FATCA: Myths, Mysteries, and Practical Perspectives

By Kimberly Tan Majure and Matthew R. Sontag

The Foreign Account Tax Compliance Act (FATCA) was enacted in response to a series of U.S. tax evasion scandals that came to light in 2006.[1] Comprising sections 1471 through 1474 of the Internal Revenue Code,[2] FATCA is a withholding regime that closely resembles section 1441, et seq. (the chapter 3 withholding rules). At a very high level, both chapter 3 withholding rules and FATCA are triggered by a cross-border payment — specifically, an outbound payment made to a foreign payee. Before the payment is made, the payor is required to identify the foreign payee and understand enough about the payee to determine whether and the extent to which withholding applies, and withhold as necessary.

As with any new and complicated regime, FATCA has generated much discussion and debate, mostly among U.S. tax advisers and financial institutions, and to a lesser extent among non-financial companies. In the financial institution context, much of the debate balances theoretical approval of FATCA's anti-evasion policies with real apprehension about the potential cost of FATCA compliance. The non-financial discussion is more muted, reflecting confusion regarding FATCA's application to non-financial companies. Ironically, the press coverage surrounding FATCA has been so focused on issues facing the financial institutions that public debate may have clouded, and not clarified, the issues facing non-financial companies.

The U.S. Treasury Department and Internal Revenue Service issued lengthy proposed FATCA regulations in February 2012. Given their complexity, it is unlikely that the debate and confusion will end with the promulgation of final regulations.[3] This article discusses several of the "myths and mysteries" that seem to have arisen concerning FATCA and makes suggestions for reconciling the legal considerations non-financial companies face in the FATCA area.

Myth No. 1: FATCA Is a Tax

First and foremost, FATCA is not a tax. The FATCA rules are very similar in structure to the chapter 3 withholding rules, but FATCA does not focus on income, tax rates, or tax liability. At its core, FATCA seeks to identify U.S. investors with foreign financial interests, making it easier for the IRS to audit income and assets that could otherwise remain hidden offshore. FATCA accomplishes this objective by compelling the aid of "withholding agents," defined under FATCA as any U.S. or foreign persons having control, receipt, custody, disposal, or payment of a cross-border item.[4] Once a withholding agent has an obligation to make a qualifying cross-border payment, the agent must obtain information from the foreign payee, regarding significant financial involvement the payee has with U.S. taxpayers. As a general matter, the foreign payee must identify its substantial U.S. owners or certify that it qualifies for an exception from information reporting requirements in documentation provided to the withholding agent prior to payment. A payee's failure to provide valid documentation triggers a 30-percent enforcement levy on the payment, which is collected and remitted to the IRS by the withholding agent. A withholding agent's failure to obtain valid documentation or, alternatively, to collect the 30-percent FATCA charge, results in secondary liability for the withholding agent.[5] The withholding agent is also responsible for providing foreign payee information to the IRS regarding FATCA payments made and the substantial U.S. owners identified in the prior year.[6]

Most important, if FATCA operates as it is intended, the U.S. government will receive information valuable for identifying potential U.S. tax evaders, and the 30-percent FATCA charge simply will not apply.[7]

In contrast, the chapter 3 withholding rules implement an enforcement mechanism for a "real" tax. Generally, a foreign person earning U.S. source income that is not effectively connected with a U.S. trade or business is not subject to net basis federal income tax. The income — referred to as "fixed or determinable annual or periodical," or "FDAP" — is instead subject to a gross basis tax.[8] The obligation to remit the tax to the IRS is not placed on the foreign payee, but instead on the payor of the income, *i.e.*, the withholding agent.[9] By statute, the tax is generally imposed at a 30-percent rate, but may be reduced or eliminated entirely under the auspices of an applicable tax treaty between the United States and the foreign person's residence country.[10] The foreign payee must certify ownership of the income, foreign residence, and eligibility for treaty benefits on pre-payment documentation provided to the withholding agent. The withholding agent is tasked with validating any documentation provided, withholding and remitting the appropriate amount of tax to the IRS, and filing annual information returns reporting the payments.[11] In the absence of valid withholding documentation (currently, the Form W-8BEN), the withholding agent must withhold tax at the default, 30-percent rate. The withholding agent is secondarily liable for any underwithheld tax.[12]

At a high level, FATCA and chapter 3 withholding look very much alike. It is important, however, to remember how different they are in nature, and to understand how those differences have influenced the specific rules under each regime.

First, whereas chapter 3 withholding applies to U.S. source FDAP "income," FATCA applies to payments viewed as posing a relatively high risk of U.S. tax evasion. Thus, FATCA defines "withholdable payments" more broadly, to include not only U.S. source FDAP income but also gross proceeds from the sale of U.S. interest- and dividend-paying instruments (which, considering the seller's basis, is at least partially a non-income item).[13] At the same time, FATCA does not apply to certain non-financial payments made in the ordinary course of the withholding agent's business (OCB payments), which, while falling within the scope of U.S. income taxing jurisdiction, are viewed as posing a relatively low risk of U.S. tax evasion.[14] (Financial payments generally remain subject to FATCA, even if they are otherwise paid in the "ordinary course.") Payments on grandfathered obligations (*i.e.*, obligations in effect as of January 1, 2013) are excepted from FATCA withholding, so long as the underlying obligations are not materially modified after the January 1, 2013, test date. [15] Those same "grandfathered payments" remain subject to information reporting[16] — a requirement that only makes sense considering FATCA's underlying purpose.

Second, although treaty benefits may reduce or eliminate entirely the 30-percent withholding rate for chapter 3 purposes, the FATCA charge is either 30 percent or zero. There are no "gradations" of FATCA liability. If the required information has been provided, no FATCA charge applies; if not, the full 30-percent FATCA charge is imposed. A non-financial payee suffering a 30-percent FATCA charge may claim a refund, based either on belated provision of the required FATCA information, or on a valid claim for treaty relief[17] — another provision that makes sense if FATCA is viewed as a penalty rather than as a true tax. On the other hand, a foreign payee that escapes the 30-percent FATCA charge may still be liable for chapter 3 withholding tax. (This would arise, for example, in the case of a Brazilian payee — or a payee resident in any other non-treaty country — that made the required disclosures regarding its substantial U.S. ownership.)

The punchline is this: Unlike death and taxes, FATCA is avoidable. Get the required information, and no one has to pay the 30-percent charge.

Myth No. 2: FATCA Does Not Apply to Non-Financial Companies

Fundamentally, the FATCA rules address two tax evasion scenarios. The first involves a U.S. person that has assets cached in an undisclosed foreign financial account (bank account, investment account, etc.). Section 1471 deals with this scenario by requiring foreign financial institutions (FFIs) to track and report substantial U.S. accountholder information to the IRS, or suffer the 30-percent FATCA charge on the FFIs' own cross-border payments.[18]

The second scenario involves a U.S. person that has assets invested in a foreign non-financial entity, the assets or income from which go unreported to the IRS. Section 1472 addresses this scenario by requiring non-financial foreign entities (NFFEs) to disclose their "substantial U.S. owners" (generally, U.S. persons directly or indirectly owning more than a 10-percent interest in the tested entity).[19] Unless a payee exception applies, a non-financial foreign company receiving a withholdable payment must attest to this information under penalties of perjury, on a properly completed Form W-8BEN-E.[20] As under the FFI rules, the 30-percent FATCA charge applies to any non-excepted entities failing to provide the required information.

That is the result in respect of the foreign payee side of a payment. FATCA also has implications for non-financials that make FATCA-withholdable payments to foreign persons. Withholding agents of all kinds — U.S., foreign, taxable, tax-exempt, financial and non-financial — are responsible for implementing the FATCA rules and are secondarily liable for failures to do so.

Thus, FATCA clearly applies to non-financial companies. Congress acknowledged, however, that financial payments carry a much greater risk of U.S. tax evasion than non-financial payments. Consequently, the statute authorizes regulations relieving "low risk" payments from the brunt of FATCA, and provides exceptions for certain "low risk" non-financial payees.[21] These currently include regularly publicly traded foreign corporations and their affiliates, certain non-financial holding companies, and intercompany treasury and hedging centers.[22]

Myth No. 3: The Payment Exceptions Fix Everything

This one is really half a myth. Prop. Reg. § 1.1473-1(a)(4) does provide an exception from the definition of "withholdable payment." As relevant here, the exception applies to payments made in the ordinary course of the withholding agent's business for nonfinancial services, goods, and the use of property; also excepted is interest on outstanding accounts payable arising from the acquisition of nonfinancial services, goods, and other tangible property.[23] (Other financial payments, such as interest and dividends, are ineligible for the OCB exception.[24]) In addition, the proposed regulations provide relief from FATCA withholding for payments arising from grandfathered obligations.[25]

These exceptions undoubtedly eliminate withholding and information reporting responsibility on the bulk of a non-financial company's payments. But — and this is where the half myth arises — their practical value to any given withholding agent will depend on the type of payments the withholding agent typically makes, as well as on the extent to which the agent's reliance on the exceptions makes sense from the resource and risk management perspectives.

Consider, first, grandfathered payments. FATCA *withholding* is not required with respect to these payments, but FATCA *information reporting* is not similarly waived in these cases. Moreover, the withholding exception only applies so long as the underlying obligation is not "materially modified" under Treas. Reg. § 1.1001-3 (for debt instruments) or based on all relevant facts and circumstances (for other obligations).[26] What does this mean as a practical matter? Some level of monitoring is required for these payments; withholding agents cannot take an entirely "set and forget" approach to them, or will risk noncompliance on payments on modified obligations. The precise nature of monitoring will vary from withholding agent to withholding agent. Some (*e.g.*, those making relatively few payments or having relatively long-term contracts that are rarely modified) may decide that the best approach would be to review every modification. Those with contracts that are often modified may establish operating parameters, under which modifications exceeding specified thresholds or involving specific contract terms — percentage of the agreement period subject to extension or royalty rates, for example — are automatically treated as modifications. Still others (*e.g.*, those making a high volume of chapter 3 withholdable payments) may decide that, since they will be collecting Forms W-8BEN-E from foreign payees in any case, the incremental cost of requesting FATCA information upfront is worth incurring to avoid the back-end risk of a compliance failure.

Similarly, the value of the OCB exception will depend on the nature of payments the withholding agent typically makes. At least one commentator has noted that, as currently proposed, the scope of the OCB exception may be unclear, particularly as the exception relates to proceeds from the sale of property (other than goods and U.S. securities).[27] Further confusion may arise regarding the meaning of "ordinary course of business," a phrase that goes undefined by the proposed regulations. A detailed review of the such comments or possible IRS responses is beyond the scope of this article, but readers should note that concerns exist and that, though very broad, the OCB exception does not apply to every type of cross-border payment made by a non-financial company. Regardless of how the OCB exception applies to non-financial payments, for example, the exception very clearly does not apply to most financial payments.

Non-financial withholding agents will need to evaluate the cost of distinguishing OCB-excepted payments from payments that remain subject to FATCA. The resource demands may increase with any additional carve-outs to the exception — particularly those that play a significant role in a company's business — and may influence the withholding agent's approach to the affected payments. The OCB exception, for example, does not by its terms apply to interest on delayed rents or royalties (*i.e.*, because the payment does not constitute interest arising from accounts payable for the "acquisition" of nonfinancial services, goods, or other "tangible" property). What is the effect of the provision's limited scope on high-tech, media, or entertainment companies (as opposed to retailers)? Given the relatively high volume of potential payments excluded from the OCB exception for a withholding agent in those latter industries — as well as the requirement that the agent must collect Forms W-8BEN-E in any case (for purposes of chapter 3 withholding) — it may be easier from a systems perspective to require all foreign payees to provide FATCA information upfront, rather than face the prospect of tracking down Forms W-8BEN-E if and when excluded interest arises.

Of course, where a withholding agent cannot obtain withholding documentation from a foreign payee, *e.g.*, when the agent's most important vendor refuses to provide the form, the agent can use the OCB exception to deflect FATCA liability. Some agents, however, may prefer to rely on a consistent documentation process as their first line of defense. Thus, although the OCB exception and the grandfathered payment rule are taxpayer-favorable, withholding agents may decide not to take full advantage of those provisions.

Myth No. 4: All Payee Exceptions Are Equal

This is a similar point with respect to the foreign payee side of the equation. The FATCA rules grant a measure of relief for non-financial foreign payees viewed as presenting a low risk of U.S. tax evasion. Among other things, the proposed regulations contain payee exceptions for nonfinancial holding companies (the nonfinancial holdco exception), intercompany treasury or hedging centers (the treasury exception), publicly traded NFFEs (the publicly traded exception) and their affiliated subsidiaries (the public affiliate exception), and active NFFEs (the active NFFE exception).[28]

The proposed regulations set forth a various tests and requirements for excepted payee status, some of which may be more difficult to navigate than others for a foreign payee (or, as the case may be, its group's internal U.S. tax department). In some cases, payees may find more than one exception potentially available to them. This is where a little strategy goes a long way.

Consider the example of a payment to the foreign operating subsidiary of a publicly traded foreign company. In this case, the subsidiary could try to qualify as an excepted payee under either the active NFFE or the public affiliate exception. Although information about the parent company's share trading volume is likely to be readily available and easily analyzed, conclusions regarding the active or passive nature of the subsidiary's income and assets may be much more difficult to reach, particularly if there are technical issues about how the requirements apply, the subsidiary's assets or assets values change significantly from year to year, or the assets are difficult to value. In any of these cases, the subsidiary might find it much easier to assert public company status, rather than to assert and maintain active NFFE status, to avoid withholding.

A change in facts may change the analysis. This time, instead of having a publicly traded parent, assume the foreign subsidiary is owned by a privately held parent, which is in turn owned by individual foreign shareholders. In these circumstances, the public affiliate exception is unavailable to the subsidiary. Rather than wrestle with the active NFFE exception, the proposed regulations permit the subsidiary to certify that is has no substantial U.S. owners. From a risk and resource management perspective, the foreign subsidiary may be better off "opting out" of the payee exceptions — and instead disclosing its U.S. owners — to avoid withholding.

Regrettably, draft IRS Form W-8BEN-E, released in May 2012, applies the proposed regulations in a relatively restrictive and unfavorable manner. Part I, item 4, appears to require payees to select one, and only one, type of payee status, ignoring potential overlaps. Furthermore, the payee cannot cleanly opt out of a payee exception. In order to identify its substantial U.S. owners (or to attest that there are none), the payee must confirm its status as a "passive NFFE" — affirmatively classifying itself as ineligible for excepted NFFE status. Draft instructions that would accompany the Form W-8BEN-E have not yet been released, making it difficult to interpret the form's apparent requirements. Optimally, the IRS will modify its approach in the final version of the Form W-8BEN-E, expected to be released by December 2012. In the meantime, foreign payees should assess their options for Form W-8BEN-E certifications, including the option to disclose ownership information.

Myth No. 5: My Chapter 3 Withholding Procedures Will Take Care of Everything

The most dependable gauge for predicting the expense and difficulty a non-financial company will have in complying with FATCA may be the efficacy of the company's chapter 3 withholding procedures. Companies not having robust chapter 3 procedures will need to shore them up before relying on them to satisfy the new FATCA requirements. Because the procedures that would be required under the new FATCA regime so closely resemble current chapter 3 procedures, many companies (particularly those who recently invested significant time and resources to remediating their chapter 3 processes) may assume that "one size fits all" when it comes to cross-border withholding. Even companies having solid chapter 3 systems, however, should consider the changes that FATCA may necessitate.

As previously discussed, chapter 3 and FATCA have different objectives. They touch a different range of payments and solicit different information from foreign payees. FATCA begins with chapter 3 withholdable payments (*i.e.*, U.S. source FDAP income), extends to gross proceeds, and eliminates OCB payments and, for some purposes, grandfathered payments. As a result, withholding agents may need to keep track of four different types of payments: (i) those subject to both chapter 3 and FATCA withholding (*e.g.*, U.S. source interest), (ii) payments subject only to chapter 3 withholding (*e.g.*, U.S. source services fees paid in the ordinary course of the withholding agent's business), (iii) payments subject only to FATCA withholding (gross proceeds), and (iv) payments currently subject to chapter 3 withholding that may become subject to FATCA withholding in the future (payments on grandfathered obligations). That may not be possible without some modification of the agent's current payment and information systems.

Furthermore, withholding agents will not be able to escape the additional documentation requirements for payments subject to FATCA. Current Forms W-8BEN may be valid and complete, but they provide the withholding agent only with chapter 3 withholding information; they are insufficient for satisfying the agent's FATCA obligations. Even if a withholding agent took advantage of the transition rules, and relied on its existing cache of Forms W-8BEN[29] to support payments on "pre-existing obligations," those forms must be supplemented (with SIC codes, credits reports, or other specified information) to demonstrate the payee's FATCA payee status.[30] Collecting and storing various forms of supplementary information may create more hassle than having pre-existing vendors complete new Forms W-8BEN-E; either way, a withholding agent will need to satisfy both chapter 3 and FATCA requirements.

Finally, not only do FATCA and chapter 3 withholding apply independently of each other, FATCA goes first. Assuming that the withholding agent has validated a payee's documentation and determined that no FATCA charge applies, the withholding agent must still determine whether and the extent to which chapter 3 withholding tax is owed. If the withholding agent imposes the 30-percent FATCA charge, the charge is credited against any chapter 3 withholding tax that would have been owed.[31] Consequently, the agent cannot rely on its chapter 3 withholding procedures — no matter how robust — to satisfy FATCA obligations.

* * *

Non-financial companies will have to wait until the IRS issues final FATCA regulations, to answer many of the questions they have regarding FATCA's implications. Nonetheless, there are several big picture issues that can be discussed and resolved in advance of final regulations, and that may help companies shape their compliance processes. Does FATCA apply to non-financial companies? Yes, it does. Will it be painful and expensive? That depends. Companies having significant soft spots in their chapter 3 withholding processes may find it costly and time-consuming to get their compliance procedures buttoned down and FATCA-ready. Companies having robust chapter 3 withholding procedures will have an easier time, but will still need to enhance their systems to satisfy the additional FATCA requirements. The various payment exceptions provide options for relieving — or at least staggering — the implementation burden. Non-financials also have options on the foreign payee side, all of which may allow them to avoid the 30-percent FATCA charge but some of which may be easier to sustain than others. The key will be for non-financial companies to focus on the specific payments and entities that are relevant for them and to take a strategic look at their options — well before FATCA withholding begins in 2014

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1. *See*, e.g., Minority and Majority Staff of Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, 109th Cong.,*Tax Haven Abuses: The Enablers, the Tools, and Secrecy* (2006) (released in conjunction with the Permanent Subcommittee on Investigations' hearing on August 1, 2006); Staff of the Joint Committee on Taxation, *Tax Compliance and Enforcement Issues with respect to Offshore Accounts and Entities*, JCX-23-09 (March 30, 2009).
2. Unless stated otherwise, all section references herein are to the Internal Revenue Code of 1986, as amended, or applicable regulations.
3. The final regulations are expected to be issued sometime during the fall of 2012. *See* K. Parillo, "No Further Extensions of FATCA Likely," 2012 TNT 143-2 (July 24, 2012). The FATCA rules go into effect on January 1, 2013, and FATCA withholding — as applied to non-financial companies — is scheduled to begin on January 1, 2014. *See* Hiring Incentives to Restore Employment (HIRE) Act § 501(d), Public Law No. 111-147, 124 Stat. 71, 106 (2010); Prop. Reg. § 1.1471-2(a).
4. I.R.C. § 1473(4); Prop. Reg. § 1.1473-1(d). This definition is generally the same as used for chapter 3 withholding purposes. See Treas. Reg. § 1.1441-7(a)(1).
5. Prop. Reg. § 1.1474-1(a)(2)
6. *See* Prop. Reg. § 1.1474-1(c)-(d).
7. The Joint Committee on Taxation estimated the cumulative 10-year tax effect of FATCA at just under $9 billion. Staff of the Joint Committee on Taxation, *Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to H.R. 2847, the "Hiring Incentives to Restore Employment Act"* JCX-6-10 (March 4, 2010).
8. I.R.C. §§ 871, 881.
9. I.R.C. §§ 1441, 1442.

10. Certain statutory rules also eliminate the withholding tax applied to certain types of payments. *See*, e.g., I.R.C. §§ 871(h), 1441(c)(9) (portfolio interest exception).
11. Prop. Reg. §§ 1.1474-1(a) through (c).
12. Prop. Reg. § 1.1474-2.
13. Prop. Reg. § 1.1473-1(a)(1). The gross proceeds rule applies to proceeds arising from sales or other dispositions occurring after December 31, 2014. Prop. Reg. § 1.1473-1(a)(1)(i).
14. Prop. Reg. § 1.1471-2(b).
15. Prop. Reg. § 1.1471-2(b)(1).
16. Prop. Reg. § 1.1474-1(d)(2)(i)(A) (providing that U.S. source FDAP income paid on or after January 1, 2014, is subject to information reporting regardless of whether it is subject to withholding).
17. Prop. Reg. § 1.1474-5(a).
18. No refund is available to a non-compliant FFI, except under the auspices of a U.S. tax treaty with the FFI's residence country. Prop. Reg. § 1.1474-5(a)(2).
19. Prop. Reg. § 1.1472-1(b)(1)(ii) (regarding requirement to disclose); Prop. Reg. § 1.1473-1(b) (defining "substantial U.S. owner").
20. The IRS issued a draft Form W-8BEN-E in May, 2012. The draft is expected to be finalized before the end of 2012.
21. Section 1472(c)(1) and (2).
22. Prop. Reg. §§ 1.1472-1(c)(1), 1.1471-5(e)(5).
23. Prop. Reg. § 1.1473-1(a)(4).
24. *Id.*
25. Prop. Reg. § 1.1471-2(b)(1).
26. Prop. Reg. §§ 1.1471-2(b)(2)(iii)-(iv).
27. *See* Comments of Tax Executives Institute, Inc. on Proposed Regulations relating to the Foreign Account Tax Compliance Act (FATCA) , 2012 TNT 85-12.
28. *See* Prop. Reg. §§ 1.1472-1(c)(1), 1.1471-5(e)(5).
29. *See* Prop. Reg. § 1.1474-3(c)(6)(vii).
30. *See, generally*, Prop. Reg. § 1.1474-3(d)(11).
31. Prop. Reg. § 1.1474-6(b)(1).

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