

# FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA) - FAQs

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## General

### What is FATCA?

FATCA is the acronym for the US legislation called “Foreign Account Tax Compliance Act”. The FATCA provisions were included in the Hiring Incentives to Restore Employment (“HIRE”) Act on 18 March 2010. FATCA is primarily a reporting system, i.e. a global system of automatic exchange of information between foreign countries and the United States. Amongst other, non-U.S. Financial Institutions must

- **Identify** and obtain information on account holders that is necessary to determine which accounts are U.S. Reportable Accounts
- Annually **report** information on their customer data, their account balances and financial income.

### What is the purpose of FATCA?

FATCA aims to prevent US taxpayers from avoiding tax by investing through non-US Financial Institutions or offshore investment vehicles and concealing their assets from the US tax authorities (called “Internal Revenue Service” or “IRS”).

### When does FATCA begin?

FATCA is applicable as from **1 July 2014**.

### Who is impacted by FATCA?

FATCA is far-reaching and can impact any person, whether Private Individual or Legal Entity, U.S. or non-U.S. While FATCA certainly affects U.S. withholding agents and U.S. multinational companies, its greatest impact is on non-U.S. Financial Institutions as all Foreign Financial Institutions (“FFI”) must comply with FATCA or be subject to a 30% penalty withholding.

### What information will bank report to the IRS to comply with FATCA?

FATCA requires reporting by financial institutions on the identity of the Specified U.S. Persons on their U.S. Reportable Accounts, the balance on these accounts as of 31st December of each year, financial income and, in the future, revenues from the sale of securities. The first reporting in 2015 will cover the year 2014.

Same information will be reported for Recalcitrant clients, i.e., clients with US indicia who have been contacted by the bank and who have not responded.

### When does FATCA reporting begin?

The first reporting will occur in 2015 and will cover the year 2014. UAE Banks will forward the information to the IRS through Central Bank of UAE by 30 September 2015 at the latest or as per the timelines to be provided by the Central Bank of UAE.

### What is the withholding tax system under FATCA?

FATCA introduces as a penalty a 30% withholding tax system on With-holdable Payments made to a Foreign Financial Institution **which does not comply with the disclosure obligations** imposed by FATCA (“Non-participating Financial Institutions”).

### When does FATCA withholding begin?

A FATCA 30% penalty withholding applies on U.S. Source Fixed or Determinable, Annual or Periodical (“FDAP”) Income, which includes interest, dividends, rents, salaries, premiums, annuities, compensations,



remunerations, emoluments. As from 1st July 2014, compliant Foreign Financial Institutions with FATCA will apply the tax on With-holdable Payments made to Foreign Financial Institutions **which do not comply with the disclosure obligations** imposed by FATCA (“Non-participating Financial Institutions”).

On 1st January 2017, withholding will begin for gross proceeds from the sale of property that can produce U.S. Source dividends or interest.

### **What are the consequences for UAE Banks of having clients with U.S. Indicia?**

If a customer has a U.S. Indicum, such as the U.S. Citizenship, a U.S. place of birth or mailing address, UAE Banks as Foreign Financial Institution (“FFI”) must obtain documentation to confirm the status (either U.S. or non-U.S.) of the customer.

If documentation is not obtained, the account customer remains **Recalcitrant**. The FATCA legislation requires that Recalcitrant as well as documented Specified U.S. Persons are reported to the IRS.

### **Does FATCA only apply to new clients?**

No. FATCA is applicable to **all** clients. Both New and Pre-existing Clients will receive a FATCA status according to their customer details.

### **Pre-existing clients will not be affected by the new FATCA legislation?**

No. FATCA is applicable to **all** clients. Both New and Pre-existing Clients will receive a FATCA status according to their customer details. However, only Specified U.S. Persons holding a Financial Account and Recalcitrant customers will have to be reported the IRS.

### **Can U.S. legislation be made compulsory in the UAE?**

The UAE has decided to enter into an Intergovernmental Agreement (“IGA”) to render FATCA enforceable in our domestic legislation.

### **Does FATCA change anything to U.S. taxpayers’ obligations?**

No. U.S. taxpayers have always had the obligation to declare their worldwide income in their annual tax return.

### **Does FATCA replace the existing US tax withholding and reporting regimes?**

No. It does not replace the existing US tax withholding and reporting regimes. It does, however, add additional requirements and complexity to the existing regimes. The IRS has expressed its intent to eliminate duplicative reporting and withholding where possible.

### **Are any other foreign entities expected to be excluded from being FFIs?**

Yes. Preliminary guidance from the IRS and US Treasury indicates the following entities will not be FFIs, and will instead be treated as NFFEs. Treasury and IRS intend to exempt payments beneficially owned by these entities from FATCA withholding, but these rules have not yet been provided:

- Certain holding companies– limited to entities whose primary purpose is to act as a holding company for a subsidiary or group of subsidiaries that primarily engage in a trade or business other than that of a “financial institution.”
- Start-up companies apply to certain entities that invest capital in to assets with the intent to operate a non-financial institution business, but is not yet operating such a business. This exclusion only applies to the first 24 months after the entity’s organization. After such time, a foreign entity will no longer qualify for this exclusion.

- Liquidation or Bankruptcy – Non-financial entities that are liquidating or emerging from reorganization or bankruptcy. This exception only applies if such an entity was not a financial institution before beginning the liquidation or reorganization process.
- Hedging/ financing centers of a non-financial group –an entity that primarily engages in financing and hedging transactions with or for members of its expanded affiliated group that are not FFIs and that does not provide such services to non-affiliates, may only be excluded from the definition of a financial institution if the expanded affiliated group is primarily engaged in a non-financial institution business.
- Certain insurance companies –entities whose business consists solely of issuing insurance or reinsurance contracts without a cash value.

#### **How can the regulations be accessed?**

The regulations can be accessed from the FATCA portal on the Internal Revenue Service (IRS) webpage using the below link:

<http://www.irs.gov/PUP/businesses/corporations/TD9610.pdf>

[http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-\(FATCA\)](http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-(FATCA))

## **Private Individuals**

#### **When am I considered a U.S. Person?**

As a private individual, you are considered a U.S. Person if you are a citizen or resident of the United States (holders of the Permanent Resident Card (Green Card) but also individuals who meet the Substantial Test of Presence for the calendar year are considered U.S. Resident for tax purposes). For more information, see <http://www.irs.gov/Individuals/International-Taxpayers/Determining-Alien-Tax-Status>.

#### **What are U.S. Indicia?**

U.S. Indicia are indicators that a Private Individual can be considered as a Specified U.S. Person.

For Private Individuals, they are:

- U.S. Citizenship or a U.S. Residency (this includes having a Green Card allowing to permanently reside in the United States as an immigrant),
- Place of birth is in the U.S.,
- Current (mailing, residence, post office box or c/o) address is in the U.S.,
- Sole address is a care of address or hold mail,
- A U.S. telephone number,
- A power of attorney or signatory authority was granted to a person with a U.S. (mailing, residence, post office box or c/o) address.
- Standing instructions from local bank account to an account in the U.S.

**Having one of these indicia does not mean that the account is owned by a U.S. Person, only that it needs closer scrutiny.**

#### **What is a U.S. Reportable Account?**

Any Financial Account that falls into the scope of the FATCA reporting system and which is held by:

- a Specified U.S. Person or
- a Passive NFFE (U.S.-owned) or
- any Non-documented Customer.

**Which information will be reported to the IRS?**

To be compliant a Foreign Financial Institutions is required to disclose details of all “U.S. Reportable Accounts” held on its books by holders who fall into the scope of FATCA.

The information that must be provided includes:

- The name, address and U.S. Tax Identification Number (“TIN”) of each account holder that is a specified U.S. individual;
- The account number;
- The year-end account balance or value (starting 31st December 2014) ; and
- Payments made with respect to the account i.e.
  - gross amount of interest, dividends or other income generated with respect to the assets held in the account (as from 2015);
  - total gross proceeds from the sale or redemption of property paid or credited to the account (as from 2016).
- The reporting to the IRS will take the form of an annual report on each U.S. Reportable Account.

**Remark:**

The disclosure is required not only in relation to direct account holders but also to any substantial U.S. owners of account holders, such as U.S. shareholders in some non-financial entities that are Passive NFFE.

**Do UAE Banks have any plans to stop accepting private U.S. customers, due to FATCA?**

U.S. Persons are and remain welcome in UAE Banks for accounts and savings as long as they are willing to comply with the FATCA obligations. However, UAE Banks will not open new financial accounts for Recalcitrant U.S. Persons.

**I am already a client of a UAE Bank and I’ve been contacted by the bank because I have U.S. indicia. Am I obliged to fill in Self declaration forms identifying myself as a specified US person or not?**

Yes, you should fill in the relevant self-declaration forms. You should be aware that, should you not fill in the appropriate form, you will be considered as a Recalcitrant client under FATCA if U.S. indicia are found in your customer data. UAE Banks will then be obliged to report your accounts to the IRS.

**I want to become a client of a UAE Bank and I have U.S. indicia. Am I obliged to fill in the Self declaration forms identifying myself as a specified US person or not?**

Yes. Not filling in the self-declaration forms would render you Recalcitrant under FATCA. UAE Banks have decided not to enter relations with potential clients who are not willing to comply with the request for FATCA documentation.

**I was born in the U.S. but have never lived there. I am not to be considered as a U.S. Citizen. What can the UAE Banks do to help me?**

Unlike most other jurisdictions, U.S. tax liability is attached to citizenship rather than only to residence which means that U.S. Citizens living abroad must, on an annual basis, file U.S. tax returns on their worldwide income regardless of the place where they reside.

**I have no link with the U.S. but I gave proxy on my account to someone who is a U.S. citizen. What does it mean for me?**

This U.S. Indicium is a power of attorney or signatory authority that is granted to a person **with a U.S. (mailing, residence, post office box or c/o) address.**



Granting a power of attorney or signatory authority on an account to a person who has a U.S. address means that there will be U.S. Indicia on the account. The account will be treated as a U.S. Reportable Account and will be reportable to the IRS as a consequence, unless you provide a self-declaration that you are not a specified US person.

**The information in the UAE Bank database is not correct and I have no link with the U.S. What can I do to cure this situation?**

Please contact your closest branch. Depending on the U.S. Indicia in the database, you will have to provide additional documentation.

## Legal Entities

**What are U.S. Indicia?**

U.S. Indicia are indicators that a person, Private Individual or Legal Entity, could be considered as a Specified U.S. Person.

For Legal Entities, they usually are:

- The country of incorporation or residence is the United States of America,
- Current (mailing, residence, post office box or c/o) address is in the U.S.,

**Having one of these indicia does not mean that the account is owned by a U.S. Person, only that it needs closer scrutiny.**

**What is a U.S. Reportable Account?**

Any Financial Account that falls into the scope of FATCA reporting and which is held by:

- a Specified U.S. Person or
- a Passive NFFE (U.S.-owned) or
- any Non-documented Customer.

**What is a Non-Financial Foreign Entity (“NFFE”)?**

A Non-Financial Foreign Entity is a non-U.S. legal entity that is not a financial institution.

There are two categories of NFFEs:

- Active NFFEs are engaged in an active trade or business (production, industry, non-financial services, etc.) where less than 50% of their gross income for the preceding calendar year is passive.  
Example: A bakery produces bread and has no other income besides the income of this activity.
- Passive NFFEs have gross income that derives for more than 50% from passive income (a. o. dividends, interests, rents, royalties, annuities).  
Example: A bakery has a large investment portfolio and has more income from financial investments than from business activity.

**What information will a Foreign Financial Institution report to the IRS regarding U.S. Reportable Accounts?**

To be compliant a Foreign Financial Institutions is required to disclose details of all “U.S. Reportable Accounts” held on its books by holders who fall into the scope of FATCA.

The disclosure is not only required in relation to direct account holders but also to any US owners of account holders, such as US individuals holding 25% or more of the equity in a local passive corporation.

The information that must be provided includes:



- The name, address and TIN (if any) of the entity and the name, address and TIN of each substantial Specified U.S. Person owner of such entity;
- The account number;
- The year-end account balance or value (as from 2014); and
- Payments made with respect to the account i.e.
  - o gross amount of interest, dividends or other income generated with respect to the assets held in the account (as from 2015);
  - o total gross proceeds from the sale or redemption of a property paid or credited to the account (as from 2016 The reporting to the IRS will take the form of an annual report on each U.S. Reportable Account. Any further information which the IRS may request about those accounts needs to be provided)

## Financial Institutions

### What is a Foreign Financial Institution (“FFI”)?

The definition of an FFI is very broad and includes several entities generally not considered to be financial institutions.

An FFI is any non-U.S. entity that:

- Accepts deposits in the ordinary course of a banking or similar business; or
- Has a substantial portion of its business in the form of financial assets for the account of others; or
- Is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including futures or forward contracts or options) in such securities, partnership interests, or commodities.

This includes not only banks, insurance companies and brokers but extends to clearing organizations, trust companies, hedge funds, private equity funds, property funds and pension funds. It also includes securitization vehicles and other investment vehicles.

### What are Foreign Financial Institutions required to do to comply with FATCA?

To be compliant with FATCA, Foreign Financial Institutions are required to:

- Register with the IRS and obtain a G.I.I.N.;
- Identify and obtain information on account holders that is necessary to determine which accounts are U.S. Reportable Accounts;
- Annually report information on U.S. Reportable Accounts;
- Apply a penalty withholding tax of 30% to specific types of U.S. Source income paid to Non-participating Foreign Financial Institution (“NPFFI”);
- Periodically comply and certify that they have met their obligations under FATCA.

A Foreign Financial Institution that does not comply with any of these five key obligations will be considered a Non-participating Foreign Financial Institution (“NPFFI”).

### What is a Participating Foreign Financial Institution?

A Foreign Financial Institution that enters into a FFI agreement with the IRS is referred to as a “Participating Foreign Financial Institution” (“PFFI”). An FFI that does not enter into an agreement with the IRS is referred to as a Non-participating Foreign Financial Institution (“NPFFI”) and is subject to withholding under FATCA. Foreign Financial Institution located in a country that has signed an IGA Model 1 are considered as Registered Deemed Compliant FFIs.





## **What is a Registered Deemed Compliant Foreign Financial Institution?**

A Foreign Financial Institution incorporated in a country that has entered into an Intergovernmental Agreement (“IGA”) with the U.S. Internal Revenue Service (“IRS”).

As from the moment UAE signs an IGA with the U.S., UAE Banks will become a Registered Deemed Compliant FFI

## **What is a Non-participating FFI?**

A Non-participating Financial Institution (“NPFFI”) is an FFI which is not a Participating FFI, a Registered Deemed-Compliant FFI or an Exempt Beneficial Owner, and which is not compliant with any of the five key FATCA requirements.

## **What is a Global intermediary Identification Number (G.I.I.N.)?**

Each Participating or Deemed Compliant FFI will be issued a Global Intermediary Identification Number (“G.I.I.N.”) which will be used to identify this entity. A G.I.I.N. will be issued when registering with the IRS.

## **If an FFI does not hold any US investments, must it still enter into an FFI Agreement with the IRS in order to avoid FATCA withholding?**

Yes. A non-participating FFI that does not hold any direct US investments may still be subject to FATCA withholding if it receives pass thru payments.

## **How can a FFI and NFFE avoid the withholding tax?**

Generally, an FFI can avoid withholding tax by entering into an agreement with the Internal Revenue Service (IRS) through which it undertakes to report specific information to the IRS on the accounts of US persons.

- An FFI that complies with the IRS requirements will be considered a participating FFI (PFFI).
- An FFI that does not comply with the requirements will be considered as a non-participating FFI (NPFFI).

An NFFE can avoid the withholding tax by supplying certain information on their US owners to US withholding agents.

## **What if local laws do not allow FFIs to make disclosures required under FATCA?**

The US has recognized that there could be certain confidentiality constraints placed by the local laws of other countries. The US Treasury has proposed Inter-Governmental Agreements (IGAs) as a solution to overcome constraints placed by local laws in other countries. Under the IGA framework an agreement is signed between the US Treasury and a competent authority in the partner country. This agreement creates a framework for FFIs within the partner countries to comply with FATCA requirements within the constraints placed by any local laws. Since mid-2012 US Treasury has been in discussions with other governments to introduce FATCA into local legislation via the signing of an Intergovernmental Agreement (IGA) that would enable entities in other countries to comply with FATCA without breaching local laws.

## **What obligations does FATCA impose?**

To prevent the abuse of the US voluntary tax compliance system the FATCA provisions require Foreign Financial Institutions (FFIs) to register with the US Treasury. It also requires FFIs that maintain US person accounts to identify and report on such accounts. FATCA also imposes increased disclosure obligations on certain Non-Financial Foreign Entities (NFFEs) that present a high risk of US tax avoidance. In addition, it provides for withholding on FFIs and NFFEs that do not comply with the reporting and other requirements.

**IGA regime:**

Under the IGA Model I, Foreign Financial institutions (FFIs) in partner jurisdictions will report information on U.S. account holders to their national tax authorities, which in turn will provide this information into the US. Under IGA Model II, the FFI enters into an agreement with the US Treasury and provides data on US persons directly to the US Treasury.

**Non-IGA regime:**

FFI's operating in countries where no IGA has been entered into need to enter a direct FFI agreement with the US Treasury. All reporting of US accounts also needs to be made directly to the US Treasury.

**How are foreign governments reacting to FATCA?**

On 25th July 2013, the US, UK, Germany, France, Italy and Spain released a joint communication that they have intensified their co-operation by collaborating on the development of a "Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA in combating international tax evasion. Amongst other matters, the intention is to have reciprocal arrangements to collect and exchange data on account holder information on an automatic basis. This would allow each country to identify tax evaders.

On 21 June 2012, Switzerland and Japan agreed to an approach with the US Treasury whereby each FFI in Switzerland and Japan directly reports required account holder information to the US Treasury.

On 24 March 2014, the Central Bank of the UAE hosted a FATCA workshop where it was emphasized UAE financial institutions should continue to on-board US customers and comply with FATCA requirements. The workshop also discussed the progress of UAE financial institutions on FATCA compliance and provided clarifications on FATCA requirements.

On 26th May 2014 Central Bank of the UAE notified that the UAE government has reached agreement in substance with United States of America regarding the implementation of FATCA as per IGA model 1 A

As of 3rd June 2014, there are 34 countries that have signed an IGA with the US Treasury. Furthermore, there are 36 that have reached an agreement in substance. The list of these countries is available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>

**Are there any entities not considered to be a financial institution?**

Certain entities are excluded from the definition of a financial institution and are treated as exempted FFIs. These entities include:

- Certain non-financial holding companies.
- Certain start-up companies (for 24 months after initial organization).
- Non-financial entities that are liquidating or emerging from reorganization or bankruptcy.
- Hedging / financing centers of a non-financial group.

Entities described in section 501(c) of the US Internal Revenue Code (i.e. tax exempt organizations).

**What does the agreement with US Treasury entail?**

The agreement generally requires that the FFI will:

- Obtain information regarding each holder of certain accounts maintained by the institution to determine which accounts are US accounts.



- Comply with certain verification and due diligence requirements with respect to the identification of US accounts.
- Annually report certain information about each US account.
- Withhold 30% of any pass-thru payment made to:
  - A recalcitrant account holder or an FFI that does not have a proper agreement with the IRS.
  - An FFI that has elected to be withheld upon rather than to withhold on the part of the payment that is allocable to the accounts held by recalcitrant account holders or FFIs that do not have proper agreement with the US Treasury.
- Comply with IRS requests for more information about US accounts maintained by the institution.

Either get a waiver or close the account if a foreign law would prevent the reporting of information about a US account absent a waiver.

### **What am I required to do?**

All staff should be aware of FATCA and familiarize themselves with the terminologies associated with FATCA.

The FATCA team will update staff on any specific actions required in their areas.

In case of needing any specific guidance, you may approach the senior management or the Compliance Officer of your unit. Alternatively, you may also approach Group Compliance.

### **What are some of the key differences between the proposed regulations and Model 1 I.G.A.s?**

Some of the key differences with respect to Model 1 I.G.A.s include:

- Report to home country. Under the Model 1 I.G.A.s, financial institutions resident in a signatory country and branches of financial institutions that are in that country are permitted to report information to their country of residence rather than the I.R.S.
- Replace 10% test with control test. The Model 1 I.G.A.s replaces the requirement that financial institutions report substantial U.S. owners of N.F.F.E.s with a requirement that they report U.S. persons who are in “control” of those entities. Control for these purposes is determined in a manner consistent with Recommendations of the F.A.T.F. for international standards on combating money laundering and the financing of terrorism and proliferation (“F.A.T.F. Recommendations”). The February 2012 F.A.T.F. Recommendations does not provide a bright line test in determining “control.” It does, however, state that “a controlling ownership interest depends on the ownership structure of the company” and that “[i]t may be based on a threshold, e.g., any person owning more than a certain percentage of the company (e.g. 25%).”
- Modified withholding obligations. The Model 1 I.G.A.s do not require signatory country financial institutions to withhold on gross proceeds or “pass-thru” payments to (and close the accounts of) recalcitrant account holders that fail to provide the required information to the financial institutions. Instead, penalties may be imposed on financial institutions that fail to comply and those who are in significant non-compliance for 18 months will be subject to F.A.T.C.A.
- All-or-none rule inapplicable. The Model 1 I.G.A.s permit signatory country financial institutions to comply with F.A.T.C.A. even if their affiliates or branches outside of the signatory country are prohibited by local law from complying, provided that certain requirements are met. The proposed regulations followed an “all-or-none” rule (subject to temporary limited exceptions) in which, in general, all members of an affiliated group must comply with F.A.T.C.A.



## What are some of the primary exceptions to F.A.T.C.A. withholding?

In general, F.A.T.C.A. does not apply to:

- Foreign source income;
- Amounts effectively connected with a U.S. trade or business;
- Grandfathered obligations; and
- Short-term obligations.

In general, the proposed regulations define grandfathered obligations as those obligations that are outstanding on or before January 1, 2013 (a later announcement – Announcement 2012-42 –extended this deadline for certain obligations, as discussed below). For these purposes the term obligation means any legal agreement that produces or could produce a with-holdable or foreign pass-thru payment other than:

- Instruments treated as equity for U.S. tax purposes;
- Instruments lacking a specified maturity date;
- Brokerage, custodial or other similar agreements to hold financial assets for the account of others; or
- Master agreements that merely set forth general and standard terms and conditions that are intended to apply to a series of transactions. For example, an I.S.D.A. Master Agreement, which provides boilerplate terms subject to a subsequent “confirmation” relating to a derivatives trade, would not constitute an “obligation” for purposes of this rule. Instead, each confirmation, which specifies the exact terms of a particular trade actually executed, would be the “obligation.”

In general, the purpose of the limitations with respect to grandfathered obligations is to prevent the instrument from being F.A.T.C.A. exempt in perpetuity. For example, an equity interest in a corporation, if exempt from F.A.T.C.A., renders the corporation F.A.T.C.A. exempt and thus a means to F.A.T.C.A. abuse as the equity interest has no maturity date. Compare a debt obligation with a fixed maturity date, which at maturity will cease to exist.

Announcement 2012-42, released on October 24, 2012, expanded the definition of grandfathered obligations to include:

- Any obligation that produces or could produce a foreign pass-thru payment and that cannot produce a with-holdable payment, provided that the obligation is outstanding as of the date that is six months after the date on which final regulations defining the term “foreign pass-thru payment” are finalized.
  - o For example, assume a P.F.F.I.’s debt interest is held by a N.P.F.F.I. The P.F.F.I. holds U.S. source assets, but is not subject to F.A.T.C.A. withholding because it has entered into the F.F.I. Agreement with the I.R.S. The P.F.F.I.’s debt interest would produce a foreign source payment upon payment of interest. The payment would not be a with-holdable payment as it is not from U.S. sources even though all or a portion of the underlying assets produce with-holdable payments. In this manner, the N.P.F.F.I. could be said to have converted payments that would be subject to F.A.T.C.A withholding into exempt payments. Under this Announcement, until the definition of “foreign pass-thru payment” is defined, this debt instrument would be considered a grandfathered obligation even if issued after 2013. This provides relief while the I.R.S. works on a workable definition of foreign pass-thru payments.



- Any obligation that produces dividend equivalent payments, provided that the instrument is outstanding on the date that is six months after the date on which instruments of its type first become subject to such treatment.
  - o Under Section 871(m) of the Internal Revenue Code, certain “dividend equivalent” payments are subject to a 30% non-F.A.T.C.A. withholding tax. Dividend equivalent payments are those payments that are contingent upon, or determined by reference to, U.S. source dividends.
  - o Section 871(m) was passed to prevent the use of equity swaps and other derivatives to escape U.S. withholding tax on U.S. equity securities that pay U.S. source dividends if those securities were held directly. The source of payments on equity swaps that referenced U.S. source securities would, in general, be foreign source under prior law and thus not subject to U.S. withholding tax even if a dividend equivalent was paid.
  - o In general, Section 871(m) applies to (i) certain specified derivatives immediately upon enactment of the statute and (ii) all other derivatives issued unless specifically exempted by regulations. However, the catch-all clause was promulgated with a delayed effective date. Proposed regulations were issued earlier this year addressing the types of derivatives subject to Section 871(m). The delayed effective date was most recently pushed back to January 1, 2014 by a recent I.R.S. announcement.
  - o Accordingly, derivatives not subject to dividend equivalent withholding are also treated as grandfathered obligations and not subject to F.A.T.C.A. withholding, but only if issued during the period when the derivative was not be subject to dividend equivalent withholding plus a grace period of six months.
- Any obligation to make a payment with respect to, or to repay, collateral posted to secure obligations under a grandfathered notional principal contract.
  - o This exception provides relief to collateral posted under notional principal contracts as many collateral arrangements typically do not have stated maturities. Thus, collateral posted on an equity swap issued in 2012 would be grandfathered and not subject to F.A.T.C.A. even if the collateral is posted after 2013.

### **What is a substantial US owner?**

A substantial US owner generally refers to a US owner that has a 10% or greater interest in an NFFE. However, where the entity is an investment vehicle (e.g., a hedge fund), any US owner is considered a substantial US owner.



## Glossary

### Exempt Beneficial Owner

Amongst others:

- Any Foreign Government, any political subdivision of a Foreign Government, or any wholly owned agency or instrumentality of any one or more of the foregoing; or
- Any International Organization or any wholly owned agency or instrumentality thereof; or
- Any Foreign Central Bank of Issue; or
- Any Government of U.S. Territory; or
- Certain Retirement Funds; or
- Entities Wholly owned by one or more other Exempt Beneficial Owners

### Fixed or Determinable Annual or Periodic Income (FDAP Income)

FDAP Income for purposes of FATCA means Fixed or Determinable Annual or Periodic income, except for gains derived from the sale of real or personal property (including market discount and option premiums, but not including original issue discount).

Examples are compensation for personal services, dividends, interest, pensions and annuities, alimony, rents, other than gains from the sale of real property, royalties, etc.

### Financial Account

Include:

- any depositary or custodial accounts maintained by a Foreign Financial Institutions (FFI),
- any shareholding or debt holdings in the FFI (unless these are regularly traded on an established securities market) and
- cash value insurance contracts.

There are some exemptions from this definition including certain retirement savings accounts and general insurance products.

### Intergovernmental Agreement (“IGA”)

In conjunction with the issuance of the proposed regulations, the Treasury Department released a joint statement with the governments of France, Germany, Italy, Spain and the United Kingdom outlining these countries’ intention to combat offshore tax evasion and to explore common approaches to implementing F.A.T.C.A. The joint statement also outlined a possible framework for F.A.T.C.A. implementation based on reciprocal reporting between the U.S. and a country with which the U.S. signs an agreement (an “intergovernmental agreement” or “I.G.A.”).

On July 26, 2012, the U.S. Department of the Treasury published two F.A.T.C.A. model I.G.A.s (“Model 1A” and “Model 1B”) which provide an alternative means to comply with F.A.T.C.A., one a reciprocal exchange agreement in which both countries agree to exchange information on the financial accounts of each other’s tax residents, and the other a nonreciprocal exchange agreement in which only the other country will report information on the accounts held by U.S. tax residents. Both model agreements establish a framework for bilateral agreements with other countries under which F.F.I.s operating in a signatory country may report the required F.A.T.C.A. information to the relevant tax authority of the other country instead of reporting required information to the I.R.S., which then would be transmitted to the I.R.S. under the existing tax treaty or tax information exchange agreement in place between the two countries.

On November 14, 2012, Treasury announced a third model agreement (“Model 2”), which would allow

- direct reporting from the foreign financial institution to the I.R.S. with respect to its U.S. account holders and
- Group information requests to the F.A.T.C.A. country partner for information relating to recalcitrant account holders.

### **Internal Revenue Service (“IRS”)**

The United States tax agency. The agency is a bureau of the U.S. Department of the Treasury.

### **New Client**

Anyone who became a client of a UAE Bank after FATCA came into force, i.e. a client opening a relationship or account **after 1st July 2014**.

### **Pre-existing Client**

Anyone who was already a client of a UAE Bank before FATCA came into force, i.e. any client **before 1st July 2014**.

### **Passive NFFE (U.S.-owned)**

A Passive NFFE is an entity for which financial income for the preceding calendar year was more than 50 percent of its gross income and more than 50 percent of the weighted average percentage of assets (tested quarterly) is assets that produce or are held for the production of financial income.

A Passive NFFE (U.S. Owned) is a Non-Financial Foreign Entity which has one or more Controlling persons who are Specified U.S. Individuals. A controlling person means the natural person who exercises control over an entity.

### **U.S. Person**

- Any U.S. Citizen or Resident individual
- Any partnership or corporation organized in the United States or under the laws of the United States or any State thereof
- Any trust if
  - o a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and
  - o one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States

### **Specified U.S. Person**

Any U.S. Person, other than:

- any corporation the stock of which is regularly traded on one or more established securities markets;
- any corporation that is a member of the same expanded affiliated group;
- the United States or any wholly owned agency or instrumentality thereof;
- any State of the United States, any U.S. Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;
- any organization exempt from taxation under section 501(a) of the U.S. Internal Revenue Code or an individual retirement plan as defined in section 7701(a)(37) of the U.S. Internal Revenue Code;
- any bank as defined in section 581 of the U.S. Internal Revenue Code
- any real estate investment trust as defined in section 856 of the U.S. Internal Revenue Code;



- any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64);
- any common trust fund as defined in section 584(a) of the U.S. Internal Revenue Code;
- any trust that is exempt from tax under section 664(c) of the U.S. Internal Revenue Code or that is described in section 4947(a)(1) of the U.S. Internal Revenue Code;
- any dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State;
- any broker as defined in section 6045(c) of the U.S. Internal Revenue Code; or
- any tax-exempt trust under a plan that is described in section 403(b) or section 457(g) of the U.S. Internal Revenue Code.

### **Tax Identification Number (“TIN”)**

Identifying number used by the Internal Revenue Service for tax purposes in the United States. It is issued either by the Social Security Administration (Social Security number) or by the IRS. See also [http://www.irs.gov/Individuals/International-Taxpayers/Taxpayer-Identification-Numbers-\(TIN\)](http://www.irs.gov/Individuals/International-Taxpayers/Taxpayer-Identification-Numbers-(TIN)).

### **U.S. Citizen**

Person born or naturalized in the United States and subject to the jurisdiction thereof and of the State wherein he/she resides.

### **U.S. Indicia**

Indicators that a person, Private Individual or Legal Entity, could be considered as a Specified U.S. Person.

For Private Individuals, they usually are:

- The identification document presented to ENBD shows that either a U.S. Citizenship or a U.S. Residency (this includes having a green card allowing to permanently reside in the United States as an immigrant
- Place of birth is in the U.S.,
- Current (mailing, residence, post office box or c/o) address is in the U.S.,
- Sole address is in care of address or hold mail
- A U.S. telephone number,
- A power of attorney or signatory authority was granted to a person with a U.S. (mailing, residence, post office box or c/o) address.
- Standing instructions to pay from a local bank account to an account in the U.S.

For Legal Entities, they usually are:

- The country of incorporation or residence is the United States of America,
- Current (mailing, residence, post office box or c/o) address is in the U.S.,

**Having one of these indicia does not mean that the account is owned by a U.S. Person, only that it needs closer scrutiny.**

### **U.S. Reportable Account**

Any Financial Account that falls into the scope of the FATCA reporting system and which is held by:

- a Specified U.S. Person or
- a Passive NFFE (U.S.-owned) or
- any Non-documented Customer





## **U.S. Source**

Derived from sources within the United States. Example: payments paid by a U.S. domestic corporation, U.S. citizens, trust, or entities formed under the laws of the U.S. or its states or if it is effectively connected to the conduct of a U.S. trade or business (such as interest paid by a U.S. branch)

## **Recalcitrant Customer**

Any customer for whom U.S. Indicia were found and not cured, or were confirmed as U.S., a. o.:

- did not respond to request for information and the time limit was exceeded, OR
- refused to provide W-9 to confirm he is a Specified U.S. Person; OR
- wished to attest that he is not a U.S. Person but did not provide a W-8BEN, W-8-BEN-E or any other documentation requested to confirm his non-U.S. status.

UAE Bank will not open any new financial account for Recalcitrant Pre-existing Clients nor enter into relationship with Recalcitrant New Clients.

## **W-9**

Request for Taxpayer Identification Number and Certification form issued by the Internal Revenue Service. Its purpose is to request the taxpayer's Taxpayer Identification Number ("TIN"). It is to be used by U.S. Persons only, Private Individuals or Legal Entities.

See also instructions on how to fill in the W-9 form on the IRS website <http://www.irs.gov/pub/irs-pdf/iw9.pdf>.

## **W-8BEN**

Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting form issued by the Internal Revenue Service. Its purpose is to identify non-U.S. beneficial owners of accounts or transactions. It is for use by Private Individuals only. Legal Entities must use Form W-8BEN-E.

See also instructions on how to fill in the W-8BEN form on the IRS website <http://www.irs.gov/pub/irs-pdf/iw8ben.pdf>.

## **W-8BEN-E**

Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities) form issued by the Internal Revenue Service. Its purpose is to identify non-U.S. Legal Entities or Foreign Financial Institutions that are beneficial owners of accounts or transactions. It is for use by Legal Entities and Foreign Financial Institutions only. Private Individuals must use Form W-8BEN.

## **With-holdable payment**

- 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 (see FDAP Income), if such payment is U.S. Source.
- Any sales or other dispositions occurring after 31 December 2016, 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.

## **Pass-thru payments**

A pass-thru payment is any with-holdable payment or other payment to the extent that is attributable to a with-holdable payment.



## **Foreign pass-thru payments**

As noted above, pass-thru payments include any with-holdable payment or “other payment” to the extent that is “attributable” to a with-holdable payment. The second prong of the definition of pass-thru payments is what is referred to as “foreign pass-thru payments.”

A payment made by a foreign entity on its debt or equity generally will be foreign source and thus will not be a with-holdable payment and thus will not be subject to F.A.T.C.A. Thus, to prevent the use of “F.A.T.C.A. blockers,” F.A.T.C.A. imposes a withholding tax on foreign pass-thru payments.

Although the proposed regulations refer to foreign pass-thru payments, it reserves on the issue and no withholding on such payments will be required until, at the earliest, January 1, 2017. However, under a prior notice (Notice 2011-34), the amount of a payment treated as a foreign pass-thru payment was to be determined by reference to the percentage of the entity’s assets that constitute U.S. assets.