



Meeting the New FATCA Deadlines: A Phased Implementation Approach to Compliance

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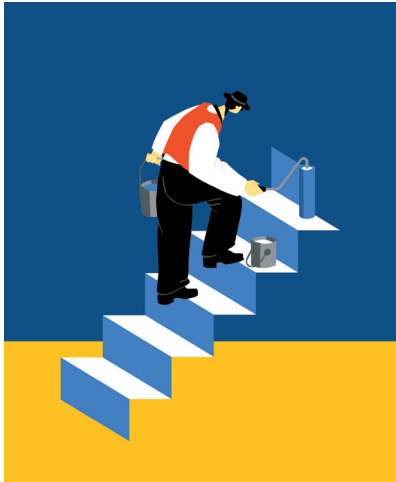
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I. INTRODUCTION

The Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") have given financial institutions much needed relief on the timeline for the implementation of a Foreign Account Tax Compliance Act ("FATCA") compliance program. FATCA will be one of the most powerful tools the U.S. Government will have in its arsenal to combat offshore tax evasion. In recognition of the difficulty of implementing a FATCA compliance program, and in response to comments from the financial services industry, the U.S. Government has delayed the required implementation dates for some of the thorniest FATCA compliance challenges.

FATCA was signed into law on March 18, 2010. Among other things, FATCA generally mandates that for a participating foreign financial institution ("FFI") to continue to remit and receive the full value of all of its transfers and conduct its worldwide operations with limited impact by FATCA, it must identify to the IRS its U.S. accounts. The penalty for non-compliance is steep: a 30% withholding tax on certain withholdable and passthru payments.¹

On July 14, 2011, in an effort to provide further guidance regarding the implementation of FATCA, the Treasury and the IRS published Notice 2011-53,² which is meant to augment the previous guidance provided in Notice 2010-60 and Notice 2011-34 and present "a phased implementation" approach to "various provisions" of FATCA.³

II. OVERVIEW OF NOTICE 2011-53

Notice 2011-53 provides a much needed phased approach to FATCA compliance and anticipated dates for the proposed and final regulations. Following are some of the provisions outlined in this new notice.

A. Due diligence and reporting

The time period to complete due diligence on pre-existing accounts was extended with due dates between July 2014 and July 2015, assuming an effective date of the FFI's FFI agreement of July 1, 2013. In their previous notice, Notice 2011-34, the Treasury and IRS emphasized the analysis of private banking accounts.⁴ Accordingly, an FFI's first reporting to the IRS will be of private banking accounts with a balance or value of \$500,000 or more as of the effective date of the FFI Agreement.

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1. A withholdable payment is any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the U.S. and any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States. Internal Revenue Code ("IRC") § 1473(1)(A). A passthru payment is defined as any withholdable payment or other payment to the extent attributable to a withholdable payment. IRC § 1471(d)(7).
2. Notice 2011-53 is entitled, "Chapter 4 Implementation Notice"
3. *Id.*, p.2.
4. For a discussion of private banking accounts under FATCA see Navigant's publication entitled, "FATCA: Take 2, Are You Ready to Certify FATCA Compliance?" (May 2011).

The chart below sets forth the new dates for completion of the relevant due diligence procedures for pre-existing accounts, assuming an effective date of the FFI Agreement of July 1, 2013:

Type of Pre-existing Accounts	Due Date
Private Banking Accounts with a balance or value of \$500,000 or more on the effective date of the FFI Agreement	July 1, 2014
Remaining Private Banking Accounts	December 31, 2014
Non-Private Banking Accounts with a balance or value of \$50,000 or more	July 1, 2015
All other pre-existing Entity accounts	July 1, 2015

Notice 2011-53 also states that FFIs have to report to the IRS by September 30, 2014 all identified U.S. accounts and known recalcitrant account holders as of June 30, 2014. An FFI will be required to report the following information on their U.S. accounts if the FFI does not elect to be subject to the same reporting requirements as a United States Financial Institution ("USFI") for their first reporting cycle:

1. The name, address and U.S. taxpayer identification number of each specified U.S. person who is an account holder; or, for non financial foreign entity account holders, the name, address, and U.S. taxpayer identification number of each substantial U.S. owner;
2. The account balance as of December 31, 2013 or the balance of the account immediately prior to closure and
3. The account number.

B. Withholding

The timetable for withholding⁵ is now divided into three categories: 1) U.S. source FDAP payments;⁶ 2) all withholdable payments,⁷ including gross proceeds from the sale or other disposition of any property which can produce interest or dividends from sources within the United States and 3) passthru payments.⁸ The chart below sets forth the time-

table for when a participating FFI or USFI has to begin withholding on payments to non-participating FFIs and recalcitrant accountholders:

Type of Payment	Withholding Begins
U.S. Source FDAP Payment	January 1, 2014
All Withholdable Payments, including gross proceeds	January 1, 2015
Passthru Payments	January 1, 2015

III. TIMELINE FOR ADDITIONAL PUBLISHED GUIDANCE

In addition to providing a phased approach to FATCA compliance implementation, the Treasury and IRS also identified anticipated publication dates for additional FATCA guidance, as set forth below:

Guidance/Document	Anticipated Publication Date
Proposed Regulations	December 31, 2011
Final Regulations	Summer 2012
Draft FFI Agreement & Reporting Forms	Summer 2012

IV. PRACTICAL CONSIDERATIONS BASED ON NOTICE 2011-53

Notice 2011-53 provides a much needed phased approach to building a FATCA compliance program. Although many of the deadlines for completing certain due diligence, withholding and reporting requirements have changed, the first step to compliance is still the same: an impact assessment. The impact assessment includes, among other things, the legal entity analysis, an inventory of affected business lines, products, services and accountholders, a determination of information maintained on accountholders and the identification of affected information technology systems. The impact assessment will allow the FFI to determine manpower and budgetary needs to build various facets of the compliance program. The biggest practical change deriving from Notice 2011-53 is the

⁵ The withholding agent with respect to such a payment shall deduct and withhold from such a payment a tax equal to 30% of the amount of such a payment to an FFI that does not meet certain requirements. IRC § 1471(a). A withholding agent pursuant to FATCA includes a participating FFI. Notice 2011-53, p. 8

⁶ An FDAP payment includes any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable, annual or periodical gains, profits, and income, if such payment is from sources within the United States. IRC § 1473(1)(a)(i). Income is fixed when it is paid in amounts known ahead of time. Income is determinable whenever there is a basis for figuring the amount to be paid. Income can be periodic if it is paid from time to time. It does not have to be paid annually or at regular intervals. Income can be determinable or periodic, even if the length of time during which the payments are made is increased or decreased. <http://www.irs.gov/businesses/small/international/article/0,,id=96404,00.html>.

⁷ Supra note 1.

⁸ Id.

order in which an FFI may apply its resources after the impact assessment. The following is a list of the key elements of FATCA implementation and practical considerations for the FFI to consider when prioritizing its implementation in light of Notice 2011-53.⁹

A. Updating on-boarding systems

As new accounts under FATCA have to be analyzed as of the effective date of the FFI Agreement, FFIs should plan on having their systems and policies and procedures updated by July 1, 2013 to collect the necessary information. This could include:

1. Updating account opening questionnaires;
2. Requesting additional documentation at account opening and
3. Updating system(s) that maintain account holder identification information to identify U.S. indicia and U.S. accounts for future reporting purposes.

B. Due diligence on pre-existing accounts

The timeline for the analysis of pre-existing accounts, which will likely be the most time and resource consuming part of FATCA implementation, has been delayed. FFIs will be able to concentrate on reviewing higher value private banking accounts (\$500,000 or more) first as those accounts must be reported on earliest. This may also aid FFIs in determining how to allocate resources by country or legal entity as some countries and legal entities may have many more accounts that fit the private banking definition. This step will likely entail, among other things:

1. Talking with information technology personnel about queries for indicia of U.S. accounts;
2. Reviewing paper documents associated with private banking accounts;
3. Requesting additional documents from clients if U.S. indicia are identified and
4. Updating account holder information systems to:
 - a. "flag" accounts with a balance or value of \$500,000 or more as of the effective date of the FFI Agreement;

- b. identify U.S. accounts for future reporting purposes;
- c. identify recalcitrant account holders and non-participating FFIs;
- d. identify non-financial foreign entities ("NFFE") with substantial U.S. owners;
- e. retain the classification of various types of entities after due diligence procedures have been applied¹⁰ and
- f. identify accounts as being reviewed after the search for U.S. indicia as pre-existing accounts only have to be reviewed one time.

C. Withholding

Potential issues concerning withholding, specifically the FFI's payment systems, should still be part of the FFI's original impact assessment, but the delay in the start date for withholding may allow FFIs to concentrate more on updates to their client on-boarding and due diligence procedures initially.

Areas of leverage regarding withholding platforms could be gained through the use of the related USFI's withholding systems and individuals employed by the USFI with tax operations experience. Additionally, based upon comments made by officials with both the Treasury and IRS, the methodology for passthru payments may change. As such, it may be too early to test system enhancements regarding the current passthru payment methodology. Proposed regulations, which are expected to be published in less than six months, may provide the necessary information to determine if the application of passthru payments will change.

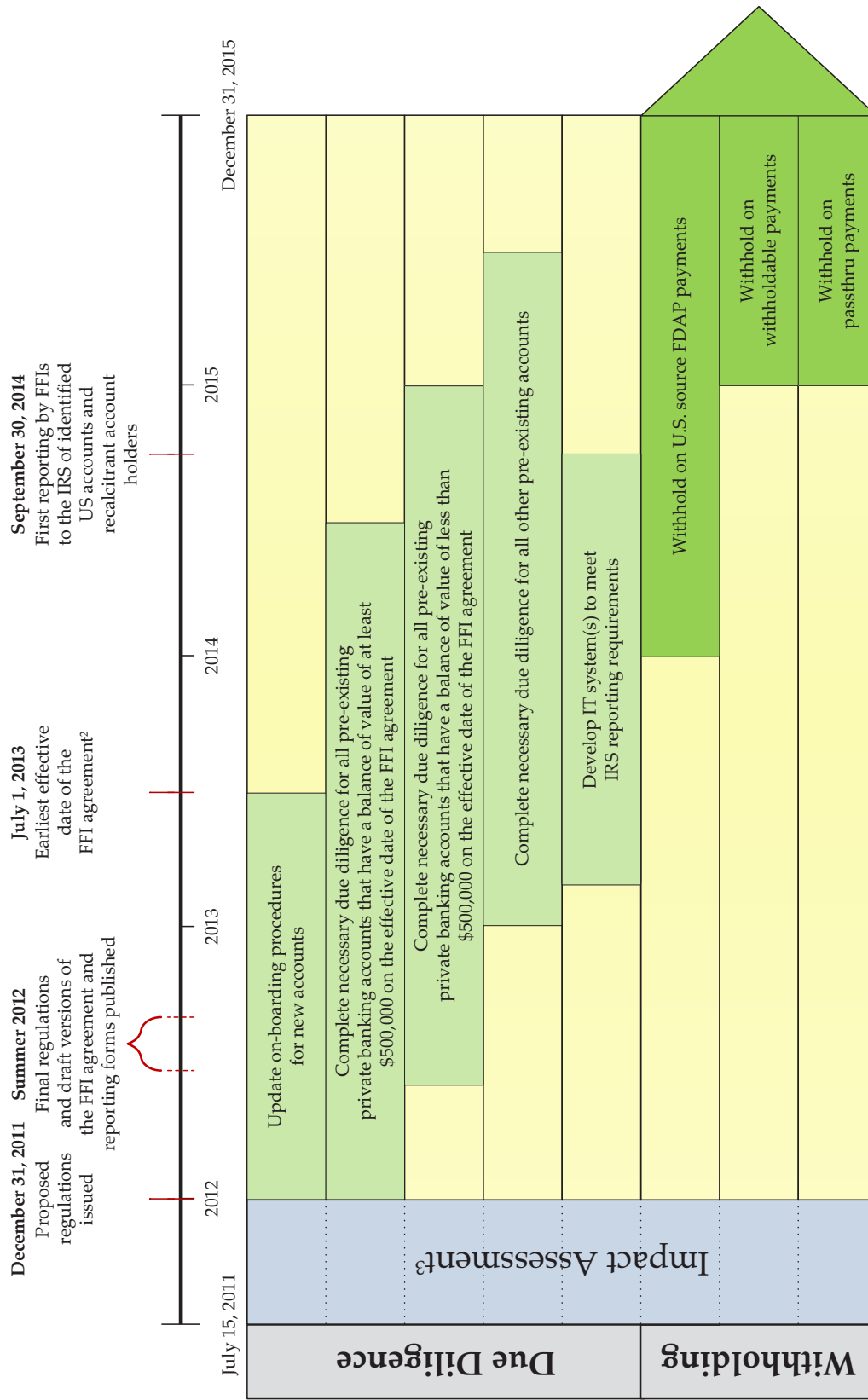
V. CONCLUSION

Notice 2011-53 provides needed relief for the industry, but it does not mean that FFIs can become lax in their implementation. FFIs must continue with their implementation steps as the first requirement to analyze new accounts is less than 24 months away.

⁹ See Navigant's Notice 2011-53 Sample Implementation Schedule, annexed hereto as Appendix A.

¹⁰ This classification could include an entity operating an active trade or business, excepted from FATCA compliance by the statute, a deemed compliant FFI, a participating FFI, a non-participating FFI, a recalcitrant account holder, an excepted NFFE or an NFFE with substantial U.S. owners.

Appendix A Notice 2011-53 Sample Implementation Schedule¹



1. The amount of time necessary to complete each of the above tasks will vary by institution.
 2. This timeline assumes the FFI enters into an FFI Agreement by June 30, 2013.
 3. The impact assessment includes, among other things, the legal entity analysis, an inventory of affected business lines, product, services and account holders, a determination of information maintained on account holders and the identification of affected information technology systems.

BIOGRAPHIES

Ellen Zimiles is a Managing Director and Head of Global Investigations and Compliance in Navigant's Disputes & Investigations practice. She has more than 25 years of litigation and investigation experience, including 10 years as a federal prosecutor. Ms. Zimiles is a leading authority on anti-money laundering programs, corporate governance, regulatory and corporate compliance, fraud control and public corruption matters. She has worked with a multitude of financial institutions preparing for regulatory exams, developing remediation programs and assisting organizations as a regulatory liaison. Ms. Zimiles founded and served as CEO of Daylight Forensic & Advisory LLC, an international investigations and compliance consulting firm which merged with Navigant in 2010. As an assistant United States attorney in the Southern District of New York for more than 10 years, Ms. Zimiles served in the civil and criminal divisions and was chief of the forfeiture unit for more than six years. She was responsible for many high-profile money laundering, fraud and forfeiture cases.

Richard Kando is a Director in Navigant's Disputes & Investigations practice, and along with Jeffrey Locke, a leader of Navigant's FATCA Task Force. Mr. Kando primarily assists counsel with anti-money laundering and other regulatory compliance related engagements and litigation related matters. Prior to joining the consulting industry, Mr. Kando served as a special agent for the Internal Revenue Service – Criminal Investigation Division in New York City where he investigated allegations of tax evasion and other tax related criminal offenses, mail and wire fraud, embezzlement, money laundering and identity theft. In recognition of his services as a special agent, he received the U.S. Department of Justice – Tax Division Assistant Attorney General's Special Contribution Award.

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