

FATCA, Part 2: Withholding and Reporting Requirements

Paul Heller - Royal Bank of Canada

David Charlton - Deloitte

Debbie Pflieger – EY

June 17, 2014

Circular 230 Disclaimer

- Any US tax advice contained herein was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local law provisions
- These slides are for education purposes only and are not intended to be, and should not be, relied upon as accounting advice

WITHHOLDING

Grandfathered Obligations

- Withholding is not required on payments made on grandfathered obligations or gross proceeds from the disposition of such obligations
 - A grandfathered obligation is any obligation outstanding on July 1, 2014
 - An obligation means any legally binding agreement or instrument and examples include:
 - A debt instrument
 - An agreement to extend credit for a fixed term, with material terms, including a stated maturity date, under which the credit will be provided
 - A derivatives transaction entered into under an ISDA Master Agreement

Material Modifications

- The final regulations required a withholding agent to stop treating an obligation as grandfathered if the withholding agent knows or had reason to know that the obligation had been materially modified
- The temporary regulations modified the rule so that a withholding agent, other than the issuer of the obligation or their agent, is only required to treat a modification as material if the withholding agent has actual knowledge that a material modification has occurred
 - “Such as in the event the withholding agent receives a disclosure indicating that there has been or will be a material modification to such obligation”

Withholding in 2014

- Technically, FATCA withholding is required on US source income effective July 1, 2014
 - However, practically, withholding will be limited due to the change in Notice 2014-33 to the definition of a “pre-existing account”
 - Withholding may be required in 2014 if
 - Payee provides a new Form W-8 indicating it is an NPFFI
 - Withholding instructions ‘passed up’ from FFIs
 - New, undocumented individual accounts held by individuals by an FFI

Offshore payments of US source FDAP (transition rule)

- The final regulations excluded payments of US source FDAP made before January 1, 2017 with respect to an offshore obligation paid by a person that was not acting as an intermediary from the definition of a withholdable payment
- The temporary regulations changed this exclusion so that it does not include payments made in connection with debt or equity issued by a US person
- The modification was made to curtail US persons from issuing debt or equity through their foreign branches and therefore bypassing any potential withholding until 2017
- The exclusion still includes interest payments made by a foreign branch of a US financial institution with respect to depository accounts maintained for retail customers

Collateral Payments

- The IRS received many comments on the final regulations requesting relief from withholding on payments made by a secured party with respect to collateral securing one or more transactions under a collateral arrangement
- The temporary regulations added a transition rule so that a US source FDAP payment made prior to January 1, 2017 will not be considered a withholdable payment if it is made by a secured party in connection with a collateral arrangement as long as only a commercially reasonable amount of collateral is held
- This transition rule was added to provide financial institutions time to modify systems to track collateral on an agreement basis instead of as comingled amounts in an omnibus account (which is the current industry standard and the basis for the comments)
- Note: This is a transition rule and did not change the date an obligation must be outstanding to be considered grandfathered. Also, chapters 3 and 61 withholding remains applicable during the transition period

REPORTING

Reporting

	Form 1099	Form 1042-S	Form 1042	Form 8966	US reportable account form*
USWA	✓	✓	✓	✓	
PFFI	✓	✓	✓	✓	
Model 1 IGA		✓	✓		✓
Model 2 IGA	✓	✓	✓	✓	

* Form to be determined by Model 1 IGA FATCA Partner jurisdiction

Offshore payments of US source FDAP (transition rule)

The final regulations excluded payments of US source FDAP made before January 1, 2017 with respect to an offshore obligation paid by a person that was not acting as an intermediary from the definition of a withholdable payment

The temporary regulations changed this exclusion so that it does not include payments made in connection with debt or equity issued by a US person

The modification was made to curtail US persons from issuing debt or equity through their foreign branches and therefore bypassing any potential withholding until 2017

The exclusion still includes interest payments made by a foreign branch of a US financial institution with respect to depository accounts maintained for retail customers