulations

- Summer 2012 – Final regulations expected to be published
- 2013 – Due diligence requirements for identifying new and pre-existing US accounts will begin
- 30 June 2013 – FFI must have entered into FFI agreement with the IRS
- 2014 and 2015 – FFI's must begin summary reporting income associated with US accounts (for calendar years 2013 and 2014)
- 2016 – FFI's must begin reporting income associated with US accounts (for calendar year 2015)
- 2017 – FFI's must begin reporting gross proceeds from securities transactions (for calendar year 2016)

Pass thru Payments

The proposed regulations extend the date on which FATCA withholding begins on foreign passthru payments from 1 Jan 2015 to 1 January 2017. However, during this interim period an FFI must report the aggregate amount of certain payments to each non participating FFI as a means to reduce the incentive for non participating FFI's to use PFFI's to block the application of the FATCA rules.



*Industry specific
commentary*

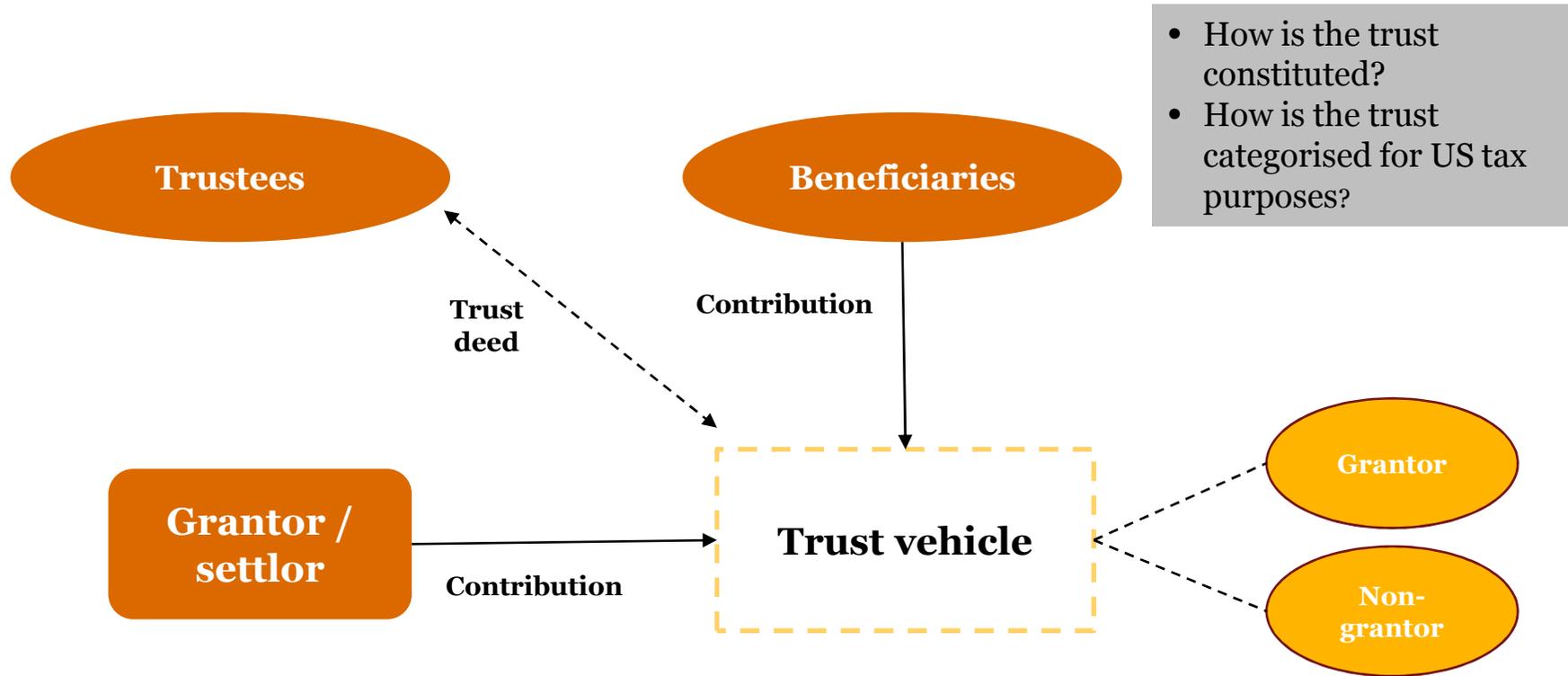
Private Equity

Impact

- Multi-tiered structures: determining whether entities are FFIs or NFFEs.
- Terms and conditions – relevance of restrictions on US investors 1933 Act v s.7701 (a) (30), IRC.
- Exit level - e.g. sub holdco v portfolio co – does the disposal involve US debt securities or US equities.
- Role of administrator in the private equity sector.
- Limited partnership investors may themselves be fund or fund-of-fund vehicles.
- Which entities could apply to be treated as deemed compliant?
- Can the fund entities be classified as an expanded affiliated group?

Trusts and trustees

Typical structure



Trusts and trustees

Impact

- Is the trust vehicle an FFI? Does it hold financial assets on behalf of others or invest in securities, commodities, partnerships or interests in such investments?
- Who 'owns' the trust where the trust is discretionary?
- How to deal with changes in the beneficiaries' share of assets or the position where beneficiaries are unknown?
- What information is available to the trustees? Nominee Companies?

What can be done now?

What preparation can be done now?

With the release of the proposed FATCA regulations, sufficient information has now been made available by the IRS to enable preparation for the new regime to commence, including:

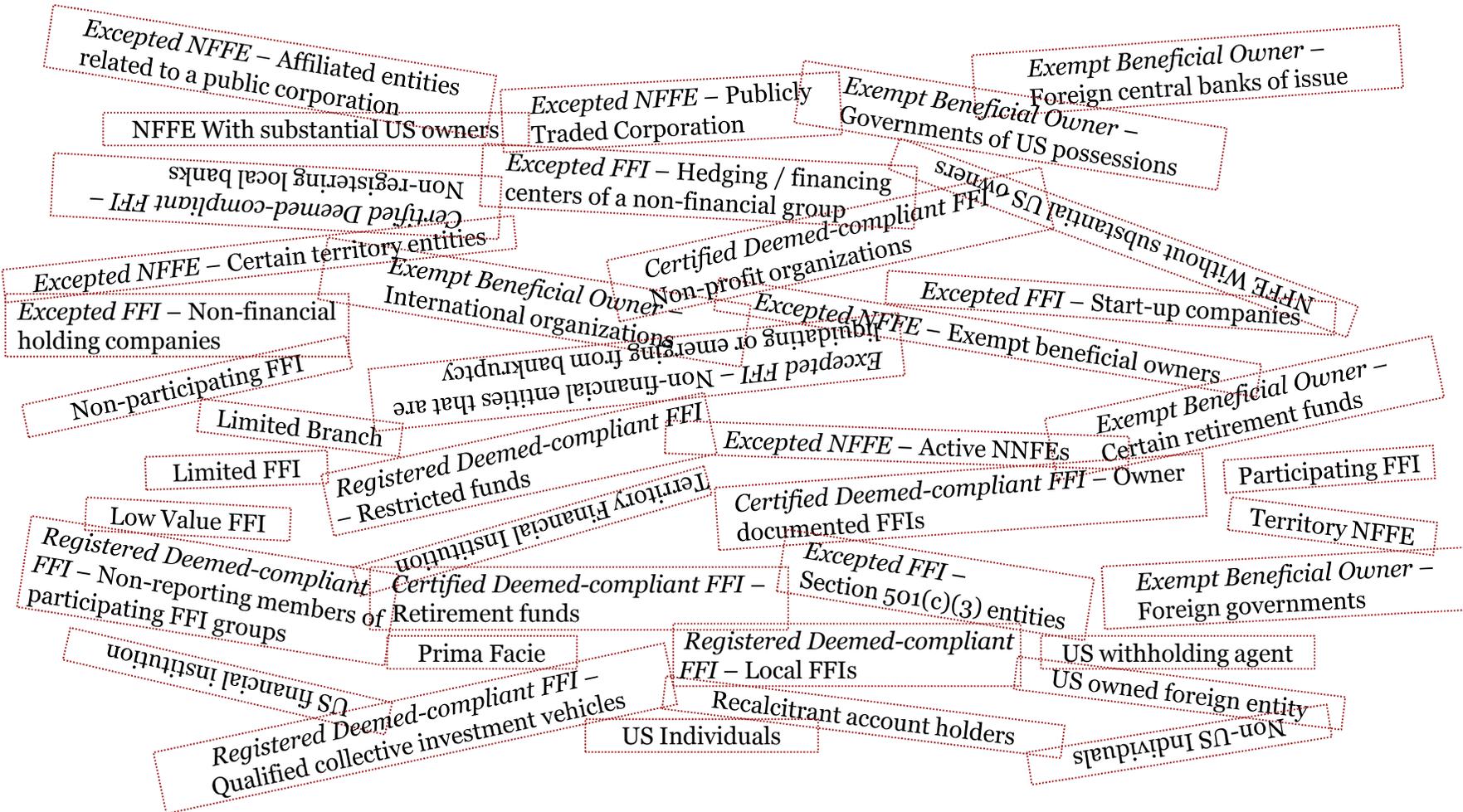
- Education of stakeholders.
- Preliminary Business Risk Assessment.
- Identification of US account holders.
- Reviewing IT systems to identify areas for development.
- Classification of entities as FFI/NFFE

Approach to assessment and implementation

	Key Questions Addressed	Approach / Activities	Deliverables	
Program Management Office (PMO)	Investment Products and Services Analysis	<ul style="list-style-type: none"> What is the nature and degree of exposure that fund vehicles have to FATCA? What are the FATCA obligations associated with the fund vehicles and other stakeholders? 	<ul style="list-style-type: none"> Determine the population of fund vehicles to be assessed Analyze FATCA relevant characteristics of the fund vehicles Identify relevant stakeholders and their FATCA obligations 	1. Fund Vehicles Assessment Report which includes: <ul style="list-style-type: none"> Inventory of FFIs, NFFEs, Financial Accounts, etc. Inventory of other relevant stakeholders High-Level complexity assessment of identified fund vehicles
	Functional Impact Analysis	<ul style="list-style-type: none"> What business functions are impacted by FATCA? In order to meet FATCA requirements what process, data, and systems gaps need to be addressed? 	<ul style="list-style-type: none"> Interview with key personnel across relevant functions (e.g., client on-boarding, AML/KYC, withholding, reporting, technology, etc.), to assess process, data, systems gaps 	2. Functional Impact and Assessment , which summarizes: <ul style="list-style-type: none"> FATCA process, data, systems gaps
	Business Impact Analysis	<ul style="list-style-type: none"> What are other business impacts to the company (distribution mechanisms, legal agreements, etc.)? 	<ul style="list-style-type: none"> Review other business processes and documentation to assess other potential significant business impacts e.g. third party distribution contracts 	3. Business Impact Assessment Summary which includes: <ul style="list-style-type: none"> Potential significant business impacts
	High-Level Implementation Roadmap and Business Case	<ul style="list-style-type: none"> What steps, timelines, and milestones to be followed between now and 1/1/2013? What can we do now vs. wait for further guidance / notice / final regulations? 	<ul style="list-style-type: none"> Socialize the data and current state gaps with various functional groups Combine the next steps & action items into a set of initiatives Conduct working sessions to validate Phase 2 and 3 scope initiatives Estimate level of effort and budget 	4. High-Level FATCA Implementation Roadmap which includes: <ul style="list-style-type: none"> Initiatives charters (e.g., objectives, scope, and dependencies) Initiatives and milestones sequenced over the remaining timeline 5. Business Case Recommendation
		<ul style="list-style-type: none"> Who needs to be included in the FATCA discussion? How are we going to manage the process? 	<ul style="list-style-type: none"> Create project governance structure (i.e., working group, etc.) Track and communicate progress, issues, and risks 	6. PMO Support <ul style="list-style-type: none"> Project Governance Status / Issue / Risk Reporting Tax Technical Support

Practical Challenges

A. Practical Tax Challenges – 39 Classifications of Entities and Accounts



A. Practical Tax Challenges – Identification of the Payee

- Approach for FATCA based upon current rules under chapter 3
- Look to status under chapter 3 and chapter 4
- General Rule – Account Holder is the Payee subject to the following key exceptions:

Account Holder Status Chapter 3	Account Holder Status Chapter 4	Payee
Intermediary – Other than a withholding QI	NFFE & PFFI	Party for whom the Intermediary acts
	NPFFI & others	Intermediary
Intermediary – Withholding QI	PFFI	Intermediary
Flow-through Entity	NPFFI, Active NFFE, Excepted FFI, WP, & WT	Flow-through Entity
	Others	Party for whom the Flow-through Entity acts

B. Operational and Technology Challenges

Assessment Phase

- Sponsorship & resources continue to hamper efforts to get started
- Lack of guidance from 3rd parties on service offerings leaves open questions
- Transition from assessment to implementation has been difficult

Implementation Phase

- Resources and budgets are scarce
- Coordination of geographies/functions has been difficult
- The intersection of in-flight projects and FATCA changes has been a challenge
- Confusion about the impact of some of the changes in the recently released Proposed Regulations

Questions / Closing Remarks

- Next Steps
 - Reach out to Fund Administrators
 - Technology software options

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