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FATCA Update: Navigating The Electronic Registration Portal

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Foreign financial institutions (FFIs)¹ may register with the Internal Revenue Service to avoid being withheld upon under the Foreign Account Tax Compliance Act (FATCA),² which withholding is scheduled to begin on July 1, 2014.³ On August 19, 2013, the IRS opened its long-awaited FATCA electronic registration portal (the Website), which will serve as the primary way for FFIs to interact with the IRS to complete the required registration, agreements, and certifications. While FATCA registration and compliance still constitute a complex task, the IRS has done a good job making the incomprehensible understandable on the Website.

¹ FFIs include foreign depository institutions (e.g., banks), investment entities (e.g., hedge funds or private equity funds), custodial institutions (e.g., mutual funds), and certain insurance companies that have cash value products or annuities. Regs. §1.1471-5(d).

² FATCA was passed on Mar. 18, 2010, as part of the Hiring Incentives to Restore Employment Act of 2010, P.L. 111-147 (H.R. 2847).

³ Notice 2013-43, 2013-31 I.R.B. 113.

The IRS has also issued an Online User's Guide⁴ as well as a series of Frequently Asked Questions and Answers (FAQs)⁵ to assist FFIs and their advisors in the task of registration. An FFI that registers on the Website (registered FFI) will, upon approval, receive a Global Intermediary Identification Number (GIIN), which will be used both for reporting purposes and to identify the FFI's status to withholding agents so as to eliminate potential imposition of withholding taxes under FATCA. A registered FFI will be identified on the IRS FFI List that will be posted electronically by June 2, 2014, and will be updated monthly thereafter at www.irs.gov/fatca. Entry on this list is important because U.S. withholding agents will not be able to eliminate withholding unless they can corroborate from the list that the GIIN is correct. To ensure inclusion in the June 2014 IRS FFI List, an FFI will need to finalize its registration by April 25, 2014. An FFI may also register on paper (i.e., by filing Form 8957), but this is not recommended.⁶

FFIs established or operated in a country that has entered into an Intergovernmental Agreement (IGA) with the United States relating to FATCA compliance are subject to rules that differ from those applicable to other FFIs, but these FFIs still have to enter the Website to ensure that no FATCA withholding will occur. For withholdable payments made prior to January 1, 2015, verification of a GIIN is not required with re-

⁴ The Online User's Guide is located at <http://www.irs.gov/pub/irs-pdf/p5118.pdf>.

⁵ FAQs are at <http://www.irs.gov/Businesses/Corporations/FAQsFATCARegistrationSystem>.

⁶ Paper registration forms will experience slower processing times than online registration, and a registrant will not receive a GIIN until the processing of its paper form is completed.

spect to payees that are reporting Model 1 FFIs.⁷ As a result, reporting Model 1 FFIs will have additional time beyond July 1, 2014, to register and obtain a GIIN in order to ensure that they are included on the IRS FFI List before January 1, 2015. Given the daunting task imposed on U.S. withholding agents and the possible confusion they may experience if they do not see a GIIN, it may be worthwhile for a reporting Model 1 FFI to consider earlier registration so that a GIIN can be delivered to those agents before FATCA withholding begins.

BACKGROUND

FATCA added “Chapter 4” (i.e., §§1471 through 1474) to the Internal Revenue Code with the intent of preventing U.S. tax evasion through the use of foreign financial accounts by forcing FFIs to disclose information on their U.S. account holders. U.S. account holders for this purpose include “specified U.S. persons” (i.e., U.S. citizens, U.S. resident alien individuals, and certain other U.S. persons (such as closely held U.S. corporations)), as well as U.S.-owned foreign entities that have significant U.S. owners (that is, 10%-or-greater U.S. shareholders or, in the case of FFIs that are investment funds, any U.S. shareholders). To create an “incentive” for FFIs to disclose the information, FATCA requires withholding agents to withhold 30% of U.S.-source fixed or determinable annual or periodical (FDAP) payments made to non-compliant FFIs. FATCA also imposes a 30% withholding tax on the gross proceeds from the sale of stock or securities that generate U.S.-source dividends or interest.⁸

If a foreign entity is classified as an FFI, in order to eliminate withholding the FFI must enter into an agreement with the IRS (FFI Agreement), unless an exemption applies.⁹ An FFI that enters into an FFI Agreement is referred to as a participating FFI (or PFFI). A participating FFI agrees to, among other things: (1) undertake a due diligence operation to identify its account holders who are specified U.S. persons or U.S.-owned foreign entities; (2) comply

with certain documentation and information reporting requirements; and (3) comply with certain withholding requirements for payments it makes to those who are not in compliance with FATCA.¹⁰

On January 17, 2013, the Treasury and the IRS published final regulations on FATCA.¹¹ While FATCA was supposed to take effect in 2013, the final regulations delayed implementation until 2014.¹² On July 12, 2013, the IRS published a notice that provided an additional six-month extension for when withholding on FDAP payments will begin (i.e., payments after June 30, 2014) and for implementing new account-opening procedures, as well as related requirements to comply with FATCA.¹³ (Withholding on the gross proceeds from the sale of stock or securities, which had been delayed until January 1, 2017, was not affected by this notice.) The notice also provided that the first information return a participating FFI must file is for 2014 and is due March 31, 2015 (subject to possible extensions that can extend the filing deadline until September 30, 2015). While the regulations are final, the IRS has made some corrections that clarify and ease some of the rules.¹⁴

In addition to the FATCA regulations, the Treasury and the IRS have been working on FATCA IGAs, under which the United States and each FATCA partner country agree to certain terms for implementing FATCA. There are two types of IGAs: the Model 1 Agreement (in both reciprocal and nonreciprocal versions), under which FFIs (Reporting Model 1 FFIs) in the foreign country satisfy their FATCA requirements by reporting information on U.S. reportable accounts

¹⁰ Withholding (or the obligation to close the account) can apply to two types of investors: (1) recalcitrant holders who fail to supply needed information to the FFI; or (2) account holders who are FFIs that are not: (a) participating FFIs; (b) subject to an IGA; or (c) exempt from FATCA.

¹¹ T.D. 9610 (1/17/13). Prior to publication of the final regulations, the IRS published proposed regulations and three notices detailing procedures to comply with FATCA. See, e.g., Notice 2010-60 (“Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding Under Chapter 4 of the Code”), Notice 2011-34 (“Supplemental Notice to Notice 2010-60, Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code”), and Notice 2011-53 (“Chapter 4 Implementation Notice”).

¹² Regs. §1.1471-2(a). This delay was first announced in Announcement 2012-42 (“Timelines for Due Diligence and Other Requirements Under FATCA”).

¹³ Notice 2013-43 (“Revised Timeline and Other Guidance Regarding the Implementation of FATCA”). See the chart titled “Timeline for Implementing FATCA, as Revised by Notice 2013-43” at the end of this article for further guidance offered in this announcement.

¹⁴ Announcement 2013-41, 2013-40 I.R.B. 322 (e.g., clarifying that a trust is professionally managed only if its manager has discretionary authority to make investment decisions).

⁷ As discussed later in this article, IGAs can be in a Model 1 or Model 2 format. FFIs subject to a Model 2 Agreement will need to register on the Website by Apr. 25, 2014, to prevent withholding on July 1, 2014.

⁸ Withholding on gross proceeds will not start until Jan. 1, 2017.

⁹ The regulations provide for a variety of exemptions for deemed compliant FFIs (such as for qualified collective investment vehicles and restricted funds), certain pre-existing accounts (such as debt obligations outstanding on July 1, 2014), and exempt beneficial owners (such as certain pension funds), but these exemptions will not apply to many FFIs who need to participate to eliminate withholding. Regs. §§1.1471-5(f), (i), and 1.1471-6.

to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States; and the Model 2 Agreement, under which FFIs (Reporting Model 2 FFIs) report specified information directly to the IRS in a manner consistent with the final regulations, supplemented by government-to-government exchange of information on request. See the chart titled “FATCA IGAs” at the end of this article for a listing of the IGAs Treasury has already concluded.

IGAs liberalize certain rules, provide for an automatic delayed September 30, 2015 deadline for filing the first FATCA information return with the IRS, and eliminate the concern that local laws may restrict an FFI from disclosing the identity of its U.S. account holders to the United States. However, one downside of an IGA is that an FFI in the relevant foreign country may be required to comply even if it would not otherwise comply with FATCA because it has no U.S. investments.

THE FATCA PORTAL

In the Preamble to the final regulations, the Treasury and the IRS announced their intent to create a FATCA electronic registration portal, which will serve as the primary way for FFIs to interact with the IRS to complete the required registration, agreements, and certifications. On August 19, 2013, the IRS opened its long-awaited Website, which serves as the primary way for FFIs to interact with the IRS to complete these tasks.

Once the application is submitted and has been approved by the IRS, an FFI will be registered and assigned a GIIN, which will be used both for reporting purposes and to identify the FFI’s status to withholding agents, so as to eliminate the potential imposition of withholding taxes under FATCA. An FFI that has branches in other countries will be given a separate GIIN for each branch.

An FFI will need to convey its FATCA status and GIIN to a U.S. withholding agent. A draft Form W-8-BEN-E¹⁵ that is to be used by non-U.S. entities for this purpose has grown from one page to eight pages to accommodate FATCA. A registered FFI will be identified on the IRS FFI List, which will be posted electronically by June 2, 2014, and will be updated monthly thereafter at www.irs.gov/fatca. Entry on this list is important because U.S. withholding agents will not be able to eliminate withholding unless they can corroborate that the GIIN is correct by checking the

¹⁵ The May 23, 2013 draft is at: <http://www.irs.gov/pub/irs-dft/fw8bene-dft.pdf>.

IRS webpage. Withholding agents may rely on this IRS FFI List to verify an FFI’s GIIN and not withhold on payments made to the FFI. To ensure inclusion in the June 2014 IRS FFI List, an FFI will need to finalize its registration by April 25, 2014. An FFI may also register on paper (i.e., by filing Form 8957), but this is not recommended.¹⁶

FFIs established or operated in a country that has entered into an IGA with the United States relating to FATCA compliance are subject to rules that differ from those applicable to other FFIs, but these FFIs still have to enter the Website to ensure that no FATCA withholding will occur. For withholdable payments made prior to January 1, 2015, verification of a GIIN is not required with respect to payees that are Reporting Model 1 FFIs. As a result, Reporting Model 1 FFIs have additional time to register and obtain a GIIN because they do not need to be included on the IRS FFI List until January 1, 2015.

The FATCA regulations exempt many categories of FFIs from the requirement to register and report, including: (1) most governmental entities; (2) most non-profit organizations; (3) certain small, local financial institutions; and (4) certain retirement entities.¹⁷ As mentioned earlier, unless otherwise exempt, FFIs that do not register and agree to report face a 30% withholding tax on certain U.S.-source payments made to them.¹⁸

While the Website is now open, no registration can be finalized in 2013. An FFI will be able to access the Website during this year to start and modify its registration information; however, any information submitted in 2013 will be stored in the system and will not be regarded as a final submission until the FFI re-enters the Website in 2014 to finalize the registration process. FFIs are thus able to utilize the remainder of 2013 to become familiar with the process, enter preliminary data, and make any necessary changes.

TYPES OF FIs

The Website requires any Financial Institution (FI) that desires to open an account and register to first determine which of the following four types of FIs it is:

¹⁶ Paper registration forms will experience slower processing times than online registration, and registrants will not receive a GIIN until the processing of their paper form is completed.

¹⁷ Regs. §1.1471-6.

¹⁸ In addition, starting on Jan. 1, 2017, FFIs generally face a 30% withholding tax on gross proceeds from the sale of U.S. stock or debt instruments unless they are in compliance with FATCA.

1) *Single FI*: A Single FI is an FI that is not part of an Expanded Affiliated Group (EAG) of FFIs.¹⁹ A Single FI may also include a foreign branch of a U.S. FI that is treated as a Reporting FI under a Model 1 IGA or that has in effect a Qualified Intermediary (QI) Agreement.

2) *Member FI*: A Member FI is an FFI that is a Member of an EAG that is registering as either a participating FFI, a Registered Deemed Compliant FFI,²⁰ or a Limited FFI.²¹ However, if that Member is registering as the Lead FI for the EAG, then such Member's designation is solely as a Lead FI. A Member FI will *not* be able to register until the Lead FI for the EAG first registers because information relating to the Lead FI is necessary to complete the registration for the Member FI.

3) *Lead FI*: A Lead FI is the Member of an EAG that will initiate the FATCA registration process for each of its Member FIs that is registering as a participating FFI, a Registered Deemed Compliant FFI, or a Limited FFI. A Lead FI can be a U.S. FI, an FFI, or a Compliance FI.²² An EAG can have more than one Lead FI.

4) *Sponsoring Entity*: A Sponsoring Entity is an entity that will perform the due diligence and fulfill withholding and reporting obligations for one or

more sponsored investment entities or controlled foreign corporations.

ADDITIONAL CATEGORIES

In addition to determining which type of FI it is, an FFI must determine in which of the following categories it falls, which in turn will dictate the type of information it must supply:

1) *Model 1 IGA FFI*: This is an FFI or branch of an FFI that is treated as a Reporting Model 1 FFI. Such an entity is able to authorize one or more Points of Contact (POCs) that can deal with the IRS²³ (which is allowed for any registered FFI). A Model 1 IGA FFI is not required to have a GIIN before January 1, 2015. However, a Model 1 IGA FFI must register by July 1, 2014, if: (1) it has one or more branches (other than a Limited Branch) in countries not covered by a Model 1 IGA; or (2) it is renewing its QI, Withholding Foreign Partnership (WP),²⁴ or Withholding Foreign Trust (WT)²⁵ status.

2) *Model 2 IGA FFI*: This is an FFI or branch of an FFI that is treated as a Reporting Model 2 FFI, and it must confirm that it will comply with the terms of its FFI Agreement, as modified by the Model 2 IGA.

3) *No Applicable IGA FFI*: This is an FFI or branch of an FFI that is *not* covered by an IGA. To prevent the imposition of FATCA withholding, it must: (1) enter into an FFI Agreement with the IRS to be treated as a participating FFI; (2) agree to meet the requirements for being treated as a Registered Deemed Compliant FFI; or (3) establish that it is a Limited FFI or Limited Branch.

4) *Sponsoring Entity*: This is an entity that is seeking to be appointed as a Sponsoring Entity²⁶ and agrees to undertake the FATCA responsibilities of one or more sponsored FFIs.

5) *QI, WP, and WT*: This is an FFI that is acting as a QI, WP, or WT, and is seeking to renew its classification as a QI, WP, or WT.

6) *U.S. FI acting as a Lead FI*: This is a U.S. FI electing to be a Lead FI, which will act on behalf of its Members that are FFIs.

¹⁹ An EAG is two or more corporations that are connected through stock ownership with a common parent corporation that owns stock directly in at least one of the members of the EAG possessing more than 50% of the total voting power of such corporation and a value of more than 50% of the value of all such stock in the corporation. In general, a partnership or any entity other than a corporation is treated as a member of an EAG if such entity is controlled by members of such group. In general, control means the ownership, directly or indirectly, of more than 50% (by value) of the beneficial interests of the partnership or other entity. See Regs. §1.1471-5(i)(2), §954(d)(3).

²⁰ A Deemed Compliant FFI is an FFI that is treated, pursuant to §1471(b)(2) and Regs. §1.1471-5(f), as meeting the requirements of §1471(b). A Deemed Compliant FFI is required to register in order to attain such status, which eliminates imposition of the requirements that are imposed on a participating FFI (such as the need to determine whether it has U.S. accounts).

²¹ A Limited FFI is an FFI that, due to local law restrictions, cannot comply with the terms of the FFI Agreement or otherwise be treated as a participating FFI or a Deemed Compliant FFI, and that is agreeing to satisfy certain obligations to be treated as a Limited FFI.

²² A Compliance FI is a PFFI, Reporting FI under a Model 1 or 2 IGA, or U.S. FI that agrees to establish and maintain a consolidated compliance program and to perform a consolidated periodic review on behalf of one or more Member FIs that are part of its EAG (the compliance group). A Compliance FI must register as a Lead FI and, as part of that registration, must identify each Member FI that is included in its compliance group. A Compliance FI must also have the authority to terminate the FATCA status of each Member FI within its compliance group.

²³ A POC is an individual authorized by the FI to receive FATCA-related information regarding the FI, and to take other FATCA-related actions on behalf of the FI. A maximum of five POCs may be appointed.

²⁴ A WP is a non-U.S. partnership that has entered into a withholding foreign partnership agreement with the IRS.

²⁵ A WT is a non-U.S. trust that has entered into a withholding foreign trust agreement with the IRS.

²⁶ Regs. §1.1471-5(f)(1)(i)(F).

REGISTRATION PROCESS

The first step in the registration process is to create an online account, which will require: (1) identification of the FI as either a Single FI, Member FI, Lead FI, or Sponsoring Entity; (2) creation of a password (Access Code);²⁷ and (3) responses to two challenge questions.²⁸ Only one e-mail address may be listed.²⁹

Once the account is created, the FI will receive a unique identifier (FATCA ID),³⁰ which is different from the GIIN. While the login credentials (namely, the FATCA ID and Access Code) can be shared by the Responsible Officer (RO)³¹ and up to five points of contact (POCs),³² only one person can access the account at any time.³³

Once the account is established, an FFI can enter the Website to register. Information that will be required³⁴ includes the following:

- Type of FI (Single FI, Lead FI, Member FI, or Sponsoring Entity);
- Legal name of FI;
- Country of residence for local income tax purposes;³⁵
- Mailing address;
- Whether it has in effect a QI, WT, or WP Agreement;
- Whether it has a branch outside its country of tax residence;
- Whether it is a tax resident of the United States or maintains a branch in the United States (excluding U.S. territories);

²⁷ The Access Code must be between 8 and 20 characters and include at least one uppercase letter, one lowercase letter, one number, and one of the following special characters: ~ ! @ # % ^ * () ? , .

²⁸ FAQs 10–12. The challenge questions are chosen from a pre-set list of questions and their purpose is to allow the FFI to reset its Access Code if it forgets it.

²⁹ FAQ 17.

³⁰ The IRS warns that the FATCA ID should not be given out to third parties because it is the way in which security can be preserved for the FFI's account and information.

³¹ An RO is an individual designated by the FI in the FATCA Registration System to complete the registration form. An FI's RO will be a POC for the FI. In addition, the RO of an FI registering as a Lead FI of all or part of an EAG will be a POC for each Member of that group. Further information on RO selection choices is available in the instructions to the Form 8957.

³² A POC is an individual authorized by the FI to receive FATCA-related information regarding the FI, and to take other FATCA-related actions on behalf of the FI. The RO can appoint additional POCs.

³³ FAQ 10.

³⁴ Not all fields in the registration process are mandatory. Required fields are marked with an asterisk. FAQ 6.

³⁵ If a dual resident, then all relevant countries must be disclosed.

- Each jurisdiction in which it has a branch:

- Whether any branch is a Limited Branch;³⁶
- Whether a branch is covered by a QI Agreement and, if so, whether the branch intends to continue that agreement;

- Information about the RO;
- Information about POCs;
- If a Lead FI, then information required in Part 2 and information about Member FIs;
- If a QI, WP, or WT, information required in Part 3.

All responses can be saved, viewed, and printed.³⁷ At the end of the registration process, an electronic signature must be affixed. By signing, the person is attesting to the following:

By checking the box, I _____, as RO for the Financial Institution, certify that, to the best of my knowledge, the information submitted above is accurate and complete and agree that the Financial Institution (including its branches, if any) will comply with its FATCA obligations in accordance with the terms and conditions reflected in regulations, intergovernmental agreements, and other administrative guidance to the extent applicable to the Financial Institution based on its status in each jurisdiction in which it operates.

After registration is complete and submitted, the final step is receipt of the GIIN that will be issued by electronic notice to the RO after registration is approved by the IRS. So far, there has been no formal commitment as to how long the approval process will take once registration is submitted. Because the IRS has stated that if registration is completed by April 25, 2014, the FFI's GIIN will be on the first published

³⁶ A Limited Branch is a branch that under the laws of the jurisdiction in which it is located is unable to: (1) report, close, or transfer its U.S. accounts to a U.S. FI, to a branch of the FFI that will report the U.S. accounts, to a PFFI, or to a Reporting FI under a Model 1 IGA; or (2) withhold, block, or close an account held by a recalcitrant account holder or nonparticipating FFI or transfer the account to a U.S. FI, to a branch of the FFI that will report the account to the IRS, to a PFFI, or to a Reporting FI under a Model 1 IGA. A Limited Branch also includes a related branch under a Model 1 or 2 IGA that is treated as a nonparticipating FFI branch because it operates in a jurisdiction that prevents such branch from fulfilling the requirements of a PFFI or Deemed Compliant FFI.

³⁷ FAQ 9.

IRS FFI List issued on June 2, 2014, the approval process should be completed in no more than five weeks. The GIIN is a 19-character identification string that is a composite of different identifiers such as the FATCA ID, the FI type, category code, and country identifier.³⁸

Once completed, registration updates are allowed, but only on the electronic portal (and not on paper).³⁹ A change in registration status may also be made.⁴⁰ Changes may be needed where an applicable IGA is concluded after an FFI has registered as a participating FFI.

EAG SPECIAL RULES

For an EAG, the Lead FI must first enter the FATCA portal and list each Member FI in Part 2. A Member FI cannot create its own account. Rather, the Lead FI must first create the account for each Member FI and then supply each Member FI with its own credentials so each Member FI can complete registration.⁴¹ Each Member FI will then need to complete its

own registration.⁴² The Lead FI will, however, have the ability to view Member FI information so that it can make sure registration is complete, and otherwise monitor compliance.⁴³ The FAQs noted a technical glitch for EAGs with more than 50 members, but a fix is in process.⁴⁴

CONCLUSION

The long-awaited FATCA electronic registration portal has opened, and FATCA compliance is now becoming a reality. While registration cannot be completed until 2014, FFIs are advised to start the registration process this year so that they can make sure the required information is ready for submission next year. To ensure inclusion in the June 2014 IRS FFI List, an FFI will need to finalize its registration by April 25, 2014. FATCA withholding is set to begin on July 1, 2014, and everyone is urged to begin preparation now. Withholding agents and FFIs also need to stay tuned for the next chapter in the FATCA saga, which is the issuance of final Form W-8s addressing FATCA withholding.

³⁸ FAQ 29. It is important to note that the three period separators that will be part of the GIIN are required. FAQ 30.

³⁹ FAQ 22.

⁴⁰ See FAQ 25 (expressly noting that a change from limited to participating is allowed).

⁴¹ FAQ 13.

⁴² FAQ 19.

⁴³ FAQ 31 (access is gained by clicking the “view member information” link from the Lead FI’s homepage).

⁴⁴ FAQ 9 (the problem is not being able to view all the Member FIs, although a temporary fix is noted).

Timeline for Implementing FATCA, as Revised by Notice 2013-43		
Matter	Old Timeline	New Timeline
Withholding	Payments made after December 31, 2013	Payments made after June 30, 2014
Gross Proceeds Withholding	January 1, 2017	No change
Foreign Passthru Payments	No earlier than 2017	No change
Grandfathered Obligations	Obligations outstanding on January 1, 2014	Obligations outstanding on July 1, 2014
New Account Opening Procedures	By January 1, 2014, or, in the case of a participating FFI, by the later of January 1, 2014, or the effective date of its FFI Agreement	By July 1, 2014, or, in the case of a participating FFI, by the later of July 1, 2014, or the effective date of its FFI Agreement
Expiring Withholding Certificates	Expire on December 31, 2013	Expire on June 30, 2014
QI, WP, or WT Agreements	Expire on December 31, 2013	Expire on June 30, 2014
FATCA Registration Portal	Expected to open July 15, 2013	Opened August 19, 2013
Initial Deadline to Register to be on First IRS FFI List	October 25, 2013	April 25, 2014
First IRS FFI List	December 2, 2013	June 2, 2014

Information Report on U.S. Accounts by Participating FFIs	March 31, 2015, for both 2013 and 2014 calendar years	March 31, 2015, for only the 2014 calendar year; longer time allowed if IGA applies
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FATCA IGAs	
Date Signed	Country
September 14, 2012	United Kingdom
November 15, 2012	Denmark
November 19, 2012	Mexico
December 21, 2012	Ireland
February 14, 2013	Switzerland
April 15, 2013	Norway
May 14, 2013	Spain
May 31, 2013	Germany
June 11, 2013	Japan

IGAs have been informally announced by some foreign governments (such as the Cayman Islands),

but have not yet been formally signed.