

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

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Tags

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F.A.T.C.A.'S FIRST ANNIVERSARY: AN ASSESSMENT

On July 1, the Foreign Account Tax Compliance Act (“F.A.T.C.A.”) celebrated the first anniversary of its implementation. F.A.T.C.A. was created to improve international tax compliance and combat offshore tax evasion. Notwithstanding dire predictions about its impact on the financial community when F.A.T.C.A. was first enacted in 2010, the sky has not yet fallen as of its first anniversary.

F.A.T.C.A. compliance has proved to be a burdensome task, but the financial community has been able to cope with those burdens. The O.E.C.D. common reporting standard (“C.R.S.”) that is set to go into effect on January 1, 2016 for dozens of countries is still lurking as a possible compliance nightmare for the financial community, given the lack of meaningful guidance as to implementation. Coordination of F.A.T.C.A. with the C.R.S. is another step that needs to be taken.

F.A.T.C.A. compliance has nonetheless been difficult due to a variety of factors.

- First, there are over 100 Inter-Governmental Agreements (“I.G.A.’s”) signed or about to be signed that greatly assist in F.A.T.C.A. compliance. Model 1 I.G.A.’s generally require local foreign financial institutions (“F.F.I.’s”) to send account information to their own taxing authorities, which then transmits the information to the U.S. Model 2 I.G.A.’s require local F.F.I.’s to send that information directly to the I.R.S. However, there is a lack of guidance notes or regulations regarding implementation issued by many of the countries that have signed I.G.A.’s, which leaves advisors and the financial community up in the air as to how to actually comply.
- Second, while a Model 1 I.G.A., which is the most common form of I.G.A., gives great latitude to local countries for implementation and enforcement, the I.R.S. has at times stepped in to give its own views as to implementation that may contradict local guidance. The U.K. and Canada have said that new individual accounts can be opened without the need for a F.A.T.C.A. status self-certification from the individual. In reaction, the I.R.S. in F.A.T.C.A. General Compliance Question 10 has taken a different view and said no individual account can be opened without a self-certification. These conflicting views leave some financial institutions in an awkward position as to which path should be followed. For further information, see the article below as well as articles in our February and May issues.
- Third, there is a lack of consistency among the I.G.A.’s and the guidance that has been issued. That inconsistency can be seen in each I.G.A.’s Annex II, which creates exceptions particular to that country, but other inconsistencies also exist. For example, each country has its own set of compliance

deadlines and obligations. There is no uniformity, which adds to the burden placed on the finance industry.

- Fourth, due diligence continues to be required for pre-existing accounts. That task is also complex.
- Fifth, despite the I.G.A.'s and the various forms of guidance issued to assist in compliance, F.A.T.C.A. is still a complex statute. In addition, completion of the variety of I.R.S. Forms W-8 is also complex, but necessary to avoid imposition of F.A.T.C.A. withholding.
- Sixth, F.A.T.C.A. has spawned the birth of the C.R.S., which has been adopted by dozens of countries. The coordination of these two tax reporting regimes is an important task that needs to be done soon so as to aid the financial community.

F.A.T.C.A. has added an administrative and financial burden that has started to decline, but that burden will not disappear. It is hoped that burden will produce benefits for the U.S. in added tax revenue, but so far, it is hard to determine if the benefits of F.A.T.C.A. outweigh the burdens it has placed on the financial community.

INTERSECTION OF F.A.T.C.A. AND THE COMMON REPORTING STANDARD

Since the 2010 enactment of F.A.T.C.A., other jurisdictions have taken up the task of gaining tax information from cross-border investments by adopting the common reporting standard ("C.R.S.") advanced by the O.E.C.D. On October 29, 2014, 51 countries signed a multilateral competent authority agreement to automatically exchange information based on Article 6 of the Multilateral Convention. Subsequent signatures of the agreement brings the total number of countries to 61. This agreement specifies the details of what information will be exchanged.

While both F.A.T.C.A. and the C.R.S. seek the automatic exchange of similar information, the inconsistencies between the two systems create unnecessary complexity that becomes worse when local country rules are applied.

F.F.I.'s are required to apply multiple classifications to the same entities, depending on whether they are being classified under F.A.T.C.A. or the C.R.S. and which jurisdictions are involved.

The differences in the definitions applied under the two regimes mean that financial institutions are unable to simply apply the work from F.A.T.C.A. for C.R.S. and in many cases, will need to rebuild their systems.

I.R.S. MAINTAINS POSITION ON OBTAINING SELF-CERTIFICATION TO OPEN NEW INDIVIDUAL ACCOUNTS

The I.R.S. maintains its position that financial institutions resident in I.G.A. countries



must obtain self-certification of tax residency from new individual customers at the time they open accounts. The U.K. and Canada have said that resident financial institutions can open new accounts without getting a self-certification form, provided that they treat such accounts as reportable accounts. This disagreement was covered in our February and May issues.

In an annual forum sponsored by the Executive Enterprise Institute on international tax withholding and information reporting, two I.R.S. officials spoke on the matter. They said that “the I.G.A.’s are clear on their face,” and that “self-certifications are required upon opening. It’s a literal reading of the I.G.A.’s.” As a result, institutions are caught between the more severe I.R.S. view and the more relaxed view of some countries.

SPONSORED ENTITIES REGISTRATION TO LAUNCH IN LATE SUMMER

Until January 1, 2016, a sponsored investment entity may use the Global Intermediary Identification Number (“G.I.I.N.”) of its sponsoring entity when submitting a Form W-8BEN-E (or a Form W-8IMY for pass-through entities and grantor trusts) or when a U.S. account is reported on their behalf. However, by January 1, 2016, sponsored entities must have their own G.I.I.N. and the sponsoring entities are required to register their sponsored entities. Notwithstanding the aforementioned, the F.A.T.C.A. Frequently Asked Questions state that sponsoring entities who want to register sponsored entities must wait for the I.R.S. to publish a streamline procedure for this purpose.

On May 20, 2015, the I.R.S. announced that in late summer it will launch the process for sponsoring entities to get registration numbers for their sponsored entities. Once launched, sponsoring entities will be able to download a template to use in requesting G.I.I.N.’s for their sponsored entities. The template will allow them to add sponsored entities individually or through a bulk upload to the I.R.S. system. The G.I.I.N.’s for these sponsored entities will then appear on an I.R.S. list showing they are associated with the sponsoring entity.

I.D.E.S. F.A.Q.’S NEW SECTION ADDRESSING F.A.T.C.A. I.D. NUMBER AND OTHER ISSUES

The International Data Exchange Service (“I.D.E.S.”) system is a secure platform for the U.S. to exchange F.A.T.C.A. information with foreign jurisdictions. On May 8, 2015, the I.R.S. added a new section to the Frequently Asked Questions (“F.A.Q.’s”) concerning the I.D.E.S. The new section deals with the format, structure, and transmission of F.A.T.C.A. information. Among other issues, it provides guidance on obtaining a F.A.T.C.A. identification number (“F.I.N.”) to allow entities that are not required to obtain a G.I.I.N. to use the system.

Additionally, the new F.A.Q.’s address the situation of a sponsoring entity that is a resident of a country with a Model 1 I.G.A. where the sponsored entity is a resident

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of a country with a Model 2 I.G.A. In such circumstances, the sponsoring entity should follow the steps set forth in the F.A.Q. response to obtain a second G.I.I.N. reflecting a Model 2 I.G.A. or non-I.G.A. jurisdiction. The I.R.S. provides that the new (second) G.I.I.N. should have been obtained by May 21, 2015 in order for the sponsoring entity to use the I.D.E.S. system in time for the June deadline for submission of F.A.T.C.A. reports for Model 2 I.G.A.'s and non-I.G.A. jurisdictions.

MORE F.A.T.C.A. REGULATIONS?

Speaking on May 19, 2015 at an annual forum sponsored by the Executive Enterprise Institute in New York on international tax withholding and information reporting, John Sweeney, chief of Branch 8 in the I.R.S. Office of Associate Chief Counsel, said that the I.R.S. will take more time before finalizing the 2014 temporary regulations and that the I.R.S. may include some further regulations under Chapter 4.

FIRST F.A.T.C.A. REPORTING EXPECTED IN SEPTEMBER IN BRAZIL

Brazil is the largest country in Latin America. It is the world's fifth largest country, both by geographical area and by population. On September 23, 2014, Brazil and the U.S. signed a Model 1 I.G.A. The first exchange of information under F.A.T.C.A. is scheduled to occur in September under the U.S.-Brazil I.G.A.

The U.S.-Brazil I.G.A. is a Model 1 I.G.A., which will operate by facilitating an annual automatic exchange of information on a reciprocal basis of specific account holder information that financial institutions ("F.I.'s") in each country will report to their own governments as required under local law. The I.G.A. provides that Brazilian F.I.'s will refer American taxpayer information to the Brazilian Federal Revenue ("R.F.B."), which will then transfer it to the I.R.S. In turn, U.S. tax authorities will send to the R.F.B. information about the financial operations of Brazilian taxpayers in U.S. F.I.'s

The adoption of the U.S.-Brazil I.G.A. may allow for greater discussion on tax matters between these two major countries and also lead to the eventual adoption of a U.S.-Brazil income tax treaty, though negotiations have not yet started. The Senate Finance Committee that is responsible for tax treaties has been blocking approval of many treaties, and that factor is the real obstacle to an income tax treaty.

BELARUS HOUSE OF REPRESENTATIVES RATIFIES MODEL 1 I.G.A.

On June 26, the Belarusian House of Representatives (lower house of the National Assembly) approved a draft law ratifying the Belarus-U.S. Model 1 I.G.A. under F.A.T.C.A., which was signed on March 18, 2015.

CYPRUS EXTENDS F.A.T.C.A. REPORTING DEADLINE

The Cypriot Tax Department on June 24 extended the reporting deadline under F.A.T.C.A. from June 30 to July 31, 2015. The Cypriot-U.S. Model 1 I.G.A. was signed on December 2, 2014.

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QUALIFIED INTERMEDIARY STATUS UNDER F.A.T.C.A.

The I.R.S. has finally released the long-awaited application to become a qualified intermediary (“Q.I.”) under F.A.T.C.A., Form 14345, which is available on the I.R.S. forms webpage.

The Q.I. system was designed to simplify U.S. tax withholding and reporting obligations for payments of income made to an account holder through one or more foreign intermediaries such as an F.F.I. A Q.I. is an eligible entity that enters into a contract with I.R.S. (*i.e.*, a Q.I. Agreement) to assume certain responsibilities related to compliance with the U.S. tax withholding and reporting regime for its withholding agents under chapter 3 (regular 30% withholding on fixed or determinable annual or periodic income) and chapter 4 (F.A.T.C.A. withholding).

The I.R.S. updated the frequently asked questions on June 22 under Question 1 in the section dealing with Q.I., withholding foreign partnerships (“W.P.”) and withholding foreign trusts (“W.T.”) to indicate that taxpayers will soon be able to get the new version of Form 14345, Qualified Intermediary Application. The I.R.S. then released the form on its webpage.

While the I.R.S. didn’t provide contact information for its Q.I. team under Question 1, the I.R.S. said under Question 3 that applicants for Q.I./W.P./W.T. status can apply to:

**IRS-Foreign Intermediary Program
Attn: QI/WP/WT Applications
290 Broadway, 12th Floor
New York, NY 10007**

Overall, the I.R.S. indicated that the process of applying to become any of these three types of entities hasn’t changed under F.A.T.C.A.

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:

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	

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

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.