

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

Authors

Philip R. Hirschfeld
Galia Antebi

Tags

Common Reporting Standard
F.A.T.C.A.
Form 8938
I.G.A.
Netherlands
U.K.

FOREIGN ACCOUNTS – UPDATE TO 2014 INSTRUCTIONS TO FORM 8938

Form 8938, *Statement of Specified Foreign Financial Assets*, requires the disclosure of certain foreign financial assets owned by U.S. citizens, resident alien individuals, and nonresidents who elect to be treated as resident alien individuals for U.S. tax purposes. (E.g., a nonresident alien having a U.S. citizen spouse may elect to be treated as a U.S. resident for purpose of filing a joint income tax return.) Form 8938 is attached to the individual's income tax return for the applicable year (starting with tax year 2011) and must be filed by the due date for said return, including extensions.

Updates to the 2014 instructions for the Form 8938 reporting requirements were announced on March 10, 2015 and incorporate final Treasury Regulations under Internal Revenue Code (the "Code") §6038D, adopted in December 2014. The final regulations are effective for taxable years beginning after December 19, 2011. The update contains additional information not included in the updated instructions for Form 8938. Taxpayers and their tax return preparers must review these recent changes to the form's instructions to make sure it does not affect their filing obligations.

Dual Resident Taxpayers

A dual resident taxpayer, within the meaning of these regulations, is an individual who is considered a resident of the U.S. under the Code and applicable regulations because he or she meets the "Green Card Test" or the "Substantial Presence Test" and is also a resident of a treaty country (pursuant to the internal tax laws of that country). The updated instructions apply to dual resident taxpayers who determine their income tax liability for all or a portion of the taxable year as if they were nonresident aliens (pursuant to a provision of an income tax treaty that provides for resolution of conflicting claims of residence by the U.S. and its treaty partner).

- A dual resident alien filing as a nonresident alien at the end of his or her taxable year is not required to report specified foreign financial assets on Form 8938 for the portion of the individual's taxable year covered by the applicable Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, if the individual complies with the filing requirements, i.e., generally, timely filing the applicable Form 1040NR and attaching Form 8833, *Treaty-Based Return Position Disclosure Under §6114 or 7701(b)*.

- A dual resident alien filing as a resident alien at the end of his or her taxable year is also not required to report specified foreign financial assets on Form 8938 for the portion of the individual's taxable year reflected on the schedule to the applicable Form 1040, *U.S. Individual Income Tax Return*, if the individual complies with all of the filing requirements, *i.e.*, generally, timely filing the applicable Form 1040 and attaching a properly completed Form 8833.

Exclusions from the Definition of “Financial Account” Under a Model 1 or Model 2 Inter-Governmental Agreement (“I.G.A.”)

For taxable years beginning on or before December 12, 2014, if the jurisdiction in which a financial account is maintained has a F.A.T.C.A. I.G.A. in effect, or is treated as having a Model 1 or Model 2 I.G.A. in effect, on or before the last day of the taxpayer's taxable year, certain financial accounts will be excluded from reporting on Form 8938. Exclusions include retirement and pension accounts, and non-retirement savings accounts, as well as accounts satisfying conditions similar to those described in the F.A.T.C.A. regulations as excluded from the definition of a financial account under Code §1.1471-5(b)(2)(i), or by virtue of the definition of a financial account pursuant to the applicable I.G.A.

Note that the above rule does not apply for taxable years beginning after December 12, 2014. With respect to such taxable years the final Code §6038D regulations provide that the above-mentioned accounts that are excluded from the definition of a financial account under the F.A.T.C.A regulations or an I.G.A. must nevertheless be reported by the taxpayer on Form 8938. Such accounts are, therefore, subject to uniform reporting rules and must be reported without regard to whether the account is maintained in a jurisdiction with an I.G.A.

Joint Form 5471 or Form 8865 Filing

Form 5471 is an information return filed by certain U.S. persons with respect to an interest in a foreign corporation. Form 8865 is an information return filed by certain persons with respect to a foreign partnership. The two forms and the applicable schedules may be filed by one person for other persons who have the same filing requirements.

A U.S. person who is required to file Form 5471 or Form 8865 but is instead included as part of a joint filing must attach a statement to his or her income tax return to notify the I.R.S. that the filing requirement was, or will be, satisfied and provide the I.R.S. with identifying information for the person and return that will satisfy the filing requirements, including the I.R.S. service center with which such return was, or will be, filed. The I.R.S.'s March 10 publication clarifies that with respect to Form 8938, such a taxpayer does not have to report any asset that is reported (or deemed reported due to joint filing) on a timely filed Form 5471 or Form 8865 for the same tax year, provided that the taxpayer's Form 8938 reports the filing of the applicable form on which the asset is reported.



F.A.T.C.A. IN TANDEM WITH O.E.C.D. INFORMATION EXCHANGE EFFORTS

The common reporting standard (“C.R.S.”) proposed by the O.E.C.D. is moving toward its first stage of implementation in 2016, and there is mounting pressure for the United States to join the global effort.

The O.E.C.D. is paralleling the Foreign Account Tax Compliance Act (“F.A.T.C.A.”) in its growth toward automatic information exchange. The C.R.S. is an indication that the rest of the world has accepted F.A.T.C.A. and is ready to embrace its benefits and burdens. In a view to maximize efficiency, the O.E.C.D. borrows heavily from the intergovernmental approach to implementing F.A.T.C.A. The model I.G.A.’s contain language indicating intent to work together toward achieving common reporting and due diligence standards for financial institutions. The C.R.S. will result in more pressure on the United States to expand its information collection regarding financial accounts held by non-U.S. persons.

The C.R.S. is aimed at preventing the spread of different reporting standards, which would increase costs for both governments and financial institutions. In a similar fashion to I.G.A.’s, the C.R.S. generally requires that jurisdictions enact domestic implementing legislation.

The C.R.S. requires reporting on investment income, account balance and sales proceeds from financial assets, whether held by individuals or entities. Reporting financial institutions include banks, custodians, brokers, and some collective investment vehicles and insurance companies. The C.R.S. includes a look-through provision for passive entities to ensure that the individuals who control the entities are disclosed.

Enforcement

While F.A.T.C.A. incorporates a 30% withholding tax to insure compliance with U.S. law, the C.R.S. lacks such an enforcement mechanism for compliance. Therefore, the chief enforcement mechanism is an honor system, which can become problematic. Local jurisdictions will likely setup their own enforcement mechanisms, such as a withholding tax or monetary penalties that can work in tandem with C.R.S. Given the possible country-by-country discretion with regard to compliance and enforcement, a multinational body may be required to oversee and monitor each country.

INTERNATIONAL DATA EXCHANGE SERVICES – GETTING F.A.T.C.A. ACCOUNT INFORMATION TO THE I.R.S.

International Data Exchange Services (“I.D.E.S.”), recently created by the Internal Revenue Service (“I.R.S.”), is a secure, managed file transfer service that is available to financial institutions (“F.I.’s”) and host country tax authorities (“H.C.T.A.’s”) to facilitate F.A.T.C.A. reporting. This reporting is provided for under the U.S. Treasury Regulations, the F.F.I. agreements, Tax Information Exchange Agreements (“T.I.E.A.’s”), and I.G.A.’s, as well as other guidance issued by the Treasury Department and the I.R.S. The data collected through I.D.E.S. will be incorporated into I.R.S. compliance operations.

I.D.E.S. is accessible to enrolled users over the Internet via Hypertext Transfer Protocol Secure (“H.T.T.P.S.”) or Secure File Transfer Protocol (“S.F.T.P.”). I.D.E.S. provides for an end-to-end controlled file transfer with enhanced monitoring and security features. The system only accepts encrypted electronic submissions and will allow for the transmission of F.A.T.C.A. reporting in the approved F.A.T.C.A. XML Schema v1.1 (“F.A.T.C.A. X.M.L.”).

I.R.S. Releases Revised Publication on F.A.T.C.A. Data Exchange Service

The I.R.S. has released Publication 5190 (03-2015), *Draft Foreign Account Tax Compliance Act F.A.T.C.A. I.D.E.S. User Guide*, providing guidance for F.I.’s and H.C.T.A.’s that enroll in the I.D.E.S. to transmit F.A.T.C.A. data.

Authorized I.D.E.S. Users

Authorized I.D.E.S. users include F.I.’s, direct reporting N.F.F.E.’s, and H.C.T.A.’s. Each authorized user has limited access to the system based on the data flow model described in their applicable agreement with the United States (e.g., an I.G.A.) or in the Treasury regulations.

I.R.S. Revises F.A.Q. on Systems Used for F.A.T.C.A. Data

The I.R.S. has released a revised list of frequently asked questions (“F.A.Q.”) on I.D.E.S. and the international compliance management model system, which are used for F.A.T.C.A. data, adding and updating several questions. Issues covered by the revised F.A.Q. include enrolling in test windows, verification of test data by authorized users prior to launching of the system, and more.

DUTCH GUIDANCE ISSUED UNDER NETHERLANDS I.G.A.

On January 22, 2015, the Dutch Ministry of Finance published the Dutch Guidance Notes for the I.G.A. between the Netherlands and the U.S. The Guidance Notes contain clarification of certain definitions and procedures to be followed by companies that are considered Dutch F.I.’s 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.

U.K. ISSUES F.A.T.C.A. ONLINE REGISTRATION GUIDANCE

HM Revenue & Customs (“H.M.R.C.”) has issued guidance that provides details on how to use H.M.R.C. online services to register for U.S. F.A.T.C.A. purposes. While a reporting U.K. F.I. has to register with the I.R.S. to receive a F.A.T.C.A. identification number, the Global Intermediary Identification Number (“G.I.I.N.”), it also has to register with H.M.R.C. to receive a U.K.-assigned F.A.T.C.A. I.D. for itself and an H.M.R.C. registration I.D. for any other F.I. it may be registering as its sponsor.

U.S. WITHHOLDING AGENTS RESPONSIBLE TO CHECK G.I.I.N.'S

Many U.S. withholding agents have faced the burden of receiving incomplete Form W-8's due to the complexity of the Form W-8BEN-E (completed by entities that are the beneficial owners of a payment) and Form W-8IMY (completed by entities that serve as an intermediary to the beneficial owner). This situation has led some withholding agents to assist in the completion of the forms.

“Withholding agents are advised to establish written internal procedures requiring G.I.I.N. verification and to clarify who is responsible for fulfilling this obligation.”

While delivery of a fully completed Form W-8, containing a G.I.I.N., is often perceived as the last step in avoiding F.A.T.C.A. withholding, withholding agents are in fact required to take one more step. To ensure that no F.A.T.C.A. withholding will apply, withholding agents must check the G.I.I.N. provided against the list of registered F.F.I.'s, which appears on the I.R.S. F.A.T.C.A. webpage. Unless a U.S. withholding agent confirms that the G.I.I.N. they received is on the I.R.S. list and matches up with the G.I.I.N. provided on the Form W-8 received, F.A.T.C.A. withholding is still required. This obligation is aided by the F.F.I. List Search and Download Tool, which is prominently displayed on the F.A.T.C.A. webpage and is updated on a monthly basis.¹

This list search is a list of F.I.'s registered, accepted, and assigned a G.I.I.N. in accordance with the F.A.T.C.A. regulations. A withholding agent can download the entire list of F.I.'s or search for a particular F.F.I. by its (1) legal name, (2) G.I.I.N., or (3) country.

Entry into this list reveals the massive number of G.I.I.N.'s that have already been issued. For the U.K., there are more than 22,000 G.I.I.N.'s. For the Cayman Islands, a popular locale for forming investment funds, over 28,000 G.I.I.N.'s have been issued. While some countries have very few (e.g., Armenia had only 36, and there were none for Antarctica at the time of this publication), more than 150,000 G.I.I.N.'s that have been issued so far.

Withholding agents are advised to establish written internal procedures requiring G.I.I.N. verification and to clarify who is responsible for fulfilling this obligation. Such practices are helpful with regard to documenting compliance and protecting the withholding agent in the event that a good faith mistake is made in the verification process and a wrong G.I.I.N. was actually set forth on the Form W-8.

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 encouraging transparency.

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

¹ See IRS.gov, “[Foreign Account Tax Compliance Act.](#)”

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

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 will continue to grow.