

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

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Mexico

UPDATE FROM THE U.S. & MEXICO: I.G.A. IMPLEMENTATION PROCEEDING WELL

On January 29, at the A.B.A. (American Bar Association) Tax Section 2016 Mid-year Meeting in Los Angeles, representatives from Mexico and the U.S. discussed implementation of their reciprocal Model 1 I.G.A. (Inter-Governmental Agreement) at a panel on the expanding global reach of F.A.T.C.A. (the Foreign Account Tax Compliance Act), which was chaired by the writer of this “F.A.T.C.A. 24/7.”

According to Aida Gabriela Contreras Delgado, the Mexican Tax Administration Service’s (“S.A.T.’s”) Sub-administrator for International Tax Rulings, despite some initial concerns, the S.A.T. is pleased with the pace of implementation of F.A.T.C.A. and its adoption by Mexican financial institutions (“F.I.’s”). Ms. Delgado reported that 615 Mexican F.I.’s have registered and obtained Global Intermediary Identification Numbers (“G.I.I.N.’s”) from the I.R.S. So far, the Mexican government has received 410 certificate requests, which are the first step an F.I. must take to access the Mexican platform that allows for electronic F.A.T.C.A. file transmission. Only 222 Mexican F.I.’s have complied with the obligation to file a report (including nil reports) with the S.A.T., which is the final step in the annual requirements of F.A.T.C.A. compliance. This disparity, Ms. Delgado said, is due to several problems caused by technical issues and a lack of understanding among those completing the necessary forms. However, she sees participation growing as better a understanding of the rules and the process is obtained.

In response to Ms. Delgado’s comments, Elena Virgadamo, Attorney-adviser, U.S. Treasury Office of International Tax Counsel, said that the Treasury and the I.R.S. are aware of the complications foreign financial institutions (“F.F.I.’s”) and governments are having with the process, and that they are working to resolve the issues as quickly as possible.

Ms. Delgado stated that since the O.E.C.D.’s Common Reporting Standard (“C.R.S.”) for exchange of information was modeled after F.A.T.C.A., the Mexican government has looked to the commentary on the C.R.S. to assist in implementation of the I.G.A. Responding to Ms. Delgado’s remarks, the writer observed that It would be desirable to fully integrate F.A.T.C.A. and the C.R.S., but that may take a long time to achieve, if it can ever be done.

Erica Gut, a managing director of PricewaterhouseCoopers, said that several of her clients have had difficulty processing the necessary F.A.T.C.A. forms and developing the required X.M.L. submission platform. However, Ms. Gut said that they are having fewer issues as clients become more familiar with the system.

Ms. Gut remarked that many foreign clients are also changing their positions

regarding entity classification. “As companies have become more familiar with the reporting and filing requirements of F.A.T.C.A., we are transitioning to an era where companies want to be classified as F.F.I.’s, as opposed to Active or Passive N.F.F.E.’s [Nonfinancial Foreign Entities].” She explained that once the initial filing requirements are satisfied for F.F.I.’s, there is actually less work required than for N.F.F.E.’s.

One concern of a Passive N.F.F.E. is that it has to report the identity of any substantial U.S. owner to every U.S. withholding agent, which can be very burdensome.¹ However, it should be noted that a Passive N.F.F.E. can elect to become a Direct Reporting N.F.F.E., which does not have to report the identity of its substantial U.S. owners to withholding agents. Such information is instead reported directly to the I.R.S. in a similar way as done by Participating F.F.I.’s.

I.R.S. RELEASES DRAFT OF UPDATED FORM W-8BEN-E AND INSTRUCTIONS

On January 15, the I.R.S. released a updated draft of Form W-8BEN-E and its instructions, which make three main changes to the current form. As this draft form has not yet been adopted, it is not currently available on the I.R.S. webpage for tax forms. The three notable changes are the following.

Accounts That Are Not Financial Accounts

Line 5 in Part I requires checking the box for the chapter 4 F.A.T.C.A. status of the person completing the form. (Some of the popular categories include Participating F.F.I., Reporting Model 1 F.F.I., and Reporting Model 2 F.F.I.) A new checkbox has been added to Line 5 for payments made to payees not with respect to financial accounts.²

Limitation On Benefits (“L.O.B.”) for Treaty Claims

Part III of Form W-8BEN-E needs to be completed to obtain treaty benefits. In order to claim treaty benefits, an entity must not only be a resident of the treaty country but also (i) derive and beneficially own the item of income and (ii) satisfy the L.O.B. article of the applicable treaty.

New checkboxes have been added to Part III representing each of the main tests that can be met to satisfy an L.O.B. provision. A taxpayer is required (i) to check the box associated with the L.O.B. test it has met in order to claim the treaty benefits associated with this form or (ii) to check a box indicating that it has obtained a favorable discretionary determination from the U.S. Competent Authority stating that it qualifies for the treaty benefits associated with this form.

Nonreporting I.G.A. F.F.I.’s

With respect to the F.A.T.C.A. status of a Nonreporting I.G.A. F.F.I., the updated draft instructions require that the qualifications for such status under the I.G.A. be coordinated with the chapter 4 regulations Deemed-Compliant status. An F.F.I. that

¹ Reporting of substantial U.S. owners is made in Part XXVI of Form W-8BEN-E.

² Treas. Reg. §1.1471-5(b)(2) defines non-financial accounts.

meets the requirements of both a Nonreporting I.G.A. F.F.I. under the I.G.A. and a Deemed-Compliant F.F.I. under the regulations should certify that it is a Nonreporting I.G.A. F.F.I. An F.F.I. that meets the requirements for an Owner-Documented F.F.I. should certify to that status under the regulations, rather than to Nonreporting I.G.A. F.F.I. status.

I.R.S. ANNOUNCES FORTHCOMING REGULATIONS THAT WILL EASE BURDENS ON F.F.I.'S

On January 19, the I.R.S. issued Notice 2016-8. Notice 2016-8 indicates that the I.R.S. intends to amend the regulations under chapters 3 and 4 that will ease the burden of F.A.T.C.A. compliance for F.F.I.'s. In particular, Notice 2016-8 addresses when to submit pre-existing account and periodic certifications, and transitional reporting of accounts of Nonparticipating F.F.I.'s, as well as when a withholding agent may rely on electronically furnished Forms W-8 and W-9.

Pre-existing Account Certifications by Participating F.F.I.'s and Reporting Model 2 F.F.I.'s

When F.A.T.C.A. first entered into effect on July 1, 2014, F.F.I.'s primarily focused on ensuring that on-boarding procedures complied with F.A.T.C.A. in order to properly account for new investors. F.A.T.C.A. also imposes obligations on F.F.I.'s to review pre-existing accounts and to determine whether they are held by U.S. investors or otherwise U.S.-controlled.

Pre-existing accounts are defined as accounts that were outstanding on the effective date of the F.F.I. Agreement³ signed by the Participating F.F.I. Generally, this means accounts that were outstanding on June 30, 2014, since F.F.I. Agreements first became effective on July 1, 2014. However, due to the difficulty of acquiring sensitive information from existing customers, F.F.I.'s were given more time to deal with pre-existing accounts, and the deadline for pre-existing account certifications was extended to 60 days following the date that is two years after the effective date of the F.F.I. Agreement.⁴ As a result, pre-existing account certifications would generally be due by August 29, 2016.⁵

In response to comments and in an attempt to reduce compliance burdens, the Treasury and I.R.S. have indicated that they will amend the regulations so as to require the pre-existing account certifications at the same time that Participating F.F.I.'s, and Reporting Model 2 F.F.I.'s, must submit their first periodic certifications of compliance with F.A.T.C.A. As a result, the pre-existing account certifications will not be due until July 1, 2018.⁶

³ Treas. Reg. §1.1471-1T(b)(104).

⁴ Treas. Reg. §1.1471-5(g)(3)(i)(B). For high value accounts (*i.e.*, accounts of one million dollars or more), the F.F.I. had to act before this date.

⁵ These same requirements apply to a Reporting Model 2 F.F.I. but not to Reporting Model 1 I.G.A. F.F.I.'s, which are not required to sign an F.F.I. Agreement and comply under the terms of an I.G.A.

⁶ Section I(B) of Notice 2016-8.

“Notice 2016-8 indicates that the I.R.S. intends to amend the regulations under chapters 3 and 4 that will ease the burden of F.A.T.C.A. compliance for F.F.I.'s.”

Pre-existing Account Certifications by Local F.F.I.'s and Restricted Funds and Periodic Compliance by Registered Deemed-Compliant Reporting Model 2 F.F.I.'s

A Registered Deemed-Compliant F.F.I. that is a local F.F.I. or restricted fund is required to make a one-time certification regarding its pre-existing accounts, similar to that required of Participating F.F.I.'s.⁷ Restricted funds must make this certification within six months after the date the F.F.I. registers as a Registered Deemed-Compliant F.F.I. Also, every three years, a Registered Deemed-Compliant F.F.I. must certify that all of the requirements for such status have been satisfied since the later of (i) June 30, 2014 or (ii) the date the F.F.I. registers as a Registered Deemed-Compliant F.F.I., until the date of such certification.

Notice 2016-8 provides that the regulations will be amended to give more time for these filings. Local F.F.I.'s and restricted funds will be allowed to submit one-time pre-existing account certifications at the same time they submit their first periodic certifications of Registered Deemed-Compliant status. In addition, the first certification of compliance by a Registered Deemed-Compliant F.F.I. will cover a period that will end at the close of the three-year period following the date it first became registered as such. As a result, this change will delay the filing date for pre-existing account certifications and the first required certifications as to overall compliance until July 1, 2018.⁸

Transitional Reporting of Accounts of Nonparticipating F.F.I.'s

A Participating F.F.I. or Registered Deemed-Compliant F.F.I. that maintains an account of a Nonparticipating F.F.I. must provide transitional reporting to the I.R.S. of all foreign reportable amounts paid to such account for calendar years 2015 and 2016.⁹ In response to concerns about the burdens placed on F.F.I.'s, reporting will not be required for 2015 payments.¹⁰

Electronically Furnished Forms W-8 and W-9

A withholding agent may establish a system for a payee to furnish a Form W-8 or W-9 electronically.¹¹ If the payee is a nonqualified intermediary ("N.Q.I."), nonwithholding foreign partnership ("N.W.P."), or nonwithholding foreign trust ("N.W.T.") then the payee must provide documentation to the U.S. withholding agent to establish the tax status of the beneficial owners of the payment or partners in the partnership. The withholding agent can rely on such documentation unless the withholding agent has "actual knowledge" that the documentation is unreliable or incorrect.¹²

Nevertheless, due to the lack of existing I.R.S. guidance, commentators have indicated that the industry practice has been for withholding agents to reject forms supplied by an N.Q.I., N.W.P., or N.W.T. because they cannot confirm the electronic



⁷ Treas. Reg. §§1.1471-5(f)(1)(i)(A)(7), 1.1471-5(f)(1)(i)(D)(6).

⁸ Section II(B) of Notice 2016-8.

⁹ Treas. Reg. §1.1471-4(d)(2)(ii)(F).

¹⁰ Section III(B) of Notice 2016-8.

¹¹ Treas. Reg. §1.1441-1(e)(4)(iv).

¹² Treas. Reg. 1.1441-1(b)(2)(vii), 1.1471-3(e)(4)(vi).

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signature of the beneficial owners or partners.¹³ Notice 2016-8 responds to this concern by providing that the standards of knowledge in the regulations¹⁴ will be modified to allow for reliance on documentation obtained from an N.Q.I., N.W.P., or N.W.T., provided that (i) the N.Q.I., N.W.P., or N.W.T. is a direct or indirect account holder of the withholding agent, (ii) the agent obtains a written statement from the N.Q.I., N.W.P., or N.W.T. confirming that the electronic documentation was generated from a system that meets the requirements of Treasury Regulation §1.1471-3(c)(6)(iv) or Ann. 98-27, and (iii) the withholding agent does not have actual knowledge that such statement is incorrect.¹⁵

I.G.A. COMPETENT AUTHORITY ARRANGEMENTS SIGNED WITH NORWAY, BARBADOS, ROMANIA, SPAIN, ITALY, & COSTA RICA

To facilitate exchanges of information under F.A.T.C.A. and to establish and prescribe rules and procedures necessary for implementation of certain provisions, an I.G.A. will generally provide that the Competent Authorities of the U.S. and the foreign country that is a party to the I.G.A. (*i.e.*, the foreign partner) will sign a Competent Authority Arrangement (“C.A.A.”).

All C.A.A.’s will become operative on the later of (i) the date the applicable I.G.A. enters into force or (ii) the date the C.A.A. is signed by the U.S. and the foreign partner. The first C.A.A. was signed with the U.K. and Australia last year, and the pace of this process is now accelerating:

- On April 15, 2013, Norway and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On January 21, 2016, the Competent Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.
- On November 17, 2014, Barbados and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On February 1, 2016, the Competent Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.
- On May 28, 2015, Romania and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On February 1, 2016, the Competent Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.
- On May 14, 2013, Spain and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On January 19, 2016, the Competent Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.
- On January 10, 2014, Italy and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On February 18, 2016, the Competent

¹³ Section IV(B) of Notice 2016-8.

¹⁴ Treas. Reg. §§1.1441-7(b)(10), 1.1471-3(e)(4)(vi)(A)(2).

¹⁵ Section IV(B) of Notice 2016-8.

Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.

- On November 26, 2013, Costa Rica and the U.S. signed a reciprocal Model 1 I.G.A. Pursuant to Article 3(6) of the I.G.A. On February 8, 2016, the Competent Authorities signed a C.A.A. to implement the information reporting and withholding tax provisions of F.A.T.C.A.

ST. LUCIA I.G.A. SIGNED

On January 19, 2016, St. Lucia and the U.S. signed a reciprocal Model 1 I.G.A. While the I.G.A. was just signed, it is applicable as of June 30, 2014, so as to require reporting of accounts in existence in 2014. However, Article 3(3)(a) limits the information that St. Lucia must provide for the 2014 and 2015 years so that a full exchange of information will only start for the 2016 year.

CURRENT I.G.A. PARTNER COUNTRIES

To date, the U.S. has signed, or reached an agreement to sign, more than 100 Model 1 and Model 2 I.G.A.'s. An I.G.A. has become the global standard in government efforts to curb tax evasion and avoidance on offshore activities and to encourage transparency.

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

Algeria	Gibraltar	Netherlands
Angola	Greece	New Zealand
Anguilla	Greenland	Norway
Antigua & Barbuda	Grenada	Panama
Australia	Guernsey	Peru
Azerbaijan	Guyana	Philippines
Bahamas	Haiti	Poland
Bahrain	Holy See	Portugal
Barbados	Honduras	Qatar
Belarus	Hungary	Romania
Belgium	Iceland	Saudi Arabia
Brazil	India	Serbia
British Virgin Islands	Indonesia	Seychelles
Bulgaria	Ireland	Slovak Republic
Cabo Verde	Isle of Man	Slovenia
Cambodia	Israel	South Africa
Canada	Italy	South Korea
Cayman Islands	Jamaica	Spain
China	Jersey	St. Kitts & Nevis
Colombia	Kazakhstan	St. Lucia
Costa Rica	Kosovo	St. Vincent & the Grenadines
Croatia	Kuwait	Sweden
Curaçao	Latvia	Thailand

Cyprus	Liechtenstein	Trinidad & Tobago
Czech Republic	Lithuania	Tunisia
Denmark	Luxembourg	Turkey
Dominica	Macao	Turkmenistan
Dominican Republic	Malaysia	Turks & Caicos Islands
Estonia	Malta	Ukraine
Finland	Mauritius	United Arab Emirates
France	Mexico	United Kingdom
Georgia	Montenegro	Uzbekistan
Germany	Montserrat	

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.

