



FStaxworld Your February snapshot

In this month's *FStaxworld*, we digest the newly-issued FATCA guidance updates

Jump to:
The View from Deloitte

Switzerland Concludes
More OECD CRS
Exchange Agreements

Related Links

Authors

The View from Deloitte

Dear Reader,

Nearing its second birthday this coming July, the FATCA regime, like any toddler, remains a work in development as evidenced by the U.S. government's release of several new items of guidance germane to key elements of FATCA compliance.

New IRS Form W-8BEN-E and instructions

On 15 January 2016, the IRS released an updated draft version of the Form W-8BEN-E and accompanying instructions. As these materials are explicitly in draft form, none of the additions, clarifications or modifications is active yet or certain to be included in the final versions of either document. However, the additions, clarifications and modifications provide a clear forewarning and ought to be viewed



as insights into forthcoming changes. Material changes, as set forth below, are segregated by topic.

Part I – Chapter 4 status

- **Guidance:** A new checkbox has been added to the chapter 4 statuses in Line 5 for payments made to payees for accounts they hold that are not financial accounts pursuant to the Treasury Regulations section 1.1471-5(b)(2).
- **Analysis:** Generally, Financial Institutions (FIs) would determine whether any client relationship qualifies as a financial account for FATCA purposes or is exempt from the corresponding account holder documentation requirement. However, in a circumstance where such status is unclear to the FFI, the client now has the means to certify such an exemption via the Form.

Part II – Disregarded entity or branch receiving a payment

- **Guidance:** Only a disregarded entity that has its own GIIN and is receiving a withholdable payment or a branch (including a branch that is a disregarded entity that does not have a GIIN) of the FFI identified in line 1 operating in a jurisdiction other than the country of residence identified in line 2 must complete part II of the Form.
- **Analysis:** The additional guidance on which disregarded entities and branches need to complete part II is welcome clarity on one of the trickier sections of the Form.

Part III – Treaty benefits claims

- **Guidance:** A taxpayer is required to check the relevant box associated with the limitation on benefits (LOB) test it meets with respect to the treaty benefits claimed on the Form, or to check a box that it has obtained a favorable discretionary determination from the U.S. competent authority that it qualifies for the treaty benefits claimed on the Form.
- **Analysis:** The additional requirement to designate an LOB status provides the most challenging new aspect introduced by the Form revisions.
- QI banks likely need to validate such statuses for plausibility based on information collected on the client for AML/KYC and other regulatory purposes.
- Thus, such statuses may need to be recorded and may need to be included on Forms 1042/1042-S, but such conclusions are premature speculations at the moment.

Part IV – Sponsored FFI status certification

- **Guidance:** Sponsored entities with their own GIIN must provide both their own GIIN and their sponsor's GIIN (also applies to Sponsored Direct Reporting NFFEs).
- A sponsored FFI is not required to obtain its own GIIN before 1 January 2017.
- However, a sponsored entity that has obtained a GIIN must provide it on line 9a and the sponsor's GIIN of the sponsoring entity on line 16.
- **Analysis:** There is a presumptive need to verify both GIINs on the IRS GIIN List and to record both for potential reporting obligations.

Part XII – Nonreporting IGA FFI status certification

- **Guidance:** A Nonreporting IGA FFI claiming a deemed-compliant status under the Treasury Regulations must indicate under which section of the Treasury Regulations it qualifies.
- A Nonreporting IGA FFI must identify the applicable IGA by entering the name of the jurisdiction that has the applicable IGA treated as in effect with the U.S., and indicate whether it is a Model 1 or Model 2 IGA.
- A Nonreporting IGA FFI must also provide the withholding agent with the specific category of FFI described in Annex II of the IGA applicable to its status (e.g. Investment Advisor and Manager, Trustee-documented Trust).

- Analysis: All deemed compliant FFIs located in an IGA jurisdiction should tick the Nonreporting FFI status box in part I, even where they access the chosen status via the Treasury Regulations, and complete part XII according to the new requirements.

Part XXIX – Substantial U.S. Owners/Controlling U.S. Persons of a Passive NFFE

- Guidance: Controlling Persons may be documented as Substantial U.S. Owners in part XXIX (for any IGA)
- Analysis: Clarification that IGA FIs may use IRS Forms to document Controlling U.S. Persons of Passive NFFE entity account holders.
- However, the certification in Part XXVI that a Passive NFFE entity account holder has no Controlling U.S. Persons remains unclarified in the draft (though a corresponding adjustment in the final version is expected).

Change in Circumstances

- Guidance: A change in circumstances includes when the jurisdiction where the FFI is organized or resident was included on the list of jurisdictions treated as having an intergovernmental agreement in effect and is removed from that list or when the FATCA status of the jurisdiction changes (e.g., from Model 2 to Model 1)
- Analysis: When a Model 2 jurisdiction moves to a Model 1 IGA, forms documenting Reporting FIs as Reporting Model 2 FIs will be subject to a Change in Circumstance treatment and the account holder will need to be re-documented.
- Were such a requirement intact when Switzerland converts to a Model 1 IGA, likely in 2018, the operational consequences would be extremely burdensome. Therefore, it is hoped that the U.S. relents on this provision and permits FIs to alter the status of relevant Reporting FI account holders by means of an internal adjustment.

IRS Notice 2016-08

On 20 January 2016, the IRS released a Notice with significant FATCA relief provisions, as follows:

- **Delay to initial RO Certification deadline:** The Notice extends the deadline for the initial RO Certification by PFFIs and Reporting Model 2 FIs from August 29, 2016 to July 1, 2018, thereby aligning the deadline for pre-existing account certifications with the one for the first periodic certifications of compliance.
- **Non-Participating FFI (NPFFI) gross proceeds reporting clarification:** Gross proceeds reporting to NPFFIs is not required for 2015, aligning with relief provided for reporting of gross proceeds paid to U.S. accounts and accounts held by ODFFIs.
- **Use of electronic IRS Forms:** Electronic form (known as E-W-8s) of a beneficial owner may be forwarded by nonqualified intermediary (NQI), nonwithholding foreign partnership (NWP), or nonwithholding foreign trust (NWT) to the upstream withholding agent, provided the withholding agent receives from the NQI, NWP or NWT an additional statement that the form was created in an acceptable manner.

The individual components of the new guidance are mainly welcome (notably the relief around the RO Certification deadline), but minor improvements and clarifications will be overwhelmed by the two looming obligations included in the new Form concerning LOB statuses and IGA model conversion consequences. Hopefully, both such requirements will be softened prior to activation.

Regards,

Paul Millen

Switzerland Concludes More OECD CRS Exchange Agreements

After announcing the intent to automatically exchange financial account information with Australia in March 2015 and signing a CRS agreement with the EU in May 2015, Switzerland recently entered into joint declarations regarding the introduction of CRS with six more jurisdictions. In particular, Switzerland concluded such declarations with the UK Crown Dependencies (Jersey, Guernsey, and the Isle of Man), Iceland, Japan and Norway. According to the Swiss government, those jurisdictions all meet the criteria for potential CRS partner jurisdictions of Switzerland: Sufficient data confidentiality, market access for Swiss financial institutions, and a solution to potential legacy issues.

The joint declarations express the intention of the involved parties to activate the Multilateral Competent Authority Agreement (MCAA) among each other via the respective notifications to the OECD Secretariat. It is planned that financial institutions in Switzerland and the partner jurisdictions start to collect relevant information by 1 January 2017 and that the first exchange information happens in 2018 (regarding information gathered during the reporting period of 2017).

For more information, please contact [Markus Weber](#) or [Robin King](#).

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