

Hong Kong



New York



Geneva



Greenwich



London



Milan



New Haven



# Distinguishing FATCA from Fiction

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# Automatic Information Exchange

- ‘Foreign Financial Institution’
- Options:
  - Agree to
    - Identify and disclose US clients to IRS
    - Withhold on
      - certain ‘non-compliant’ ‘clients’
      - non-participating institutions
    - Suffer 30% withholding on US investments
- No US investments?
  - Pass thru payment withholding still applies!



# Withholding Agreement

- Client identification and withholding procedures, include:
  - Identifying US clients and disclosing account details
  - Closing the account of anyone protected by banking secrecy laws who fails to waive the protections of such laws
- Withholding – Passthru Payments
  - account holders refusing to be identified
  - any FFI not entering adopting these procedures

A vertical strip on the left side of the slide shows several red lanterns hanging from above. The lanterns are traditional in style, with a red fabric body and a yellow top. One lantern in the foreground is in sharp focus, showing its texture and the tassel hanging from it. The background is dark, making the red lanterns stand out.

# Passthru Payments

- Notice 2011-34
- Tracing deemed unworkable
- ‘Simplified’ approach
- Applies to recalcitrant account holders and non-participating FFIs
- Withholding
  - Determined by reference to the FFIs ratio of US investments to non-US investments
  - Actual US investments irrelevant!!!

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## Timing

- Originally 1 January 2013 ‘all in start date’
- Notice 2011-53
- 1 January 2014 – FDAP income withholding
- 1 January 2015 – Sales proceeds & pass thru payments
- BUT 30 June 2013 for withholding agreement

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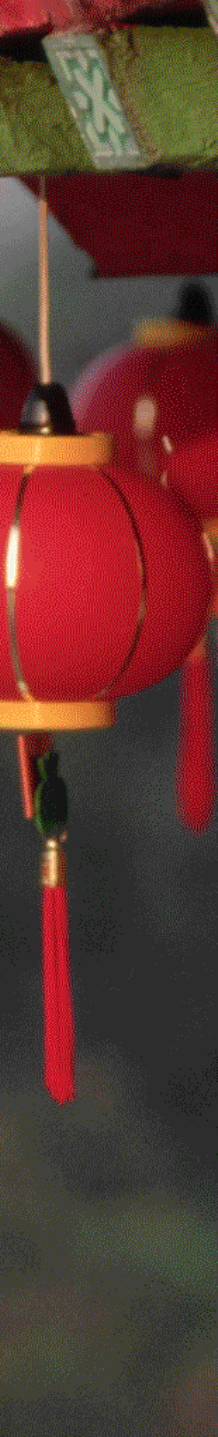
## Financial Institution Defined

- Accepts deposits in ordinary course of banking or similar business – 1471(d)(5)(A);
- Holds financial assets for the account of others as a substantial portion of its business – 1471(d)(5)(B); or
- Engaged primarily in the business of investing... – 1471(d)(5)(C)

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## ‘Financial Institutions’ Generally Affected

- Banks, savings and loans, thrifts, credit unions, building societies, etc.
- Custodians, broker dealers, clearing organizations, employee benefit plans, etc.
- Hedge and private equity funds, funds of funds, mutual funds, ETFs and all other collective investment and securitisation structures
- Life Insurance companies



# Identifying Account Holders

## Who is a 'US client'?

- US citizens
  - Anyone born in the US
  - Either parent US? Child US if
    - Parent spent 5 years in US, 2 of which after age 14 (11/14/86)
    - Parent spent 10 years in US, 5 of which after age 14
  - Passport irrelevant!
- US residents
  - Green card holder; or
  - Substantial presence test
- Entity look through



## Identifying 'Account Holders'

- Existing accounts v New accounts
- Individuals v Entities
- Individual accounts < \$50,000 – exempt
- Accounts < \$500,000 – electronic data search
- Account aggregation?
- 'Private Banking Accounts'
  - Notice 2011-34



# Private Banking Accounts

- Relationship manager must
  - Identify any client known to be a US citizen or green card holder
  - Perform diligent review of electronic and paper files
- Indicia of US status
  - US place of birth
  - US residence or correspondence address
  - Transfer instructions to US or directions from US address
  - Sole address 'in care of' or 'hold mail'
  - Signature authority or power of attorney with US address
- Trustees? Likely...

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# Compliance Officer

- Notice 2011-34
- ‘Responsible officer’ must certify
  - Completion of identification procedures
  - FFI personnel did not direct, encourage or advise account holders as to avoiding disclosure



# Trustees

- Trust companies
  - Treated as entity holding assets for the benefit of others
  - Notice 2010-60 section II.A.2.
- Trusts
  - ‘Small family trust’ listed as an example of an FFI
  - FFI status supposedly arising under Section 1471(d)(5)(C) which requires that the entity be primarily in the business of investing
  - Notice 2010-60 section II.B.3.

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# Classifying Trusts

- Grantor v non-grantor trusts
  - Settlor or beneficiaries for identifications purposes?
  - Classify all trusts under US tax principles?
- Who's a beneficiary?
  - Letters of wishes
  - Recent trends
- Attributing 'ownership' for discretionary trusts
- Private banking standards apply?

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## Additional Considerations: Conflict of Laws

- Privacy
- Data protection
- Anti-discrimination
- Withholding foreign taxes

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## Additional Considerations: Response from Local Banking Associations

- Association of Banks Singapore
- Association of Banks Malaysia
- Thai Bankers Association
- Bankers Association of the Republic of China
- Hong Kong Association of Banks

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## Additional Considerations: Stop Tax Haven Abuse Act Proposal

- Reintroduced July 12
- Jurisdictional black list dropped in favor of non-participating FFI blacklist
- ‘Special measures’ authorized
  - Where US tax enforcement impeded
  - Adopt measures from Patriot Act
  - IRS consults with Attorney General and Secretary of State
  - Require US institutions
    - obtain info on all clients of non-US bank
    - prohibit opening of ‘correspondent accounts’ in the US
    - Navy SEAL teams...
    - Tactile missile strikes...

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## Client's Perspective

- Where to begin?
- Am I US? Citizen, green card holder or resident
- Options
  - Structure affairs for tax and reporting compliance
  - Expatriate BUT
    - Must certify US tax compliance under penalties of perjury



# Client's Perspective - Expatriation

- Expatriation?
  - Citizens
  - 'Long term' green card holders
- Exit tax regime from mid 2008
  - Deemed sale of assets with tax on deemed gains
  - Future gift and estate taxation notwithstanding expatriation
  - New planning opportunity
    - \$5,000,000 lifetime gift tax exemption amount
    - Expires December 31, 2012
- Exceptions
  - Dual citizens from birth
  - Age 18 1/2

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## Client's Perspective – Expatriation

- What if not fully tax and reporting compliant?
- Expatriation exit tax regime applies unless
  - Can certify full compliance for last five years
- Voluntary disclosure

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## Client's Perspective

- New 2012 Offshore Voluntary Disclosure Program