



**Independent Insurance Agents
& Brokers of America, Inc.**

OFFICE OF THE GENERAL COUNSEL

FOREIGN ACCOUNT TAX COMPLIANCE ACT: FREQUENTLY ASKED QUESTIONS

This FAQ is not intended to provide specific advice about individual legal, business, or other questions. It was prepared solely as a guide and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

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Introduction

The purpose of these “Frequently Asked Questions” is to provide guidance to Big “I” members that must comply with the Foreign Account Tax Compliance Act (“FATCA”). As it relates to Big “I” members, FATCA places due diligence, reporting, and withholding obligations on U.S. agents and brokers placing U.S. risk with foreign insurers. FATCA does not apply to U.S. risk placed with domestic insurers or domestic subsidiaries of foreign insurers.

These FAQs are not comprehensive. Instead, the Office of General Counsel has sought to identify the topics most relevant to Big “I” members. Members that want to discuss these FAQs or have additional questions regarding FATCA are encouraged to make contact with the Office of General Counsel.

FAQs

1. What is FATCA?

FATCA is a 2010 federal law passed by Congress and signed by President Obama as part of the Hiring Incentives to Restore Employment Act, Pub. L. 111-147 (H.R. 2847).

2. What is the purpose of FATCA?

FATCA was primarily intended to stop schemes used by some U.S. taxpayers to evade taxes on investment accounts held with foreign financial institutions. FATCA seeks to achieve its intent by requiring reporting to the IRS of certain foreign financial assets owned by U.S. taxpayers and certain payments made from U.S. taxpayers to foreign financial institutions (“FFI”).

3. How does FATCA affect insurance brokers in the U.S.?

FATCA requires brokers placing U.S. risk with a foreign insurer to verify the foreign insurer’s FATCA status – FACTA compliant, FATCA exempt, or not compliant with FATCA – prior to making a premium payment. A broker will typically do this by obtaining an IRS Form [W-8-](#)

[BEN-E](#) from the foreign insurer and an IRS Form [W-8 IMY](#) from the foreign broker (if any). Generally speaking, a foreign insurer is FATCA compliant if it has entered an FFI agreement to obtain status as a participating FFI and to, among other things, report certain information on accounts held by U.S. taxpayers.

4. What happens if a foreign insurer or foreign broker does not or refuses to provide the W-8-BEN-E or W-8 IMY?

It is anticipated that most foreign insurers and foreign brokers will provide the W-8-BEN-E and W-8 IMY to the U.S. broker in order to demonstrate that the foreign insurer is either FATCA compliant or FATCA exempt. The risk to foreign insurers and foreign brokers is that U.S. taxpayers or brokers seeking to place U.S. risk with a foreign insurer will not do business with a foreign insurer or broker that may cause the U.S. taxpayer or broker to violate FATCA.

However, FATCA does not require foreign insurers and foreign brokers to complete the W-8-BEN-E and W-8 IMY. U.S. brokers could obtain the information required by the forms – and, therefore, verify the foreign insurer’s FATCA status – through other means. Such an alternative process comes with risks, however, because it is unknown how the IRS will deal with alternative processes.

5. What if a broker is unable to verify the foreign insurer’s FATCA status?

FATCA requires a broker who is unable to verify the foreign insurer’s FATCA status to withhold 30% of the premium payment.

6. Does FATCA create an exception to the rule that coverage is not bound until the prospective insured makes the first premium payment in full?

No. Making 70% (or anything less than 100%) of the first premium payment is generally insufficient to bind coverage. FATCA does not change this rule. In practice, a U.S. taxpayer or broker seeking to place U.S. risk with a foreign insurer is unlikely to place such risk unless it can verify that the foreign insurer is FATCA compliant or FATCA exempt.

7. What is the effective date for FATCA? How are obligations that exist prior to the effective date treated?

FATCA’s effective date is July 1, 2014. However, the IRS recently provided relief that will inure to the benefit of many U.S. brokers.

The [IRS announced in May 2014](#) its intention to amend the existing regulations to provide additional time to comply with FATCA’s requirements. The regulations in effect in May 2014 state that obligations existing prior to July 1, 2014 need not comply with FATCA’s requirements as long as the obligation does not materially change after that date – for example, the premium increases. The IRS’ announcement provides a limited extension to this “grandfathering” for certain obligations issued, opened, or executed between July 1, 2014 and December 31, 2014. Importantly, this relief is limited to entity accounts and does not apply to individual accounts.

Moreover, the U.S. broker must still document the foreign insurer's FATCA status (typically via a W-8-BEN-E and W-8 IMY) but has until June 30, 2016 to do so.

The IRS also announced that it will consider 2014 and 2015 as a transition period for purposes of IRS enforcement and administration of FATCA's requirements. Although U.S. brokers are encouraged to comply with FATCA's requirements immediately, during the transition period, "the IRS will take into account the extent to which a . . . withholding agent [including a U.S. broker] has made good faith efforts to comply with" FATCA when determining whether to take action against that entity. The IRS cautions, however, that "[a]n entity that has not made good faith efforts to comply with the new requirements will not be given any relief from IRS enforcement during the transition period."

8. What does the U.S. broker have to do to verify the accuracy of a W-8-BEN-E or W-8 IMY?

The U.S. broker's primary responsibility is to ensure that the form is complete. Based on the existing regulations and guidance, the IRS does not require the U.S. broker to perform any due diligence when verifying the accuracy of the forms. However, the U.S. broker cannot accept a form that the broker knows or has reason to know is inaccurate.

9. How long are a W-8-BEN-E and W-8 IMY valid?

A W-8-BEN-E is valid until the end of the third successive calendar year after the date it is signed, unless a change of circumstances occurs during that time. For example, a W-8-BEN-E signed on August 1, 2015 is valid until December 31, 2018. Absent a change in circumstances, the W-8-BEN-E obtained for one insured's placement is valid for other insureds' placements.

A new W-8 IMY must be obtained with each new placement because the form contains transaction-specific information.

10. What are a U.S. broker's reporting obligations to the IRS?

A U.S. broker does not provide the W-8-BEN-E or W-8 IMY to the IRS. Those forms must be retained in the broker's files.

Per instructions issued by the IRS in July 2014, U.S. brokers will have to file a Form [1042-S](#) with the IRS even if the broker did not withhold any portion of any premium payment.

11. How will Lloyd's report its FATCA status?

Reporting is done at the operating company level, not at the syndicate level. Lloyd's has reached an agreement with the IRS to be considered a qualified intermediary. Lloyd's will report its FATCA status via a single W-8 IMY. Unlike the typical W-8 IMY, the W-8 IMY from Lloyd's is not transition-specific. Other foreign insurers may also seek qualified intermediary status.

12. How do these requirements achieve FATCA's purpose of stopping tax evasion schemes?

FATCA's requirements arguably make sense when applied to insurance and investment products that have cash value – *e.g.*, annuities and whole life insurance policies. However, the requirements do not make sense when applied to property and casualty insurance policies, which have no cash value and very rarely, if ever, could be used to avoid U.S. taxation. FATCA's text gives discretion to the IRS to decide whether to apply FATCA's requirements to premiums paid on property and casualty insurance policies. Despite heavy (and continued) opposition from the insurance industry, the IRS and Treasury Department regulations place premiums paid on property and casualty insurance policies within FATCA's ambit.

13. Do FATCA's requirements apply to placements of U.S. risk with a U.S. subsidiary of a foreign insurer?

No. A U.S. subsidiary of a foreign insurer will provide a W-9.

Also, a foreign insurer may apply with the IRS for tax treatment as a U.S. company. If the request is granted, the foreign insurer would provide a W-9.

14. Can an insured avoid FATCA's requirements by working without a broker?

No. An insured placing U.S. risk with a foreign insurer is required to verify that the foreign insurer is FATCA compliant or FATCA exempt before making the first premium payment. If the insured is unable to do so, the insured must withhold 30% of the premium payment.