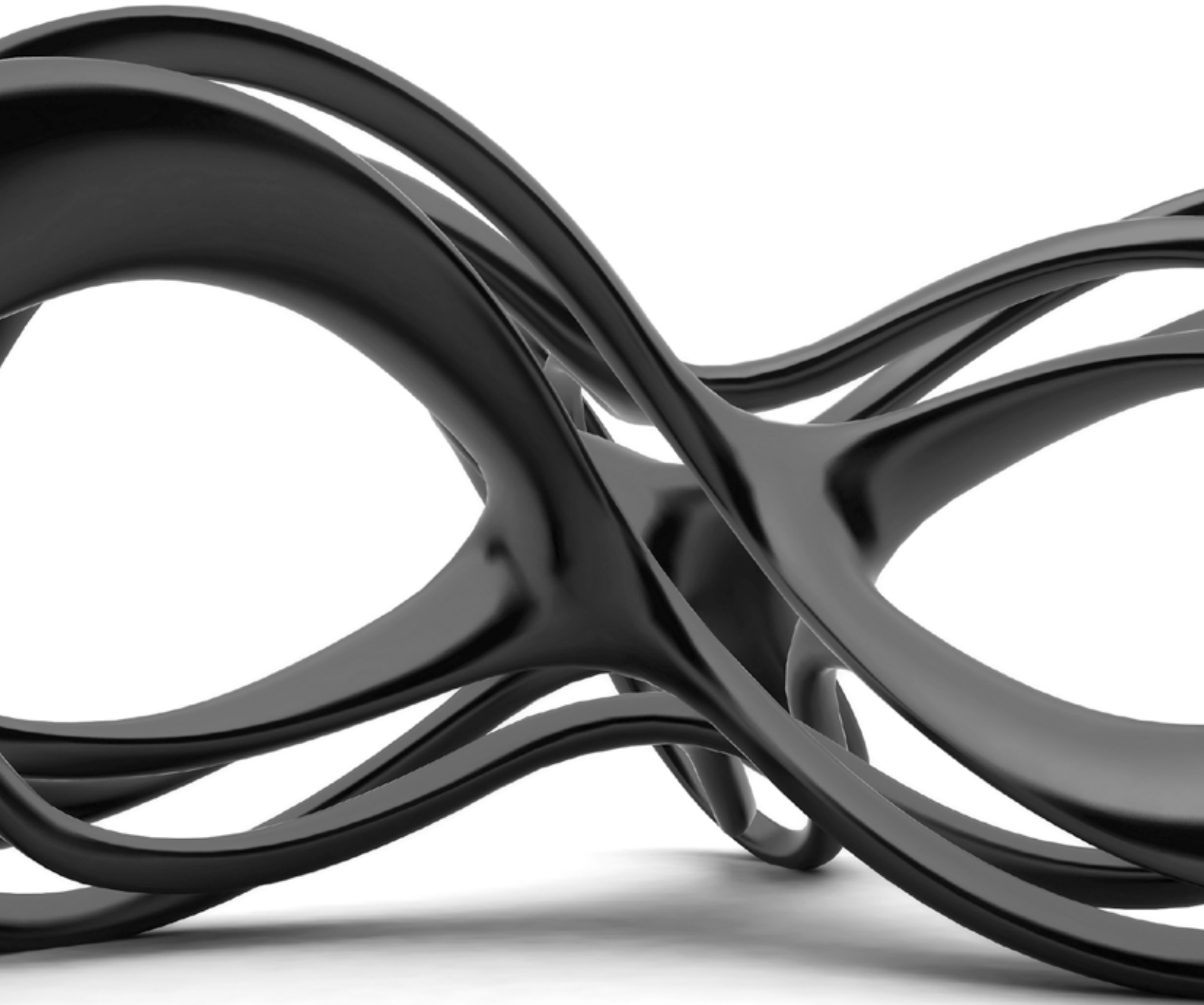


ALLEN & OVERY



A guide to recommended HIRE Act/
TEFRA/FATCA changes to international
capital markets documentation

2012

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Recommended HIRE Act/TEFRA/FATCA Changes to International Capital Markets Documentation (November 2012)

Issuer	Instrument	Issued on or before 18 March 2012	Issued after 18 March 2012	Issued on or before 31 December 2012 ⁽⁸⁾	Issued after 31 December 2012	Effective date of FATCA withholding tax	Recommended documentary changes
U.S. Issuers ⁽¹⁾	Debt	Bearer form possible only if: (i) TEFRA D compliant, or (ii) maturity of 183 days or less	Bearer form possible only if: (i) issued through dematerialized clearing system ⁽³⁾ , or (ii) maturity of 183 days or less, or (iii) in "immobilized bearer" form ⁽⁴⁾	30% FATCA withholding not applicable	30% FATCA withholding applies	Interest / dividends: 1 January 2014 Gross proceeds of sale: 1 January 2017	(a) FATCA withholding disclosure (all) (b) Authorization to withhold under FATCA (all) (c) Additional carve-out to the tax gross up for FATCA withholding (all) (d) Agency agreement information and termination provisions (all) (e) Collection of relevant IRS Forms W-8 (non-bearer debt only) (f) Add registered option (debt only)
	Equity ⁽²⁾	TEFRA not applicable	TEFRA repeal not relevant/ TEFRA not applicable	30% FATCA withholding applies	30% FATCA withholding applies		
Non-US Non-FFI Issuers ⁽⁵⁾	Debt	Bearer form possible only if: (i) TEFRA C or D compliant, or or (ii) issued through certain dematerialized clearing system ⁽³⁾ , or (iii) in "immobilized bearer" form ⁽⁴⁾ , or (iv) maturity of 1 year or less	Bearer form possible only if: (i) TEFRA-like compliant, or (ii) issued through dematerialized clearing system ⁽³⁾ , or (iii) in "immobilized bearer" form ⁽⁴⁾ , or (iv) maturity of 1 year or less	30% FATCA withholding not applicable	30% FATCA withholding not applicable	Not applicable	None
	Equity ⁽²⁾	TEFRA not applicable	TEFRA repeal not relevant/ TEFRA not applicable	30% FATCA withholding not applicable	30% FATCA withholding not applicable		

Issuer	Instrument	Issued on or before 18 March 2012	Issued after 18 March 2012	Issued on or before the date six months after foreign passthru payment defined by final regulations ⁽⁷⁾	Issued after the date six months after foreign passthru payment defined by final regulations	Effective date of FATCA withholding tax	Recommended documentary changes
FFI Issuers⁽⁶⁾							
	Debt	Bearer form possible only if: (i) TEFRA C or D compliant, or (ii) issued through certain dematerialized clearing systems ⁽³⁾ , or (iii) in "immobilized bearer" form ⁽⁴⁾ , or (v) maturity of 1 year or less	Bearer form possible only if: (i) TEFRA-like compliant, or (ii) issued through dematerialized clearing system ⁽³⁾ , or (iii) in "immobilized bearer" form ⁽⁴⁾ , or (iv) maturity of 1 year or less	30% FATCA withholding not applicable	30% FATCA withholding on "foreign passthru payments" ⁽⁸⁾	1 January 2017	(a) FATCA withholding risk factor (b) Authorization to withhold under FATCA (c) Amend payment condition/additional carve-out to the tax gross-up, but only if scope of gross-up otherwise sufficiently broad to cover FFI withholding (where no tax gross-up (e.g., securitisations) expand Taxation condition to cover FATCA) (d) Agency agreement information and termination provisions
	Equity⁽²⁾	TEFRA not applicable	TEFRA repeal not relevant / TEFRA not applicable	30% FATCA withholding on "foreign passthru payments" ⁽⁸⁾	30% FATCA withholding on "foreign passthru payments" ⁽⁸⁾		

(1) U.S. issuers include not only U.S.-incorporated entities, but also, e.g., non-U.S. corporate entities issuing out of their U.S. branches, issuances by "disregarded entities" owned by U.S. corporations and certain "back-to-back" or "conduit" issuances by a non-U.S. corporation for the benefit of a U.S. corporation.
(2) Certain securities that are in the form of debt instruments may be treated as equity or another category of non-debt instruments for U.S. federal tax purposes. Such instruments may include, but are not limited, to securities with extended or no maturity, index-linked notes, deeply subordinated notes, or notes issued by thinly capitalized entities.
(3) Dematerialized systems include "other book entry systems specified by the Secretary [of the Treasury]". Currently Euroclear and Clearstream cannot be treated as such book entry systems. A U.S. tax analysis is currently required to ensure that the dematerialized system used is suitable for this purpose.
(4) An immobilized bearer structure calls for the issuance of a non-transferable global note which underlies certificated or certificate-less registered depositary interests issued by a depositary to the clearing systems. Although there have been many immobilized bearer issuances by non-U.S. issuers, there is as yet no established market or clearing system practice for immobilized bearer issuances by U.S. issuers, and caution is advised.

(5) Non-U.S. non-FFI issuers include any non-U.S. issuers that are not FFIs (see fn 6).
(6) FFIs include, but are not limited to, banks and securitization vehicles, but exclude governments and government-owned agencies or instrumentalities and financing subsidiaries of a non-financial group. FFIs that enter into an agreement with the U.S. Internal Revenue Service to disclose information about their account holders and to withhold on "passthru payments" will be considered "participating FFIs".
(7) If an obligation is materially modified after this date it will be regarded as having been re-issued on the date of such modification.
(8) A foreign passthru payment is the portion of any payment originated by a participating FFI (see fn 6) in proportion to the ratio of the FFI's US assets to its total assets, i.e., the FFI's "passthru payment percentage".

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