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Background of the Foreign Account Tax Compliance Act (FATCA)

The Foreign Account Tax Compliance Act (FATCA) is a U.S. law enacted on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act of 2010, the primary focus of which is to identify non-compliance by U.S. taxpayers using offshore accounts. In a press release, Treasury described the law and its purpose as follows:

> [FATCA is] a provision that targets the illicit activities of some wealthy individuals who use offshore accounts to evade millions of dollars in taxes. International tax evasion is illegal, adds to the federal debt, and contributes to the perception that the tax system is unfair because the wealthy can avoid the taxes other Americans pay.[1]

To achieve its goal, FATCA requires foreign financial institutions (FFIs) (a broadly defined term which includes both traditional banks and a broad array of non-bank financial institutions including hedge funds) to disclose annually information about accounts held by U.S. individuals, or foreign companies in

which U.S. individuals hold a substantial ownership interest. FFIs which refuse to provide such information about their customers to the United States will face a stringent penalty: withholding of 30% of all U.S.-source payments of interest, dividends, and the like. The withholding rules are essentially a mechanism to enforce new reporting requirements, and not a revenue-raising mechanism. While FATCA is technically a voluntary reporting regime, the threat of withholding on U.S.-source payments of funds essentially forces foreign banks to cooperate if they wish to have access to U.S. capital markets, and substantially penalizes those that refuse to participate.

FATCA became fully effective on July 1, 2014. As of that date, over 80,000 foreign financial institutions had registered with the IRS and indicated their agreement to report information to the IRS pursuant to FATCA, and nearly 100 foreign countries had either formally signed treaties with the United States, or were actively negotiating such agreements, in order to implement FATCA's information sharing requirements.[2] FATCA is expected to provide the IRS with information regarding thousands of accounts held by U.S. taxpayers at financial institutions located around the globe. The implementation of FATCA signals a new era and arms the U.S. government with a powerful tool to detect offshore tax evasion. U.S. taxpayers with undeclared foreign accounts can no longer assume that they will remain undetected or protected by foreign banking secrecy laws. With the IRS and Justice Department continuing their unrelenting global crackdown on international tax evasion and bank secrecy laws, and full-scale implementation of FATCA now underway, the risk of detection is significantly increased and the threat of criminal prosecution is real.

Tax Policy Underlying FATCA

Q 1.1 What is the tax policy behind FATCA?

It is important to understand that despite its withholding provisions, FATCA is not intended to be a revenue-generating law. Instead, FATCA is primarily an information reporting regime, imposing reporting obligations on foreign financial institutions in order to provide the IRS with additional data regarding the foreign activities of U.S. taxpayers. To that end, the preamble to final regulations issued by Treasury and IRS states as follows:

> U.S. taxpayers' investments have become increasingly global in scope. FFIs now provide a significant proportion of the investment opportunities for, and act as intermediaries with respect to the investments of, U.S. taxpayers. Like U.S. financial institutions, FFIs are generally in the best position to identify and report with respect to their U.S. customers. Absent such reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts. To prevent this abuse of the U.S. voluntary tax compliance system and address the use of offshore accounts to facilitate tax evasion, it is essential in today's global investment climate that reporting be available with respect to both the onshore and offshore accounts of U.S. taxpayers. This information reporting strengthens the integrity of the U.S. voluntary tax compliance system by placing U.S. taxpayers that have access to international investment opportunities on an equal footing with U.S. taxpayers that do not have such access or otherwise choose to invest within the United States.[3]

Obligation to Report Worldwide Income and Disclose Foreign Bank Accounts and Certain Foreign Financial Assets

Q 1.2 What are the U.S. tax and reporting obligations for taxpayers with offshore bank accounts?

Since the 1970s, U.S. taxpayers with foreign banks accounts have been required to report annually their foreign bank account information to the Department of Treasury on a form titled "*Report of Foreign Bank and Financial Accounts*" (commonly known as the "FBAR" form).[4] In addition to requiring the filing of an FBAR, the United States, unlike many other jurisdictions in the world, taxes worldwide income, meaning that a U.S. taxpayer's income is subject to tax regardless of where it is earned and regardless of whether the taxpayer lives in the United States or abroad. The failure to file an FBAR or to report foreign income can subject a taxpayer to significant civil, and even criminal, penalties.

Q 1.2.1 What must be reported on a U.S. income tax return with respect to an offshore bank account?

There is nothing improper about a U.S. taxpayer maintaining a bank account in a foreign country, even in so-called "bank secrecy" countries such as Switzerland, the Cayman Islands, and Singapore. Any taxpayer having such an account is required to report on his or her personal income tax return all income (interest, dividends, and capital gains) earned in that account and answer "yes" to a question on Schedule B of the return which asks whether the taxpayer maintained a foreign bank account during the year. An excerpt of the 2013 version of Form 1040, Schedule B, which sets forth the foreign bank account questions, is shown below.

FIGURE 1-1

Form 1040, Schedule B

			Yes	No
Part III Foreign Accounts and Trusts (See instructions on back.)		You must complete this part if you **(a)** had over $1,500 of taxable interest or ordinary dividends; **(b)** had a foreign account; or **(c)** received a distribution from, or were a grantor of, or a transferor to, a foreign trust.		
	7a	At any time during 2013, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions		
		If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), formerly TD F 90-22.1, to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements		
	b	If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ▶		
	8	During 2013, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back		

Q 1.2.2 Under what circumstances is a U.S. taxpayer required to file the FBAR form?

Any U.S. taxpayer with a financial interest in, or signature or other authority over, a foreign bank account (which includes bank, security, and other types of financial accounts, including certain foreign life insurance policies) is required to file the FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (commonly known as the "FBAR" form), if the aggregate value of the account (or accounts) exceeded $10,000 at any time during the 2013 calendar year, subject to certain exceptions. The FBAR filing requirements apply to all types of taxpayers with offshore bank accounts, including individuals, corporations, partnerships, LLCs, trusts, and estates (with some exceptions). Corporate officers with signature authority over corporate bank accounts located in a foreign country must also file the FBAR form in their individual capacity.

The FBAR filing deadline is June 30 of each year. No extensions of time to file the FBAR are available. Significant criminal and civil penalties may be imposed for the failure to timely file the FBAR form. Starting in 2014, all FBARs are required to be filed electronically through the Treasury Department's BSA E-Filing System, which can be accessed at http://bsaefiling.fincen.treas.gov/main.html.

Q 1.2.3 Under what circumstances is a U.S. taxpayer required to report the existence of certain foreign assets?

Since 2011, U.S. taxpayers with foreign assets valued in excess of certain dollar thresholds are also required to file a new reporting form with their personal tax returns called Form 8938, *Statement of Foreign Financial Assets*.[5] Civil and criminal penalties also apply to the failure to file this form, and the failure to file extends indefinitely the civil statute of limitations to assess taxes for the tax return that failed to report the foreign assets.[6]

The United States' Crackdown on Offshore Tax Evasion

Q 1.3 What led the United States to enact FATCA?

Since 2009, the U.S. government has waged an unprecedented global campaign to crack down on the use of secret, offshore bank accounts by U.S. taxpayers to evade taxes. A top priority for both the Internal Revenue Service and the U.S. Justice Department is combating the serious problem of noncompliance with U.S. tax laws by taxpayers using secret offshore bank accounts. According to a U.S. Senate report issued in 2008, the use of secret offshore accounts to evade U.S. taxes costs the Treasury at least $100 billion annually.[7] More recently, the same Senate subcommittee estimated that offshore tax schemes cost the U.S. $150 billion annually in lost tax revenue.[8]

While there is nothing illegal about maintaining accounts in foreign countries, U.S. taxpayers are required annually to disclose their offshore accounts to the Internal Revenue Service on the FBAR form and to report all income generated by those holdings on their personal income tax returns. The failure to report foreign accounts can subject a taxpayer to substantial civil penalties and, in the case of willful conduct, criminal prosecution. Since 2009, over 45,000 U.S. taxpayers have come forward under special IRS voluntary disclosure programs to reveal that they have unreported bank accounts in countries such as Switzerland, India, Israel, and many others. During the same time period, the U.S. Department of Justice has brought criminal charges

against numerous individual account holders and a substantial number of "enablers"—including bankers, attorneys, and investment advisors.[9]

The UBS Deferred Prosecution Agreement. The Internal Revenue Service and Justice Department initially trained their sights on UBS AG, Switzerland's largest bank. After a whistleblower, UBS banker Bradley Birkenfeld, provided information to the IRS on his bank's practice of aiding U.S. taxpayers in hiding funds in numbered bank accounts (and eventually received a $104 million whistleblower reward), UBS admitted that it helped U.S. citizens hide money using undisclosed accounts, offshore corporations, family foundations, and other mechanisms designed to conceal the true identity of account holders. The U.S. also discovered that the sheer number of accounts held by Americans was staggering: in court filings, the Justice Department estimated that over 52,000 Americans held accounts at UBS alone.

UBS avoided criminal prosecution in the U.S. by paying $780 million in fines and penalties to the U.S. government and by agreeing to turn over the names of U.S. customers of the bank that were suspected of committing tax fraud.[10] Under enormous diplomatic pressure from the U.S. government which ensued, Swiss legislators subsequently voted to weaken the country's historic bank secrecy laws, paving the way for UBS to hand over additionally the names of thousands of its U.S. depositors to the U.S. authorities. This result prompted the Justice Department to proclaim on its website that "fabled Swiss bank secrecy" had been dealt "a devastating blow."[11]

Justice Department attorneys and IRS agents combed through mountains of information handed over by UBS, commenced more than 150 criminal investigations of account holders, and eventually brought criminal charges against the most egregious tax evaders. To date, scores of U.S. taxpayers holding accounts at UBS and other Swiss banks have faced criminal charges, along with dozens of "enablers"—such as bankers, attorneys, and financial advisors—who assisted account holders in hiding assets offshore.

The U.S. government's crackdown on offshore tax avoidance and evasion did not end with UBS; the Justice Department subsequently opened criminal investigations of banks in Switzerland, India, and Israel, among other countries. Switzerland's oldest bank, Wegelin & Co.,

was indicted in federal court in New York, had its correspondent bank accounts in the U.S. seized, and eventually pleaded guilty and paid fines and penalties in excess of $70 million. The bank admitted to conspiring to defraud the United States by helping U.S. account holders hide assets from the IRS in undeclared accounts. A federal district court has also authorized the IRS to issue a "John Doe" summons that will allow the United States to determine the identity of U.S. taxpayers who may hold accounts at Wegelin and other banks based in Switzerland to evade federal income taxes.[12]

Between 2008 and April 2013, the Justice Department's Tax Division criminally charged over thirty banking professionals and sixty account holders, resulting in five convictions after trial and fifty-five guilty pleas, including two trial convictions and sixteen guilty pleas in the first four months of 2013 alone.[13] In April 2013, a federal district court authorized the IRS to issue a "John Doe" summons seeking information about U.S. taxpayers who may hold undeclared offshore accounts at CIBC FirstCaribbean International Bank (FCIB), a Barbados-based bank with branches across the Caribbean.[14] The summons, issued to Wells Fargo N.A., sought records of U.S. taxpayers and financial institutions that used FCIB's U.S. correspondent account at Wells Fargo to evade taxes.

In August 2013, the Justice Department announced that it would offer a program for Swiss banks that are not currently under investigation to resolve their potential liability to the U.S. government for assisting U.S. taxpayers in evading their tax obligations.[15] Under the terms of the program, titled "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks," any Swiss bank not currently under criminal investigation could apply for admission to the program by no later than December 31, 2013.[16] Banks admitted to the program were eligible for a non-prosecution agreement or a non-target letter if they fully cooperated with the U.S. government's ongoing investigations, provided information to the Justice Department regarding their U.S. accounts, and agreed to pay a penalty which was based upon the number of U.S. accounts maintained at the institution since 2008.[17] Of the more than 300 Swiss banks eligible to participate in this program, 106 sought to join the initiative.[18] As of January 1, 2015, the Justice Department had not yet announced that it had entered into any non-prosecution agreement or issued any non-target letter as to any participating Swiss bank.

On May 19, 2014, Credit Suisse AG, Switzerland's second largest bank, pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS.[19] As part of the plea agreement, Credit Suisse acknowledged that, for decades prior to 2009, it operated an illegal cross-border banking business that knowingly and willfully aided and assisted thousands of U.S. clients in opening and maintaining undeclared accounts and concealing their offshore assets and income from the IRS. According to the statement of facts filed with the plea agreement, Credit Suisse employed a variety of means to assist U.S. clients in concealing their undeclared accounts, including by:

- assisting clients in using sham entities to hide undeclared accounts;
- soliciting IRS forms that falsely stated, under penalties of perjury, that the sham entities were the beneficial owners of the assets in the accounts;
- failing to maintain in the United States records related to the accounts;
- destroying account records sent to the United States for client review;
- using Credit Suisse managers and employees as unregistered investment advisors on undeclared accounts;
- facilitating withdrawals of funds from the undeclared accounts by either providing hand-delivered cash in the United States or using Credit Suisse's correspondent bank accounts in the United States;
- structuring transfers of funds to evade currency transaction reporting requirements; and
- providing offshore credit and debit cards to repatriate funds in the undeclared accounts.[20]

The guilty plea was the result of a years-long investigation by U.S. law enforcement authorities that produced indictments of eight Credit Suisse executives since 2011. The plea agreement, along with agreements made with state and federal partners, required Credit Suisse to pay a total of $2.6 billion: $1.8 billion to the Department of

Justice for the U.S. Treasury, $100 million to the Federal Reserve, and $715 million to the New York State Department of Financial Services. Earlier in 2014, Credit Suisse paid approximately $196 million in disgorgement, interest, and penalties to the Securities and Exchange Commission for violating the federal securities laws by providing cross-border brokerage and investment advisory services to U.S. clients without first registering with the SEC. As part of the plea agreement, Credit Suisse further agreed to make a complete disclosure of its cross-border activities, cooperate in treaty requests for account information, provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed, and to close accounts of account holders who fail to come into compliance with U.S. reporting obligations. Credit Suisse has also agreed to implement programs to ensure its compliance with U.S. laws, including its reporting obligations under FATCA and relevant tax treaties, in all its current and future dealings with U.S. customers.

In December 2014, Bank Leumi, one of Israel's largest banks, admitted that it conspired to aid and assist U.S. taxpayers to prepare and present false tax returns to the IRS by hiding income and assets in offshore bank accounts in Israel, Switzerland, and Luxembourg.[21] Bank Leumi entered into a Deferred Prosecution Agreement that permitted the bank to defer criminal prosecution on conspiracy charges. As part of its deal, Bank Leumi agreed to pay the U.S. government a total of $270 million. According to a statement of facts filed in federal court, Bank Leumi engaged in the following conduct:

- surreptiously sending private bankers from Israel and elsewhere around the world to the United States to meet secretly with U.S. clients at hotels, parks, and coffee shops to discuss their offshore account activity;
- assisting U.S. clients in using nominee corporate entities created in Belize and other foreign jurisdictions to hide their undeclared accounts by concealing the U.S. client as the true beneficial owner of the account;
- using the Bank Leumi Le-Israel Trust Company as a nominee account holder for U.S. clients with accounts in Israel to conceal the U.S. client as the true beneficial owner of the account;

- maintaining U.S. clients' undeclared offshore accounts under assumed names or numbered accounts to conceal the U.S. client as the true beneficial owner of the account;
- providing hold mail services so that correspondence and other account information would not go directly to the U.S. client to make it more difficult to connect the client to the secret offshore account;
- extending loans to U.S. clients from Bank Leumi USA that were collateralized by the assets in those clients' offshore accounts, so that the clients could leverage their offshore assets to obtain and use capital in the United States while keeping their foreign accounts secret and undetected from the U.S. government; and
- after the department's investigation into UBS and other Swiss banks' criminal conduct in aiding U.S. taxpayers to evade their taxes became public, the Bank Leumi Group opened and maintained accounts for U.S. taxpayers who left UBS and other Swiss banks due to the investigation in an effort to continue to avoid detection by the U.S. government.[22]

As part of its Deferred Prosecution Agreement, Bank Leumi turned over the names of more than 1,500 of its U.S. account holders, and agreed to continue to disclose information and cooperate with the Justice Department's ongoing offshore tax evasion investigations.

Despite the large numbers of individuals who have participated in various IRS voluntary disclosure programs over the past four years, it is nonetheless widely believed that many more U.S. taxpayers holding foreign accounts in countries around the world have failed to "come in from the cold." The refusal of certain U.S. taxpayers to comply is presumably due to their belief that the U.S. government would never discover the existence of their accounts due to the bank secrecy laws of the countries where they maintain accounts or that those jurisdictions would never willingly give up the names of account depositors. The goal of FATCA is to ferret out undisclosed bank accounts and the like held by U.S. taxpayers at financial institutions around the globe and dismantle the ability of any U.S. taxpayer to hide behind the protection of bank secrecy laws in foreign countries.

FATCA Statutory Provisions

Q 1.4 What are the FATCA statutory provisions contained in the Internal Revenue Code ("Code")?

The enactment of FATCA added Chapter 4 of Subtitle A of the Code, and new Code sections 1471 through 1474. Chapter 4 generally requires U.S. withholding agents to withhold tax on certain payments to FFIs that do not agree to report certain information to the IRS regarding their U.S. accounts, and on certain payments to certain nonfinancial foreign entities (referred to as "NFFEs") that do not provide information on their substantial U.S. owners to withholding agents.

Q 1.4.1 What does Code section 1471 require?

Section 1471(a) requires any withholding agent to withhold 30% of any "withholdable payment" to an FFI that does not meet the requirements of section 1471(b). A withholdable payment generally includes (i) any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income (referred to generally as "FDAP" income), if such payment is from sources within the United States; and (ii) 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.[23]

An FFI meets the requirements of section 1471(b) if it either enters into an FFI agreement with the IRS to perform certain obligations or meets requirements prescribed by the Treasury Department and the IRS to be deemed to comply with the requirements of section 1471(b). An FFI is broadly defined as any financial institution that is a foreign entity, and a "financial institution" is similarly defined broadly to include any entity that (i) accepts deposits in the ordinary course of a banking or similar business; (ii) as a substantial portion of its business, holds financial assets for the account of others; or (iii) is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities.[24]

An FFI that enters into an FFI agreement with the IRS is considered to be a "participating FFI" and is required to identify its "U.S. accounts" and comply with verification and due diligence procedures prescribed by Treasury and the IRS.[25] A "U.S. account" is generally defined as any financial account held by one or more "specified United States persons" or "United States owned foreign entities."[26] A U.S. owned foreign entity is defined as any foreign entity that has one or more substantial U.S. owners.[27] The requirements of the FFI agreement shall apply to the U.S. accounts of the participating FFI and to the U.S. accounts of any other FFI that is a member of the same "expanded affiliated group."[28]

FATCA requires a participating FFI to report certain information on an annual basis to the IRS with respect to each U.S. account maintained at its institution.[29] The information that must be reported with respect to each U.S. account includes: (i) the name, address, and taxpayer identifying number of each account holder who is a specified U.S. person (or, in the case of an account holder that is a U.S. owned foreign entity, the name, address, and TIN of each specified U.S. person that is a "substantial U.S. owner" of such entity); (ii) the account number; (iii) the account balance or value; and (iv) the gross receipts and gross withdrawals or payments from the account. If foreign law would prevent the FFI from reporting the required information absent a waiver from the account holder, and the account holder fails to provide a waiver within a reasonable period of time, the FFI is required to close the account.[30]

FATCA further requires a participating FFI to withhold 30% of any "passthru [sic] payment" to a "recalcitrant account holder" or to an FFI that does not meet the requirements of section 1471(b) (referred to as a "nonparticipating FFI").[31] A "passthru payment" is defined as any withholdable payment or other payment to the extent attributable to a withholdable payment.[32] A "recalcitrant account holder" refers to any account holder that fails to provide the information required to determine whether the account is a U.S. account, or the information required to be reported by the FFI, or that fails to provide a waiver of a foreign law that would prevent reporting.[33]

Q 1.4.2 What does section 1472 require?

Section 1472 addresses U.S.-source payments made to NFFEs, which are defined as any foreign entity that is not a financial institution.[34] FATCA requires a withholding agent to withhold 30% if the payment is beneficially owned by the NFFE or another NFFE, unless the requirements of section 1472(b) are met with respect to the beneficial owner of the payment.[35] The requirements of section 1472(b) are met with respect to the beneficial owner of a payment if: (i) the beneficial owner or payee provides the withholding agent with either a certification that such beneficial owner does not have any substantial U.S. owners, or the name, address, and TIN of each substantial U.S. owner; (ii) the withholding agent does not know or have reason to know that any information provided by the beneficial owner or payee is incorrect; and (iii) the withholding agent reports the information provided to the IRS.

Q 1.4.3 What does section 1473 require?

Section 1473 sets forth definitions of key FATCA terms, including "withholdable payment," "substantial United States owner," "specified United States person," "withholding agent," and "foreign entity."[36]

Q 1.4.4 What does section 1474 require?

Section 1474 provides a series of special rules applicable under FATCA, including liability for withheld tax, credit and refund procedures for withheld tax, confidentiality of information disclosed to the IRS, coordination with other withholding provisions in the Internal Revenue Code, and the treatment of tax withheld under an FFI agreement.[37]

FATCA Guidance Issued by Treasury and the IRS

Q 1.5 What regulatory guidance regarding FATCA has been issued by Treasury and the IRS since enactment of the law in 2010?

Since the passage of FATCA by Congress in 2010, Treasury and the IRS have issued thousands of pages of preliminary guidance, notices,

revenue procedures, and regulations regarding implementation of FATCA's withholding and reporting provisions.[38] On February 15, 2012, Treasury and IRS published proposed regulations for implementation of the FATCA statutory provisions,[39] and on October 24, 2012, released Announcement 2012-42 which stated that certain provisions of the proposed regulations would be amended when final regulations were promulgated.

Following issuance of proposed regulations, Treasury and the IRS received significant comments from interested stakeholders. The bulk of the concerns focused on the costs and burdens associated with FATCA implementation and legal hurdles to compliance posed by foreign law. A public hearing was held on May 15, 2012, at which further comments were received by Treasury and IRS.

Final regulations. On January 17, 2013, Treasury and IRS issued a massive set of final regulations spanning 543 pages.[40] In a press release announcing the regulations, Treasury stated that "[t]hese regulations give the Administration a powerful set of tools to combat offshore tax evasion effectively and efficiently. The final rules mark a critical milestone in international cooperation on these issues, and they provide important clarity for foreign and U.S. financial institutions."[41] In attempting to address compliance concerns expressed by stakeholders, the final regulations state that Treasury and IRS "carefully considered these comments and established three avenues for addressing the principal concerns regarding burdens, legal impediments, and technical implementation."[42] First, the regulations utilize a risk-based approach to implementing FATCA. Second, the regulations allow for collaboration with foreign governments to develop an alternative intergovernmental approach to streamline FATCA implementation and compliance. Third, the regulations attempt to simplify the process for registering and entering into an FFI agreement with the IRS in order to minimize operational costs associated with collecting and reporting FATCA information.[43]

Following publication of the final regulations, the Treasury Department and the IRS also issued additional FATCA guidance. Notice 2013-43 previewed the revised timelines for implementation of the FATCA requirements and provided additional guidance concerning the treatment of FFIs located in jurisdictions that have signed intergovernmental

agreements (IGAs) but have not yet brought those IGAs into force.[44] In particular, Notice 2013-43 clarified that a jurisdiction would be treated as having in effect an IGA if the jurisdiction is listed on Treasury's website as a jurisdiction that is treated as having an IGA in effect. The notice provided that Treasury and the IRS intended to include on this list jurisdictions that have signed but have not yet brought into force an IGA. Notice 2013-69 further previewed some of the changes that Treasury and the IRS intended to make to the final regulations and published a draft of the agreement that an FFI may enter into with the IRS in order to satisfy its obligations and be treated as a participating FFI.[45] Revenue Procedure 2014-13 published the final FFI agreement.[46] Following publication of the final regulations in January 2013, Treasury and the IRS received numerous comments with respect to those regulations and continued active discussions with stakeholders in preparation for FATCA withholding.

Temporary and coordination regulations. On February 20, 2014, Treasury and the IRS released temporary regulations under chapter 4 that clarified and modified certain provisions of the final chapter 4 regulations, including incorporating the revised timeline for the implementation of FATCA set forth in Notice 2013-43.[47] The temporary chapter 4 regulations accordingly require that withholding agents (including participating FFIs, qualified intermediaries, withholding foreign partnerships, and withholding foreign trusts) begin withholding with respect to withholdable payments made on or after July 1, 2014, unless the withholding agent can reliably associate the payment with documentation upon which it is permitted to rely to treat the payment as exempt from withholding under chapter 4.

On February 20, 2014, Treasury and the IRS also released temporary regulations under chapters 3 and 61 of the Internal Revenue Code, and section 3406, to coordinate those regulations with the requirements provided in the final and temporary chapter 4 regulations.[48] These coordination regulations sought to harmonize the requirements contained in pre-FATCA rules under chapters 3 and 61 and section 3406 with those under FATCA. Chapter 3 contains reporting and withholding rules relating to payments of certain U.S.-source income (for example, dividends on stock of U.S. companies) to non-U.S. persons. Chapter 61 and section 3406 address the reporting and withholding requirements for various types of payments made to certain U.S. persons. The regulations coordinate these pre-FATCA regimes with the requirements

under FATCA to integrate these rules, reduce burden (including certain duplicative information reporting obligations), and conform the due diligence, withholding, and reporting rules under these provisions to the extent appropriate in light of the separate objectives of each chapter or section.[49] In a press release, Treasury explained that the changes related to four key areas:

> 1. *Rules for Identification of Payees*. Documentation requirements are central to identification of payees under the chapter 3 and FATCA reporting and withholding regimes. The documentation requirements for withholding agents and FFIs under FATCA differ in certain respects from the corresponding documentation requirements for withholding agents under chapter 3. The regulations remove inconsistencies in the chapter 3 and FATCA documentation requirements (including inconsistencies regarding presumption rules in the absence of valid documentation) based, in part, on stakeholder comments.
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> 2. *Coordination of the Withholding Requirements Under Chapter 3, Section 3406, and FATCA*. Chapter 3, section 3406, and FATCA require a payor to withhold under certain, potentially overlapping, circumstances. The temporary regulations provide rules to ensure that payments are not subject to withholding under both chapters 3 and FATCA, or under both I.R.C. § 3406 and FATCA.
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> 3. *Coordination of Chapter 61 and FATCA Regarding Information Reporting with Respect to U.S. Persons*. FATCA generally requires FFIs to report certain information with respect to their U.S. accounts. In some cases, this reporting may be duplicative of the information required to be reported on Form 1099 with respect to the same U.S. accounts when the holders of such accounts are U.S. non-exempt recipients or the benefits of Form 1099 reporting to increasing voluntary compliance is not outweighed by the burden of overlapping information reporting requirements with respect to the same accounts.
>
> - Under existing FATCA regulations, certain FFIs may be able to mitigate duplicative reporting under FATCA and chapter 61 by electing to satisfy their FATCA reporting obligations by reporting U.S. account holders on Form 1099 instead of reporting the account holder on the Form 8966 as required under FATCA. This election, however, is not expected to relieve burden for FFIs that are required to report on U.S. accounts pursuant to local laws implementing a Model 1

IGA. As previewed in Notice 2013-69, to further reduce burdens and mitigate instances of duplicative reporting under FATCA and chapter 61, the temporary regulations generally relieve non-U.S. payors from chapter 61 reporting to the extent the non-U.S. payor reports on the account in accordance with the FATCA regulations or an applicable IGA.

- The regulations do not, however, provide a similar exception to reporting under chapter 61 for U.S. payors. While some of the information reported by FFIs under FATCA on Form 8966 and under chapter 61 on Form 1099 may overlap, there are also significant differences. Most notably, the requirement under chapter 61 to furnish a copy of Form 1099 to the payee facilitates voluntary compliance, and there is no equivalent requirement for payee statements under FATCA. Moreover, U.S. payors generally have well-established systems for reporting and are subject to reporting on a broader range of payments under chapter 61 than non-U.S. payors. In light of these differences, the benefits of chapter 61 reporting by U.S. payors to the voluntary compliance system outweigh the reduction in burden that would be achieved by eliminating this reporting for U.S. payors that report on the same account under FATCA or an applicable IGA.
- Today's regulations provide a new, limited exception to reporting under chapter 61 for both U.S. payors and non-U.S. payors that are FFIs required to report under chapter 4 or an applicable IGA with respect to payments that are not subject to withholding under chapter 3 or I.R.C. § 3406 and that are made to an account holder that is a presumed (but not known) U.S. non-exempt recipient. FFIs that are required to report under chapter 4 or an applicable IGA will provide information regarding account holders who are presumed U.S. non-exempt recipients. Moreover, such presumed U.S. non-exempt recipients may not actually be U.S. persons for whom the recipient copy of Form 1099 would be relevant to facilitate voluntary compliance. As a result, the IRS and Treasury believe that reporting under chapter 61 should be eliminated on payments to account holders who are presumed U.S. non-exempt recipients and for whom there is FATCA reporting.

> 4. *Conforming Changes to the Regulations Implementing the Various Regimes*. The temporary regulations also make numerous conforming changes, including (i) revising the examples in chapters 3 and 61 to take into account that payments in those examples may now be subject to FATCA; (ii) ensuring that defined terms in the FATCA regulations that are used in chapters 3 and 61 are appropriately cross-referenced; and (iii) unifying definitions of terms used in chapters 3, 4 and 61.[50]

Correcting regulations. Treasury and the IRS subsequently published corrections to the final and temporary regulations on April 22, 2014,[51] and again on June 30, 2014.[52]

2014/2015 "transition period." In response to numerous concerns from interested stakeholders requesting that the FATCA implementation timetable be delayed beyond July 1, 2014, the IRS announced on May 2, 2014, that calendar years 2014 and 2015 will be regarded as a "transition period" for purposes of enforcement and administration of FATCA.[53] In Notice 2014-33, Treasury and IRS stated that "[t]he transition period and other guidance described in this notice is intended to facilitate an orderly transition for withholding agent and FFI compliance with FATCA's requirements, and responds to comments regarding certain aspects of the regulations under chapters 3 and 4."[54]

Correcting amendment regarding preexisting accounts. On November 18, 2014, Treasury and the IRS issued a correcting amendment to the previously issued FATCA regulations.[55] According to the preamble to the correcting amendment, the change "affects FFIs that have entered into an agreement with the IRS to obtain status as a participating FFI and to, among other things, report certain information with respect to U.S. accounts that they maintain." The preamble further sets forth why the correction was needed:

> As published, the temporary regulations contain an error that is misleading with respect to the reporting requirements of participating FFIs (as defined in § 1.1471-1(b)(91)) maintaining U.S. accounts during the 2014 calendar year. This correcting amendment modifies the last date in the first sentence in § 1.1471-4T(d)(7)(iv)(B) to correct the relevant provision to meet its intended purpose.

Specifically, the amendment corrects Treasury Regulations section 1.1471-4T(d)(7)(iv)(B), and provides that "[w]ith respect to the 2014 calendar year, a participating FFI must report under paragraph (d)(3) or (5) of this section on all accounts that are identified and documented under paragraph (c) of this section as U.S. accounts or accounts held by owner-documented FFIs as of December 31, 2014 (or as of the date an account is closed if the account is closed prior to December 31, 2014), if such account was outstanding on or after the effective date of the participating FFI's FFI agreement." Prior to the correcting amendment, participating FFIs were only permitted to treat accounts as "preexisting" if they were opened prior to July 1, 2014. The amendment allows participating FFIs to treat accounts as preexisting if they were opened before the institution signed its FFI Agreement with the IRS. The change allows FFIs to have greater leeway in characterizing accounts as "preexisting," particularly for those institutions which registered as participating FFIs and entered into FFI Agreements after July 1, 2014.

IGA Relief. On December 1, 2014, Treasury and the IRS issued Announcement 2014-38 which provides relief to those countries which have reached FATCA IGAs in substance, but have not signed such agreements. In 2012, Treasury and the IRS released Model 1 and Model 2 IGAs to implement the FATCA. Following the release of the model IGAs, many countries around the world expressed interest in entering into IGAs with the U.S. to facilitate the efficient implementation of FATCA's requirements. Treasury has periodically updated the model IGAs since their initial release, including by developing "standalone" versions of the nonreciprocal Model 1 IGA and the Model 2 IGA that can be implemented by jurisdictions with which the United States does not have a tax treaty or tax information exchange agreement. Treasury has also released new versions of each model IGA that have been updated to reflect the relevant timing of due diligence and transition rules for FFIs that will be the models for IGAs with jurisdictions reaching an agreement in substance after June 30, 2014, or signing an IGA after June 30, 2014, without having previously reached an agreement in substance, and to provide other clarifications.

All versions of the models are available on Treasury's website.[56] Treasury and the IRS also publish a list identifying all countries that are treated as if they had Model 1 or Model 2 IGA in effect. This list is

maintained on Treasury's website[57] and the IRS's website.[58] Treasury and the IRS include on this list jurisdictions that have signed, but may not yet have brought into force, an IGA, as well as a list of jurisdictions treated as if they had an IGA in effect because on or before June 30, 2014, they had reached agreements in substance with the United States on the terms of an IGA and consented to be included on the Treasury and IRS list of such jurisdictions, even though the jurisdiction had not yet signed the IGA.

In anticipation of FATCA's effective date of July 1, 2014, Treasury and the IRS issued Announcement 2014-17 in order to provide certainty to FFIs and other stakeholders with respect to the status of FFIs in jurisdictions that reached an agreement in substance on the terms of an IGA on or before June 30, 2014, provided that the IGA is signed by December 31, 2014. FFIs that are resident in, or organized under the laws of, or are a branch located in, a jurisdiction that is included on the Treasury and IRS list as having reached an agreement in substance are permitted to register on the FATCA registration website consistent with their treatment under the relevant model IGA, and are permitted to certify their FATCA status to withholding agents consistent with that treatment. Announcement 2014-17 also provided that a jurisdiction that is treated as having an IGA in effect must sign the IGA by December 31, 2014, in order for the FATCA status of FFIs (or branches) in such jurisdiction to continue without interruption.

As of July 1, 2014, 101 jurisdictions were treated as if they have an IGA in effect; forty-eight of these agreements had been signed, and fifty-three remained unsigned. In light of the large number of IGAs that were agreed to in substance but have not yet been signed (and were not likely to be signed by December 31, 2014), many stakeholders expressed concerns to Treasury and the IRS about the practical challenges presented by the requirement that all of these IGAs be signed by December 31, 2014, in order for jurisdictions with an agreed-in-substance IGA to continue to be treated as if they had an IGA in effect. In particular, Announcement 2014-38 noted that:

> The large number of jurisdictions that have reached agreements in substance demonstrates worldwide support for the IGA approach to effectively and efficiently implement FATCA, but it also raises concerns about the practicality of getting all of the agreed-in-substance IGAs signed by December 31, 2014.

> Stakeholders have expressed concerns that FFIs located in jurisdictions with IGAs that are agreed in substance, but not yet signed, are unable to plan efficiently for FATCA compliance given the uncertainty regarding whether the IGA will be signed by December 31, 2014. More specifically, FFIs have expressed concern that if an IGA that is agreed in substance is not signed by December 31, 2014, and an FFI in that jurisdiction has already registered with an IGA-based registration status, it would have to change its registration status. Similarly, withholding agents have expressed concern about re-documenting the FATCA status of FFIs in a jurisdiction that misses the December 31, 2014, signing deadline, including in particular with respect to withholding agents' reliance on the special rule providing that GIINs of reporting Model 1 FFIs do not need to be obtained before January 1, 2015.
>
> Stakeholders also have expressed concerns about whether jurisdictions that had not signed or reached an agreement in substance on the terms of an IGA on or before June 30, 2014, but that did make significant progress in their IGA discussions, will be able to sign the IGA prior to 2015 in light of the significant number of agreed-in-substance IGAs that are being finalized for signature.

In light of these well-founded concerns, Treasury and the IRS issued Announcement 2014-38 on December 1, 2014, to provide additional guidance with respect to jurisdictions that are treated as if they had an IGA in effect pursuant to Announcement 2014-17 but that did not sign the IGA before December 31, 2014. Announcement 2014-38 also provided guidance with respect to certain jurisdictions that reached an agreement in substance on the terms of an IGA after June 30, 2014.

Announcement 2014-38 provided that a jurisdiction that is treated as if it had an IGA in effect, but that has not yet signed an IGA, retains such status beyond December 31, 2014, provided that the jurisdiction "continues to demonstrate firm resolve" to sign the IGA that was agreed in substance on or before June 30, 2014, as soon as possible. The announcement further provided that after December 31, 2014, Treasury will review the list of jurisdictions having an agreement in substance on a monthly basis to assess whether it continues to be appropriate to treat each jurisdiction included therein as if it had an IGA in effect or whether a jurisdiction should be removed from the list. According to the announcement:

> This determination will be based on, among other factors, the responsiveness of a jurisdiction to communications from the United States regarding the IGA and whether the jurisdiction has raised concerns regarding its ability to sign or bring into force the text that was agreed to in substance. As stated in Notice 2013-43, a jurisdiction that has signed an IGA may also be removed from the list of jurisdictions that are treated as if they had an IGA in effect if Treasury determines that the jurisdiction is not taking the steps necessary to bring the IGA into force within a reasonable period of time.

The announcement further addressed the status of certain jurisdictions that were in advanced discussions on the text of an IGA prior to June 30, 2014, but were unable to complete all the necessary steps to reach an agreement in substance on the IGA on or before June 30, 2014. Several of these jurisdictions subsequently reached an agreement in substance with the United States on the terms of an IGA. Announcement 2014-38 provided that the following jurisdictions will be treated, as of November 30, 2014, as if they had a Model 1 IGA in effect: Angola, Cambodia, Greece, the Holy See, Iceland, Kazakhstan, Montserrat, the Philippines, Trinidad and Tobago, and Tunisia. In addition, Macao will be treated, as of November 30, 2014, as if it had a Model 2 IGA in effect. Any jurisdictions that are not included on the updated list of jurisdictions that are treated as if they had an IGA in effect will not be treated as such until the IGA is signed. Based on the same criteria used for the jurisdictions that are treated as if they had an IGA in effect on or before June 30, 2014, Treasury will review this list on a monthly basis for whether these jurisdictions continue to demonstrate firm resolve to sign the IGA that was agreed in substance on or before November 30, 2014, or whether any should be removed from the list.

Announcement 2014-38 further provided that the text of the agreements in substance will not be published by the IRS or Treasury until the IGA is signed. Instead, the list will specify only whether the relevant IGA is a Model 1 or a Model 2 IGA, and the date on which the relevant jurisdiction is treated as if it had an IGA in effect. Until the IGA is signed, the jurisdiction will be treated as if it had in effect the relevant model provisions, including in the case of the additional jurisdictions listed above, the "determination date" referenced in the new Model Annex I, which for IGAs agreed in substance after June 30, 2014, will be

November 30, 2014. This means that an FFI resident in, or organized under the laws of, or a branch located in, a jurisdiction that is listed on the Treasury and IRS websites as having reached an agreement in substance will be permitted to register on the FATCA registration website consistent with its treatment under the relevant model IGA and will be permitted to certify its status to a withholding agent consistent with that treatment.

The announcement further confirmed that Treasury maintained its policy of not deviating from the model IGA text except in limited circumstances in Annex II. As in Announcement 2014-17, any modifications made in the relevant IGA to the model Annex II categories of exempt beneficial owners, deemed-compliant FFIs, and accounts excluded from the definition of financial accounts will not be applicable until the IGA is signed.

If a jurisdiction is removed from the list of jurisdictions that are treated as if they had an IGA in effect, FFIs that are resident in, or organized under the laws of, that jurisdiction, and branches that are located in that jurisdiction, will, from the first day of the month following the month of removal, no longer be entitled to the status that would be provided under the IGA, and will be required to update their status on the FATCA registration website accordingly. Such FFIs should also notify withholding agents and financial institutions with which they maintain financial accounts of their change in FATCA status.

Options for Noncompliant Taxpayers

Q 1.6 What options exist for U.S. taxpayers with undisclosed offshore bank accounts?

Taxpayers who are not compliant with their prior year FBAR or income tax reporting obligations with respect to foreign bank accounts may wish to take advantage of the IRS Offshore Voluntary Disclosure Program (OVDP), an amnesty program designed to encourage U.S. taxpayers with undisclosed foreign bank accounts to come into compliance with U.S. tax laws and avoid criminal prosecution. This program permits eligible taxpayers with undisclosed foreign bank accounts, and unreported income associated with those accounts, to avoid criminal

prosecution in return for the payment of back taxes, interest, and penalties. Currently, there is no deadline for participation in the OVDP, although the IRS has stated that it could end the program, or modify its terms, at any time. To date, more than 45,000 taxpayers have come into compliance voluntarily through the OVDP and predecessor programs, paying about $6.5 billion in taxes, interest, and penalties.[59]

Prior IRS Offshore Voluntary Disclosure Programs. In 2009, shortly after UBS executed its deferred prosecution agreement and the Swiss government started divulging the identities of holders of secret accounts, the IRS announced a special amnesty program for offshore bank accounts. This program was prompted by the recognition that not everyone with a Swiss bank account was a tax cheat; indeed, many Americans inherited bank accounts in Switzerland–such as from ancestors fleeing Nazi Germany–or maintained accounts in foreign countries for wholly legitimate reasons. Amnesty was only available, however, if the account holder came forward before the IRS obtained the individual's account information; once the IRS learned of the taxpayer's noncompliance, the voluntary disclosure program was no longer an option. Individuals who took advantage of that program were required to pay back taxes and substantial civil penalties in exchange for amnesty from criminal prosecution. This special program (which lasted for only six months) was such a huge success, with over 15,000 individuals coming forward to confess that they had unreported bank accounts, that the IRS reopened the program in 2011 and yet again in 2012.

In 2012, the IRS also announced the Streamlined Filing Compliance Procedure (the "Streamlined Procedure") which was designed to provide an easier road to compliance for taxpayers who nonwillfully failed to report their foreign accounts and income.[60] While originally hailed by then–IRS Commissioner Doug Shulman as a "series of common-sense steps," the practical reality was that the qualifications for the Streamlined Procedure were very narrowly tailored to include only certain U.S. citizens residing abroad who owed little or no back taxes. Many taxpayers with non-willful conduct were ineligible to take advantage of the Streamlined Procedure, and in many instances, were forced to accept the strict penalties of the OVDP in order to come into tax compliance.

Modifications to OVDP and Streamlined Program. On June 18, 2014, the IRS announced significant changes to the OVDP and related programs, including modifications to the existing Streamlined Procedure.[61] According to IRS Commissioner John Koskinen, "[t]he new versions of our offshore programs reflect a carefully balanced approach to ensure that everyone pays their fair share of taxes owed. Through the changes we are announcing today, we provide additional flexibility in key respects while maintaining the central components of our voluntary programs."[62] The modifications provide that taxpayers who can certify that their failure to file an FBAR and/or report income from an offshore bank account was non-willful may be eligible for a reduced penalty framework. On the other hand, taxpayers whose failure to file FBARs and reporting offshore income was willful can be subject to an increased penalty, up to 50% of the maximum aggregate balance of their offshore holdings.

Expansion of Streamlined Filing Compliance Procedures to all taxpayers with non-willful conduct. The IRS expanded the Streamlined Procedure to provide more taxpayers with an easier way to voluntarily come into compliance.[63] Taxpayers residing in the United States are now eligible to use the Streamlined Procedure if they: (1) previously filed a U.S. tax return (if required) for each of the most recent three tax years; (2) failed to report gross income from a "foreign financial asset" and pay tax as required by U.S. law, and may have failed to file an FBAR and/or one or more international information returns (such as Forms 5471 or 8938) with respect to the "foreign financial asset;" and (3) such failures resulted from non-willful conduct. Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law. For these purposes, a "foreign financial asset" includes traditional bank accounts and securities accounts, as well as the broader group of assets that are required to be reported on a Form 8938 such as a real property lease with a foreign lessee.

Taxpayers residing outside the United States are eligible for the Streamlined Procedures if they: (1) meet the non-U.S. residency requirement (for joint return filers, both spouses must meet the non-residency requirement); and (2) have failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed

to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) with respect to a foreign financial account, and such failures resulted from non-willful conduct.

Unlike the old Streamlined Procedure, there is no requirement that the taxpayer have $1,500 or less of unpaid tax per year and no requirement that the taxpayer live abroad. To participate in the new Streamlined Procedure, taxpayers meeting the above criteria will, among other requirements, be required to submit three years of amended tax returns and six years of FBARs, and sign a certification (under penalty of perjury) that the failure to report all income, pay all tax, and submit all required information returns (including FBARs) resulted from non-willful conduct.

Perhaps most importantly, under the new Streamlined Procedure, taxpayers living in the United States will only be subject to a miscellaneous offshore penalty equal to 5% of the foreign financial assets that gave rise to the tax compliance issue. This represents a significant decrease from the 27.5% penalty imposed by the 2012 OVDP. For taxpayers residing outside the United States, there is no penalty under the new Streamlined Procedure.

Changes to the OVDP. The IRS also reshaped the OVDP for certain taxpayers whose failure to comply is willful in nature, and therefore does not qualify for the Streamlined Procedure.[64] As of August 4, 2014, the offshore penalty percentage was increased from 27.5% to 50% if, before the taxpayer's OVDP preclearance request is submitted, it becomes public that a financial institution where the taxpayer holds an account or another party facilitating the taxpayer's offshore arrangement: (1) is under investigation by the IRS or Department of Justice, (2) is cooperating with the IRS or Department of Justice in connection with accounts beneficially owned by a U.S. person, or (3) has been identified in a court-approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a "John Doe summons") at the foreign financial institution.[65] The new 2014 OVDP program also eliminated the previous lower-tier penalties for certain non-willful taxpayers, and adopted new procedures for taxpayers who have failed to file an FBAR and/or information reporting form, but correctly reported all gross income on their tax returns.[66]

Assessment of "Willfulness." A critical issue that taxpayers and practitioners will now have to confront is whether the conduct in question was "willful." The willfulness determination will dictate whether a taxpayer should proceed with the new Streamlined Procedures (designed for non-willful conduct) or the 2014 OVDP (designed for willful conduct). As noted, an individual choosing to proceed under the new Streamlined Procedures will be required to sign a certification, under penalty of perjury, that the "failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct." Many factors that will have to be considered in determining if an individual's failure to report a foreign bank account to the IRS was willful including, but not limited to, the following:

- Whether the offshore account was funded with unreported income;
- Whether the taxpayer employed a structure/entity to hold the offshore account;
- Whether the box on Line 7, Schedule B was checked "no" indicating that the taxpayer did not have a foreign bank account;
- Whether the taxpayer failed to advise the return preparer of the existence of the offshore account;
- Whether the taxpayer transferred the offshore funds to another institution to avoid detection;
- The sophistication of taxpayer; and
- Whether the taxpayer was "willfully blind" to the income tax and FBAR reporting obligations with respect to foreign bank accounts.

None of these factors is likely to be determinative, standing alone, on the question of willfulness, but each factor will certainly affect whether the taxpayer's behavior is ultimately deemed to be willful.

Notes

1. U.S. Treasury Department Office of Public Affairs, *Fact Sheet: FATCA Amendments and Coordination Regulations*, at 1 (Feb. 20, 2014).
2. *See* Treasury Notes, *Online Resources on the Foreign Account Tax Compliance Act* (July 2, 2014), *available at* www.treasury.gov/connect/blog/Pages/FATCA-Resources.aspx.
3. Final Regulations, Preamble Part II, TD 9610; 78 Fed. Reg. 5874 (Jan. 28, 2013).
4. *See* FinCEN Form 114, Report of Foreign Bank and Financial Accounts (previously known as Form TD F 90-22.1).
5. I.R.C. § 6038D.
6. I.R.C. § 6501(c)(8).
7. United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Tax Haven Banks and U.S. Tax Compliance Staff Report*, at 1 (July 17, 2008).
8. United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts Majority and Minority Staff Report*, at 9 (Feb. 26, 2014).
9. *See* U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, *available at* www.justice.gov/tax/offshore_compliance_initiative.htm.
10. U.S. Justice Department Press Release, *UBS Enters Into Deferred Prosecution Agreement; Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay $780 Million* (Feb. 18, 2009).
11. U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, *available at* www.justice.gov/tax/offshore_compliance_initiative.htm.
12. U.S. Attorney's Office, Southern District of New York, Press Release, *Court Authorizes IRS to Seek Records from UBS Relating to U.S. Taxpayers with Swiss Bank Accounts* (Jan. 28, 2013).
13. U.S. Justice Department, Tax Division, Offshore Compliance Initiative website, *available at* www.justice.gov/tax/offshore_compliance_initiative.htm.
14. U.S. Justice Department Press Release, *Court Authorizes Service of John Doe Summons Seeking the Identities of U.S. Taxpayers with Offshore Accounts at CIBC FirstCaribbean International Bank* (Apr. 30, 2013).
15. Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance (Aug. 29, 2013).
16. *Id.*
17. *Id.*
18. David Voreacos, *Bloomberg*, "Swiss Banks Seek Tax Amnesty as Third Accept U.S. Offer" (Jan. 25, 2014).

19. U.S. Justice Department Press Release, *Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns* (May 19, 2014).
20. *Id.*
21. U.S. Department of Justice Press Release, "Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Asserts in Offshore Bank Accounts" (Dec. 22, 2014).
22. *Id.*
23. I.R.C. § 1473(1).
24. I.R.C. § 1471(d)(5).
25. I.R.C. § 1471(b)(1)(A), (B).
26. I.R.C. § 1471(d)(1).
27. I.R.C. §§ 1471(d)(3), 1473(2).
28. I.R.C. § 1471(e), (e)(2).
29. I.R.C. § 1471(b)(1)(C), (E).
30. I.R.C. § 1471(b)(1)(F).
31. I.R.C. § 1471(b)(1)(D)(i).
32. I.R.C. § 1471(d)(7).
33. I.R.C. § 1471(d)(6).
34. I.R.C. § 1472(d).
35. I.R.C. § 1472(a).
36. I.R.C. § 1473.
37. I.R.C. § 1474.
38. *See generally* Notice 2010-60, 2010-37 I.R.B. 329; Notice 2011-34, 2011-19 I.R.B. 765; and Notice 2011-53, 2011-32 I.R.B. 124.
39. *See* 77 Fed. Reg. 9022 (Feb. 15, 2012).
40. *See* T.D. 9610 (Jan. 17, 2013); 78 Fed. Reg. 5874 (Jan. 28, 2013).
41. U.S. Department of the Treasury Press Release, *Treasury and IRS Issue Final Regulations to Combat Offshore Tax Evasion* (Jan. 17, 2013).
42. Final Regulations, Preamble Part IV, T.D. 9610; 78 Fed. Reg. 5874 (Jan. 28, 2013).
43. *Id.* On September 10, 2013, Treasury and the IRS published corrections to the final regulations. *See* 78 Fed. Reg. 55,202 (Sept. 10, 2013).
44. 2013-31 I.R.B. 113.
45. 2013-46 I.R.B. 503.
46. 2014-3 I.R.B. 419.
47. T.D. 9657, 79 Fed. Reg. 12,812.
48. T.D. 9658, 79 Fed. Reg. 12,726.
49. U.S. Treasury Department Office of Public Affairs, *Fact Sheet: FATCA Amendments and Coordination Regulations* (Feb. 20, 2014).
50. *Id.*
51. 79 Fed. Reg. 22,378 (Apr. 22, 2014).
52. *See* 79 Fed. Reg. 37,175 (July 1, 2014); 79 Fed. Reg. 37,181 (July 1, 2014).
53. IRS Notice 2014-33, *Further Guidance on the Implementation of FATCA and Related Withholding Provisions* (May 2, 2014).
54. *Id.* at 1.

55. *See* T.D. 9657 (published in *Federal Register* on November 18, 2014).

56. *See* www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

57. *See* www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

58. *See* www.irs.gov/Businesses/Corporations/Information-for-Foreign-Financial-Institutions.

59. IR-2014-73, *IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance* (June 18, 2014).

60. IR-2012-65, *IRS Announces Efforts to Help U.S. Citizens Overseas Including Dual Citizens and Those with Foreign Retirement Plans* (June 26, 2012).

61. IR-2014-73, *IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance* (June 18, 2014).

62. *Id.*

63. The new Streamlined Procedure rules are available at www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures.

64. The updated OVDP Frequently Asked Questions are available at www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised.

65. A list of the foreign financial institutions or facilitators currently meeting the above criteria is available at www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators.

66. *See* www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures (delinquent FBAR submission procedures); www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures (delinquent international information return submission procedures).