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

Authors
Philip R. Hirschfeld
Galia Antebi

Tags
F.A.T.C.A.

GLOBAL TAX TRANSPARENCY IS RISING

The Foreign Account Tax Compliance Act ("F.A.T.C.A.") enacted in 2010 has been the driving force and the primary impetus for global tax transparency across borders. It has led to a ginormous administrative challenge for banks and other financial institutions as well as withholding agents in 2015. The O.E.C.D.'s recent release of the common reporting standard has led Treasury Department officials to view it as "the multilateralization of F.A.T.C.A."

The U.S. has negotiated more than 100 Intergovernmental Agreements ("I.G.A.'s") with nations across the globe to implement F.A.T.C.A and allow tax information to be shared between governments, which has set the stage for discussion for the onset of global exchange of tax information. More than 50 I.G.A.'s had already been signed and the remainder are treated as in effect and should be signed soon.

I.G.A. Challenge

The I.G.A.'s represent a growing trend in global tax transparency, though implementation has posed a challenge to some nations. Implementing an I.G.A. may require changes to local legislation, such as approving actions that are required to be taken under the I.G.A. and thus essentially making F.A.T.C.A. a part of the law of that country. The Internal Revenue service ("I.R.S.") said in December 2014 that jurisdictions with I.G.A.'s treated as agreed-in-substance will have more time to get the pacts signed if they can demonstrate "firm resolve" to finalize them, which is subject to a monthly review. Given the uncertainty of whether all agreed-in-substance I.G.A.'s will eventually be signed, and what the language of the signed I.G.A. will provide, 2015 will pose a growing concern for foreign financial institutions ("F.F.I.'s"), who are required to navigate multinational F.A.T.C.A. compliance, and for banks, who must put new procedures in place.

Common Reporting Standard

On January 12, the I.R.S. has launched the system that foreign banks and tax authorities will use to send U.S. account information to the U.S. under F.A.T.C.A., known as the International Data Exchange Service. Additionally, the U.S. can use its double-encryption mechanism to send data to other countries in cases involving reciprocal I.G.A.'s.

The global movement toward a common reporting standard ("C.R.S.") continues to gather steam internationally, though implementation may still prove difficult. Fifty countries have agreed to be early adopters of C.R.S., but the U.S. isn't among them. Treasury officials have said that while the U.S. strongly supports C.R.S., putting the regime in place in the U.S. could take several years due to the legislative

fixes necessary. Given the U.S.'s lack of involvement in the C.R.S., it is possible U.S. investment funds will get negative treatment outside the U.S., such as F.F.I.'s becoming reluctant to deal with U.S. funds.

B.E.P.S.

The existence of different tax regimes across the globe has led to many opportunities when trying to find the best place to do business or own intellectual property that can be licensed to affiliates. However, this jurisdiction shopping has fostered extreme complexity, revenue loss for many nations (including the U.S.), and additional compliance and audit activities, burdening companies and local tax authorities. The O.E.C.D.'s base erosion and profit shifting ("B.E.P.S.") project started several years ago to address this situation and create a more uniform global tax environment to address the situation where companies might face multiple levels of tax on the same income. Among other things, B.E.P.S. addresses transfer pricing and the use of hybrid entities and other special purpose entities. The B.E.P.S. initiative is also trying to create uniformity as certain countries implement local B.E.P.S.-inspired legislation or regulations. Detailed B.E.P.S. guidance is expected later this year.

O.V.D.P. to Remain Open

In a January 28 news release, the I.R.S. announced that its Offshore Voluntary Disclosure Program ("O.V.D.P."), which allows U.S. citizens and taxpayers to disclose to the U.S. government their overseas assets in exchange for a set penalty and protection from criminal prosecution, will remain open until otherwise specified.

Taxpayers and practitioners have indicated a strong interest in the O.V.D.P. I.R.S. Commissioner John Koskinen stressed that with his agency's string of successful enforcement actions, "It's a bad bet to hide money and income offshore."

Despite several years of budget cuts, "the I.R.S. continues to pursue cases in all parts of the world, regardless of whether the person hiding money overseas chooses a bank with no offices on U.S. soil," the I.R.S. cautioned.[1]

Conclusion

Given the increased flow of cross-border information brought on by globalization in the digital age and the increased information reporting achieved by treaties and agreements, there will be an ever increasing focus on international tax audits. The borders between more jurisdictions are increasing their transparency and in some cases account information can even be spontaneously sent to the U.S. Thus, taxpayers can no longer focus only on their U.S. exposure, but rather must look to global compliance.

F.A.T.C.A. DUE DILIGENCE REQUIREMENT UPDATE – ACTION NEEDED

Once an entity has determined that it is a Foreign Financial Institution ("F.F.I.") and registered on the I.R.S. F.A.T.C.A. webpage to get a G.I.I.N., then the F.F.I. has

[1] IR-2015-09, "Hiding Money or Income Offshore Among the 'Dirty Dozen' List of Tax Scams for the 2015 Filing Season."

to start the due diligence process to determine if it has any U.S. account holders. For those F.F.I.'s based in I.G.A. countries, Annex I provides the procedures for conducting that due diligence. Local guidance will also govern that process, provided that such guidance does not frustrate the purpose of the I.G.A.

The I.R.S. issues general guidance on the due diligence process and constantly updates their website with relevant Questions and Answers ("Q&A's") which provide further guidance and clarifications. Such guidance may also apply to I.G.A. F.F.I.'s, and while it would not govern the actual I.G.A., it may govern local guidance which deviates from the I.G.A.

This was demonstrated in the I.R.S.'s recent update to the F.A.T.C.A. Q&A. The I.R.S. recently added a new Question 10 to its list of questions relating to General Compliance. The question asked whether a Reporting Model 1 F.F.I. or a Reporting Model 2 F.F.I. can open an individual account if it does not have a Form W-8BEN or acceptable self certification form from the individual. The I.R.S.'s answer was no; a Reporting Model 1 or 2 F.F.I. cannot open an *individual* account unless it has a Form W-8BEN, a substitute Form W-8BEN, or a self-certification from the individual account owner. While this is consistent with the language of Annex I in Model 1 I.G.A.'s, this addition clarifies that no change to such directive may be made in local guidance.

"A substitute Form W-8 can be in a foreign language, provided that an English translation of the form and its contents is made available to the I.R.S. upon request."

While the furnishing of a Form W-8 is the best procedure to use to determine the F.A.T.C.A. status of an account owner, self-certification may be an acceptable alternative. Based on Question 9 in the General Compliance section of the I.R.S.'s F.A.T.C.A. Q&A, to be acceptable, a self-certification must be signed, dated, and contain the following items:

1. Name of account owner;
2. Residence address of the account owner for tax purposes;
3. Jurisdiction of residence for tax purposes—a U.S. citizen living abroad is still a U.S. tax resident;
4. Taxpayer identification number—a U.S. Person must give their U.S. taxpayer identification number while a non-U.S. person must give the taxpayer identification number they use for their tax residence country;
5. In the case of an entity, the entity's F.A.T.C.A. status (*e.g.*, Reporting Model 1 F.F.I., Passive N.F.F.E., etc.); and
6. In the case of an account owner that is a Passive N.F.F.E., the name, residence address for tax purposes, and taxpayer identification number of any Controlling Person who is a Specified U.S. person (*e.g.*, a U.S. citizen who owns the company).

The answer to Question 8 in the General Compliance section also notes that a substitute Form W-8 can be used. The answer says a substitute Form W-8 can be in a foreign language, provided that an English translation of the form and its contents is made available to the I.R.S. upon request.

More guidance is given in these Questions and Answers. While this source of information is helpful, it does complicate F.A.T.C.A. compliance since it means there is an additional place that must be checked before certainty on a F.A.T.C.A. issue can be obtained.

F.A.T.C.A. INELIGIBLE FOR I.R.S. RULINGS

In Revenue Procedure 2015-7, 2015-1 IRB 231, effective January 2, the I.R.S. has released an updated list of international tax matters for which they will not issue rulings or determination letters. F.A.T.C.A. is on the list of areas where the I.R.S. will not rule.

Item 27 on the list of the areas in which rulings or determination letters will ordinarily not be issued states:

> (27) Sections 1471, 1472, 1473, and 1474 - Taxes to Enforce Reporting on Certain Foreign Accounts. - Whether a taxpayer, withholding agent, or intermediary has properly applied the requirements of chapter 4 of the Internal Revenue Code (sections 1471 through 1474, also known as "FATCA") or of an applicable intergovernmental agreement to implement FATCA.

The I.R.S. has made this determination based upon the issue in question being either inherently factual or for other reasons, such as F.A.T.C.A.'s complexity.

THE DUTCH F.A.T.C.A. GUIDANCE NOTES

On January 22, the Dutch Ministry of Finance published the Dutch guidance notes in relation to the I.G.A. concluded between the Netherlands and the United States with respect to the intergovernmental implementation of F.A.T.C.A. The guidance notes contain a clarification of certain definitions and procedures to be followed by companies that are considered Dutch financial institutions for F.A.T.C.A. purposes. The publication of the Dutch guidance notes follows the approval of the I.G.A. by the Dutch House of Representatives. The I.G.A. is still subject to the approval of the Dutch Senate (voting is planned to take place in the first quarter of 2015).

CURRENT I.G.A. PARTNER COUNTRIES

To date, the U.S. has signed or reached an agreement to sign more than 100 Model 1 I.G.A.'s. An I.G.A has become a global standard in government efforts to curb tax evasion and avoidance on offshore activities and encourage transparency.

At this time, the countries that are Model 1 partners by execution of an agreement or concluding an agreement in principle are:

"To date, the U.S. has signed or reached an agreement to sign more than 100 Model 1 I.G.A.'s."

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

The countries that are Model 2 partners by execution of an agreement or concluding an agreement in principle are: Armenia, Austria, Bermuda, Chile, Hong Kong, Iraq, Japan, Macao, Moldova, Nicaragua, Paraguay, San Marino, Switzerland, and Taiwan.

This list is expected to continue to grow.