Highlights of final and temporary Chapter 3 regulations and final, temporary, and proposed FATCA regulations

March 1, 2017

In brief

The US Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) on December 30, 2016 issued final and temporary regulations (2016 Chapter 3 Regulations) under Chapter 3 of the Internal Revenue Code (Code) regarding withholding of tax on certain US source income paid to foreign persons. Although many of the changes introduced in the 2016 Chapter 3 Regulations have been previewed in previous IRS pronouncements, the regulations introduce several new concepts in response to stakeholder comments.

Treasury and the IRS also released final regulations (2016 Final FATCA Regulations), temporary regulations (2016 Temporary FATCA Regulations), and proposed regulations (2016 Proposed FATCA Regulations) under Chapter 4 of the Code implementing the Foreign Account Tax Compliance Act (FATCA) (collectively, 2016 FATCA Regulations). The 2016 FATCA Regulations make changes to a number of key definitions, due diligence and documentation requirements, standards of knowledge, identification of the payee, legal entity classification, and withholding and reporting requirements. Many of the changes introduced in the 2016 FATCA Regulations have been previewed in previous IRS pronouncements. A number of the provisions also are cross referenced in the 2016 Chapter 3 Regulations.

This insight provides highlights of the 2016 Chapter 3 and FATCA Regulations and includes observations regarding the potential impact of the regulations on withholding agents, foreign financial institutions (FFIs), and those who receive payments from withholding agents and/or FFIs. These affected parties should assess the potential impact of the changes made by the 2016 Chapter 3 and FATCA Regulations on their existing information reporting and withholding tax processes and systems.

In detail

E-commerce

Several changes included in the 2016 regulations are intended to modernize methods of furnishing account documentation and withholding tax information and make them more consistent with current business practices which leverage technology, including (1) electronic transmission of withholding certificates and documentary evidence, (2) electronic system for the collection of Form 8233, Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, (3) electronically signed Forms W-8 provided by...
intermediaries, (4) third-party repositories used to furnish withholding certificates and documentary evidence, and (5) furnishing Form 1042-S, Foreign Person’s U.S. Source Income Subject to Withholding, recipient copies electronically. See our Insight: Final and temporary Chapter 3 regulations modernize how account documentation and US withholding tax information is shared for more information.

**Documentation of account holders and payees**

Although many of the changes with respect to the documentation of account holders and payees introduced in the 2016 Chapter 3 Regulations and the 2016 FATCA Regulations have been previewed in previous IRS pronouncements, the changes to these regulations introduce several new concepts to documenting account holders and payees in response to comments received from stakeholders. A number of the documentation provisions in the 2016 FATCA Regulations are cross referenced in the 2016 Chapter 3 Regulations. See our Insight: Final and temporary Chapters 3 and 4 regulations contain several changes relating to identification and documentation of account holders and payees for more information.

**Year-end information reporting**

The 2016 Chapter 3 and FATCA Regulations provide a number of year-end information reporting changes. Many of these changes were previously announced by the IRS, and a number of the changes have been made in response to stakeholder comments. These changes relate to authorized agents and Form 8655, Reporting Agent Authorization, truncation of foreign tax identification numbers (TINs) on recipient copies of Form 1042-S, and authorized signers on passive foreign investment company (PFIC) statements. A number of the year-end information reporting provisions in the 2016 Chapter 4 regulations are cross referenced in the 2016 Chapter 3 Regulations. See our Insight: Final and temporary Chapters 3 and 4 regulations contain several changes relating to year-end information reporting for more information.

**Curing late documentation for claims that income is effectively connected with the conduct of a trade or business in the United States**

Withholding agents are permitted, under certain circumstances, to obtain a valid withholding certificate (i.e., a Form W-8) after the payment date to support a reduced rate of withholding. Additional requirements, such as the requirement to obtain an affidavit of unchanged status, apply based on how much time has transpired between the payment date and the date that the withholding agent received the late documentation.

The 2016 Chapter 3 Regulations modify the requirements for late-received Forms W-8ECI, Certificate of Foreign Person’s Claim That Income Is Effectively Connected With this Conduct of a Trade or Business in the United States, by providing that a Form W-8ECI received more than 30 days after the payment date must be accompanied by a signed affidavit in order for a withholding agent to treat the form as effective on the date of payment. The signed affidavit (either at the bottom of the form or on an attached page) must state that the information and representations contained on the certificate were accurate as of the time of the payment and either (1) the beneficial owner has included the income on its US income tax return for the taxable year in which the income must be reported, or (2) the beneficial owner will include the income on its US income tax return for the taxable year in which the income must be reported and the due date for filing the return (including any applicable extensions) is after the date on which the affidavit is signed.

**Observation:** Withholding agents welcomed the ability to rely on a late-received Form W-8 when the concept was refined with the 2014 Chapter 3 Regulations. However, withholding agents need to make note of the new requirement for late-received Forms W-8ECI and make certain they receive the required affidavit if the form is received more than 30 days after the payment date.

**Dual resident taxpayers**

The 2016 Chapter 3 Regulations address the status of a dual resident taxpayer and state that an individual will not be treated as a US person for a taxable year for which he or she is a dual resident taxpayer who is treated as a nonresident alien under Treas. Reg. Sec. 301.7701(b)-7. A dual resident taxpayer is an individual who is considered a resident of the United States under internal US laws and also a resident of a treaty country under that country’s internal laws.

**Observation:** Although the clarification of the status of a dual resident taxpayer in the 2016 Chapter 3 Regulations should help avoid confusion for taxpayers with that status, it does not represent a substantive change in the withholding tax treatment of payments made to dual resident taxpayers. Regulations under Code Section 7701 have addressed the withholding tax consequences for dual residents under Chapter 3 for several years, and now are consistent with the 2016 Chapter 3 Regulations.
The 2016 Final FATCA Regulations provide consistency between the Chapter 3 and FATCA Regulations by modifying the definition of US person to exclude dual residents so that such persons will be treated as nonresident aliens. The definition of US person also has been modified to remove the requirement that a foreign insurance company that has made a Code Section 953(d) election to be treated as a US person must not be licensed to do business in any state. However, the final regulations retain the requirement that such an entity may not be a specified insurance company.

**Observation:** The amended definition of US person provides some reporting relief and clarifies the requirements for FFIs that have reportable accounts held by dual residents.

**Transportation income**

The 2016 Chapter 3 Regulations clarify that US source gross transportation income (USSGTI) is not subject to 30% withholding tax under Chapter 3. USSGTI consists of US source income that is derived from, or in connection with, the use, hire, or lease of an aircraft or vessel, or from the performance of certain services directly related to the use of a vessel or aircraft.

Stakeholders noted it was unclear whether USSGTI subject to the 4% tax under Code Section 887(a) was also subject to a 30% withholding tax under Chapter 3. The 2016 Chapter 3 Regulations clarify this issue by providing that income subject to Chapter 3 withholding does not include USSGTI subject to the 4% tax under Code Section 887(a). In addition, the IRS requested comments regarding the documentation requirements for applying the new exception for USSGTI.

**Observation:** Although it is helpful to know that USSGTI is not subject to 30% withholding under Chapter 3, the IRS must issue guidelines for the documentation withholding agents must obtain from payees to substantiate that the payments are USSGTI and qualify for the exemption under Chapter 3.

**US branches of foreign banks and insurance companies acting as intermediaries**

US branches of certain foreign banks and insurance companies acting as intermediaries may elect to be treated as US persons for purposes of information reporting and withholding. The 2014 Chapter 3 Regulations required a US branch making this election to be part of a foreign company with a specified FATCA status (e.g., participating foreign financial institution (PFFI), registered deemed compliant foreign financial institution (RDCFFI), etc.).

The 2016 Chapter 3 Regulations remove the requirement that the foreign person owning a US branch have a specified FATCA status. The IRS also announced that it will modify the requirements for the withholding certificate furnished by such US branch (i.e., Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting).

**Observation:** The removal of the restriction on the FATCA status of a US branch’s foreign owner will enable more US branches to make the election to be treated as a US person. US branches acting as intermediaries that elect to be treated as US persons will continue to certify their status on Form W-8IMY.

Similarly, the 2016 Final FATCA Regulations provide that a US branch of an FFI that is treated as a US person is no longer required to (1) be treated as part of an FFI that is acting as a PFFI or registered deemed compliant FFI when it is acting as an intermediary, and (2) furnish the global intermediary identification number (GIIN) of the home office. This modification recognizes that a US branch of an FFI that agrees to be treated as a US person is subject to withholding, due diligence, and reporting requirements similar to other US withholding agents.

**Observation:** In order to prevent a US branch treated as a US person from acting on behalf of other branches of the FFI that are nonparticipating FFIs (NPFFIs) to avoid FATCA withholding on payments made to customers of such other branches, the Chapter 3 regulations provide that a US branch must withhold on payments made to another branch to the extent required under FATCA, as if the US branch were an entity separate from the other branch.

A US branch that does not agree to be treated as a US person also is not required to be part of a PFFI or RDCFFI so long as, when acting as an intermediary, the branch applies the FATCA due diligence, withholding, and reporting rules to all of its accounts as if the US branch were a PFFI.

A US branch also is not required to register or agree to the terms of the FFI agreement. The preamble to the 2016 FATCA Regulations states that the IRS opted not to apply the verification requirements as the US branch is subject to IRS examination and summons procedures.

The 2016 Final FATCA Regulations require a withholding agent that, on or after June 30, 2017, makes a withholdable payment to an intermediary that is a US branch that is not treated as a US person to obtain the employer identification number (EIN) of the US branch along with a certification that the US branch is applying the FATCA due diligence, withholding, and reporting rules to all payments made to customers of such other branches.
of its accounts as if the US branch were a PFFI.

Observation: It is important to recognize that the provisions discussed above apply only where a US branch is acting as an intermediary for a payment, and do not apply where the US branch is the beneficial owner of a payment. Moreover, the June 30, 2017 date provides withholding agents time to obtain the certification from applicable US branches that it previously documented.

Modified definitions of key terms
The 2016 Final FATCA Regulations modify the definition of a number of key terms to resolve conflicts among various pieces of guidance and to coordinate other changes.

Nonreporting IGA FFI
To be consistent with the intergovernmental agreements (IGAs), the 2016 Final FATCA Regulations expand the definition of nonreporting IGA FFI to include (1) a financial institution that is treated as a RDCFFI under Annex II of the Model 2 IGA, and (2) a financial institution that satisfies the requirements of deemed-compliant FFI status under the FATCA regulations.

As part of this coordination, the definition of certificated deemed-compliant FFI was modified to exclude nonreporting IGA FFIs as some nonreporting IGA FFIs are required to obtain a GIIN.

Observation: Some in the IGA community disagreed as to whether a FFI in an IGA jurisdiction seeking to qualify for nonreporting IGA FFI status under a registered deemed-compliant provision in the regulations would actually have to obtain a GIIN. The IRS rationale for modifying the definition of certified deemed-compliant FFI would seem to imply that it would.

Preexisting obligation
The 2016 Final FATCA Regulations modify the definition of preexisting obligation to provide that a withholding agent or FFI may treat an obligation held by an entity with the withholding agent or FFI that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation.

Withholding
The 2016 Final FATCA Regulations clarify that withholding consists of the deduction and withholding of tax at the applicable rate, rather than the deduction and remittance of tax.

Observation: Interestingly, the removal of the requirement that a remittance be made in order for a withholding to have occurred would seem to strengthen the industry view that it is inappropriate for the IRS to issue regulations (as announced in Notice 2015-10) that deny a refund claim to a payee because the withholding agent has failed to deposit tax that it withheld from the payee.

Withholding and due diligence requirements
Withholding responsibility of foreign branch of US financial institutions
The 2016 Final FATCA Regulations clarify that a foreign branch of a US financial institution has all the responsibilities of a US withholding agent, and therefore has primary withholding responsibility on withholdable payments that it makes, and is not subject to withholding under Chapter 4 on withholdable payments received.

While such a branch may be treated as an FFI under an applicable IGA, its status as an FFI will not have an impact on its withholding responsibilities as a US withholding agent. The 2016 Final FATCA Regulations, however, permit a foreign branch of a US financial institution that is treated as an IGA FFI to apply the procedures in Annex I of the applicable IGA to document the Chapter 4 status of an account holder of an account maintained by the branch in an IGA jurisdiction.

Grandfathered obligations
The 2013 FATCA Regulations provided that if collateral (or a pool of collateral) is posted to secure both grandfathered and non-grandfathered obligations, the collateral posted to secure the grandfathered obligations must be determined by allocating the collateral (or pool of collateral) on a pro rata basis by value. The 2016 Final FATCA Regulations modify the requirement by providing that the use of the pro rata rule is no longer mandatory. The 2016 Final FATCA Regulations also amend the definition of grandfathered obligation to include any obligation that gives rise to a substitute interest payment that arises from the payee posting collateral that is a grandfathered obligation.

Observation: With respect to a material modification of a grandfathered obligation, the preamble notes that the IRS considered, but ultimately rejected, a request that actual knowledge of a material modification be limited only to instances where the withholding agent receives notice of the material modification from the issuer.

Sponsored financial institutions
The 2016 Final FATCA Regulations modify the procedures for withholding agents to document a sponsored investment entity, a sponsored controlled foreign corporation, or a sponsored direct reporting nonfinancial foreign entity (NFFE) — collectively, sponsored financial institutions — by extending the transitional period to March 31, 2017 for when a withholding agent must obtain and verify the sponsoring entity’s GIIN.
The 2016 Final FATCA Regulations also provide that a withholding agent is not required to verify the GIIN of a sponsored financial institution prior to January 1, 2017 (even if the sponsored entity obtains a GIIN before such date) if the withholding agent verifies the sponsoring entity’s GIIN.

However, a GIIN is not required for a payee that, prior to January 1, 2017, provides a withholding certificate identifying the payee as a sponsored entity and includes the GIIN of the sponsoring entity where the withholding agent determines that the payee is resident, organized, or located in a Model 1 IGA jurisdiction. A withholding certificate provided on or after January 1, 2017 by a payee that is a sponsored entity subject to a Model 1 IGA must identify the payee as a nonreporting IGA FFI, or if the payee identifies itself as a sponsored FFI, must include the payee’s GIIN.

Rather than obtaining a new withholding certificate, a withholding agent may obtain a sponsored entity’s GIIN in any manner (including e-mail), provided that the withholding agent retains a record of the confirmation, which will become part of the withholding certificate.

**Modifications to the FFI agreement**

**Foreign passthru payments**

The 2016 Final FATCA Regulations provide that a PFFI will not be required to withhold on foreign passthru payments made to a recalcitrant account holder or NPFFI before the later of January 1, 2019, or the date final regulations defining the term foreign passthru payment are published in the Federal Register.

**Due diligence certifications**

The 2016 Final FATCA Regulations modify the timing for an FFI’s responsible officer to certify that the FFI has complied with the applicable due diligence requirements for preexisting accounts held by the FFI and that the FFI did not have any formal or informal practices or procedures in place to assist account holders in the avoidance of the Chapter 4 requirements, by providing that the certification of compliance must be submitted to the IRS by the due date of the FFI’s first certification of compliance. To mitigate any increased burden created by the modified due date, the 2016 Final FATCA Regulations change the period for which the FFI must certify that it did not have any formal or informal practices or procedure in place from August 6, 2011 through the date that is two years after the effective date of the FFI’s agreement, rather than through the certification due date.

The 2016 Final FATCA Regulations also provide that the certification of compliance must be submitted on or before July 1 of the calendar year following the end of each certification period. The IRS will publish instructions for making the certification and will require the FFI to complete and submit the certification electronically through the FATCA registration website.

A RDCFFI’s responsible officer will be required to submit its certification that all of the requirements for the deemed-compliant status claimed by the FFI have been satisfied since the latter of the date that the RDCFFI registers or June 30, 2017 under the same time frame and in the same manner.

**Election to perform Chapter 61 reporting for cash value insurance contracts**

The 2016 Final FATCA Regulations remove the requirement for an FFI to report the account balance or value if it elects to report a US account that is a cash value insurance contract or annuity contract on Form 1099-R, *Distributions from Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.*

**Limited FFIs**

The deadline for continued usage of either a limited FFI or limited branch status was extended to December 31, 2016 to align with the transitional relief provided in Notice 2015-66 for expanded affiliated groups that have entities that are limited FFIs and/or limited branches.

**Observation:** As the date for expanded affiliated groups that have entities that are either limited FFIs or limited branches has passed, FFIs that have not decided whether to continue to operate in jurisdictions with limited FFIs or limited branches should assess the potential consequences that would result from their continued operation.

**IRS requests for additional information**

The 2016 Final FATCA Regulations clarify that IRS requests for information may be based on the absence of any information reporting forms filed by the FFI with the IRS for the calendar year, and that the IRS may request additional information with respect to information reported or required to be reported, including confirmation that the FFI has no reporting requirement.

**Active NFFEs**

**Clarifications to asset test**

The 2014 Temporary FATCA Regulations provided that, for an entity to qualify as an active NFE, less than 50% of the weighted average percentage of its assets (tested quarterly) could be assets that produce or are held for the production of passive income. The 2016 FATCA Regulations clarify that the weighted average of the percentage of assets held by the NFE must be weighted by total assets and measured quarterly. The 2016 FATCA Regulations also
provide that the test should be applied to the prior calendar or fiscal year and can be calculated using any accounting period permitted under Treas. Reg. Sec. 1.1472-1(c)(1)(iv)(C), provided the NFFE applies a uniform method of measuring assets for the year.

**Determination of excepted NFFE status**

The 2016 Final FATCA Regulations clarify that a NFFE determines its status as an excepted NFFE (active NFFE under an IGA) by applying the rules applicable to the jurisdiction where the NFFE’s account is maintained. Moreover, a NFFE determined to be a passive NFFE will apply the standard of the jurisdiction where the account is maintained when identifying its US owners.

A foreign entity first applies its local law to determine if it is an FFI or an NFFE. An entity determined to be an NFFE applies the law of the jurisdiction where its account is maintained to determine its excepted (active) status. For example, if an entity is located or organized in a Model 1 IGA jurisdiction and maintains an account with a US withholding agent, the entity would apply the rules of the Model 1 IGA to determine if it is an FFI or NFFE. An entity determined to be an NFFE applies the US regulations to determine if it is an excepted or a passive NFFE. If the entity is determined to be a passive NFFE, then it will be required to identify its substantial US owners (rather than controlling US persons).

**Excepted nonfinancial group test**

Stakeholders commented that expanded affiliated groups found it difficult to qualify under the nonfinancial group test as the FATCA regulations treat receivables related to financing to customers as passive assets, even when the receivables are originated by a captive finance company within the expanded affiliated group. Since customer financing is a permissible activity for a captive finance company, the 2016 FATCA Regulations now exclude these receivables from the passive income and asset tests. Specifically, the receivables that are excluded are notes issued by customers to a captive finance company to finance the customer’s purchase of inventory or goods manufactured by a member of the expanded affiliated group.

The 2016 Final FATCA Regulations also provide that the income and asset tests should be performed for the three-year period (or the period during which the expanded affiliated group has been in existence, if shorter), ending December 31 (or the end of the fiscal year of one or more members of the group) of the year preceding the year in which the determination is made.

In addition, the 2016 Final FATCA Regulations provide that a change affecting the Chapter 4 status of a member of a nonfinancial group, or an acquisition by a member of the expanded affiliated group of an FFI that does not have a permissible Chapter 4 status, disqualifies the group as a nonfinancial group 90-days after such a change or acquisition.

Finally, although Treasury and IRS did not implement a request to eliminate the requirement that each FFI in a nonfinancial group be a PFFI or deemed-compliant FFI, the 2016 FATCA Regulations do permit PFFI groups to include exempt beneficial owners.

**Preexisting account certifications by RDCFFIs**

Prior guidance required a RDCFFI that is a local FFI or restricted fund to make a certification to the IRS regarding its required review of preexisting accounts. A restricted fund’s certification is required to be completed by the later of December 31, 2014, or six months after the date that the FFI registers as a deemed-compliant FFI. However, no due date was specified for the certification of a local FFI. The 2016 Final FATCA Regulations provide that the preexisting account certification for a local FFI or restricted fund must be submitted by the due date of the FFI’s first certification of compliance.

**Sponsored investment entities and controlled foreign corporations**

**Liability of sponsoring entities**

The 2016 Final FATCA Regulations clarify a discrepancy between the preamble and text of the 2014 Temporary FATCA Regulations regarding the potential liability of a sponsoring entity related to a sponsored FFI’s Chapter 4 withholding and reporting obligations by revising the regulations to provide that a sponsoring entity that is a withholding agent is separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of a sponsored FFI. Note that this modification does not affect a sponsoring entity’s liability as a withholding agent for payments unrelated to the sponsoring entity’s obligations as a sponsoring entity.

**Withholding foreign partnerships as sponsored investment entities**

The 2016 FATCA Regulations provide that a withholding foreign partnership (WP) may be a sponsored investment entity to the extent permitted in the WP agreement if the WP otherwise meets the requirements for status as a sponsored investment entity.
Limited life debt investment entities

Assets acquired upon a foreclosure or restructuring of debt

The 2014 Temporary FATCA Regulations required that substantially all of the assets of a limited life debt investment entity (LLDIE) consist of debt instruments or interests therein. This requirement posed potential issues when a borrower on a debt instrument held by the LLDIE encountered financial trouble. If the lender foreclosed or restructured the debt, or the borrower entered bankruptcy, this could have resulted in the LLDIE holding non-debt assets, such as equity or real estate that represented a significant portion of the LLDIE’s assets. As a result, the 2016 Final FATCA Regulations revise this requirement such that debt instruments or interests therein now include assets acquired pursuant to a restructuring, workout, or similar event with respect to a debt instrument.

Direct reporting NFFEs

Certification

The 2016 Final FATCA Regulations revise the certification deadlines for direct reporting NFFEs to account for GIINs issued before the implementation of FATCA and for consistency with certifications by other entities. As a result, the final regulations amend the date that the first certification period begins for a direct reporting NFFE to the later of the date a GIIN is issued to the NFFE or June 30, 2014. Furthermore, the final regulations require that the direct reporting NFFE make the periodic certification on the form and in the manner prescribed by the IRS and that the certification will be due on or before July 1 of the calendar year following the end of each certification period. This due date now conforms to the due dates for certifications by PFFIs and RDCFFIs.

Revocation of direct reporting NFFE status

The 2016 Final FATCA Regulations remove the requirement that a direct reporting NFFE needs IRS consent to revoke its election. The instructions for Form 8966, FATCA Report, provide that a direct reporting NFFE can revoke its election simply by canceling its registration account on the FATCA registration website and notifying the IRS. The NFFE also has 30 days to send notification of the revocation to each financial institution and withholding agent to which it previously provided a withholding certificate or written statement representing its status as a direct reporting NFFE.

Withholdable payments

Gross proceeds

With respect to gross proceeds, the 2016 Final FATCA Regulations modify the definition of a withholdable payment to include, beginning January 1, 2019, gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are US source fixed or determinable, annual or periodical (FDAP) income.

Observation: This change was first announced in Notice 2015-66 and is now reflected in the 2016 FATCA Regulations. It is important to note that while gross proceeds are not subject to withholding until January 1, 2019, reporting on gross proceeds on Form 8966 is required under certain circumstances (e.g., PFFI filers). It is unclear whether the effective date for gross proceeds withholding will be delayed beyond January 1, 2019.

Offshore payments of US source FDAP income prior to 2017

Treasury and the IRS decided not to adopt a request for an extension of the transition rule excluding from the definition of a withholdable payment certain non-intermediated offshore payments of US source FDAP insurance and reinsurance premiums to a foreign insurance or reinsurance company made by a non-US insurance broker. As a result, as of January 1, 2017, these payments made by a non-US insurance broker constitute a withholdable payment.

2016 Temporary FATCA Regulations

The 2016 Temporary FATCA Regulations adopt and cross reference a number of provisions related to documentation provided in the 2016 Chapter 3 Regulations, provide rules for combined reporting on Form 8966 and reporting under Chapters 3 and 4 on Form 1042-S by an acquirer in a merger or acquisition, and provide additional due diligence and documentation rules.

Change in circumstances due to removal of IGA in effect status

Announcement 2016-27 provides that on January 1, 2017 Treasury will begin updating the list of jurisdictions treated as having an IGA in effect to remove jurisdictions that have failed to bring their IGA into force. A jurisdiction that is removed from the list will not cease to be treated as having an IGA in effect until at least 60-days after the jurisdiction’s status on the IGA list is updated. The 2016 Temporary FATCA Regulations provide that a withholding agent will have reason to know of a change in circumstances with respect to an FFI’s Chapter 4 status on the date that the jurisdiction where the FFI is resident, organized, or located ceases to be treated as having an IGA in effect. The current rule that allows a withholding agent 90-days to cure the change in circumstances still applies.

Observation: Withholding agents and FFIs in jurisdictions that do not have a signed IGA with the United States should assess the potential impacts on the onboarding.
withholding, and reporting processes. Considerations for withholding agents may include, where applicable:

- Solicitation of withholding certificates from account holders or payees in such jurisdictions,
- Potential need to apply FATCA withholding in jurisdictions that cease to be treated as having an IGA in effect,
- Potential need to reconsider the standards applied during the due diligence process, and
- Potential need to reassess the Chapters 3 and 4 reporting obligations and corresponding exemptions, statuses, and income types.

Considerations for FFIs in jurisdictions that cease to be treated as having an IGA in effect, where applicable, include (1) updating their withholding certificate to provide an updated Chapter 4 status and (2) potential need for a responsible officer in such jurisdiction(s), in which case FATCA certifications may be required.

2016 Proposed FATCA Regulations
The 2016 Proposed FATCA Regulations provide verification requirements for sponsoring entities of certain FFIs, trustees of trustee-documented trusts, and sponsoring entities of sponsored direct reporting NFFEs. The proposed regulations also provide modifications to the verification rules for PFFIs and RDCFFIs.

Finally, the proposed FATCA regulations implement rules in regard to procedures and timing for notices of events of default and termination with respect to the PFFI agreement. See our Insight: IRS and Treasury release proposed FATCA regulations for more information.

The takeaway
The IRS continues to modify the Chapter 3 Regulations in response to comments from stakeholders and to make the regulations more workable in light of technological advances that have occurred in recent years. Withholding agents should familiarize themselves with the various changes the IRS has introduced, and determine the impact on their withholding, reporting, and account documentations systems and processes.

Almost two and a half years after the 2014 FATCA Regulations were released, the 2016 FATCA Regulations provide coordination and clarification on operational issues withholding agents and FFIs are facing. FFIs should read the revised FFI agreement in conjunction with the 2016 Final and Temporary FATCA regulations to obtain a complete picture of the compliance landscape.
Let’s talk
For more information regarding how the 2016 Chapters 3 and 4 Regulations may impact your business, please contact:

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