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FATCA Notice 2011-34

Real answers or continued uncertainty?

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Agenda

1. FATCA – Recap
2. Notice 2011-34 – Further Guidance
3. Miscellaneous: Fbar

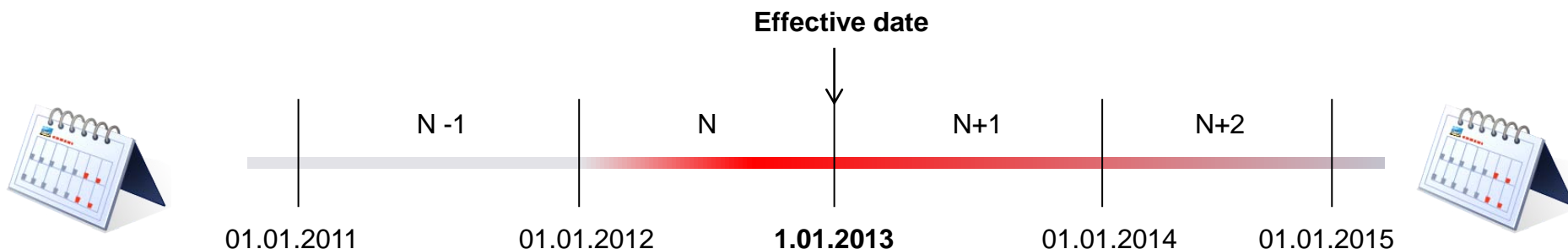
1. FATCA – RECAP

FATCA - Recap

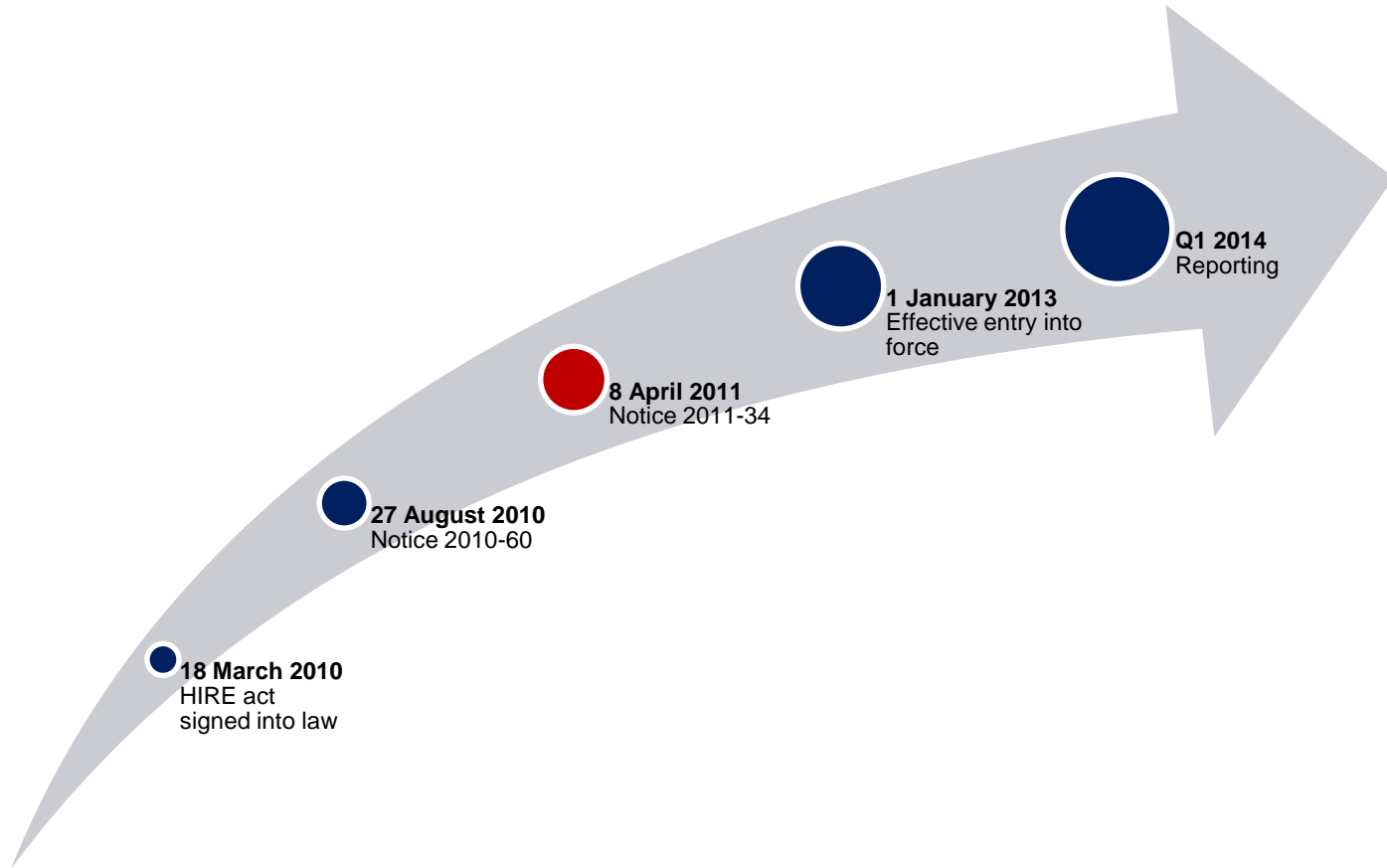
FATCA provisions impose a 30% withholding tax on withholdable or passthru payments to foreign financial institutions (FFIs) unless the FFIs agree to:

- identify U.S. accounts;
- comply with verification and due diligence procedures;
- perform annual reporting;
- deduct and withhold 30% from any passthru payment that is made to
 - a recalcitrant account holder (i.e. one who refuses to be disclosed),
 - another financial institution that does not enter into an agreement with the Secretary, or
- foreign financial institution that has elected to be withheld upon rather than to withhold with respect to the portion of the payment that is allocable to a recalcitrant account holder or to foreign financial institutions that do not have an agreement with the Secretary.
- comply with requests for additional information; and
- attempt to obtain a waiver in any case in which any foreign law would prevent the reporting of information required, and if a waiver is not obtained, to close the account.

Provisions generally apply to US source payments made after December 31, 2012



FATCA - Where do we stand now?

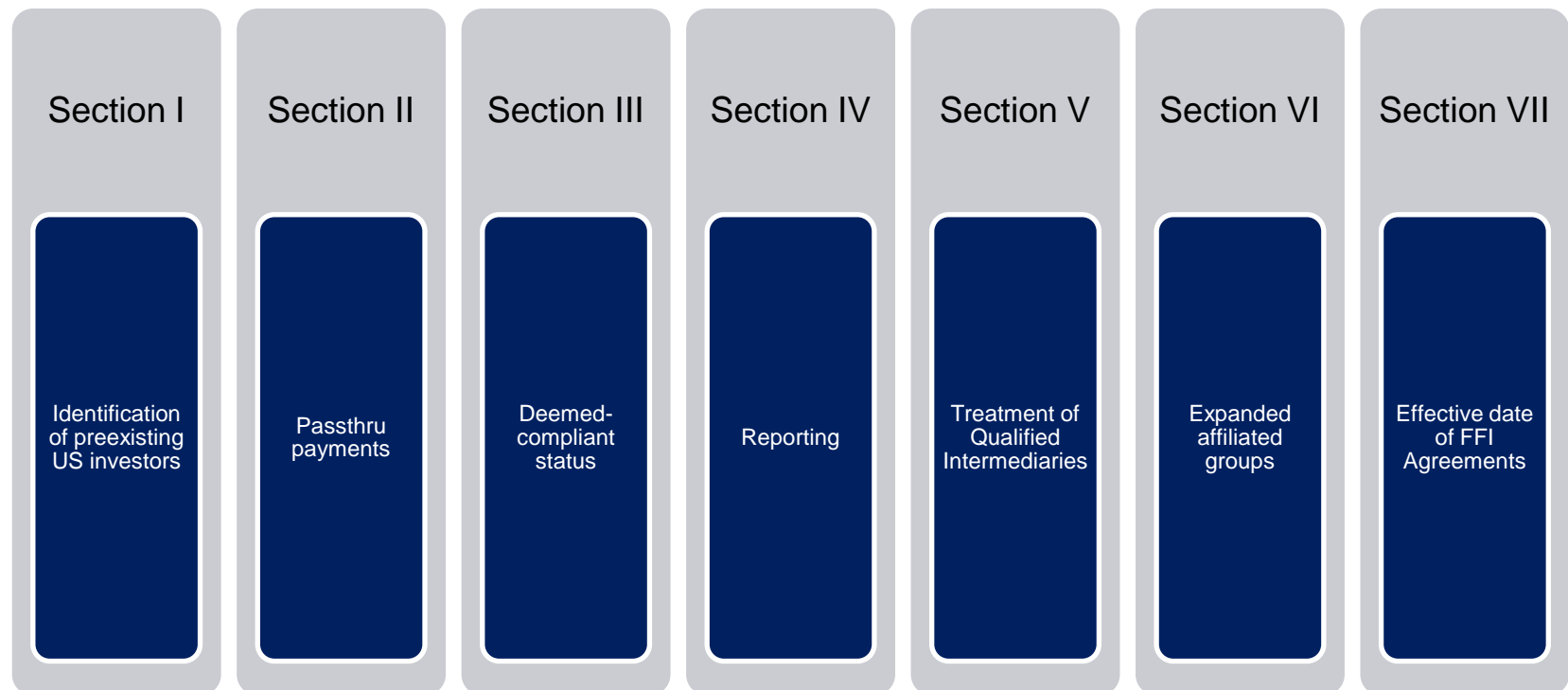


2. *Notice 2011-34* **Further Guidance**

Overview – Notice 2011-34

Issued on April 8th, 2011, Notice 2011-34 is intended to assess certain priority concerns identified by commentators following the publication of Notice 2010-60

- Notice 2011-34 amends or replaces some of the sections of 2010-60, and must therefore be regarded as complementary to Notice 2010-60

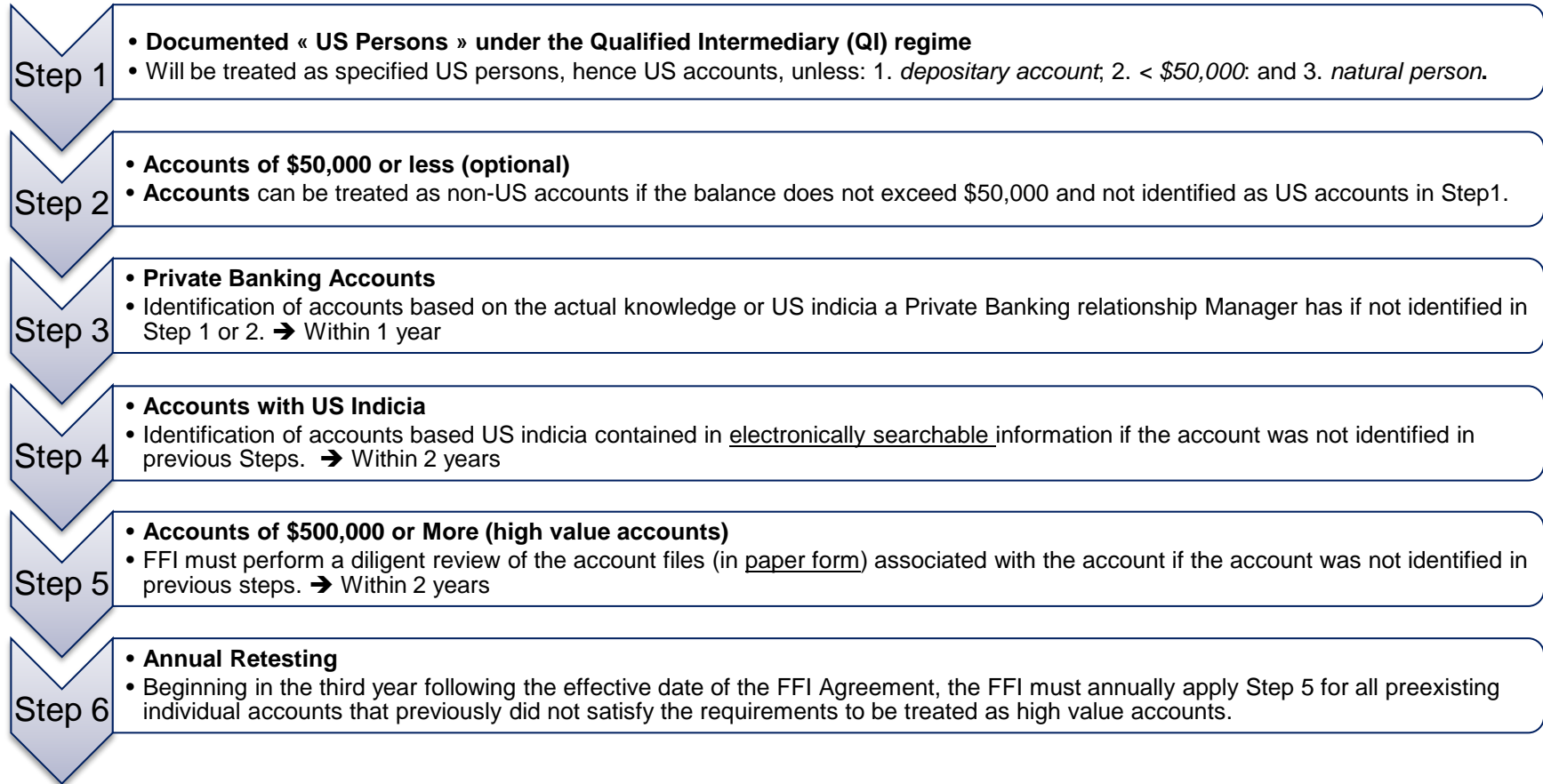


Section 1

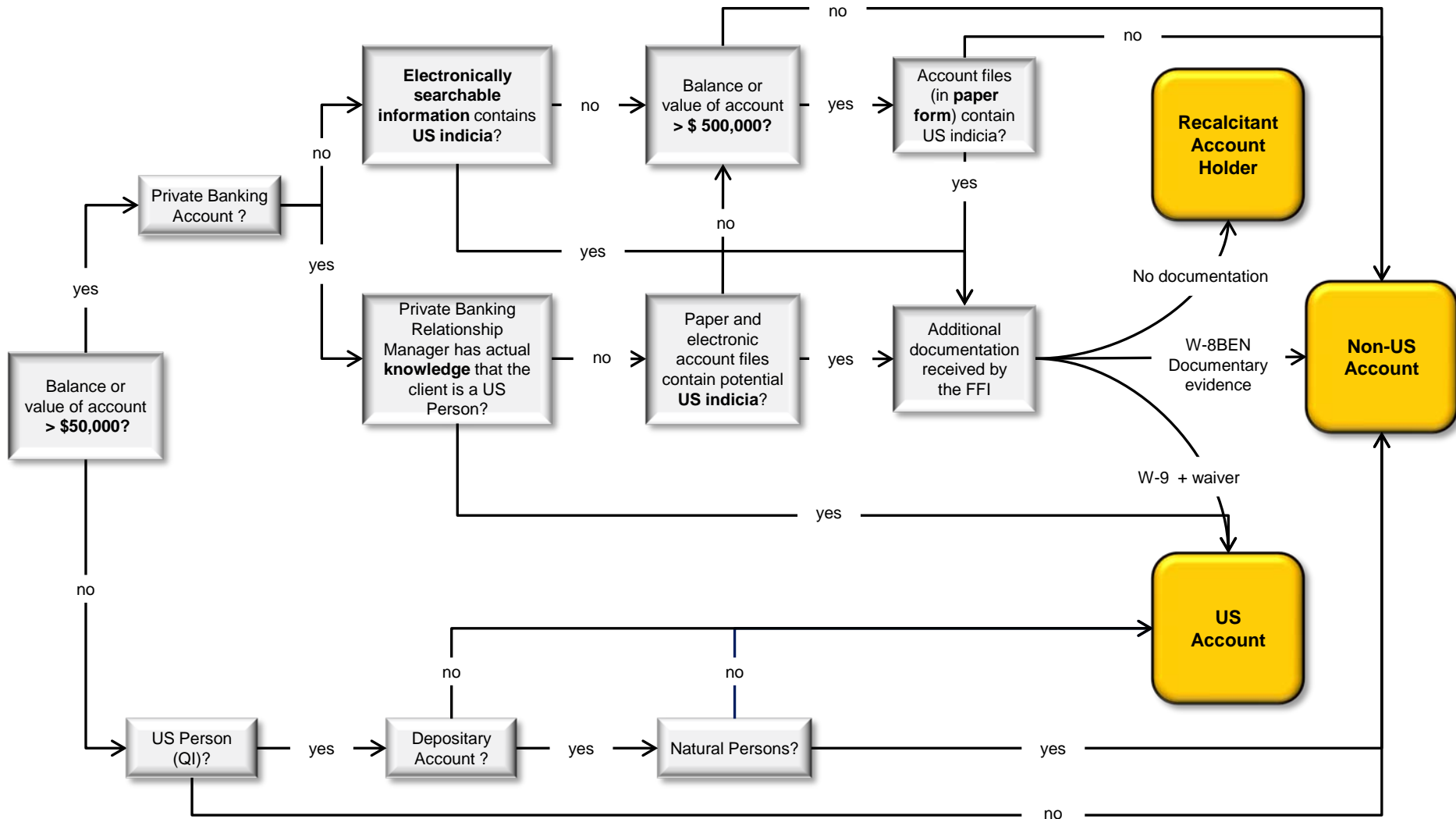
Preexisting Individual Accounts

Section 1 - Revised Identification for Preexisting Individual Accounts

Notice 2011-34 proposes a 6 step approach:



Section 1 - Procedures for identification of preexisting individual accounts



Section 1 - Procedures for identification of preexisting individual accounts

Other provisions:

- Balance or value of accounts:

“an FFI will be required to treat as a single account all accounts maintained by the FFI or its affiliates that are associated with one another due to partial or complete common ownership of the accounts under the FFI’s existing computerized information management, accounting, tax reporting, or other recordkeeping systems”

- Private Banking Accounts

Must search paper and electronic records for indicia of U.S. status for the account holder (AND any associated family members)

NOTE: Definition of “associated family members” is not yet clear.

- Certificate of Completion

Chief Compliance Officer must certify to the IRS the PFFI’s compliance with documentation requirements for existing individual accounts.

Section 2

Passthru Payments

Section 2 - Calculation of Passthru Payments

- FATCA requires a participating FFI to deduct and withhold a tax equal to 30% of any passthru payment made to a recalcitrant account holder or non-participating FFI.
- Notice 2011-34 provides first guidance on the calculation of the passthru payment :
 - The Passthru Payment Percentage (PPP) has to be determined according to the following formula:

$$PPP = \frac{\sum Assets_{US}}{\sum Assets_{Total}}$$

- From there Passthru Payments can be calculated as follows:

Custodial Payment

Withholdable Payment
+
(Non-withholdable Payment x Passthru Payment
% of the **Issuer FFI**)

Any Other Payment

Withholdable Payment
+
(Non-withholdable Payment x Passthru Payment
% of the **Payor FFI**)

Section 2 - Calculation of Passthru Payments

Custodial payment

- Custodial payment:

A payment with respect to which an FFI acts as a custodian, broker, nominee, or otherwise as an agent for another person.

- Example 1:

- ✓ An FFI holds stock of a US corporation in a custodial account for a recalcitrant account holder,
- ✓ The US corporation pays a dividend,
- ✓ the FFI must treat the dividend as a passthru payment when credited to the account of the recalcitrant account holder because the dividend constitutes a withholdable payment.

- Example 2:

- ✓ A broker (PFFI) holds an interest in another FFI on behalf of a recalcitrant account holder and collects a distribution from that other FFI on behalf of the account holder,
- ✓ Passthru payment = [amount of the distribution x other FFI's PPP].
- ✓ Broker's own PPP is irrelevant in this case.

Section 2 - Calculation of Passthru Payment Percentage

- Guidelines

Determination of Assets

- Determine both Total Assets and US Assets held at each of the last four quarterly testing dates.
- US Assets are defined as including *“any asset to the extent that it is of a type that could give rise to a passthru payment”*

Passthru Payment Percentage

- The passthru payment percentage is calculated for each quarterly testing date.
- If no passthru payment percentage is calculated or published by the FFI the passthru rate will be set at 100%.

Timing and Publishing

- Each participating FFI will be required within 3 months after its quarterly testing date to make available its passthru payment percentage.
- Passthru Payment percentage must be published on a website or a database readily searchable by the public.

Section 2 – Example 1

Calculation of the Passthru Payment

Let's suppose that a fund with the below balance sheet on the last business day of the quarter distributes its net income of 100 on non-US securities to its investors.

BS			
Assets		Liabilities	
US securities	1000	Own funds	2000
Non-US securities	1000		

Accordingly the PPP is given as follows:
$$PPP = \frac{\sum Assets_{US}}{\sum Assets_{Total}} = \frac{1000}{2000} = 50\%$$

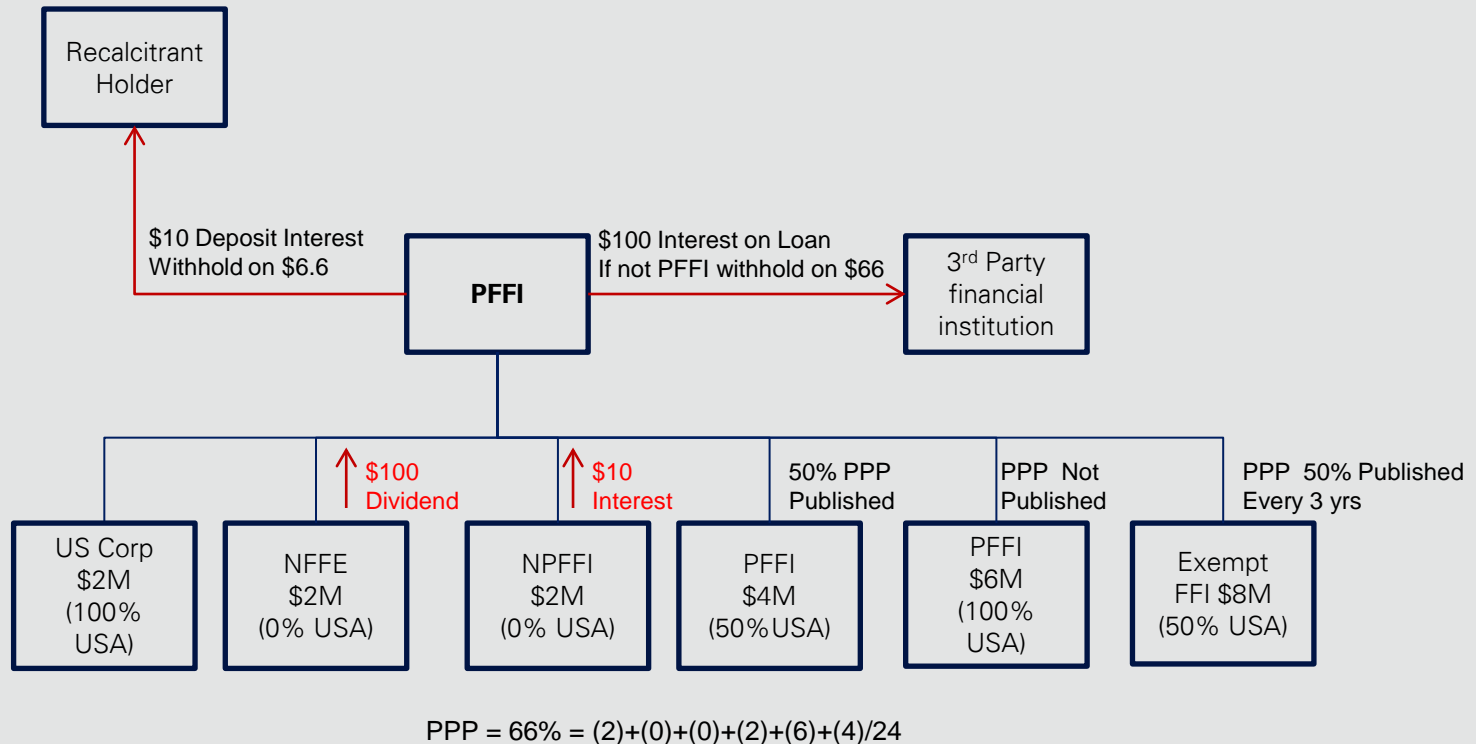
Finally, the Passthru Payment can be calculated by the formula provided in Notice 2011-34, as follows:

$$\text{Passthru Payment} = \text{Withholdable Payment} + (\text{Non-withholdable Payment} \times \text{PPP}) = 0 + (100 \times 50\%) = 50$$

In this case the amount subject to withholding is 50, regardless of the fact that no US income was distributed.

Section 2 – Example 2

Calculation of the Passthru Payment Percentage



Section 3

Deemed-Compliant Status for Certain FFIs

Section 3 – Deemed Compliant FFIs

- Notice 2011-34 expands the concept given in Notice 2010-60 by the following entities:

Notice 2011-34

Certain Local Banks

- Each member of the expanded affiliated group must be a bank
- All group members are organized in the same country
- No member has operations or solicits accounts from outside the country
- No holding of nonresident accounts and no active trade or business with NPFFIS or NFFEs

Local FFI Members of Participating FFI Groups

- No operations are maintained outside the country of organization
- Does not solicit customers outside the country
- Agrees to follow the account identification rules for US Accounts, NPFFIs and NFFEs and if such an account is discovered, it will become a PFFI, transfer the account to a PFFI in the group, or close the account.

Certain Investment Vehicles

- All direct holders in the fund are PFFIs or deemed-compliant FFIs holding on behalf of other investors, or an exempt beneficial owner
- The fund prohibits the subscription for or acquisition of interests in the fund by anyone who is not PFFI, DCFFI or an exempt beneficial owner.
- The fund agrees to the passthru payment percentage requirements.

- Exchange traded funds, foreign retirement plans, or other entities that pose a low risk of tax evasion?

Section 4

Reporting on US Accounts

Section 4 – Reporting on US Accounts

- **Notice 2011-34 revised** some of the reporting requirements outlined in Notice 2010-60
- In addition, the reporting requirements the following points should be regarded:
 - **Cost Basis Reporting:** FFIs that are not US payors will not be required to report tax basis information
 - FFIs that are funds or other collective investment vehicles must report gross distributions
 - Where a US account is closed, FFI must additionally report the fact that the account was closed or transferred and any amount transferred or withdrawn at the end of the relationship
 - Branches of FFIs may elect to report separately

Reporting requirements for US Accounts

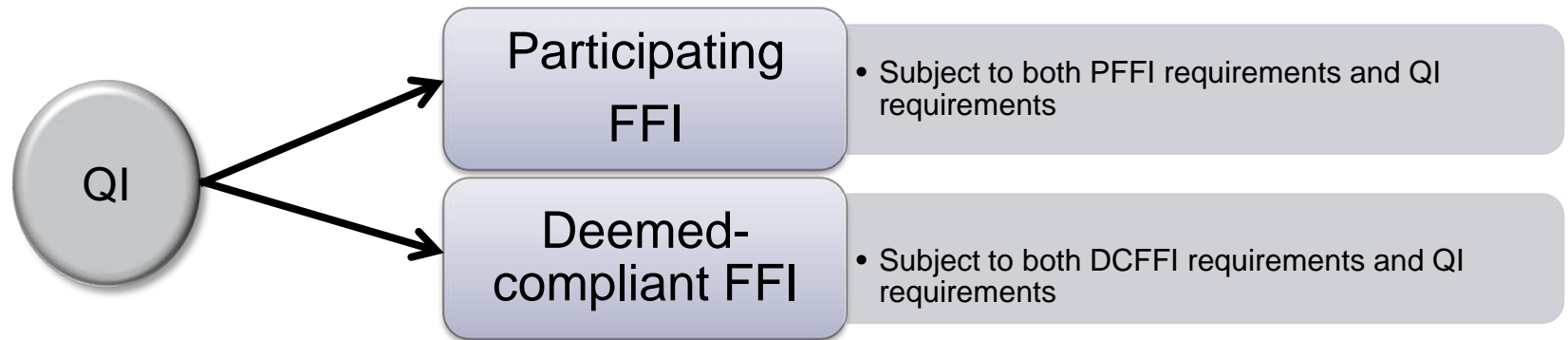
- **Name address and TIN** ✓
- **Year end account balances** ✓
- **Gross income (e.g. dividends, interest and other income) paid or credited to the account** ✓
- **Gross proceeds from the sale or redemption of property paid or credited to the account** ✓

Section 5

Requirements for QIs

Section 5 – Requirements for QIs

- A QI that is FFI is subject to the requirements of FATCA in addition to the reporting requirements imposed on QIs, unless they qualify as deemed-compliant FFIs.



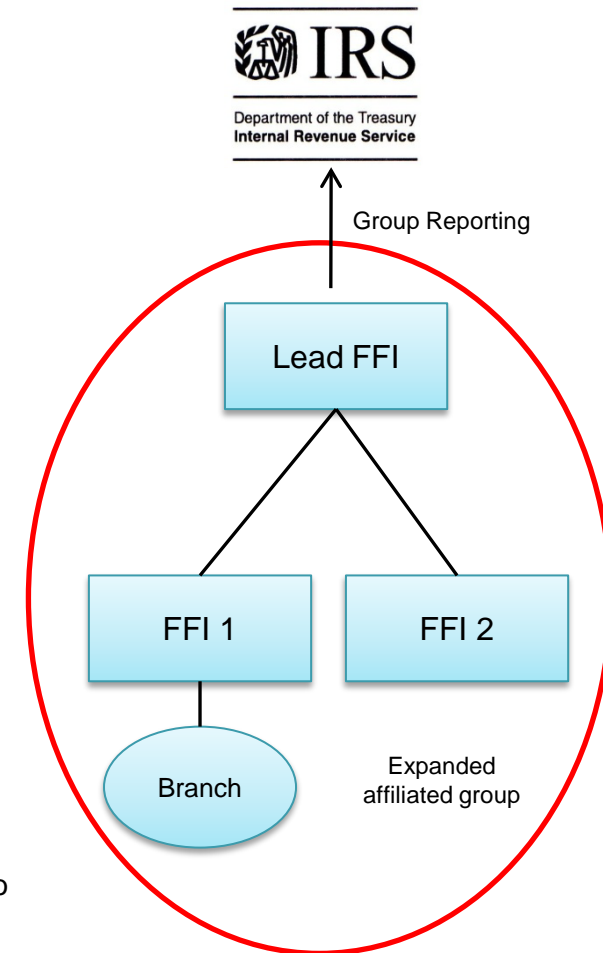
- Transition rules are anticipated for the QI requirements for both QI and FATCA
- Requirements will also apply to withholding foreign partnerships and withholding foreign trusts
- The QI, WFP and WFT Agreements will be updated to include the requirements of FATCA

Section 6

Expanded Affiliated Groups

Section 6 – Expanded Affiliated Group

- **Notice 2011-34 provides that:**
 - Each FFI affiliate in such a group must enter into an agreement with the IRS to become a participating FFI or satisfy the requirements of a deemed compliant FFI.
 - Each entity will be assigned its own FFI-EIN and will be solely responsible for compliance with the terms of the agreement.
 - The agreements will apply to each entity's worldwide branches and offices.
- **But, Notice 2011-34 also provides that:**
 - Each such affiliated group may appoint a lead FFI, who will complete the applications and execute the agreements for all entities in the group
 - Affiliated groups will be allowed to appoint a single member as the “Compliance FFI”
 - Compliance FFI will be responsible for drafting policies and procedures relating to FATCA compliance, for determining that the policies and procedures are adopted and implemented throughout the group, and for accounting to the IRS
 - Collective investment entities may contract with an asset manager or other agent to execute a single FFI agreement on behalf of each member of a group of funds.
 - ➔ Each fund participating in an agreement under this option would remain liable.



3. Miscellaneous

Fbar

Miscellaneous– FBAR

FBAR

Report of Foreign Bank and Financial Accounts

What?

FBAR Requires American Tax payers with overseas bank accounts and foreign assets to file a special disclosure with the Treasury Department each year.

Who?

- American citizens and residents (not American Banks and foreigners) with foreign accounts that collectively hold more than \$10,000

Penalty?

- Top penalty for failing to file the disclosure: **50%** of the account balance for each year of violation
- Possible result: penalty may be multiples of the account balance!

What's new?

- The penalty may be applicable to **foreign banks/other Non-US persons** that willfully caused FBAR violation.

Thank you

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