
IRS releases revised FFI agreement and other FATCA related guidance

January 12, 2017

In brief

The Internal Revenue Service (IRS) on December 30, 2016 released [Rev. Proc. 2017-16](#) which provides guidance to foreign financial institutions (FFIs) that are treated as participating FFIs (PFFIs) and as reporting financial institutions under an applicable Model 2 intergovernmental agreement (IGA) (Reporting Model 2 FFIs). Rev. Proc. 2017-16 updates the 2014 FFI agreement, which was set forth in Rev. Proc. 2014-38 and expired on December 31, 2016, to provide guidance on new and renewed FFI agreements.

The 2017 FFI agreement, which expires on December 31, 2018, has been revised to provide clarification with respect to certain compliance requirements and to be consistent with various provisions of concurrently released final and temporary Chapter 4 regulations implementing the Foreign Account Tax Compliance Act (FATCA). Modifications contained in the 2017 FFI agreement address:

- the expiration of transitional periods,
 - clarification of the requirements for Reporting Model 2 FFIs and branches, and
 - new procedures for final certifications of compliance and other obligations upon termination of an FFI agreement.
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In detail

New applicants and renewals

The 2017 FFI agreement applies to both PFFIs and Reporting Model 2 FFIs either entering into a new agreement or renewing an existing agreement. Renewed FFI agreements will be effective January 1, 2017 if FFIs act in accordance with the 2017 FFI agreement beginning on January 1, 2017 and renew their agreements by July 31, 2017. If an FFI does not renew its FFI agreement by July 31, 2017, the agreement will be treated as

terminated on January 1, 2017. The IRS expects the electronic FFI agreement renewal function on its FATCA registration website to be available in May 2017.

Observation: *FFIs seeking to renew their agreements with a retroactive effective date of January 1, 2017 should take immediate steps to review how this recent guidance affects their overall strategy and process for complying with FATCA.*

FFIs and their branches seeking to enter into a new FFI agreement need to register on the FATCA registration website by completing Form 8957, *Foreign Account Tax Compliance Act (FATCA) Registration*. The effective date of the new FFI agreement is the date on which the IRS issues the FFI or branch a global intermediary identification number (GIIN).

Scope of the FFI agreement

Each branch of a PFFI (including the home office) generally must comply with the terms of the FFI agreement. However, the FFI agreement does not apply to a Reporting Model 1 FFI unless it has registered a branch located outside of a Model 1 jurisdiction.

Where a PFFI also enters into a qualified intermediary (QI) agreement, withholding foreign partnership (WP) agreement, or withholding foreign trust (WT) agreement, the QI, WP, or WT agreement (as applicable) will apply in addition to the requirements of the FFI agreement, unless specifically modified in the QI, WP, or WT agreement.

Amendments to the FFI agreement

Expiration of transitional periods

The 2017 FFI agreement includes several revisions relating to the expiration of transitional provisions contained in the Chapter 4 regulations and related notices. These transitional provisions, which expired on December 31, 2016, were intended to ease the FFI compliance burden. For example, the 2017 FFI agreement does not include references to 'limited FFI' and 'limited branch' as these statuses are no longer valid as of January 1, 2017. For Reporting Model 2 FFIs, the concept of a 'limited FFI' or 'limited branch' has been replaced with the concept of a 'related entity or branch' (i.e., related entity or branch of a Reporting Model 2 FFI that is treated as a nonparticipating FFI (NPPFI) under the related entity provisions of the relevant IGA). Similarly, the transitional reporting rules for information on payments to certain US accounts are not included in the 2017 FFI agreement since such

reporting applied only to calendar years 2014 and 2015.

Observation: While the absence of items related to transitional provisions was anticipated, the coordination with the related entity rules in the IGAs provides helpful clarification for compliance.

Consistency with Chapter 3 and Chapter 4 regulations

Rev. Proc. 2017-16 updates the FFI agreement to make it consistent with various provisions of concurrently issued final and temporary regulations under Chapters 3 and 4 of the Code. As a result, the 2017 FFI agreement includes several clarifications on an FFI's reporting obligations, including:

- allowances for combined reporting on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, and Form 8966, *FATCA Report*, following a merger or bulk acquisition of another FFI's accounts,
- requirements for reporting a partner's interest in a FFI that is a partnership on Form 8966, and
- clarification that an FFI withholding statement may include a certification that the FFI is reporting to the IRS information provided for specified US persons and passive nonfinancial foreign entities (NFFEs) with one or more substantial US owners and account holders or payees that the FFI has agreed to treat as owner-documented FFIs.

The 2017 FFI agreement also has been modified to clarify that FATCA withholding will be required on withholdable payments made by a PFFI to a payee that is, or presumed to be, a passive NFFE that has not disclosed information on its

substantial US owners (or failed to certify that it has no substantial US owners) with respect to an offshore obligation that is not an account.

Observation: The 2017 FFI agreement reiterates and makes it clear that an FFI's obligation includes not just knowing "who they pay" and "what they pay" with regard to payments to account holders, but also to other payee relationships.

Clarification of requirements for Reporting Model 2 FFIs and branches

The 2017 FFI agreement generally applies to PFFIs, Reporting Model 2 FFIs, and their branches. While the PFFI requirements are included in the Chapter 4 regulations, the Model 2 IGAs introduced several nuances applicable to Reporting Model 2 FFIs. The 2017 FFI agreement addresses these nuances and industry questions regarding the compliance requirements for Reporting Model 2 FFIs and their account holders.

The 2017 FFI agreement aligns Reporting Model 2 FFI requirements with Model 2 IGA provisions by:

- clarifying that a Reporting Model 2 FFI does not need to apply the FFI agreement to all branches of the Reporting Model 2 FFI unless those branches are required to be treated as Reporting Model 2 FFIs or PFFIs,
- revising the definition of a preexisting account to align with the definition of such an account in the Model 2 IGA agreement, and
- referencing the permissibility and timing for which a Reporting Model 2 FFI can use publicly available information to document certain accounts (as defined in the applicable Model 2 IGA).

The 2017 FFI agreement also has been revised to respond to industry comments that requested a Reporting Model 2 FFI be allowed to treat undocumented entity accounts as non-consenting US accounts rather than as NPFIs. The updated agreement explicitly provides that where entity accounts cannot be documented consistently with the procedures set forth in the Chapter 4 regulations or Annex 1 to the relevant Model 2 IGA, such entities are to be classified under the presumption rules as NPFIs, and thereby subject to withholding on withholdable payments.

Observation: *In describing the requirement for Reporting Model 2 FFIs to apply the NPFI presumption to undocumented entity accounts, the IRS observed that there should not be situations where accounts are undocumented, such that the presumption rules need to be applied, if the due diligence rules are properly employed. Moreover, the IRS warns that if an FFI has a significant number of undocumented accounts, the US Competent Authority may determine that the FFI is significantly non-compliant with the terms of the IGA.*

US branches acting as intermediaries

The 2017 FFI agreement does not include provisions that were in the 2014 FFI agreement relating to US branches to bring the FFI agreement in line with changes to the Chapter 4 regulations. Under these regulations, a US branch of an FFI that is treated as a US person is not required to be treated as part of an FFI that is acting as a PFI or registered deemed compliant FFI when it is acting as an intermediary. 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 that is treated as a US person from acting on behalf of another branch of the FFI that is treated as an NPFI to avoid FATCA withholding on payments made to customers of such other branch, the Chapter 3 regulations provide that a US branch must withhold on payments made to the other branch to the extent required under FATCA, as if the US branch were an entity separate from the other branch.*

In addition, a US branch that does not agree to be treated as a US person is not required to be part of a PFI or registered deemed compliant FFI if the branch, when acting as an intermediary, applies the FATCA due diligence, withholding, and reporting rules to all of its accounts as if the US branch were a PFI. Although the US branch is required to apply certain rules as if it were a PFI, it is not required to register with the IRS or agree to the terms of the FFI agreement. Moreover, the IRS has opted not to apply the verification requirements to such US branches because they are subject to IRS examination and summons procedure in the same manner as US withholding agents.

Incorporation of final certification requirements

The 2017 FFI agreement introduces provisions related to the procedures for final compliance certifications upon the termination of an FFI agreement. An FFI will have six months following the termination of an agreement to provide the IRS with a certification of compliance covering the period from the end of the most recent certification period to the termination date. This requirement exists regardless of whether a periodic review has been completed for such period.

To promote consistency with the QI, WP and WT agreements, the 2017 FFI agreement provides that an FFI's

obligations will not expire with the termination of the agreement. As such, the compliance responsibilities (i.e., reporting, withholding, depositing payments, etc.) with respect to the period covered by the agreement up to the termination date will survive the termination.

The final certification requirements are extended to cover situations where a jurisdiction that was previously a non-IGA jurisdiction is subsequently treated as having a Model 1 IGA in effect. In such cases, the PFI in the jurisdiction should modify its registration on the FATCA registration website and comply with provisions of the Model 1 IGA. The PFI must provide its respective withholding agents a new withholding certificate or otherwise communicate its status change within 30 days of this status change and provide the IRS with a certification of compliance within six-months.

Observation: *In an effort to monitor compliance and keep the FFI list current, the 2017 FFI agreement not only requires a final certification within six months of termination, but also creates specified timelines for FFIs to update their status with the IRS and withholding agents following a change.*

The takeaway

Almost two and a half years after the Chapter 4 regulations were initially released, additional IRS guidance issued in December 2016 provides coordination and clarification on operational issues facing FFIs. The changes introduced in the 2017 FFI agreement should not come as a surprise nor require a substantial change for compliant FFIs. The updates support the other changes introduced by the IRS in December 2016 guidance and seek to create cohesive compliance requirements for PFIs and Reporting Model 2 FFIs (and their branches). FFIs should read

the revised FFI agreement in conjunction with the final and temporary Chapter 4 regulations to obtain a complete picture of the compliance landscape. FFIs also

should monitor the activation of the renewal function on the FATCA registration website to ensure that their renewal is completed by July 31, 2017.

Let's talk

For more information about the potential impact of the 2017 FFI agreement on your business, please contact:

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