

HIRE Act/FATCA Foreign Provisions

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**HIRE Act/FACTA
Foreign Provisions**



**New
Withholding
Obligations -
Payments to
Foreign Entities**

Foreign Financial Institution
(FFI) Withholding &
Disclosures [§1471]

Nonfinancial Foreign Entity
(NFFE) Withholding &
Disclosures [§1472]

Code §1471 - 30% Withholding:

**Withholding
Agent**

U.S. source FDAPI, or

*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.*

FFI

[Excluding ECI]

UNLESS...

NO WITHHOLDING IF FFI ENTERS INTO AN AGREEMENT WITH IRS TO:

- Determine its U.S. accounts,
- Comply with verification and due diligence requirements for U.S. accounts,
- Report info on U.S. accounts annually, and
- Withhold 30% on payments to recalcitrant account holders and in other circumstances.

Also are withholding exceptions for payments to certain types of entities (including publicly traded corporations) or payments with a low risk of tax evasion

Account info being reported includes name, address, & TIN of substantial U.S. owners, account numbers, and account balances or value.

Code §1472 - 30% Withholding:

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*Gross proceeds from the
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→ **NFFE**

[Excluding ECI]

UNLESS...

NO WITHHOLDING IF:

- NFFE Certification to withholding agent that there are no “substantial US owners”, or
- Delivery to the withholding agent of the name, address, and TIN of each substantial US owner (which agent then reports to the IRS).

Also are withholding exceptions for payments to certain types of entities (including publicly traded corporations) or payments with a low risk of tax evasion

If the agent does not know or has no reason to know the provided information is incorrect

SOME NEW TERMS AND ABBREVIATIONS TO LEARN:

- Financial Account. Code §1471(d)(2).
- Financial Institution (FI). Code §1471(d)(5).
- Foreign Financial Institution (FFI). Code §1471(d)(4).
- Non-Financial Foreign Entity (NFFE).
- Recalcitrant Account Holder. Code §1471(d)(6).
- Specified United States Person (Code §1473(3)).
- Substantial United States Owner. (Section 1473(2))
- United States Account. Code §1471(d)(1).
- United States Owned Foreign Entity. Code §1471(d)(3).
- Withholdable Payment (Code §1473(1)):
- Withholding Agent (Code §1473(4)).

PAYOR DETERMINATIONS:

- **U.S. Entity Payee** (no withholding)
- **FFI Payee**. Then have to further determine if payee entity is:
 - Participating FFI (no withholding)
 - Code §1471(f) entity (no withholding)
 - Deemed compliant FFI (no withholding & will not be a NFFE)
 - Nonparticipating FFI (withholding)
- **NFFE Payee**. Then have to determine or receive:
 - No substantial U.S. owner (no withholding)
 - Receives substantial U.S. owner information (no withholding - must report to IRS)
 - Excepted NFFE (no withholding)
 - Code §1472(c)(2) low risk entity (no withholding)
 - Other NFFE (withholding)

OTHER DETERMINATIONS

- U.S. financial institutions as to status of entity account holders
- Participating FFI as to U.S. person, U.S. account, and entity classification of their account holders

**FBAR-esque
Foreign Asset
Disclosures
Code §6038**

Imposed on individuals

Report “specified foreign
financial assets”

In addition to FBAR

“Specified Foreign Financial Assets”

- Financial account in an FFI, and
- Following assets not held in a financial institution:
 - Stock or security issued by a non-US person,
 - Any financial instrument or contract held for investment that has a non-U.S. person issuer or counterparty, and
 - Any interest in a foreign entity.

**Statute of
Limitations
Extensions**

- Indefinite Suspensions
- 6 Year Statute

Code §6501(c) – Indefinite Suspensions

- 3 year statute of limitations does not start on items until the following information reporting is completed on them:
 - QEF election for a PFIC,
 - Annual report of PFIC shareholder, and
 - Self-reporting of specified foreign financial assets.
- Extension of prior law as to other foreign reporting.
- Keeps statute open on all items with respect to any “tax return, event, or period” to which the information relates.
 - But “tax return” expansion limited if failure to file was for reasonable cause.

Code §6501(e)(1) – 6 Year Statute

6 year statute of limitations for assessments of tax on understatements of income attributable to foreign financial assets

Extended No Interest Period for Refunds

The 45 day period of no interest on refunds of overpayments on taxes withheld upon payments to foreign persons is extended to 180 days. Code §6611(e)(4).

Foreign Targeted Obligations No Longer Exempt from Various Registration Requirements

Penalties for Failing to Register (if required):

- no interest deduction is allowed to the payor;
- no tax exemption as state or local bond interest is allowed;
- a 1% excise tax is imposed; and
- if the excise tax is not applicable, gains from sale may be converted to ordinary income and loss deductions may be disallowed.

Foreign targeted obligations were previously excepted from the definition of a registration required obligation, thus allowing bearer obligations if foreign targeted.

With minor exceptions, for obligations issued after March 18, 2012 there is no foreign targeted exception to the definition of a registration required obligation. Code §§149(a), 163(f)(2)(A), 163(f)(3), & 4701(b)(1).

Uncompensated Use of Foreign Trust By US Person of Property as a Deemed Distribution

Deemed Distribution - Potentially Impacts:

- Whether the trust is a simple or complex trust;
- Computing the distribution deduction;
- Determining income of the beneficiaries;
- Computing accumulation distributions (and the interest charge on accumulation distributions).

Increase in Minimum Penalty for Failure to Report on Foreign Trusts

Failures to report on foreign trust transactions are subject to penalties of 5% or 35% of the gross reportable amount. The Act now imposes a \$10,000 minimum penalty.

However, the penalty cannot exceed the "gross reportable amount."

New PFIC Reporting Requirements

Previously, a U.S. shareholder of a PFIC was required to file Form 8621 only in tax years which he or she (1) recognized gain on a direct or indirect disposition of PFIC stock, (2) received certain direct or indirect distributions from a PFIC or (3) made a reportable election.

Now, unless otherwise provided by the IRS, each U.S. person who is a PFIC shareholder must file an **annual** report.

Determination of Whether Foreign Trusts have U.S. Beneficiaries for Code §679 Purposes

Expansion of Current Rules for:

- Contingent Interests
- Powers to Determine Beneficiaries
- Incorporation of Agreements & Understandings
- Below Market Loans & Uncompensated Use of Trust Property

Rebuttable presumption of existence of U.S. beneficiaries

Enhanced Reporting for Foreign Grantor Trusts

- Presently, if a U.S. person is treated as the owner of any portion of a foreign trust under the grantor trust rules, they are required to ensure that the TRUST makes any required return for the year and that it provides required information to each U.S. person that is treated as the owner of any portion of the trust or who receives a distribution from the trust. Code §6048(b)(1).
- But the U.S. person had no direct reporting requirement.
- Now, such U.S. grantors must submit such information as the IRS requires with respect to the foreign trust.

Dividend Equivalents [Code §871(I)]

Dividend equivalent payments from U.S. payors to foreign persons are treated now as actual dividend payments for withholding and other purposes.
Code §871(I).

A dividend equivalent payment is:

- A substitute dividend made pursuant to a securities lending or a sale-repurchase transaction that is contingent upon, or determined by reference to, the payment of a dividend from sources within the U.S.;
- Payment pursuant to a specified notional principal contract that is contingent upon, or determined by reference to, the payment of a dividend from sources within the U.S.; or
- Any other payment that IRS determines is substantially similar to these types of payments such as certain forward contracts or other financial contracts that reference stock of U.S. corporations.

Portfolio Interest Exception

The portfolio interest exception from U.S. tax and withholding will no longer apply to nonregistered obligations. Code §§871(b)(2), 871(h)(3)(A), & 881(c)(2).

Electronic Filing May be Required for Withholding Agents.

The Act provides an exception to the general annual 250 returns threshold.

Permits IRS to issue regulations to require filing on magnetic media for any return filed by a financial institution with respect to any taxes withheld by the financial institution.

Penalties

- An underpayment attributable to any UNDISCLOSED FOREIGN FINANCIAL ASSET understatement is subject to the Code §6662 penalty, except the penalty is imposed at 40% and not 20%.
- "Undisclosed foreign financial asset" - any asset with respect to which information was required to be provided under Code §6038, Code §6038B, Code §6038D, Code §6046A , or Code §6048
- Imposed even in the absence of aggravating circumstances

- Code §6038 - a U.S. person who controls a foreign corporation or partnership must furnish IRS with certain information about the entity.
- Code §6038B - requires information reporting by U.S. persons who make certain “outbound” transfers to foreign entities.
- Code §6046A - returns must be filed by a U.S. person who acquires or disposes of certain foreign partnership interests or whose proportional interest in a foreign partnership changes substantially.
- Code §6048 - requires certain information reporting with respect to foreign trusts.