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Update



Family offices

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FATCA

The US Treasury Department has published comprehensive regulations on information reporting by foreign financial institutions commonly known as FATCA.

Introduction

The Hiring Incentives to Restore Employment Act of 2010 (HIRE Act) introduced a general requirement on US withholding agents to withhold tax on certain payments to foreign financial institutions (FFIs) that do not agree to report certain information to the IRS regarding US accounts, and on certain payments to non-financial foreign entities (NFFE's) that do not provide information on their substantial US owners. Withholdable payments include US source income on securities and any gross proceeds from the sale of securities which generate US source income.

Foreign financial institutions

An FFI includes:

- banks
- custodians
- investment entities
- specified insurance operations.

The regulations exempt some FFIs from the requirement to register and report, including governmental organisations, most non-profit organisations, certain small local financial institutions and retirement funds.

Withholding will not be applied if an FFI enters into an agreement with the IRS (an FFI agreement). Participating FFIs will be required to identify their US accounts and comply with verification and due diligence procedures prescribed by FATCA. US accounts are defined as any financial account held by one or more specified US persons or US owned foreign entities.

Participating FFIs are required to report certain information on an annual basis to the IRS with respect to each US account and to comply with the request for additional information from the US authorities. The information that must be reported includes:

- the name, address and taxpayer identification number (TIN) of each account holder who is a specified US person;
- the account number;
- the account balance or value;
- the gross receipts and gross withdrawals or payments from the account in the relevant period.

FACTA requires a participating FFI to withhold 30% of any pass through payment to a recalcitrant account holder or to a non-participating FFI. There are limited exceptions and the requirements apply to other FFI members of the same expanded affiliated group.

Non-financial foreign entities

Any foreign entity that is not an FFI is considered to be a non-financial foreign entity (NFFE). FACTA requires a withholding agent to withhold 30% of any withholdable payment to an NFFE unless (1) the beneficial owner provides the withholding agent with either a certification that such beneficial owner does not have any substantial US owners, or the name, address and TIN of each substantial US owner, (2) the withholding agent does not know or have any reason to know that any information provided by the beneficial owners is incorrect, and (3) the withholding agent reports the information to the US authorities.

Inter-governmental Agreements

In many cases, foreign law would prevent an FFI from reporting directly to the IRS the information required by FACTA. To overcome these legal impediments, the US Treasury Department has collaborated with foreign governments to develop two alternative Model Inter-governmental Agreements (IGA) that facilitate the effective and efficient implementation of FACTA in a manner that removes domestic legal impediments to compliance. The first model Inter-governmental Agreement (Model 1 IGA) requires FFIs to report to the authorities in their jurisdiction, rather

than directly to the IRS. The partner jurisdiction then exchanges this information with the IRS on an automatic basis. A second Model Inter-government Agreement (Model 2 IGA) directs the FFI to register with the IRS and report specified information about US accounts directly to the IRS in a manner consistent with the general regulations, with certain modifications.

Registrations and technical implementation

FFIs registering with the IRS are able to do so through a secure online web portal at www.irs.gov/fatca. Upon approval, they will receive a global intermediary identification number (GIIN) from the IRS.

The detailed requirements are set out below:

General rule of withholding

An FFI will suffer withholding tax of 30% on any withholdable payments unless the withholding agent has established that the payment is exempt (such as payments to participating FFIs, or deemed compliant FFIs). A withholding agent may treat a payee as a deemed compliant FFI if the withholding agent has a withholding certificate that identifies the payee as a certified deemed compliant FFI.

Obligations of participating FFIs

- A participating FFI is required to deduct withholding tax with respect to payments made to recalcitrant account holders and non-participating FFIs. Where prohibited from doing so by foreign law, the FFI is required to close such an account within a reasonable period of time.
- A participating FFI is required to undertake due diligence to determine whether each account is a US account or an account held by a recalcitrant account holder or non-participating FFI.
- A participating FFI is required to report required information annually with respect to US accounts and accounts held by recalcitrant account holders. A participating FFI that is unable to obtain a waiver, if required by foreign law, to report on an account must close or transfer such an account within a reasonable period.
- Except as provided in the Model 1 IGA or Model 2 IGA, each member of a group of FFIs wishing to be treated as a participating FFI must register individually.
- A participating FFI is required to adopt a compliance programme under the authority of a compliance officer, who will be required to certify periodically to the IRS on compliance with the requirements of the FFI agreement.

Due diligence requirements for entity accounts

A participating FFI must determine if an account is a US account or an account held by a recalcitrant account holder or a non-participating FFI by applying the required procedures to

establish the 'Chapter 4' status of each account holder and each payee regardless of whether the participating FFI makes a payment to the account.

Due diligence requirements for individual accounts

With respect to an individual account that is not a pre-existing account, a participating FFI must determine if the account is a US account by reviewing all information collected in connection with the opening or maintenance of each account, including documentation collected for regulatory purposes. Aggregation is required.

US indicia

US indicia include:

- classification of the account holder as a US citizen or resident;
- a US place of birth;
- a current US resident address or US mailing address;
- a current US telephone number;
- standing instructions to pay an amount from the account to an account maintained in the United States;
- a current power of attorney granted to a person with a US address;
- an 'in care of' address or a 'hold mail' address that is the sole address the FFI has identified for the account holder.

If US indicia are identified, the participating FFI must retain a record of the documentation. Where the account holder was born in the United States but has subsequently lost his citizenship, the FFI must retain a record evidencing citizenship in another country and a copy of the Certificate of Loss of Nationality of the United States.

Account reporting

Generally, participating FFIs are required to report the following:

- the name, address and TIN of each account holder that is a specified US person;
- the account number;
- the account balance or value of the account;
- the payments during the calendar year.

Annual reports shall be completed on Form 8966 and filed electronically with the IRS on or before 31 March of the year following the end of the calendar year to which the form relates.

Compliance programme

Participating FFIs are required to appoint a responsible official to oversee the compliance with the requirements of the FFI agreement. He must establish a compliance programme that includes policies, procedures and processes sufficient for the participating FFI to satisfy the requirements of the FFI agreement.

Six months following the end of each certification period, the compliance officer must confirm:

- he has established a compliance programme that is in effect as at the date of that certification and that has been subjected to the review required;
- with respect to material failures; (a) there are no material failures for the certification period, or (b) if there are any material failures, appropriate actions were taken to remediate such failures and prevent such failures from reoccurring;
- with respect of any failure to withhold or report to the extent required under the FFI agreement; the FFI has corrected such failure by paying any taxes due (including interest and penalties).

Exceptions

A financial account does not include:

- retirement and pension accounts;
- certain tax favoured savings accounts with annual contributions of less than \$50,000;
- certain term life insurance contracts;
- accounts held by an Estate (if the documentation for such accounting includes a copy of the deceased's will or death certificate);
- escrow accounts;
- annuity contracts;
- specific accounts or products excluded under IGAs.

Exclusions

The definition of an FFI excludes:

- non-financial group entities, including for example holding companies, treasury companies or captive finance companies that are part of a non-financial group;
- non-financial start-up companies or companies entering a new line of business (excluding private equity funds);
- non-financial entities in liquidation or bankruptcy;
- inter-affiliate FFIs, if the group does not maintain financial accounts nor hold accounts with or receive payments from a withholding agent;
- Section 501C entities;
- non-profit organisations.

Registered deemed compliant FFIs include local FFIs regulated as a financial institution in the country of incorporation which do not have a fixed place of business outside that country, and where at least 90% of the accounts by value are held by residents of the country in which the FFI is incorporated or organised. An FFI that is incorporated or organised in a member state of the European Union may treat account holders that are residents of other member states as residents of that country.

Registered deemed compliant FFIs must register with the IRS and they also include:

- non-reporting members of participating FFI groups, where policies and procedures are introduced to transfer US accounts to a participating FFI or close the accounts;
- certain qualified collective investment vehicles held by an FFI or by exempt owners;
- restricted funds;
- qualified credit card issuers;
- sponsored investment entities and controlled foreign corporations.

Certified deemed compliant FFIs are required to certify their status and provide withholding agents with prescribed documentation. They include:

- non-registering local banks;
- FFIs with only low value accounts of less than \$50,000;
- sponsored closely holding investment vehicles;
- limited life debt investment entities.

Owner documented FFIs

A qualifying FFI (which must be an investment entity) may be treated as an owner documented FFI with respect to payments received from and accounts held with a designated withholding agent (a US financial institution, participating FFI or Model 1 FFI) that agrees to undertake the additional due diligence and reporting requirements.

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