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FATCA reporting: where and how

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Introduction

One of the stated purposes of the Foreign Account Tax Compliance Act (FATCA) is to address the use of non-US accounts to facilitate tax evasion. In order for the Internal Revenue Service (IRS) to gather information on the foreign financial assets of US persons, more than 145,000 financial institutions have registered through the IRS FATCA registration system. FATCA requires these financial institutions to report information on their US account holders beginning in 2015 for reporting year 2014. The United States has intergovernmental agreements (IGAs) with more than 110 countries, which are either signed or agreed in substance. Those countries with a Model 1 IGA have agreed to collect the data and exchange it with the IRS annually, beginning in 2015 with information for 2014. Foreign financial institutions (FFIs) in Model 2 IGA jurisdictions and the local tax authorities in Model 1 IGA jurisdictions will use the IRS's newly opened International Data Exchange Service (IDES) to securely provide and exchange information on financial accounts held by US persons.

Reporting Model 1 FFI will report to local tax authorities

Governments that have entered into a Model 1 IGA with the United States have agreed to obtain information with respect to all US reportable accounts from each of their reporting FFIs and to annually exchange this information with the United States. The way in which FFIs will submit the information to the local tax authority is being finalised by each jurisdiction, but it is anticipated that reports will be filed electronically and in a format that will accord with the published reporting schema issued by the IRS. In Guernsey, for example, the new online system has been named Information Gateway Online Reporting and is now live.

In addition to non-US banks and trust companies, reporting FFIs include investment entities within a family structure that have registered as FFIs with the IRS. For example, an investment holding company established in the British Virgin Islands (which has a Model 1 IGA) in which several non-US family trusts own shares, and which has registered and been issued a global intermediary identification number (GIIN), will provide information to the BVI tax authorities with regard to any US reportable accounts of the company. Provided that each non-US family trust owning shares in the BVI company is FATCA compliant, the BVI company itself will have no such accounts.

Trustee-documented trusts

Assuming that a non-US family trust has a reporting Model 1 IGA trust company as trustee, the trust can be deemed compliant for FATCA purposes as a trustee-documented trust. The trustee will report information on the trust's US reportable accounts, if any, to the local tax authorities. Guidance notes to the Model 1 IGAs have taken the approach that a trust is resident in the IGA jurisdiction for FATCA reporting purposes if its trustee is located in the IGA jurisdiction. For example, pursuant to the Cayman guidance notes, for the purpose of the Cayman IGA a trust is resident in the Cayman Islands if it has a trustee that is a trust corporation which is incorporated, registered or licensed in the Cayman Islands. Such a Cayman resident trust may be established under Cayman law or under the law of another jurisdiction.

The definition of 'trustee-documented trust' in Annex II of both the Model 1 IGA and the Model 2 IGA refers to a trust "established under the laws of" the FATCA partner jurisdiction (for further details please see "FATCA: trustee-documented trusts are not sponsored entities"). This wording has

caused some confusion for family advisers, since it is not unusual for a trust to be established under the law of one jurisdiction and to have as a trustee a trust company established in a second jurisdiction, or for the original trustee of a trust to have resigned and been replaced with a trust company in another jurisdiction. The Annex II definition appears to contemplate these possibilities since a trust "established in the partner jurisdiction" must have as a trustee a reporting US financial institution, a reporting Model 1 FFI or a participating FFI (which includes a Model 2 FFI). However, according to their IGA guidance notes, the local tax authorities are not looking to collect data from non-resident trust companies, even though the trusts themselves were established under local trust law. A reasonable interpretation of the IGAs is that the trust company serving as trustee must report any US accounts of a trust established in an IGA jurisdiction to the local tax authorities in the jurisdiction where the trust company is located in the case of a Model 1 FFI trust company, and to the IRS in the case of a Model 2 FFI trust company. This approach would clearly appear to be a good-faith effort to comply with the requirements of the IGA.

Timetables and nil reports

A family's advisers must look to the IGA of the jurisdiction where the family's trust companies are located to determine the local reporting obligations and timetable (for further details please see "FATCA update: planning for compliance within structures for international families"). For example, under the Cayman IGA guidance notes the reporting deadline is May 31 2015 for reporting year 2014. The Guernsey timetable shows a June 30 2015 reporting date and requires Guernsey FFIs with no reportable accounts to make a nil return via a 'tick box' using Information Gateway Online Reporting. Similarly, Cayman FFIs with no reportable accounts are required to make a report to that effect to the Cayman tax authorities. Conversely, according to the BVI draft guidance notes, returns will not be required by BVI FFIs if there are no reportable accounts.

FFI under Model 2 IGA subject to FFI agreement reports directly to IRS

As mentioned above, where the trust company is located in an IGA jurisdiction and the non-US family trust was established under the law of an IGA jurisdiction (whether the same or a different jurisdiction), the trust can have a FATCA status of trustee-documented trust. When the trustee is

a reporting Model 1 IGA FFI, the trustee will report on any US reportable accounts of the trust to the local tax authorities. On the other hand, a reporting Model 2 IGA FFI will report directly to the IRS.

For example, take the case of a trust established under the law of Guernsey, which has a Model 1 IGA, with a Swiss reporting FFI as its trustee. The Swiss Model 2 IGA contains no reference to a trustee-documented trust because Switzerland has no domestic trust law. However, the Swiss trust company, which is registered with the IRS pursuant to the Swiss IGA, must abide by the terms of the IRS-issued FFI agreement, which specifically says that a participating FFI that is the trustee of a trustee-documented trust (as defined in an applicable Model 1 or Model 2 IGA) must report each US account maintained by the trust "as if" the participating FFI maintained the account. Therefore, the trust in this example is defined in the Guernsey Model 1 IGA and its Swiss trust company will report US accounts, if any, directly to the IRS as per its Swiss Model 2 IGA and the FFI agreement.

Similarly, a trust established under Bahamas law that migrates to Bermuda pursuant to a change of trustee should be able to qualify as a trustee-documented trust, provided that its new trustee is a reporting Bermuda FFI. The Bermuda trust company will file a FATCA report with the IRS, if the trust has US reportable accounts, and not with the Bahamas tax authorities. (For a discussion of private trust companies please see "FATCA: practical compliance for non-US private trust companies and their trusts").

Form 8966 FATCA report filed electronically

Reporting Model 2 FFIs and FFIs that have registered with the IRS but are not in an IGA jurisdiction must file Form 8966 for calendar year 2014 on or before March 31 2015. The report is to be filed directly with the IRS using IDES. The instructions to Form 8966 state that, with respect to calendar year 2014 only, an automatic 90-day extension of time to file Form 8966 will be provided to all filers, without the need to file any form or take any action. This appears to effectively extend the due date to June 31 2015. For years after 2014, an automatic 90-day extension must be formally requested.

Enrolment and use of IDES

Reporting Model 2 IGA FFIs can begin the IDES enrolment process in advance of their reporting deadline. Model 1 IGA tax authorities are to enrol and use IDES to exchange FATCA data electronically with the United States. IDES will also enable the United States to make reciprocal exchanges as described in the IGAs.

To begin transmitting information in IDES, the reporting FFI or tax authority will first need to obtain a digital certificate. Digital certificates are used to bind the transmitted digital information to the physical identity of the reporting entity and provide data integrity. All IDES enrollees must obtain a proper digital certificate in order to enrol. A list of approved certificate authorities is available on the IDES enrollment page, from which entities can purchase certificates for an annual fee.

Comment

FATCA continues to roll out and will settle into standard business practice before long, just as happened with know-your-customer standards, anti-money-laundering due diligence and suspicious activity reporting. International families which maintain non-US structures to safeguard and pass wealth to succeeding generations must be sure that the directors of their registered investment entities are aware of any local registration or nil reporting. These families should also be comfortable that their professional offshore trust companies are registered as reporting Model 1 or Model 2 IGA FFIs, and that any reporting by the trustee is coordinated with the reporting required of the US individual family members.

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