Client Alert

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CURRENT ISSUES RELEVANT TO OUR CLIENTS JULY 20, 2011

FATCA Withholding Delayed (In Part)

The new 30 percent withholding on payments to non-US entities scheduled to start in 2013 has been delayed in regard to payments to foreign financial institutions (FFIs) until January 1, 2014. FFIs will be treated as participating FFIs (and not subject to the withholding) if they have registered as participating FFIs and entered into FFI agreements by June 30, 2013.

The withholding obligations of participating FFIs in regard to passthru payments will begin no earlier than January 1, 2015.

The effective date of the 30 percent withholding on payments to non-financial foreign entities (NFFEs) has not been delayed.

FFIs Can Sigh for Relief – For Now

Part of the HIRE Act passed early in 2010 introduced a new 30 percent withholding on payments to non-US entities. This is generally called FATCA withholding. FATCA withholding has two major parts: payments to FFIs and payments to NFFEs.

- Payments to FFIs will be subject to withholding unless the FFI enters into an agreement with the IRS to determine whether the entity has any direct or indirect US account holders. The agreement will also obligate FFIs to withhold on passthru payments made by the FFI.
- Payments to NFFEs will be subject to the new withholding unless the NFFE certifies that it has no direct or indirect US owners of more than 10 percent of the NFFE's equity (or provides information about those that it has).

Notice 2011-53 Extends Dates for FFIs

Notice 2011-53 (released July 14, 2011) delayed the times that withholding will apply in regard to payments to FFIs and in regard to passthru payments by FFIs in response to industry comments.

- The IRS will begin accepting applications for entering into participating FFI agreements January 1, 2013.
- The time by which a participating FFI agreement must be entered into (so that payments to the FFI are not subject to FATCA withholding) has been delayed until June 30, 2013.
- A participating FFI will be required to put in place account-opening procedures described in Notice 2010-60 (briefly discussed below) on or after the effective date of its FFI agreement. For pre-existing private banking accounts of individuals of $500,000 or more, within one year of the effective date of the participating FFI agreement, the relationship manager will need to identify those accounts for which the relationship manager has actual knowledge that the client is a US person and review paper and electronic files for other accounts to determine if the client has US citizenship or green card status, a US birthplace, a US residence, or correspondence address, standing instructions to transfer funds to a US account, an "in care of" address or "hold mail" address that is its sole address, or a power of attorney or signatory authority granted to a person with a US address. The FFI may also need to request further documentation to determine if the account is a US account. For private banking accounts of less than $500,000, a

participating FFI will be required to complete the private banking procedures by the later of December 31, 2014, or the date that is one year after the effective date of its FFI agreement. For all other pre-existing accounts, a participating FFI must complete its due diligence within two years of the effective date of its FFI agreement. If an account is identified as having US indicia, the FFI must request a Form W-9 (establishing US status) or Form W-8 and documentation establishing foreign status from the account holder. Similar procedures are required in respect of accounts held by entities except that, if the entity itself is not a US person, the FFI has the further question of whether there are any direct or indirect US owners of more than 10 percent of the NFFE's equity.

- Payments to FFIs that have not entered into a participating FFI agreement by June 30, 2013, will not be subject to FATCA withholding until January 1, 2014.
- FATCA withholding in regard to payments to FFIs in 2014 will only apply to interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income (collectively, FDAP), if such payment is from sources within the United States.
- FATCA withholding in regard to payments to FFIs of gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States is delayed until 2015.
- Participating FFIs will be obligated to withhold on US source FDAP payments made on or after January 1, 2014. Participating FFIs will not be required to withhold on passthru payments made before January 1, 2015.

New Accounts

As mentioned above, a participating FFI will be required to put in place account-opening procedures described in Notice 2010-60 on or after the effective date of its FFI agreement. In general, in regard to any account if the opening balance or average balance of the accounts of an individual account holder exceeds $50,000, the FFI must determine if the account holder has already been documented as a US person. From accounts that have not already been documented, the FFI must examine from individuals that are beneficial owners of new individual accounts documentary evidence establishing its status as US or non-US. For accounts that are not documented as US accounts, the FFI must also follow the same procedures as outlined above for pre-existing accounts described above. Similar procedures are required in respect of accounts opened by entities except that, if the entity itself is not a US person, the FFI has the further question of whether there are any direct or indirect US owners of more than 10 percent of the NFFE's equity.

NFFEs Still Facing 2013 Withholding

Notice 2010-60 does not address withholding on payments to NFFEs so (absent further IRS action) withholding on payments to NFFEs will start January 1, 2013.

- Prior to January 1, 2013, NFFEs receiving payments from the US should determine whether there are any direct or indirect US owners of more than 10 percent of the NFFE's equity.
- If there is any direct or indirect US owner of more than 10 percent of the NFFE's equity, the NFFE must obtain the US owner's name, address, and taxpayer identification number.
- In some jurisdictions, consent of the direct or indirect US owners must be obtained in order to provide the certification necessary to disclose the information.

Key Terms

FATCA

Foreign Account Tax Compliance Act, enacted as Sections 1471 through 1474 of the Code as part of the HIRE Act.

FFI

Foreign financial institution. A financial institution is any entity which (1) accepts deposits in the ordinary course of a banking or similar business, (2) as a substantial portion of its business, holds financial assets for the account of others, or (3) is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities. Thus, a financial institution would include a hedge fund, a private equity fund, or other collective investment vehicle, as well as a bank. An insurance company will not be a financial institution for these purposes if the insurance company only sells property or casualty insurance or reinsurance contracts.

HIRE Act

Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R.2847).

NFFE

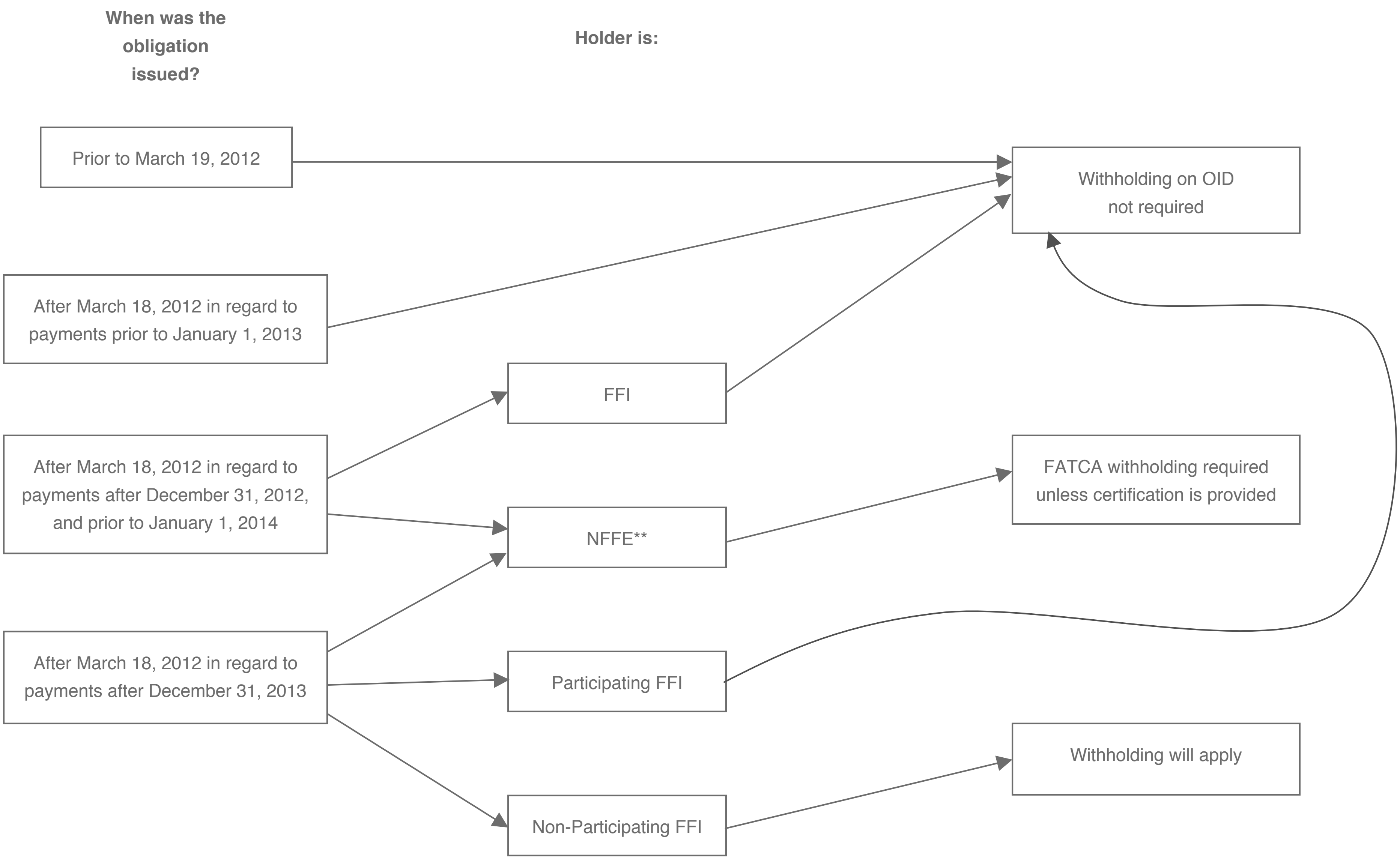
Non-financial foreign entity. A non-financial foreign entity is any non-US entity that is not a financial institution. Certain NFFEs are excluded from the withholding obligations. Excluded non-financial foreign entities include (a) any corporation the stock of which is regularly traded on an established securities market, (b) any corporation which is a member of the same expanded affiliated group as a corporation the stock of which is regularly traded on an established securities market, (c) any entity which is organized under the laws of a US territory and which is wholly owned by one or more bona fide residents (as defined in Sec. 937(a)) of such US territory, (d) any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing, (e) any international organization or any wholly owned agency or instrumentality thereof, (f) any foreign central bank of issue, and (g) any other class of persons identified by the Treasury for purposes of Sec. 1472(c).

Withholdable Payment

A withholdable payment under FATCA includes (1) any payment of interest (including original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income if such payment is from sources within the United States and (2) any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States. Income that is effectively connected with a US trade or business is excluded from the definition of withholdable payment.

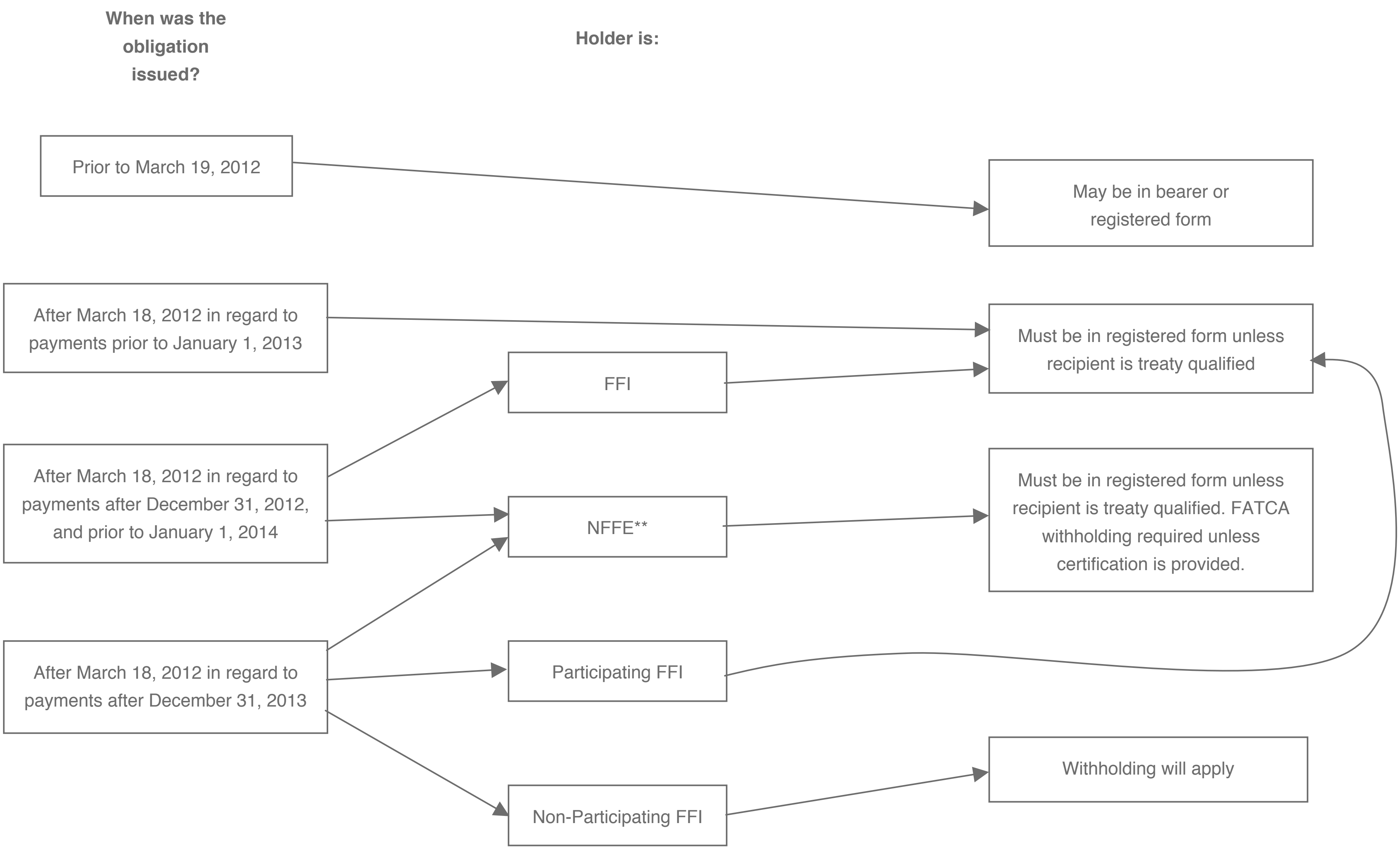
For more information please contact Melanie Gnazzo (415-541-9020) or Paul Carman (312-845-3443). To the extent that any part of this summary is interpreted as being tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

US Withholding on Interest for Terms of 183 Days or Less



*The denial of interest deductions may still apply even if the recipient is treaty qualified. Excise tax may apply unless in registered form or foreign targeted bearer form.
** Certain NFFEs are not subject to FATCA withholding. See discussion in main text.

US Withholding on Interest for Terms of >183 Days but not more than 1 year



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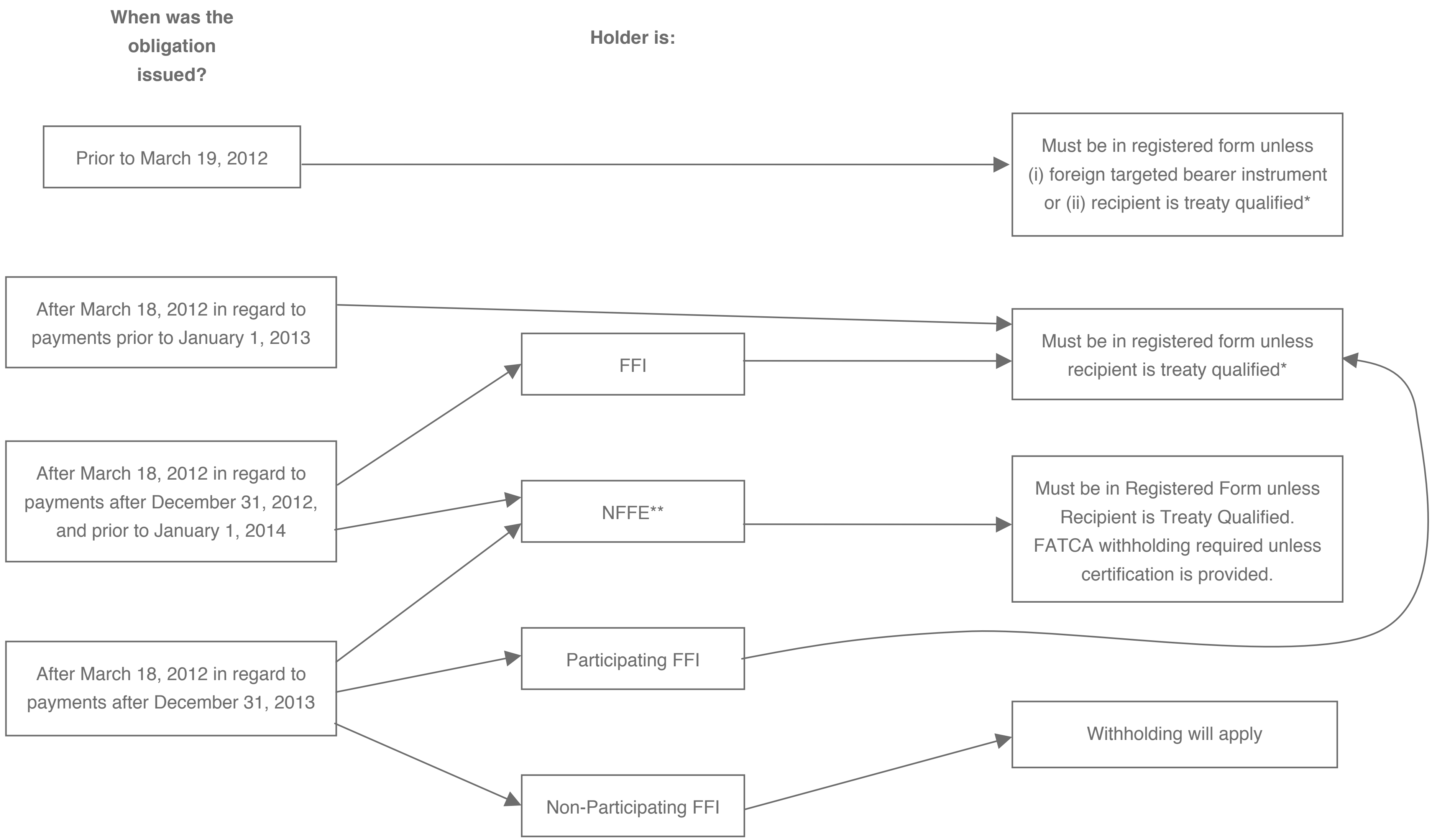
US Withholding on Interest for Terms of More Than One Year



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