Real Estate Tax Alert

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The impact of FATCA withholding on real estate companies, funds and joint ventures

Part 2: Non-US entity classification

Introduction

This is the second client alert we are issuing regarding the implications for real estate companies, funds and joint ventures in connection with the proposed regulations related to the due diligence, withholding, reporting and certification obligations under Internal Revenue Code Sections 1471-1474 (commonly referred to as the Foreign Account Tax Compliance Act ("FATCA")). While the first alert focused on US entities and their obligations under FATCA, this alert focuses on the classification of non-US entities under FATCA and the steps that non-US entities should be taking with respect to complying with this new regime (which, is in addition to, and does not replace other US information reporting and withholding regimes).

FATCA withholding: Why it matters to non-US real estate entities

Unless a non-US entity is able to qualify for an exemption or comply with FATCA's requirements, US source FDAP income paid to that non-US entity generally will be subject to 30% withholding ("FATCA Withholding") starting on January 1, 2014. On January 1, 2015, the payments subject to FATCA withholding will be expanded to include gross proceeds from the sale or disposition of a property which can produce US source interest and dividends (previously gross proceeds paid to non-US persons were not subject to any withholding, except in limited situations such as proceeds attributable to the disposition of a US real property interests subject to the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA")). While FATCA withholding is not set to commence until 2014, an entity that does qualify for an exception will need to consider, plan and implement the appropriate due diligence, withholding, reporting and certification requirements well before that date in order to avoid any FATCA withholding.

Payments subject to withholding: Broad scope

Through a phased approach, FATCA withholding begins in 2014 and 2015 and applies to "withholdable payments" which includes both US source fixed and determinable annual or periodic income (which includes rent, interest and dividends) and proceeds from the sale or disposition of property that produce US source interest or dividends. Withholding on withholdable payments applies even if the payment generally would not be subject to other US withholding regimes. Examples of payments to non-US persons which may be subject to FATCA withholding but generally were not subject to withholding previously (if proper documentation was provided) include:

- Income that qualifies for the portfolio interest exemption;
- Income that would be subject to no withholding (or a lower rate) under a treaty;

- Proceeds from the sale of stock of an entity that is not a US real property holding corporation;
- Proceeds from the sale of stock of a domestically controlled REIT or other stock of a US real property holding corporation if the sale would otherwise be exempt from the FIRPTA withholding regime;
- Repayment of the principal on a note issued by a US entity; and
- Distributions from a US corporation that are not dividend distributions.

Moreover, certain payments received from non-US persons (foreign passthru payments) are currently scheduled to be subject to FATCA withholding beginning no earlier than 2017. The proposed regulations reserved the definition of foreign passthru payments for future guidance. However, previous guidance noted that this could include non-US source payments from a non-US corporation if a portion of the payment is treated as attributable to a US source withholdable payment received by the non-US corporation. While it remains unclear in which circumstances a non-US entity will need to be concerned about payments the non-US entity receives from non-US sources, a non-US entity must undertake certain diligence obligations with respect to its investors. Therefore, FATCA classification may also be relevant for investments in non-US corporations.

Importance of FATCA classification for non-US real estate entities

The due diligence, reporting, withholding and certification requirements under FATCA differ depending on the non-US entity's FATCA classification. At one end of the spectrum, certain entities will only need to certify their status to the payee on a Form W-8 (or equivalent), while at the other end of the spectrum, other entities will be required to enter into agreements with the IRS and comply with all of the provisions therein ("FFI agreement"). There are dozens of different classifications that may apply, however it is helpful to think of three broad classifications: (i) foreign financial institution ("FFIs"), (ii) non-financial foreign entities ("NFFE"), and (iii) exempt beneficial owners.

FFIs

Under the proposed regulations, a non-US entity will be an FFI if the entity:

- Accepts deposits in the ordinary course of a banking or similar business;
- Holds assets, as a substantial portion of its business, for the account of others;
- Is an insurance company (or the holding company of an insurance company) that issues or is obligated to make payments with respect to a financial account (as defined in the regulations); or
- Is engaged (or holds itself out as engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests and other financial instruments listed in the proposed regulations.

Entities in the real estate sector likely would be most affected by the last FFI category, which is referred to herein as an Investment FFI. Under the proposed regulations, an entity will be an Investment FFI if 50% or more of its gross income is attributable to investing, reinvesting and trading securities, partnership interests and other listed financial instruments over a three year period (or the period during which the entity has been in existence).

Because the test for the last FFI category is based on investment in securities, partnership interests and certain other financial instruments, an entity that directly holds only real estate generally would not be treated as an FFI because real estate is not treated as a security. However, investments in US real estate by non-US persons are often made through an entity treated as a corporation (including a REIT) for US tax purposes. Therefore, as a

practical matter, the fact that an entity that invests directly in US real estate would not be treated as an FFI may have limited relevance in practice. Still, some non-US entities that invest in US real estate may have significant investments in non-US real estate that are made directly or through entities that are disregarded as separate from their owner for US tax purposes. If the income derived from a non-US entity's investments in real estate through disregarded entities exceeds the income derived from investments made through entities treated as partnerships or corporations for US tax purposes, then the non-US entity generally would not be treated as an FFI.

It is interesting to note that under the proposed regulations a non-US entity will be treated as an Investment FFI only if 50% or more of its gross income is from "investing." It is unclear whether there are circumstances in which income may be derived from subsidiaries, but not be treated as derived from "investing." For example, if a real estate fund holds an investment through a subsidiary, income derived from that subsidiary would almost certainly be treated as derived from "investing." However, it is unclear whether the income derived by a real estate operating company from a wholly owned subsidiary would be treated as being derived from "investing."

This raises a concern for real estate (and other) operating companies. Unless the IRS provides guidance indicating that income from a subsidiary will not be treated as from "investing," if an operating company holds one or more subsidiaries, and if 50% or more of the income of the operating company is comprised of dividends received from the subsidiaries, the operating company may be treated as an FFI even though operating companies were not the target of the rules applicable to FFIs.

Classification of FFIs

Once it has been determined that an entity is an FFI, the entity will need to determine whether it can qualify as an excepted FFI or a deemed compliant FFI. If an FFI cannot satisfy either of those categories it must decide to become a participating FFI or it will be a non-participating FFI. In general, withholdable payments to a nonparticipating FFI may be subject to FATCA withholding while payments to a participating FFI, excepted FFI or a deemed compliant FFI generally are not subject to FATCA withholding (unless the payee is required to look through to the owners of the FFI (i.e. in a partnership or similar flow through vehicle) and the owners of the FFI are subject to FATCA withholding).

The key distinction between a participating FFI, on the one hand, and a deemed compliant FFI or an excepted FFI, on the other, is that a participating FFI is required to enter into an agreement with the IRS, which will not only require the entity to perform a high level of diligence with respect to its investors, but also FATCA withholding and reporting and more extensive certifications, whereas the requirements of a deemed compliant FFI and an excepted FFI generally are less burdensome. The requirements of an excepted FFI are generally less burdensome than the requirements of a deemed compliant FFI.

Requirements for participating FFIs

In general, a participating FFI must enter into an FFI agreement in order to mitigate FATCA withholding. While a draft of the FFI agreement has not been released, the proposed regulations do provide some insight regarding some of the responsibilities of a participating FFI under an FFI agreement. These obligations generally relate to account holders, which in the case of an FFI that is a real estate fund or another type of real estate investment entity generally would include many holders of debt or equity in the fund or entity. These obligations are expected to include:

- Applying FATCA withholding on certain payments to account holders to the extent they are made to nonparticipating FFIs, or account holders that do not provide the documentation required under FATCA, or to certain payees that make an election for the withholding agent to withhold certain amounts.

- Performing specified due diligence and certification procedures to identify and document each account holder. Although this alert does not explore the diligence procedures in the proposed regulations in detail, among the due diligence requirements is that a participating FFI will be required to perform an electronic review of information and documentation received by individuals that own financial accounts to determine if an indication of potential US ownership exists with an enhanced review of accounts with a value in excess of $1,000,000.

- Reporting with respect to non participating FFIs, recalcitrant account holders and US accounts.

- Obtaining a waiver with respect to any local law that would prevent providing the information required under FATCA directly to the IRS.

- Adopting written policies and procedures governing its due diligence procedures for complying with FATCA and periodically certifying compliance with these policies.

Excepted FFIs

Certain entities, that otherwise might be treated as FFIs, are excepted FFIs and will not have to provide information about their investors to avoid FATCA withholding. Instead, these entities will provide a Form W-8 certifying their status. The applicability of these exceptions is somewhat limited as described in more detail below.

Non-financial holding companies

In order for an entity to satisfy the rules in the proposed regulations related to non-financial holding companies, which are excepted from the rules generally applicable to both FFIs and NFFEs, the entity must operate as a holding company for a subsidiary or group of subsidiaries that primarily engage in a trade or business other than that of a financial institution. Therefore, the exception is not available to an investment vehicle whose purpose is to acquire or fund companies and then hold the interests in those companies as capital assets for investment purposes. Consequently, the exception is not available to a non-US real estate investment fund that holds all of its real estate investments through subsidiaries. However, it is not clear when a real estate operating business that holds subsidiaries would be treated as holding the subsidiaries as capital assets for investment purposes. If the operating company was treated as holding the subsidiaries for investment purposes, then it would not be able to take advantage of this exception.

Even if a real estate operating company was treated as holding its subsidiaries for non-investment purposes, the holding of those subsidiaries must comprise substantially all of the company's activities. Therefore, a company which has subsidiaries but also has its own business (or has a business conducted through a disregarded entity) would not appear to be able to satisfy this exception.

As the exception only applies if the subsidiaries engage in a non-financial trade or business, the non-US entity will first need to determine whether the activities of the subsidiaries are treated as a trade or business. Therefore, the non-US entity will need to examine the real estate (and other) activities of the subsidiaries to determine if the activities constitute a trade or businesses. Often, this will not be a simple analysis.

It is also unclear whether a subsidiary would be treated as engaged in a trade or business if it did not engage in a trade or business directly, but held an interest in a subsidiary which engaged in a trade or business. Therefore, it is not clear if a non-US entity could satisfy the holding company exception even if it held all of its interests through subsidiaries if those subsidiaries held interests in other entities (even if each of those other entities are engaged in a trade or business).

Other entities not subject to the requirements applicable to FFIs and NFFEs

Other types of entities that are excepted FFIs include certain (i) entities described under Section 501(c) of the Internal Revenue Code (which describes certain entities, such as charities, exempt from US taxation), (ii) non-financial businesses during their start-up phase, (iii) non-financial entities that are liquidating or emerging from bankruptcy and (iv) hedging centers of a non-financial group. The start-up entity exception will only apply during the first 2 years of existence.

Deemed compliant FFIs

Certain FFIs will be treated as a deemed compliant FFI and will not need to enter into an FFI agreement. As will be readily apparent, treatment as a deemed compliant FFI is only available in certain limited cases.

Owner documented FFIs

Owner documented FFIs are FFIs that, among other things, provide information about their owners to a US financial institution or a participating FFI from whom the FFI receives a payment subject to withholding. The payer would then withhold amounts from the owner documented FFI based on the information provided about the owner documented FFI's owners. Unlike other classifications under FATCA which apply to an entity in connection with all of its investments, an entity may be an owner documented FFI with respect to some investments, but not others.

This classification is likely to be particularly relevant to FFIs that do not want to enter into an FFI agreement with the IRS and are investing in entities, or are investing through custodians, that would be willing to assume the withholding obligations for their investors. However, as noted above, the FFI would be required to provide information about its direct and indirect owners to the entity in which it is investing in order to be treated as a deemed compliant FFI.

As a practical matter, many investors that have a particular classification under FATCA may need to utilize the owner documented FFI provisions as well when they do not make an investment directly. For example, under the proposed regulations, if a non-US entity that is a retirement fund that qualifies as a deemed compliant FFI invests in a US fund or a non-US fund, but does so indirectly through an entity that is regarded for US income tax purposes, the entity through which it invests is not likely to qualify as a retirement fund itself. However, the entity that makes the investment could be treated as an owner documented FFI and could provide information about the retirement fund to the withholding agent indicating that no withholding is required.

Note that the owner documented FFI classification is only available with respect to amounts received from a US financial institution or a participating FFI. Therefore, whether the owner documented FFI classification is available will depend on whether the entity directly invests in, or receives a payment from, either a US financial institution or a participating FFI. This can lead to some surprising results.

For example, if a non-US entity invests in a US partnership that only holds interests in a REIT, the US partnership would be a US financial institution (because more than 50% of its income would be derived from dividends which presumably would be treated as from investing in securities) and it may be possible for the FFI to be an owner documented FFI. In that case, the non-US entity would not need to enter into an FFI agreement or adopt specific diligence procedures. Instead, it would provide information about its owners to the US partnership and the US partnership, would withhold as appropriate.

However, if the non-US entity invested directly in a REIT which holds all of its real estate through wholly owned LLCs, the REIT would not be a financial institution (as explained above, if it is treated as holding only real estate it would not be treated as an FFI) and the non-US entity would not be able to be an owner documented FFI and, unless another exception applied, would be required to enter into and comply with an FFI agreement to avoid

FATCA withholding. It is possible that limiting the availability of owner documented FFI treatment to payments received from financial institutions was not intentional and may be remedied in the final regulations or other future guidance.

There are several other important requirements that must be satisfied to qualify as an owner documented FFI.

- The withholding agent must agree to undertake this responsibility. Therefore, as noted above, a non US entity may be an owner documented FFI with respect to payments received from some persons, but not others.

- This classification is not available to an entity if the entity or its affiliates can be classified as an FFI because the entity accepts deposits, holds assets on the account of others or is an insurance company.

- This classification is available only if the FFI does not have any account holders that are non-participating FFIs and the FFI does not issue debt to an account holder in excess of $50,000. An account holder for this purpose may include a holder of a debt or equity interest.

- To become an owner documented FFI with respect to a particular withholding agent, a non-US entity will have to annually provide to the withholding agent either certain information and documentation about its owners or provide an auditor's letter from a firm with a location in the United States.

    - A non-US entity that satisfies this requirement by providing information and documentation will need to provide: (i) the name, address, TIN, and entity classification for every person that owns an interest in the entity, (ii) the percentage owned, and (iii) any other information that is reasonably requested by the withholding agent to fulfill its withholding obligations. The entity will also be required to provide certain documentation regarding certain investors that hold an interest, directly or indirectly, in the non-US entity.

    - A non-US entity that satisfies this requirement with an auditor's letter will need to provide a letter signed by a US accounting firm or legal representative indicating that the auditor has reviewed the information about the owners of the FFI and that certifies that the non-US entity meets certain requirements outlined in the FATCA regulations.

Retirement funds

As discussed below, certain retirement funds are exempt beneficial owners that are exempt from the requirements generally applicable to both FFIs and NFFEs. However, even if a retirement fund is not treated as an exempt beneficial owner, it may still qualify as a deemed compliant FFI (which would obviate the need to become a fully participating FFI to avoid FATCA withholding). For a retirement fund to be treated as a deemed compliant FFI, the entity must be organized for the provision of retirement or pension benefits under the laws of the country in which it is established or in which it operates and it must satisfy one of the following two tests.

> **Test One** – (i) all contributions to the retirement fund must be employer, government or employee contributions that are limited by reference to earned income, (ii) no single beneficiary can have the right to more than 5% of the retirement fund's assets and (iii) either (a) contributions that would otherwise be subject to tax in that jurisdiction are excluded from the gross income of the beneficiary, (b) the taxation of income attributable to the beneficiary is deferred under the laws of the jurisdiction, or (c) 50 percent or more of the total contributions to the FFI are from the government or the employer.
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> **Test Two** – (i) the retirement fund must have fewer than 20 participants, (ii) the retirement fund must be sponsored by an employer (other than certain employers that are FFIs, including a real estate fund), (iii) contributions to the retirement fund must be limited by reference to earned income, (iv) participants that are not residents of the country in which the retirement fund was organized may be entitled to no

more than 20% of the retirement fund's assets and (iv) no participant that is a resident of a country other than the country in which the retirement fund FFI is organized may be entitled to more than $250,000 of the retirement fund's assets.

Other deemed compliant FFIs

Other deemed complaint FFIs include non-profit organizations, non-reporting members of FFI groups, qualified collective investment vehicles, restricted funds, local FFIs, nonregistering local banks and FFIs with low value accounts. The requirements for each of these deemed complaint FFIs can be found in the Schedule attached to this alert.

NFFEs

The classification of an NFFE is relatively straightforward as they are simply non-US entities that are not FFIs. The requirements of an NFFE are less burdensome than the requirements applicable to participating FFIs as NFFEs do not need to enter into agreements with the IRS, and there are no specified diligence requirements applicable to an NFFE. However, an NFFE will be required to identify US owners (subject to certain exceptions) that own more than 10%, directly or indirectly, of the NFFE or certify that it has no such owners. Therefore, it will need to obtain sufficient information from its direct and indirect owners to be able to make such a certification.

Certain NFFEs may be eligible for an exception from the certification requirements applicable to NFFEs. Exceptions available for NFFEs may be available for (i) publicly traded companies and their affiliates, (ii) certain entities organized in US possessions (iii) active NFFEs, (iv) exempt beneficial owners and (v) excepted FFIs. It is important to note that (i), (ii) and (iii) only apply to NFFEs and do not apply to an entity classified as an FFI. For example, a publicly traded corporation that is an FFI generally is not excepted from FATCA withholding as a result of its publicly traded status.

An NFFE is an active NFFE if less than 50% of its gross income is passive income and less than 50% of its assets are assets that produce or are held for the production of passive assets. Passive income includes, among other things, interest, dividends and passive rents. Passive rents are rents other than those derived in an active trade or business conducted by employees of the NFFE. Therefore, if the entity does not have employees, its rental income will be passive in nature. Still, certain entities that conduct active real estate activities through its employees may be treated as active NFFEs.

Exempt beneficial owners

Entities that are classified as exempt beneficial owners generally have little compliance responsibilities with respect to FATCA withholding, reporting and due diligence and generally will be required to only provide a Form W-8 to a withholding agent to certify their status in order to avoid FATCA withholding. While there are a number of entities that fall within this category, these classifications are unfortunately narrow in scope. While some of these classifications may be helpful to certain classes of non-US investors in real estate, they are not generally applicable to real estate related funds, companies and joint ventures themselves.

Foreign governments and other non-US governmental entities

The following entities qualify as exempt beneficial owners under the proposed regulations and are not subject to the rules that generally apply to FFIs or NFFEs:

- Foreign governments;
- Governing authorities of a foreign sovereign (provided the net earnings do not inure to the benefit of any private person);
- Wholly owned entities of a foreign sovereign (provided the net earnings do not inure to the benefit of any private person);
- Governments of US possessions;
- International organizations; and
- Foreign central banks of issue.

It is interesting to note (in particular, for real estate entities that have foreign government investors and joint venture partners) that the exception from FATCA withholding for entities wholly owned by a foreign sovereign may apply to certain entities, even if the entity is not treated as part of a foreign sovereign for purposes of Section 892 of the Code (which generally exempts non-commercial income earned by foreign governments from US income taxation). For example, an entity that is organized outside of the home country of a foreign government is not eligible for the exemption in Code Section 892, but could be exempt from FATCA.

In addition, while a wholly owned entity that engages in commercial activity would not be eligible for the exemption in Code Section 892, such an entity generally would not be subject to FATCA withholding. However, under the proposed regulations a wholly owned entity that accepts deposits in the ordinary course of a banking or similar business or holds accounts for the benefit of others as a substantial part of its business (such as a broker/dealer) may not be eligible for this exception.

Retirement funds

Under the proposed regulations, certain retirement funds can also be classified as exempt beneficial owners provided the retirement fund is the beneficial owner of the payment received and the retirement fund meets all of the requirements under either of the following two tests (as noted above, retirement funds that do not satisfy these tests, and therefore are not exempt beneficial owners, may still be deemed compliant FFIs as described above):

> **Test One** – The retirement fund is: (i) established in a country with a US tax treaty in force, (ii) exempted, in general, from income taxation in the country in which it is established, (iii) operated principally to administer or provide pension or retirement benefits and (iv) entitled to benefits under the US income tax treaty with respect to income from US sources as a resident of the other country that satisfies any applicable limitation on benefits requirement.
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> **Test Two** – The retirement fund: (i) is formed for the provision of retirement or pension benefits under the laws of the country in which it was established, (ii) receives all of its contributions from government, employer and employee contributions that are limited by reference to earned income or from certain transfers of assets, (iii) does not have a beneficiary entitled to more than five percent of the entity's assets and (iv) either is exempt from tax in the country in which it is established or operates or receives more than 50% of its total contributions from the government or employers.

State of flux

It is important to note that the classifications described above, and the requirements associated with them, are still in somewhat of a fluid state. The Treasury and the IRS have received a number of comment letters since the publication of the proposed regulations and the FATCA classifications that have been described above may be revised by either the final regulations or other future guidance. There also may be additional classifications in the final regulations.

The United States is currently negotiating FATCA agreements with other countries which may create new classifications of entities that will be specific to a particular country. The agreements with other countries may also provide that entities described above may be able to satisfy the FATCA requirements in ways not outlined in the proposed regulations. For example, it is expected that certain entities will be able to provide information to their own government, in lieu of reporting the information directly to the IRS. While the US has released model agreements, no agreements have been entered into.

Action items for non-US entities

Organizations that have one or more non-US entities in their organizational structures should begin considering the implications of FATCA withholding on each of their non-US entities. While FATCA withholding will not begin until 2014, non-US entities that intend to be participating FFIs may submit their FFI applications prior to January 1, 2013. The IRS has indicated that entities that submit applications prior to June 30, 2013 will be considered participating FFIs by January 2014. Therefore, entities that desire to be treated as participating FFIs will want to submit their applications between January 1, 2013 and June 30, 2013. This will allow the participating FFIs to provide the necessary information to their withholding agents before withholding commences in 2014.

In addition, each organization should identify an internal team to address FATCA to ensure that individuals are empowered to take the appropriate steps so that its entities do not unexpectedly become subject to FATCA withholding. Once the team is identified, internal staff should be trained so that they know what FATCA implementation will involve and, to the extent needed, so that they can reach out to investors and other stakeholders to allay any fears or apprehensions over FATCA.

The FATCA team should take an inventory of all entities in the organizational structure and classify each entity into its appropriate FATCA category. As described above, FATCA classification is an important step to determine the burden that FATCA will place on the organization.

Assuming the organization will include at least one participating FFI, the FATCA team should also be responsible for ensuring that the organization is in a position to enter into, and comply with the provisions in, the FFI agreement. As part of this process, the FATCA team should identify gaps in existing information reporting and withholding processes and procedures and technology that will prevent FATCA compliance (e.g., inability to track gross proceeds).

Deemed compliant entity criteria

Entity type	Criteria to meet designation
Local FFI	(1) Must be licensed as a bank, securities dealer, financial planner or advisor, (2) Must not qualify under (e)(1)(iii), primarily engaged in investing, (3) Must not have a fixed place of business or solicit accountholders outside its country of incorporation, (4) Must be required to perform information reporting or withholding on residents, (5) Must have at least 98% accountholders in country of organization (includes residents of other EU member states), (6) Must have policies and procedures not to open or maintain accounts for US persons, (7) Must complete due diligence on pre-existing accounts, and either (a) certify that no US accounts were identified, (b) certify that all identified accounts were closed, or (c) agree to withhold and report on identified US accounts), and (8) Each member of the EAG must be incorporated in the same country and qualify as a local FFI.
Low Value Accounts	(1) Must qualify as an FFI as a bank or custodial institution, (2) Must have no accounts which are in excess of $50,000 (if a member of an EAG, no member of the EAG may have an account in excess of $50,000), and (3) Must have no more than $50M in assets on its balance sheet (if a member of an EAG, the EAG must have no more than $50M in assets on its consolidated balance sheet).
Non-profit Organizations	(1) Must be organized exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes, (2) Must be exempt from tax in its country of residence, (3) Must have no shareholders with a proprietary or beneficial interest in its income or assets, (4) Must not allow for distribution of income or assets to a private person or non-charitable FFI, other than pursuant to its charitable activities, and (5) Must, upon liquidation, be required to distribute its income or assets to a foreign government or another qualifying non-profit organization.
Non-registering Local Bank	(1) Must be licensed and operate solely as a bank in its country of operation, (2) Must have no fixed place of business outside of its country of organization, (3) Must not solicit accountholders outside of its country of organization, (4) Must have no more than $175M in assets on its balance sheet, (5) If a member of an EAG, the EAG must have no more than $500M in total assets on its consolidated balance sheet, (6) Must be required to perform information reporting or withholding on residents or if not required to perform information reporting and withholding, have no account with a value or account balance of %50,000 or more, and (7) If a member of an EAG, each member of the EAG must be incorporated in the same country and qualify as a non-registering local bank.
Non-reporting FFI in a Participating Group	(1) Must complete account due diligence, (2) Must, within 90 days, if any US accounts identified, (a) enter into an FFI agreement, (b) transfer the account to a participating FFI or US financial institution, or (c) close the account, and (3) Must implement policies and procedures to transfer accounts or register as an FFI within 90 days of opening a US account, or if a change in circumstances within an existing account creates a US account.

Deemed compliant entity criteria

Entity type	Criteria to meet designation
Owner documented	(1) Must not be (or be affiliated with) a bank, custodial institution, or insurance company, (2) Must not maintain an account for a non-participating FFI in excess of $50,000, (3) Must provide withholding agent all required documentation, and (4) The withholding agent must agree to report information on all US accountholders (direct or indirect) to the IRS.
Qualified Collective Investment Fund	(1) Must qualify under (e)(1)(iii), primarily engaged in investing, and be regulated as an investment fund in its country of organization, (2) Each debt holder in excess of $50,000 or equity holder must be a (a) participating FFI, (b) registered deemed-compliant FFI, (c) US person according to table 14, or (d) exempt beneficial owner, and (3) If a part of an EAG, all members of the EAG must be participating or registered deemed-compliant FFIs.
Restricted Fund	(1) Must qualify under (e)(1)(iii), primarily engaged in investing, be regulated as an investment fund in its country of organization, and be sold through qualifying distributors or redeemed directly by the fund, (2) Each distributor must be a participating FFI, registered deemed-compliant FFI, non-registered local bank, or a restricted distributor (collectively "qualifying distributor"), (3) Must ensure that distribution agreement prohibits sales to US persons, non-participating FFIs, or passive NFFEs with substantial US owners (4) Must require distributors to notify the fund of a change of its Chapter 4 status within 90 days, (5) If a distributor ceases to qualify under (2), Fund will (a) terminate its relationship with the distributor within 90 days, and (b) acquire or redeem all debt and equity interests issued through the distributor within 6 months, (6) Must implement policies and procedures that either the Fund (a) does not open or maintain accounts for holders defined in (3), or (b) will either (i) close any account held by holders defined in (3) within 90 days or (ii) withhold as a participating FFI, and (7) If a part of an EAG, all members of the EAG must be participating or registered deemed-compliant FFIs.
Retirement Funds	(1) Must be organized for the provision or retirement or pension benefits in its country of organization and either: (2) (a) all contributions are from employer, government, or employee, (b) all contributions are limited by reference to earned income, (c) no beneficiary has a right to more than 5% of the FFIs access, and (d) contributions are deductible or excluded from gross income, or (3) (a) has fewer than 20 participants, (b) is not sponsored by a FFI in the primary business of investing or a passive NFFE, (c) contributions are limited by reference to earned income, (d) non-resident participants are not entitled to more than 20 % of the FFIs assets, and (e) no non-resident is entitled to more than $250,000 of the FFIs assets.

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