

## F.A.T.C.A. 24/7

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### TREASURY ACCEPTS CANADIAN NARROWING OF INVESTMENT ENTITY DEFINITION

Canada's recently published guidance with respect to F.A.T.C.A. provides that only "listed financial institutions" should be considered investment entities subject to F.A.T.C.A. under the intergovernmental agreement ("I.G.A.") with Canada ("U.S.-Canada I.G.A."). The U.S. Treasury has accepted this position.

The U.S.-Canada I.G.A. provides that the definition of "investment entity" is to be interpreted in a manner consistent with the definition of "financial institution" in the recommendations of the Financial Action Task Force ("F.A.T.F."). The F.A.T.F. provides that any natural person or legal entity that conducts, as a business, one or more listed activities or operations for, or on behalf of, a customer, would be treated as a "financial institution." The F.A.T.F. also provides a list of designated nonfinancial businesses and professions, including certain trust and company service providers that are not otherwise financial institutions and act as trustees for trust entities. Canada's anti-money laundering rules interpret this standard to treat the unlisted financial institutions as designated nonfinancial businesses. The Canadian F.A.T.C.A. guidance treats only the expressly listed financial institutions as investment entities, and as mentioned above, the I.R.S. has approved this position.

The Treasury Office of International Tax Counsel explained earlier this month that this is one example of complexities raised by the multiple models of I.G.A.'s and multiple rules across jurisdictions that are not always consistent. The result is that most Canadian personal investment companies and trusts will not be considered F.F.I.'s, and thus, they will not be required to report U.S.-owned accounts to the I.R.S. and will not face a 30% withholding tax.

### I.R.S. WARNS FOREIGN BANKS: SCAM ARTISTS PHISHING FOR F.A.T.C.A.-RELATED ACCOUNT DATA

As if to add insult to injury, the I.R.S. is now cautioning foreign financial institutions against scam artists who are posing as I.R.S. agents and fraudulently seeking out account information from foreign institutions fulfilling their F.A.T.C.A. compliance requirements. These fraudulent solicitations are known as "phishing" scams, and

based on a news release from September 24<sup>th</sup>, the I.R.S. has affirmed reports of such scams from multiple countries and continents.

In light of current events, the I.R.S. stresses that F.A.T.C.A. requirements do not include providing specific information about accounts, or those who hold them, over the phone, by fax or by e-mail. Furthermore, the I.R.S. reminds institutions that it does not solicit F.A.T.C.A. registration passwords or similar confidential account access information. In the September 24<sup>th</sup> news release, I.R.S. Commissioner John Koskinen warns that “people should always be cautious before sending sensitive information to anyone.”

Foreign financial institutions or their representatives that suspect they are the subject of a “phishing” scam should report the matter to the Treasury Inspector General for Tax Administration (“T.I.G.T.A.”) at 800-366-4484 or through the T.I.G.T.A.’s [secure website](#). Any suspicious emails that contain attachments or links in the message should not be opened, and the emails should be forwarded to [phishing@irs.gov](mailto:phishing@irs.gov).

Just as a matter of note, persons outside the U.S. are now regularly subject to phishing scams regarding bank accounts in the U.S. through bogus W-8BEN requests. As I.R.S. information reporting obligations grow, so do the opportunities for hackers and thieves.

## E.U. EXPECTED TO APPROVE F.A.T.C.A.-INSPIRED LEGISLATION

The European Union is expected to take its next major step in combating tax evasion when E.U. finance ministers vote this month on a F.A.T.C.A.-inspired law that would require automatic exchange of data relating to dividends, capital gains, and other income generated from assets held in a financial account.

The E.U.’s administrative cooperation legislation was approved several years ago and is due to take effect as of January 1, 2015. According to the administrative cooperation legislation, E.U. member states will be required to exchange data on nonresident E.U. citizens concerning employment, directors’ fees, life insurance products, pensions, and ownership and income from immovable property.

The E.U. now moves towards expanding the administrative cooperation legislation to include F.A.T.C.A.-inspired exchange of information. This expansion will also incorporate the Organization for Economic Cooperation and Development’s Common Reporting Standard adopted in July 2014.

## SUBSTITUTIONS FOR FORM W-8

On September 25, 2014, the I.R.S. updated its list of F.A.T.C.A. F.A.Q.’s to explain the “similar agreed form” which can be used instead of the self-certification made on Form W-8 (Certificate of Foreign Status), as provided in Annex I of both the Model 1 and Model 2 I.G.A.’s. In addition, the I.R.S. also clarified when a non-reporting financial institution in a Model 1 I.G.A. jurisdiction is treated as a certified deemed-compliant F.F.I. and isn’t required to register.

*“F.A.T.C.A. requirements do not include providing specific information about accounts, or those who hold them, over the phone, by fax or by e-mail.”*

## Similar Agreed Form

Under “General Compliance,” the I.R.S. added a new F.A.Q. 8 to address what would be considered a “similar agreed form.” The I.R.S. said that a similar agreed form could include, for example, a substitute Form W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, or W-8IMY if its content is substantially similar to I.R.S.’s official Form W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, or W-8IMY, and the partner jurisdiction doesn’t decline such treatment. A substitute Form W-8 is generally valid only if it contains the same penalties of perjury statement and certifications as the official forms and the required signature. The substitute form does not have to include all of the Chapter 4 statuses provided on the Form W-8, as long as it includes any Chapter 4 status for which withholding may apply, e.g., the categories for a nonparticipating F.F.I. or passive N.F.F.E. The substitute form may be incorporated into other business forms customarily used, such as account signature cards, if the required certifications are clearly set out. However, filers cannot use a substitute form that requires the payee to agree to provisions unrelated to the required certifications or to imply that a person may be subject to 30% withholding or backup withholding, unless that person agrees to provisions on the substitute form that are unrelated to the required certifications.

Lastly, filers could develop and use a substitute form that is in a foreign language, if an English translation of the form is made available to the I.R.S. upon request.

## Registration for Certified Deemed-Compliant F.F.I.’s

Under the “I.G.A. Registration” F.A.Q.’s, the I.R.S. added a new F.A.Q. 7. It addresses registration requirements for a Model 1 I.G.A. entity that relies upon the definition of a non-reporting F.F.I. under the applicable I.G.A. to determine that it qualifies as a certified deemed-compliant F.F.I. or an exempt beneficial owner.

The I.R.S. said that a Model 1 I.G.A. non-reporting F.F.I. would nevertheless have to register on the F.A.T.C.A. registration website if:

- The F.F.I. is subject to a registration requirement under its qualified intermediary (“Q.I.”) agreement or its withholding foreign partnership (“W.P.”) or withholding foreign trust (“W.T.”) agreement;
- The F.F.I. will act as a sponsoring entity (*i.e.*, an entity that agrees to perform the due diligence, withholding, and reporting obligations of one or more sponsored entities);
- The F.F.I. will act as a Lead F.I. for one or more related entities (a Lead F.I. is a designated participating F.F.I. in an expanded affiliated group that initiates the F.A.T.C.A. registration process for other members of the group and is generally authorized to carry out most aspects of its members’ F.A.T.C.A. registrations);
- The F.F.I. is explicitly required to register under the applicable I.G.A.; or
- The F.F.I. has a financial account on which it will report to the Model 1 jurisdiction under the requirements of the applicable I.G.A.

*“A substitute Form W-8 is generally valid only if it contains the same penalties of perjury statement and certifications as the official forms and the required signature.”*

## I.R.S. ANTICIPATES JANUARY 2015 LAUNCH OF DATA EXCHANGE SYSTEM

The International Data Exchange Services (“I.D.E.S.”) is a system that will allow the I.R.S. to exchange taxpayer information with other tax authorities under F.A.T.C.A. It is a key part of implementing I.G.A.’s, and is set to go live on January 12, 2015. On September 17, 2014, the I.R.S. updated the F.A.Q.’s dealing with the technical aspects of the services.

The I.R.S. said it is planning to publish an overview on data transmission to the I.D.E.S. “as soon as possible” and that the system is designed to be “always on” and available to receive the files.

The updated F.A.Q.’s also addressed the International Compliance Management Model (“I.C.M.M.”) system. The I.C.M.M. will allow the I.R.S. to receive, process, store, and manage F.A.T.C.A.-related data it collects from various sources to support needed compliance activities. The I.C.M.M. will allow the I.R.S. to request information on recalcitrant accounts on an “ad-hoc” basis as Host Country Tax Administrations receive the data from F.F.I.’s.

## SINGAPORE RELEASES PROPOSED REGULATIONS TO IMPLEMENT F.A.T.C.A.

Singapore's authorities have released proposed regulations and draft guidance to help financial institutions in Singapore comply with F.A.T.C.A. Singapore agreed on a Model 1 I.G.A. with the U.S. in May 2014, and the two parties are expected to sign the agreement before the end of the year. The full text of the agreement will be released after it is signed.

The draft<sup>81</sup> sets out the due diligence and reporting obligations of Singapore-based financial institutions in relation to the I.G.A. Combined with the supporting *e-Tax Guide*,<sup>82</sup> which provides further explanation of those obligations, the documents include the following information:

- Financial institutions that are obligated to submit information under F.A.T.C.A. and those that are exempt;
- Account holders and financial accounts that are subject to reporting requirements and those that are exempt;
- Due diligence procedures required to identify the reportable accounts;

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<sup>81</sup> The draft legislation can be reviewed here: [http://app.mof.gov.sg/data/cmsresource/public%20consultation/2014/2014\\_FA\\_TCA/ITEM%20A\\_FATCA%20Reg\\_19%20September%202014\\_For%20PC.pdf](http://app.mof.gov.sg/data/cmsresource/public%20consultation/2014/2014_FA_TCA/ITEM%20A_FATCA%20Reg_19%20September%202014_For%20PC.pdf)

<sup>82</sup> The e-Tax Guide can be reviewed here: [http://app.mof.gov.sg/data/cmsresource/public%20consultation/2014/2014\\_FA\\_TCA/e-Tax%20Guide\\_SG%20US%20FATCA.pdf](http://app.mof.gov.sg/data/cmsresource/public%20consultation/2014/2014_FA_TCA/e-Tax%20Guide_SG%20US%20FATCA.pdf)

- Information to be reported; and
- Timelines for reporting the necessary information to the I.R.S.

Singapore's finance ministry has stressed that the guidance does not provide an exhaustive list of the topics covered but instead seeks to convey broad principles, which can be applied to different circumstances.

Interested parties can comment on the proposed regulations and guidance until October 17, 2014. The ministry will then release a summary of the comments received and its accompanying responses by December 2014. The finance ministry has said that where the draft regulations and guidance refer to persons, products, and accounts that are not found in the Model I.G.A., respondents should provide comments based on their F.A.T.C.A. status and treatment as set out in the documents.

## SWITZERLAND NEGOTIATES TRANSITION TO MODEL 1 I.G.A.

On October 8<sup>th</sup>, Switzerland announced that it has adopted negotiation mandates to begin talks regarding a Model 1 I.G.A. It would replace the current Model 2 I.G.A., signed in 2013, which requires Swiss F.F.I.'s to report U.S. account information directly to the I.R.S.

This announcement is a milestone in global transparency efforts. Historically, Switzerland was known for its secrecy and would exchange financial information upon specific request and only in limited circumstances. But now, Switzerland is proposing to exchange significant financial information automatically. It seems that this move towards transparency is a result of the worldwide focus on ending tax evasion and strengthening global financial scrutiny.

## BRAZIL SIGNS RECIPROCAL MODEL 1 I.G.A.

Even though Brazil and the U.S. did not sign an I.G.A. until September 23, 2014, a Model 1 I.G.A. between Brazil and the U.S. is treated as "in effect" by the U.S. Treasury as of April 2, 2014. The Brazilian government announced it has signed an I.G.A. with the U.S. as part of Brazil's adoption of F.A.T.C.A. According to a government announcement, the agreement was signed September 23<sup>rd</sup> in Brasilia by Finance Minister Guido Mantega and U.S. Ambassador Liliana Ayalde, and expands on the U.S.-Brazil tax information exchange agreement that took effect in May 2013.

The Brazilian government said that the I.G.A. signed provides that information on U.S. taxpayers residing in Brazil will be sent by Brazilian financial institutions to Brazil's federal tax department, which will then pass on the information to the I.R.S. Reciprocally, the I.G.A. also calls for the I.R.S. to provide Brazilian tax authorities with financial information on Brazilian taxpayers living in the U.S.



## POLAND SIGNS RECIPROCAL MODEL 1 I.G.A

Even though Poland and the U.S. did not sign an I.G.A. until October 7, 2014, a Model 1 I.G.A. between Poland and the U.S. is treated as “in effect” by the U.S. Treasury as of April 2, 2014. The U.S. Treasury published the text of the I.G.A. between Poland and the U.S. earlier this month and according to the I.R.S.’s website, the I.G.A. signed follows the Model 1 I.G.A.

## CURRENT I.G.A. PARTNER COUNTRIES

At this time, the countries that are Model I partners by execution of an agreement or concluding an agreement in principle are:

Algeria	Denmark	Jersey	Portugal
Anguilla	Dominica	Kosovo	Qatar
Antigua & Barbuda	Dominican Republic	Kuwait	Slovenia
Australia	Estonia	Latvia	South Africa
Azerbaijan	Finland	Liechtenstein	South Korea
Bahamas	France	Lithuania	Spain
Barbados	Greenland	Luxembourg	St. Kitts & Nevis
Bahrain	Grenada	Malaysia	St. Lucia
Belarus	Georgia	Malta	St. Vincent & the Grenadines
Belgium	Germany	Mauritius	Grenadines
Brazil	Gibraltar	Mexico	Sweden
British Virgin Is.	Guernsey	Montenegro	Romania and Thailand
Bulgaria	Guyana	The Netherlands	Thailand
Cabo Verde	Haiti	New Zealand	The U.K.
Canada	Hungary	Norway	Turkey
Cayman Islands	Honduras	Panama	Turkmenistan
China	India	Peru	Turks & Caicos
Colombia	Indonesia	Poland	United Arab Emirates
Costa Rica	Ireland	Saudi Arabia	Ukraine
Croatia	Isle of Man	Serbia	Uzbekistan
Curacao	Israel	Seychelles	
Czech Republic	Italy	Singapore	
Cyprus	Jamaica	Slovak Republic	

The countries that are Model II partners are: Armenia, Austria, Bermuda, Chile, Hong Kong, Iraq, Japan, Moldova, Nicaragua, Paraguay, San Marino, Switzerland, and Taiwan.

This list is expected to continue to grow.