

FATCA IS NOW!

US TAX

& FINANCIAL SERVICES

The Foreign Account Tax Compliance Act (FATCA) is here, bringing with it a sort of financial apartheid system designed to classify all the world's entities as Foreign Financial Institutions (FFIs), Non Financial Foreign Entities (NFFEs), or U.S. entities. These entities are further defined under a whole new lexicon including *Owner-documented FFIs*, *Nonreporting IGA FFIs*, *Reporting Model 1 FFIs*, and *Participating FFIs in a Model 2 IGA jurisdiction* or *Active* versus *Passive NFFEs* amongst the 28 possible choices which appear on the latest draft of *Form W-8BEN-E*.

There are a number of reasons why this matters to a *Swiss Investment Advisor*:

— You are probably classified as an FFI under the category of *Investment Entity* if you are in the investment or portfolio management business for clients and trade in an enumerated list of financial instruments, provide individual or collective portfolio management, or otherwise invest, administer, or manage assets on behalf of other persons, subject to a test that such investment activity earns 50% of your gross income;

— Any professionally managed investment fund, SICAVs, etc. as well as any private equity, collective investment, venture capital and hedge or exchange traded funds deemed to be established to invest in financial assets which you may own or manage are also considered FFIs.

— Your clients may also be FFIs, NFFEs, *U.S. accountholders or substantial U.S. owners* and subject to either registration or reporting depending on their facts and circumstances, and you may be asked to classify, help register, or be required to report on them depending on where they fit within the FATCA framework.

— At the very least you will need to understand how FATCA will affect tax withholding on their investments which generate U.S. source income or gains.

Tax Withholding

The full name of Form W-8BEN-E is *Certificate of Status of Beneficial Owner for United States Tax Withholding and Re-*

porting (Entities) and this name goes a long way in explaining FATCA, whose means of enforcement is precisely the U.S. tax-at-source withholding system. Fundamentally, this means that any foreign financial actor who does not participate in FATCA will suffer a 30% withholding tax on any *withholdable payments*. The term withholdable payment means:

— Any U.S. source payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income,

— Gross proceeds from the sale of any property of a type that can produce U.S. source interest or dividends, including sales of covered property, redemptions, and certain stock related distributions that exceed earnings and profits, and

— Foreign Passthru Payments (FPPs) which are foreign payments “attributable to” a withholdable payment. Withholding on FPPs is intended to stop U.S. persons from using blockers to make indirect investments in U.S. assets. The treatment of FPPs is unclear in both the final FATCA Regulations and U.S.-Swiss Intergovernmental Agreement (IGA) which states that the parties are committed to work together “to develop a practical and effective” approach to withholding on pass-thru payments.

FATCA does not fundamentally change the substantive tax liability of withholdable payments, except for withholding on gross proceeds and eventually FPPs. Instead, FATCA's withholding rules are intended to ensure that withholding agents can establish the proper withholding rate and reporting on U.S. source payments, depending on whether the beneficial owner of the payment is a U.S. person, subject to the 30% withholding rate, eligible for an exemption from withholding, or subject to a lower tax treaty withholding rate.

FATCA Registration

Registering under FATCA can be a paperless process via an online web portal which will be accessible to FFIs beginning on July 15, 2013. IRS has also released a *draft* Form 8957 FATCA Registration as a paper alternative. IRS has announced that a final paper registration form will be made available in July 2013,

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Version A, Cycle 13

Form **8957** (July 2013)
Department of the Treasury
Internal Revenue Service

Foreign Account Tax Compliance Act (FATCA) Registration OMB No. 1545-0006

Information about Form 8957 and its separate instructions is at www.irs.gov/form8957.

- All applicants must complete Part 1.
- This form will not be processed if it is not signed.
- DO NOT fill out this form if you have begun registering at <http://www.irs.gov/fatca>.
- The IRS strongly recommends that applicants register by accessing the online version of this form at <http://www.irs.gov/fatca>. The use of this paper form will take longer for the IRS to process and if any information is missing or incomplete the delay in registration may be significant.
- This form should be mailed no earlier than July 1, 2013 to:
FATCA, Stop 9099 AUSC
3651 South IH 35
Austin, Texas 78741

Part 1 Financial Institution Registration

1. Select Financial Institution Type (check only one)

- Single (not a member of an Expanded Affiliated Group)
- Lead of an Expanded Affiliated Group
- Member (not Lead) of an Expanded Affiliated Group. If a member, you must provide the FATCA ID issued for each member and that was provided to your Lead.
- Sponsoring Entity

2. Legal name of the Financial Institution _____

3. What is the Financial Institution's country of residence for tax purposes? _____

4. Select the Financial Institution's FATCA classification in its country of tax residence (check only one)

- Participating Financial Institution not covered by an IGA or a Reporting Financial Institution under a Model 2 IGA
- Registered Deemed-Compliant Financial Institution (including a Reporting Financial Institution under a Model 1 IGA)
- Limited Financial Institution
- None of the above

5. Mailing Address of Financial Institution

City _____

Address Line 1 _____

Address Line 2 _____

City _____ State/Province/Region _____ ZIP/Postal Code _____

6. Indicate whether the Financial Institution has in effect a withholding agreement with the IRS to be treated as one of the following:

a. Qualified Intermediary (QI)

Provide QI EIN: _____

Does the Financial Institution intend to maintain its status as a QI?

- Yes
- No

b. Withholding Foreign Partnership (WFP)

Provide WP EIN: _____

Does the Financial Institution intend to maintain its status as a WFP?

- Yes
- No

c. Withholding Foreign Trust (WT)

Provide WT EIN: _____

Does the Financial Institution intend to maintain its status as a WT?

- Yes
- No

d. Not applicable

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 37770V Form **8957** (7-2013)

January 13, 2013. Just one month later, on February 14, 2013, the U.S. and Switzerland signed a bilateral intergovernmental agreement (IGA). There is an interplay between the Regulations and an IGA so that where a term has different definitions under both the Regulations and IGA, the IGA definition should apply to entities subject to the IGA.

Under Annex II of the U.S.-Swiss IGA, a Swiss Investment Adviser, defined as “an entity the sole activity of which is to render investment advice to and act on behalf of a customer,” can be treated as a non-reporting Swiss Financial Institution under its status as a Registered Deemed-Compliant FFI. A registered deemed-compliant FFI must still register with the IRS (*via the portal or Form 8957*), certify that it meets various requirements for its deemed-compliant status, and renew its certification every three years.

Although IRS has not yet released instructions for registration, draft Form 8957 does allow us to understand various requirements of registration, including importantly the need for all registering financial institutions to name a Responsible Officer (RO). This RO must be a director or officer of the financial institution with sufficient authority to certify that the FFI has established a FATCA compliance program. The RO will also need certify that there have been no “material failures” to comply on an on-going basis, or if there are identified material failures that these have been remediated and actions taken to prevent re-occurrence. The certification must be renewed every 3 years.

Your Clients and FATCA

If you are a Swiss Investment Advisor you probably render investment advice to and act on behalf of a client and probably manage or otherwise invest, or administer assets on behalf of other persons. These other persons, your clients, are also caught up in the FATCA net as either FFIs or NFFEs. It is thus important for them to understand their obligations under FATCA, and to understand that as an FFI or Swiss Financial Institution their custodian bank is going to require your clients to provide their FATCA classification.

For clients who hold assets in their personal names, not much has changed – they will provide the bank with a Form W-9 or Form W-8Ben depending on their status as a U.S. person or non-U.S. person. But for clients who hold assets through either a trust or holding company, both of which are entities for FATCA purposes, classification of these entities can be complicated and may require registration of the entity under FATCA (*and more complicated for clients with a classic trust and holding company structure*).

but has “strongly encouraged” FFIs to use the online registration process warning that paper registrations forms will not be processed until October 2013 and that FFIs may experience a delay obtaining their global intermediary identification number (GIIN), which is key to demonstrating FATCA compliance.

The following types of entities are expected to register:

- Participating FFIs,
- Registered deemed-compliant FFIs,
- Reporting Model 1 FFI,
- Sponsored FFIs,
- Qualified intermediaries (QIs),
- Withholding foreign partnerships (WPs) and withholding foreign trusts (WTs), and
- Foreign branches of U.S. financial institutions

Swiss Investment Advisors and the U.S.–Swiss IGA:

As mentioned above, Swiss Investment Advisors most likely fall within the definition of an Investment Entity and classified as FFIs under the final FATCA regulations which were issued on

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Very generally, the regulations provide two simple examples of trusts wherein a trust which is managed by an individual is an NFFE, whilst a trust which is managed by a trust company (*itself an FFI*), will be an FFI. Note that NFFEs are subject to lower levels of certification and information reporting to avoid withholding than FFIs, and not subject to FATCA registration. As for a holding company, much like an investment advisor, it is considered to invest assets on behalf of other persons, and will be considered an FFI subject to the 50% gross income test with respect to its investment activities.

New IRS Forms

Most people who work in international financial services are familiar with Form W-8Ben which is a certificate of foreign status for beneficial owners, and Form W-9 which is a certification of status as a U.S. taxpayer. The IRS released new draft versions of these Forms in May 2012, so as FATCA evolves and FFIs prepare for FATCA due diligence, individual account holders will be asked to renew these certifications of their foreign or U.S. status via the newly issued Forms as these are released in their final versions.

But for foreign entities, status certification will take place via the new Form W-8BEN-E mentioned above. The current draft of Form W-8BEN-E includes 28 possible entity choices. Many of these choices are easily excluded, such as “Foreign Government,” “International Organization” or “Exempt Retirement Fund.” But for most client entities, status certification will remain very complicated, may depend on choices made by the entity’s management (*for example an FFI trustee may decide to “sponsor” the status of the trusts it manages*), and will result in information on the entity and its U.S. accountholders or substantial U.S. owners being transferred to the IRS.

Furthermore, in liaising with custodian banks on FATCA, it is clear that most banks will not assume responsibility for FATCA entity classification and will leave it up to an entity’s managers or owners to provide the correct status certification.

Conclusion

The purpose of this article is really twofold. First it is intended to alert you again that FATCA is coming and will require a Swiss Investment Advisor to register with the IRS. Furthermore, FATCA will affect your clients – by either requiring them to register as FFIs or by requiring that the upstream FFI provide IRS information on their accounts.

But further, the purpose of this article is to promote our firm and to let you know that we are here as a resource. FATCA is new and the overlay of regulations, IGAs, and registration and reporting from a world-wide base of entities is clearly not something you should navigate alone. We are thus providing one-on-one consultations to our fellow GSCGI members so that together, we can plan the best path through FATCA for both you and your clients.



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Gregory J. Dean, diplômé en droit (J.D.) de l'Université de Denver, Colorado, est avocat US avec 15 ans d'expérience comme conseiller en commerce et fiscalité internationale, et en planification successorale. En tant que Directeur de US Tax Genève, il conseille les sociétés, les particuliers et les trusts sur des questions de régularisation et de planification fiscale US.

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We determine the US tax consequences for investors in funds

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We advise US companies on the acquisition and sale of foreign businesses

We advise on investing in the US

We help US taxpayers with voluntary disclosure and ongoing compliance

We help individual US investors with international tax planning and compliance



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CONSULTATION ON FATCA FOR GSCGI MEMBERS

As part of our mission to provide US tax compliance and tax advisory services, US Tax & Financial Services proposes to provide one-on-one FATCA consultations to our fellow GSCGI members. The consultation will provide individualized advice covering:

- A review of US source income withholding rules as these apply to investing in the US markets, private equity structures and real estate
- Your obligations as an FFI to register and provide information reports to the IRS under FATCA
- Your clients' obligations to register and provide information reports to the IRS under FATCA including individual, holding companies and trust structures
- The new IRS FATCA related Forms including W-9, W8-Ben and the new FATCA Form for entities, the W-8Ben-E

We are providing this special in-depth 2-hour consultation to GSCGI members at a special fee of CHF595. Please contact us to make an appointment: FATCA@ustaxfs.com