

# YEAR-END REVIEW: F.A.T.C.A.

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## Tags

F.A.T.C.A.

Implementation of F.A.T.C.A., first enacted in 2010, took great strides in 2013.

On January 17, 2013, the I.R.S. issued the final F.A.T.C.A. regulations. In more than 500 pages, the I.R.S. laid out a roadmap for determining who is covered by F.A.T.C.A., who is exempt, and the burdens imposed on foreign financial institutions (“F.F.I.”s), other foreign investors, and U.S. withholding agents to comply with its rules.

On July 12, 2013, the I.R.S. released Notice 2013-43, which revised the timelines included in the final F.A.T.C.A. regulations for withholding agents and F.F.I.s to begin their due diligence, withholding, and information reporting requirements. Specifically, it delayed implementation of F.A.T.C.A. withholding on investment income (but not gross proceeds from sale) by six months so that withholding will first start on July 1, 2014. It also adopted a six-month extension for the F.A.T.C.A. registration portal (the “Portal”). Also deferred were rules applicable to grandfathered obligations, new account opening procedures, new qualified intermediaries (“Q.I.”s), withholding foreign partnerships (“W.P.”s), and withholding foreign trusts (“W.T.”s) agreements. Withholding on gross proceeds from sales of stocks and securities is still scheduled to come into effect on January 1, 2017.<sup>24</sup>

On August 19, 2013, the I.R.S. opened its long awaited electronic Portal, which serves as the primary way for F.F.I.s to interact with the I.R.S. An F.F.I. that registers on the Portal will, upon approval, receive a Global Intermediary Identification Number (“G.I.I.N.”), which will be used both for reporting purposes and to identify the F.F.I.’s status to withholding agents so as to eliminate potential imposition of withholding taxes under F.A.T.C.A. The first registration list will be posted June 2, 2014 and will be subsequently updated monthly thereafter. While the Portal has been open for several months, any F.F.I. that may have completed its registration in 2013 must go back into the system, as registration on the Portal will only be effective if finalized in 2014.<sup>25</sup>

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<sup>24</sup> Our client alert on this notice is available on our website at: [http://www.ruchelaw.com/pdfs/Client\\_Alert\\_FATCA\\_Revised\\_Timeline\\_2013-43.pdf](http://www.ruchelaw.com/pdfs/Client_Alert_FATCA_Revised_Timeline_2013-43.pdf).

<sup>25</sup> For more information, please see Philip Hirschfeld’s article “FATCA Update: Navigating the Electronic Registration Portal,” published in Bloomberg BNA and available on our website at: [http://www.ruchelaw.com/pdfs/FATCA%20Update\\_Navigating%20the%20Electronic%20Registration%20Portal.pdf](http://www.ruchelaw.com/pdfs/FATCA%20Update_Navigating%20the%20Electronic%20Registration%20Portal.pdf).

On September 30, 2013, Announcement 2013-41 was released, which provided technical corrections to certain portions of the final regulations. One major concern was an example in the final regulations, which suggested that all family owned trusts and other similar foreign entities could be classified as F.F.I.s subject to extensive F.A.T.C.A. burdens. This announcement assured that merely soliciting investment advice or receiving fees from those services, without something more, should not cause F.F.I. status in respect of F.A.T.C.A. under the investment entity prong of the test.<sup>26</sup>

On October 29, 2013, the I.R.S. issued Notice 2013-69, which provided for a Draft of the language required for an F.F.I. Agreement. F.F.I. Agreements will need to be provided by F.F.I.s in non-Inter-Governmental Agreement (“I.G.A.”) countries and countries that have direct reporting under Model 2. In addition, that notice provided two new categories of non-financial foreign entities (“N.F.F.E.”s), a direct reporting N.F.F.E. and a sponsored direct reporting N.F.F.E. Those entities will not be treated as passive N.F.F.E.s subject to withholding unless the N.F.F.E. either certifies it has no substantial U.S. owners or discloses its substantial U.S. owners. A direct reporting N.F.F.E. will have to register with the I.R.S. and report directly to the I.R.S. information on its substantial U.S. owners on Form 8966 (“F.A.T.C.A. Report”). A direct reporting N.F.F.E. could also be sponsored, in which case the I.R.S. will require the sponsoring entity to report on Form 8966 directly to the I.R.S. (on the sponsored direct reporting N.F.F.E.’s behalf) information about each sponsored direct reporting N.F.F.E.’s direct or indirect substantial U.S. owners.

In Rev. Proc. 2014-10, issued at the end of December, the I.R.S. issued the final F.F.I. Agreement. The final version incorporated certain corrections, better cross referencing for definitions and a two year transition rule that allows a Reporting Model 2 I.G.A. F.F.I. to use either the due diligence procedures in the F.F.I. Agreement or in the Model 2 I.G.A. The I.R.S. also confirmed that it will not issue signed copies of the F.F.I. Agreement, which will be deemed entered into once an F.F.I. registers on the Portal.

In 2012, only two countries signed Model 1 I.G.A.s: the U.K. on 9/12/2012 and Mexico on 11/19/2012. In 2013, this list expanded greatly: Ireland on 1/23/2013, Norway on 4/15/2013, Spain on 5/14/2013, Germany on 5/31/2013, France on 11/14/2013, Denmark on 11/19/2012, Costa Rica on 11/26/2013, the Cayman Islands on 11/29/2013, Guernsey on 12/13/2013, the Isle of Man on 12/13/2013, Jersey on 12/13/2013, Malta on 12/16/2013, and the Netherlands on 12/18/2013. On 2/14/2013 Switzerland signed onto a Model 2 I.G.A. and was subsequently followed by the signing of Model 2 I.G.A.s by Japan on 6/11/2013, Bermuda on 12/19/2013, and Mauritius on December 27, 2013. At the close of 2013, the I.G.A. list encompassed 19 different countries. In 2014 so far, an I.G.A. was signed by Italy on 1/10/2014, Hungary on 2/4/14, and Canada on 2/5/14, which brings the total number of signed I.G.A.s to 22.

U.S. withholding agents will not be able to eliminate withholding unless they obtain an updated Form W-8, corroborate that the supplied G.I.I.N. is correct on I.R.S.

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Our client alert on this notice is available on our website at:  
<http://www.ruchelaw.com/pdfs/To%20Clients%20and%20Friends%20-%20Technical%20Correction%20to%20Investment%20Advice%2010-8-13.pdf>.

*“For those hoping for another extension due to the government shutdown, new I.R.S. commissioner John Koskinen and other officials stated there will be no further delays.”*

webpage, and ensure inclusion on the I.R.S. F.F.I. list (registration will need to be finalized by April 25, 2014, to insure inclusion on the first I.R.S. F.F.I. list, to be published in June 2014). However, reporting F.F.I.s in a Model 1 I.G.A. country will receive an extra six-month extension.

U.S. withholding agents will need to file a newly revised Form 1042-S for 2014 to deal with F.A.T.C.A.; draft instructions for the 2014 form (but not the form itself) have been published on November 1, 2013. This will require the U.S. withholding agents to file electronically, report payments subject to chapter 3 and chapter 4 withholding, report any applicable exemption if there is no F.A.T.C.A. withholding and starting in 2017, put down the recipient’s foreign taxpayer identification number and/or date of birth. The 2014 Form 1042-S will need to be filed by March 15, 2015.

Two forms are replacing the existing Form W-8BEN: Form W-8 BEN-E for entities and W-8BEN for individuals. Either of these forms will need to be provided to the U.S. withholding agents to stop F.A.T.C.A. withholding. Additionally, if the foreign entity is an intermediary such as a Q.I., foreign partnership, foreign grantor trust, or foreign simple trust, then Form W-8IMY will need to be provided instead. Draft Forms W-8BEN, W-8BEN-E, W-8IMY, W-8EXP, and W-8ECI incorporating F.A.T.C.A. were published in 2013, but are not yet finalized.

For those hoping for another extension due to the government shutdown, new I.R.S. commissioner John Koskinen and other officials stated there will be no further delays. Thus, the July 1, 2014 start-date appears to be real. Accordingly, we expect 2014 to be a busy year for the I.R.S., financial institutions, and others in addressing F.A.T.C.A. compliance. For those procrastinating, either with respect to F.A.T.C.A. due diligence or those who have an undeclared financial account, time is running out.