



FATCA Deadlines Approaching For Sponsors of Non-US Retirement Plans

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Under final regulations now in effect under the Foreign Account Tax Compliance Act (FATCA), multi-national employers that sponsor non-US retirement plans may be required to register those plans with the IRS as Foreign Financial Institutions (FFIs) by **April 25, 2014** and comply with certain FATCA withholding and reporting obligations starting **July 1, 2014**.

FATCA is a US federal law designed to enforce the IRS's policy of taxing US taxpayers on all worldwide income. Under FATCA rules, a FFI subject to the reporting and withholding obligations is defined extremely broadly and includes non-US retirement plans (subject to certain exemptions, described further below). If a non-US retirement plan qualifies as a FFI, it is required to register as such with the IRS by the April 25 deadline and agree to report a range of information about US taxpayer participants in the plan (including personal identification information, account balance information, withdrawal records, and more), subject to each participant's consent to such disclosure. If a US taxpayer participant with an account balance of at least \$50,000 in the plan refuses to allow the FFI to report this information to the IRS, the FFI is instead required to report these non-consenting participants to the IRS **and** withhold a 30% tax on certain payments from the plan to the participant. Reporting for the period July 1, 2014 through December 31, 2014 is due by March 31, 2015 (going forward, March 31 will be the reporting deadline for the entire prior year).

If a plan that is required to register as a FFI fails to so register or otherwise fails to comply with its reporting and withholding obligations under FATCA, the plan will be subject to a 30% withholding tax on any US source income paid to the plan. "US source income" would include any income earned from assets invested in US-based stocks, bonds, mutual funds, or other investment vehicles.

As noted above, not all non-US retirement plans will qualify as FFIs, as there are several useful exemptions available. However, in order to take advantage of any exemption, the plan must affirmatively claim it through the filing of a Form W-8BEN-E (the IRS released the final version of this form on April 3) with the US withholding agent for each of its US-based investments. Plans that may qualify as exempt from the FFI registration requirement include:

- "Broad participation" retirement funds. This category would generally cover any retirement plan (i) with participants who are current or former employees and their beneficiaries, (ii) in which no single participant owns more than 5% of the fund's assets, (iii) that is subject to government regulation, including annual reporting requirements, of the

tax authorities in its home country, and (iv) that satisfies at least one of the following requirements: (A) its investment income is tax-exempt in its home country due to qualification as a retirement plan, (B) it receives at least 50% of its contributions from sponsoring employers, (C) distributions are only allowed upon specified events related to retirement, or (D) employee contributions are limited by reference to earned income or may not exceed \$50,000 per year.

- “Narrow participation” retirement funds. This category would generally cover any retirement plan (i) with participants who are current or former employees and their beneficiaries, (ii) with fewer than 50 participants, (iii) that is sponsored by one or more employers that are not investment entities or passive non-financial foreign entities, (iv) that is subject to government regulation, including annual reporting requirements, of the tax authorities in its home country, (v) with respect to which participants not residing in the home country are not entitled to more than 20% of the fund’s assets, and (vi) with respect to which employee and employer contributions are limited by reference to earned income and compensation, respectively.
- Treaty-qualified retirement funds (generally meaning those established in a country that has an income tax treaty with the United States, subject to certain other requirements).
- Funds similar to US qualified plans (generally meaning those that would meet the requirements for tax qualification in the United States, but for the requirement that the plan’s assets must be held by a US trust).
- Investment vehicles used exclusively for retirement funds.
- Pension funds of governmental and international organization employers.

Given the approaching deadlines for FATCA compliance, companies with overseas operations that sponsor retirement or savings plans abroad should be assessing whether those plans are required to register as (and comply with the reporting and withholding obligations applicable to) FFIs.

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