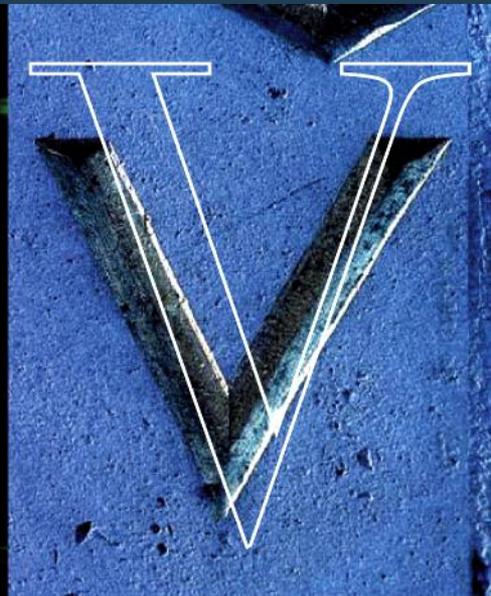
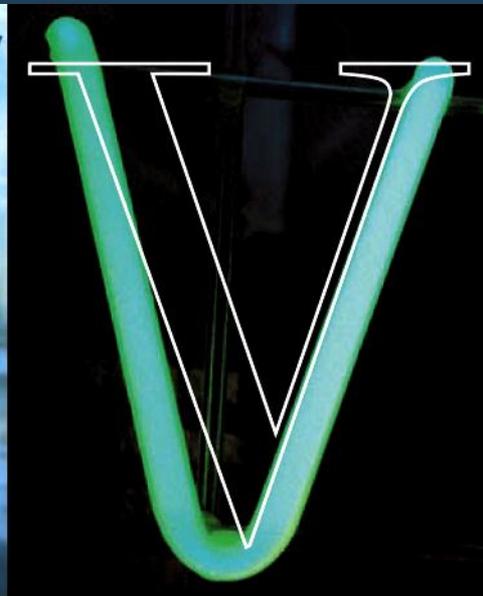
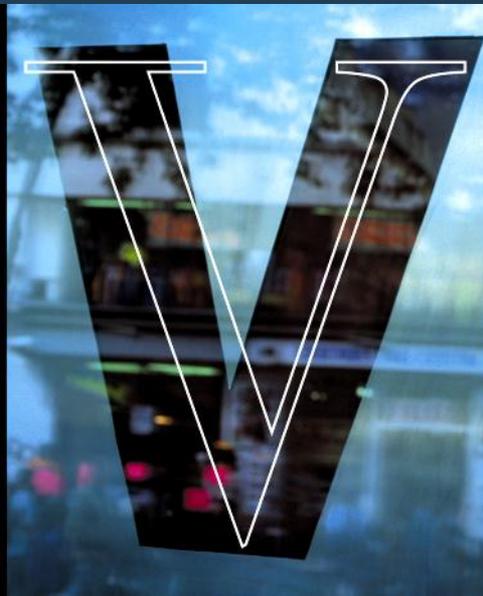
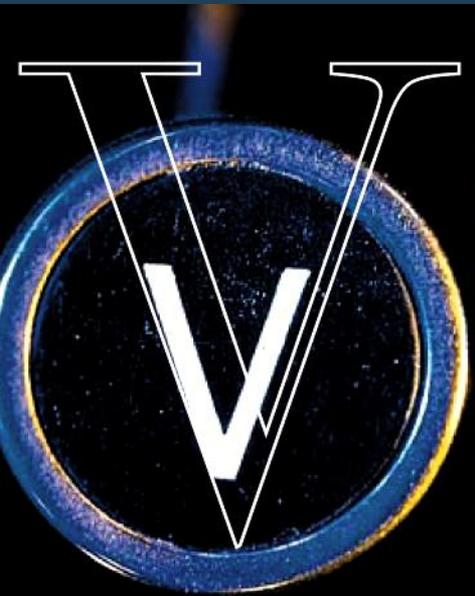




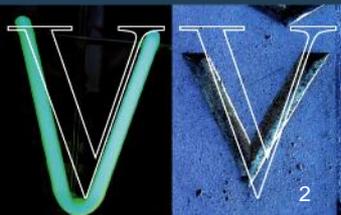
# Foreign Account Tax Compliance Act (“FATCA”) How Does It Affect NFFEs and Individuals

May, 2012



# agenda

- Overview
- FATCA and NFFEs
- FATCA and Individuals
- US Information Reporting for US Residents and Green Card Holders
- Recent US Enforcement Actions
- Immigration and Compliance with US Tax Laws
- Conclusion



# Overview

- The US Congress has been concerned that US taxpayers were hiding assets overseas and improperly shifting income overseas
- FATCA was enacted as part of the HIRE Act in 2010
  - Requires foreign entities to report US investors/account holders to the IRS
  - Includes very broad provisions that will affect thousands of foreign entities



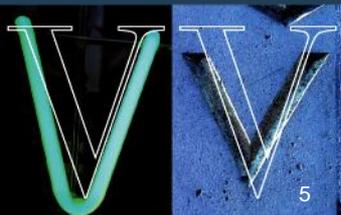
# Overview

- The US has significantly increased its enforcement actions in two areas
  - Targeted non-US financial institutions
  - Targeted US taxpayers with foreign financial accounts:
    - IRS collected some \$4.4 billion in taxes and penalties in the 2009 and 2011 voluntary disclosure programs
    - IRS recently announced a 2012 Voluntary Disclosure Program



# FATCA Overview

- FATCA added new withholding tax requirements applicable to payors of US source income to designated foreign entities
  - Section 1471 for Foreign Financial Institutions (“FFIs”)
  - Section 1472 for Non-Financial Foreign Entities (“NFFEs”)
- FATCA also added new tax reporting requirements (Section 6038D) for US citizens, residents and green card holders



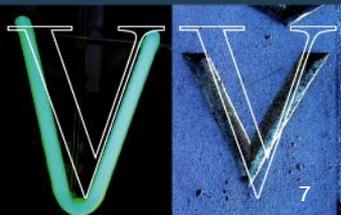
# FATCA Overview

- Sections 1471 and 1472 impose a new 30% withholding tax, in addition to the historic 30% withholding tax imposed on US source fixed and determinable, annual or periodic (“FDAP”) income under Sections 1441 and 1442
  - The Proposed Regulations provide that the withholding under FATCA will be applied against and reduce the withholding under Sections 1441 and 1442 to avoid duplicative withholding



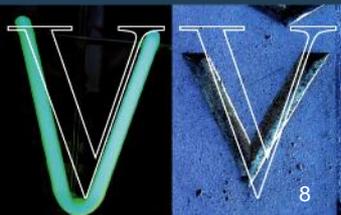
# FATCA Overview

- A 30% withholding tax applies unless FFIs or NFFEs report US account holders or US investors to the withholding agent
  - Withholding agent has to report those account holders or investors to the IRS
- New withholding tax rules become effective for payments of US source income after 12/31/2013
  - Grandfathered instruments



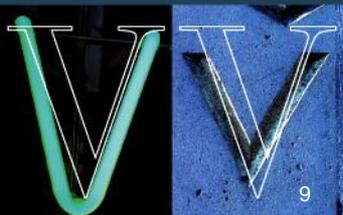
# FATCA Overview

- FFIs include
  - Banks
  - Securities Brokers
  - Insurance companies
  - Mutual funds
  - Other entities primarily engaged in the business of investing in stocks, securities, partnership interests and other financial instruments (i.e., hedge funds, etc.)



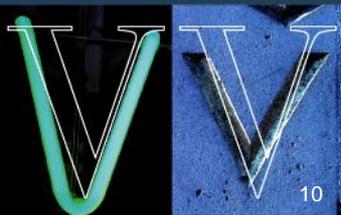
# FATCA Overview

- FFIs generally avoid the FATCA withholding by entering into an FFI agreement with the IRS and becoming a participating FFI
  - Substantial compliance, reporting and recordkeeping requirements
  - Issue of whether disclosure of US account holders violates Taiwanese law
- Special rules apply to registered deemed-compliant FFIs and certified deemed-complaint FFIs



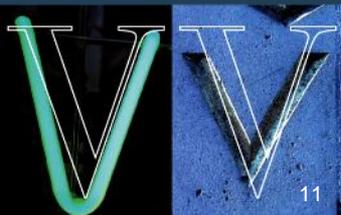
## FATCA and NFFEs

- Under Section 1472, NFFEs include any foreign entity which is not an FFI
  - Foreign corporations
  - Foreign partnerships
  - Foreign trusts
- NFFEs can avoid the 30% withholding tax if they
  - Certify to the withholding agent that it has no substantial US owners; or
  - Provide the name, TIN and other information on their substantial US owners to the withholding agent



# FATCA and NFFEs

- A substantial US owner is one who has a greater than
  - 10% equity interest in a foreign company;
  - 10% profits and capital interest in a foreign partnership; or
  - 10% beneficial interest in a foreign trust



# FATCA and NFFEs

- Accordingly, NFFEs will have to get information on their direct and indirect owners to determine if any of them are substantial US owners
  - Need to get initial information before 12/31/2012 to avoid withholding on payments on or after 1/1/2013
  - Need to update information on a periodic basis
  - If an owner refuses to provide that information, then the NFFE will be subject to the FATCA withholding tax on ALL of its US source FDAP income



# FATCA and NFFEs

- Foreign Trusts
  - Determination of percentage interest based upon actual distributions by the foreign trust in the case of discretionary trust
  - Different rules apply to foreign trusts with mandatory distributions
  - Trust has to report its US beneficiaries to the withholding agent to avoid the FATCA withholding tax
  - Trust has to report information to the US beneficiaries so that they can comply with their FATCA reporting under Section 6038D



# FATCA and NFFEs

- Withholding not required for payments to “Active NFFEs”
  - Less than 50% of gross income is dividends, interest, rents, royalties or other passive income
    - Note that definition is different from the passive income definition under the Subpart F rules
  - Less than 50% of assets are assets that produce passive income



# FATCA and NFFEs

- Withholding also not required on payments to the following NFFEs
  - Corporations whose stock is regularly traded on an established securities exchange
  - Members of expanded affiliated groups whose parent company is publicly traded
  - Certain corporations organized in a US possession
  - Certain foreign governmental or international agencies or central banks



# FATCA and NFFEs

- Publicly Traded NFFEs
  - Traded on the Taiwan Stock Exchange or other recognized stock exchange
  - More than 50% of the voting power and value of all classes of stock are traded on the exchange
  - Stock is traded at least 60 days in the prior calendar year
  - Shares actually traded in prior calendar year are at least 10% of average outstanding shares



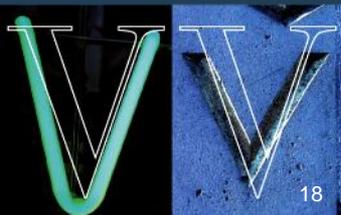
## FATCA and NFFEs

- Holding Companies that own stock in NFFEs may become a FFI because one or more of its subsidiaries provide loans or credit card services to the group's customers
  - If any member of an affiliated group is an FFI, then the whole group is tainted and cannot qualify as an NFFE
  - A Holding Company is one substantially all of whose activities is to own stock of subsidiaries



## FATCA and NFFEs

- Hedging/Financing centers of a NFFE are also excluded from the definition of an FFI.
  - Center must primarily engage in financing or hedging transactions with members of its affiliated group which are not themselves FFIs and does not provide financing or hedging services to non-affiliates



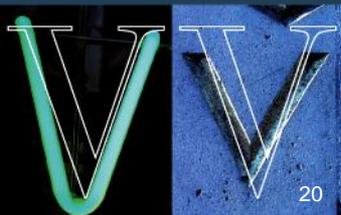
## FATCA and NFFEs

- Exception from withholding for payments made in the Ordinary Course of Business for nonfinancial services, goods and the use of property
  - Services, wages, office and equipment leases, software licensed, transportation, and interest on outstanding accounts payable for such payments



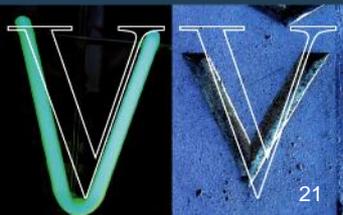
# FATCA and NFFEs

- NFFEs can be withholding agents
  - Foreign entities with control over the payment of US source FDAP income are withholding agents
  - Option to be a non-withholding NFFE
  - Need to register with the IRS, obtain a Taxpayer Information Number, and report payments and taxes withheld to the IRS annually



# FATCA and NFFEs

- Grandfathered Obligations
  - FATCA withholding does not apply to grandfathered obligations that are outstanding as of January 1, 2013
  - Any material changes to the terms of the obligations will cause it to lose its grandfathered status
  - Obligations include debt obligations, certain insurance and annuity contracts, and derivative and swap agreements
  - Equity instruments do not qualify as obligations



# FATCA and Individuals

- Section 6038D imposes new reporting requirements on individuals who hold an interest in specified foreign financial assets (“SFFAs”)
- Individuals must file Form 8938, beginning with the 2011 tax year, to report interests in SFFAs
- Penalties imposed for failure to file Form 8938 on a timely basis
  - \$10,000 per form
  - 40% understatement penalty



# FATCA and Individuals

- SFFAs include
  - Financial accounts such as bank accounts, mutual funds, etc.
  - Stock or securities issued by a foreign person, including companies and partnerships
  - A financial instrument which has a foreign issuer
  - Interests in a foreign entity, such as a corporation, partnership, trust, or estate
  - Real estate held through a foreign entity



## FATCA and Individuals

- SFFAs do not include the following
  - Gold held in a safe deposit box
  - Direct ownership of real estate by an individual
  - Interests in foreign social security plans
- An individual has an interest in an SFFA if income, gains, losses, deductions, credits, gross proceeds or distributions attributable to an SFFA is or would be required to be reported on that individual's US income tax return



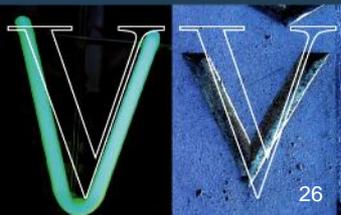
# US Information Reporting for US Tax Residents and Green Card Holders

- US citizens are subject to US tax on their worldwide income, regardless of where they live and where the income is earned
- Similar rule applies to Green Card holders
  - Even if they live outside of the US
  - A Green Card holder is deemed to have expatriated if they file as a non-resident under the provisions of an income tax treaty
    - Subject to exit tax under Section 877A
- Significant information reporting requirements for offshore investments, etc.



# US Information Reporting for US Tax Residents and Green Card Holders

- Form 90-22.1 (Foreign Bank Account Report)
  - Due June 30; NOT filed with the US income tax return
- Form 3520 – Information on Foreign Trusts
- Form 5471 – Information on Foreign Corporations
- Form 8261 – Information on PFICs
- Form 8858 – Information on Foreign Disregarded Entities
- Form 8865 – Information on Foreign Partnerships
- Form 8938 – Information of SFFAs



## Recent US Enforcement Actions

- Since 2009 the DOJ and the IRS have aggressively begun to enforce US laws on the reporting of foreign bank and other financial accounts
- A number of US citizens have pled guilty to charges of failing to file Form 90-22.1, and filing false US income tax returns
- Banks in Switzerland, Israel and other countries are cooperating with IRS investigations into US account holders



## Recent US Enforcement Actions

- UBS – Agreed to allow the US access to information regarding some 4,000 US account holders
- UBS – Agreed to pay a fine of \$780 million to the US in order to keep its banking and other licenses
- Amendment to US-Swiss income tax treaty approved by Swiss Parliament in March, 2012
  - Makes it easier for the IRS to obtain bank account information on US account holders



## Recent US Enforcement Actions

- HSBC – the US obtained a John Doe summons in April 2011 to obtain information from HSBC (India) regarding its US account holders
- Credit Suisse
  - US indicted eight former Credit Suisse employees in 2011
  - Target of a criminal investigation by the US DOJ
- TIEAs with Panama and other countries with which the US does not have an income tax treaty



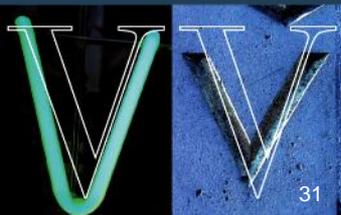
# Recent US Enforcement Actions

- Tax Compliance Initiatives for US taxpayers
  - 2009 Offshore Voluntary Disclosure Program (20% penalty)
  - 2011 Offshore Voluntary Disclosure Initiative (25% penalty)
  - Open-ended 2012 Offshore Voluntary Disclosure Program (27.5% penalty; details for the program were not released as of April 30, 2012)



# Recent US Enforcement Actions

- Indictments and Plea Bargains
  - R Cittadini plead guilty in 2009 to a charge of willfully filing a false tax return under Section 7206(1), for failure to report a UBS bank account
  - J Homann plead guilty in 2009 to a willfull failure to file a FBAR for his UBS accounts
  - H Schumacher and M Rickenbach, both bankers at UBS, were indicted by a US grand jury in August 2010 for assisting US clients in setting up “sham and nominee offshore entities”



# Recent US Enforcement Actions

- Indictments and Plea Bargains
  - J Barouh plead guilty in 2010 to filing a false return for failure to report a UBS bank account, opened in the names of nominee corporations. He was allowed to remain out of jail on \$1,000,000 bail.
  - M Brandner was the subject of a forfeiture action in 2012 with respect to some \$4,600,000 in funds deposited with Bank of America that had been in an offshore account. The US alleged that Brandner failed to file an FBAR for those funds, and thus the funds should be forfeit to the government.



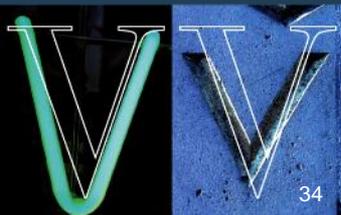
# Immigration and Compliance with US Tax Laws

- Aliens who have a US visa, including a Green Card, are subject to deportation in certain circumstances
  - Conviction of an “aggravated felony” can lead to deportation
  - “Aggravated felonies” include:
    - fraud or deceit involving amounts greater than \$10,000, and
    - Tax evasion under Section 7201



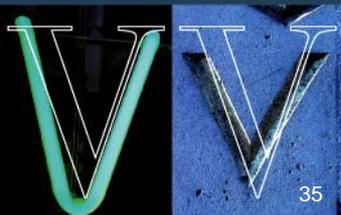
# Immigration and Compliance with US Tax Laws

- Kawashima case
  - Mr. Kawashima pled guilty to filing a false income tax return under Section 7206(1)
  - Mrs. Kawashima pled guilty to aiding and assisting in the filing of a false income tax return under Section 7206(2)
  - The INS sought to deport them for having been involved in aggravated felonies



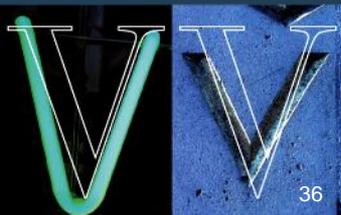
# Immigration and Compliance with US Tax Laws

- Kawashima case
  - The issue was whether conviction of filing a false income tax return under Section 7206 involved fraud or deceit
  - Supreme Court decided that filing false income tax returns involved fraud or deceit, even though they had not pled guilty to tax evasion, and thus the Kawashima's were subject to deportation



## Conclusion

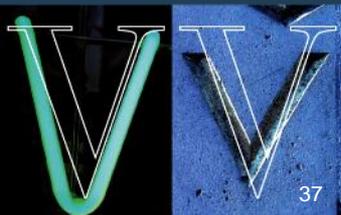
- FATCA imposes significant information gathering and record retention as well as compliance burdens on Taiwanese companies that receive US source FDAP income
- FFIs will have to make significant changes to their computer systems to comply with FATCA requirements
- Need to act now in order to be prepared to deal with 2013 payments and certifications to avoid FATCA withholding



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