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Your December snapshot

In this month's FS*taxworld*, we discuss the pending FATCA deadline of 1 January 2015, imposing the next set of major FATCA compliance activities on financial institutions

Articles in this issue

The View from Deloitte

Dear Reader,

At the first major deadline, 1 July 2014, FATCA introduced a series of new and assorted compliance responsibilities for Financial Institutions (FIs). On 1 January 2015, the next major phase of FATCA compliance obligations awaits FIs, including:

- The obligation for Reporting Model 1 FIs to register and obtain a valid GIIN number for self-certification purposes;
- The expiration of the deemed active category for IGAs negotiated in substance but not yet signed (recently postponed via Treasury Announcement 2014-38 for jurisdictions demonstrating a good faith intent to sign one in the near future);
- The need to track payments to accounts identified and documented as U.S. Reportable Accounts in order to capture them for account reporting for tax year 2015 and beyond; and
- The need to track payments to Non-participating FFI (NPFFI) account holders (and/or payees depending on the IGA jurisdiction and its guidance notes) for account reporting for tax years 2015 and 2016.

However, the incoming compliance activity likeliest to generate significant confusion and uncertainty concerns the requirement for FATCA-enhanced on-boarding for new entity account holders. Originally, the Treasury Regulations and IGAs scheduled the onset of the obligation to collect mandatory information about, *inter alia*, the FATCA compliance status of new entity

account holders via FATCA-adjusted forms for 1 July 2014, the same start date as the enhanced on-boarding requirements for individual account holders. However, in part due to the delayed publication of the necessary final forms and accompanying instructions, the IRS postponed the activation date of this compliance activity to 1 January 2015 via relief provided in IRS Notice 2014-33. To complicate the situation still further, the application of the relief provision was itself optional and the IRS Notice was not binding on IGA jurisdictions, some of whom (most notably, the UK) declined to offer the optional relief under their IGAs.
As a result, even though the relief provision was adopted as the standard in many jurisdictions and new entity on-boarding under FATCA thus generally postponed, FIs with a global expanse obtained some localized experience in on-boarding new entity account holders and being on-boarded themselves.

This unexpected preview of the impending obligations provided a rough education in the topic, which may lessen the burden of implementing these requirements worldwide. The lessons learned so far include:

- **The need for flexibility –** Perfect clarity is absent regarding which FATCA entity classification types claim which chapter 4 status on the self-certification form. This uncertainty is particularly acute in the context of IGA compliance path categories that vary in some facet from their brethren under the Treasury Regulations, but pervades IGA entity classifications in general. Consequently, requester FIs may prefer to adopt a tolerant approach, accepting any plausible claimed chapter 4 statuses, even where the requester FI itself might prefer a more suitable chapter 4 status for the FATCA compliance path category of such an entity. Conversely, from the perspective of the filer entity, where the requester FI rejected a submitted chapter 4 status due to inflexible internal guidance, the filer entity may opt to conform with the requester FI's determination (within the bounds of reason), rather than combat the determination and incur consequent delays.

- **Use of self-certification forms** – As expected, the official IRS withholding certificates (the assorted Forms W-8) are cumbersome and intimidating, but as outlined above, unexpectedly, they are not comprehensive, disserving entities subject to IGAs and FIs maintaining account for such entities. Thus, where permissible, self-certification forms, so long as they satisfy the validity criteria, provide a better on-boarding format as they are client-friendlier and more adaptable to the needs of entity account holder types in the specific IGA jurisdiction.

- **Focus on GIIN verification –** The IRS intended the GIIN verification process as a safe harbor by which FIs could confirm the FATCA compliance of account holders and counter-parties based on an external, IRS-administered source. Over the past few months, FIs with primarily other FIs as counter-parties adopted this safe harbor with gusto, exchanging GIINs in a flurry. This method for settling identification and documentation, where available, is effective and economical.

- **FATCA rubber meets on-boarding road –** New entity account holder on-boarding exposes defects and short-cuts in FATCA compliance programs that escaped prior notice. For less sophisticated FIs and entities belonging to a group of non-financial companies, who may have neglected their FATCA entity classification and potential registration duties, demands for the completion of FATCA-approved self-certification forms at the time of on-boarding (and subsequent rejection when unable to comply) is the moment they first learn the peril of ignoring FATCA. Additionally, for the more sophisticated FIs, several of the complex FATCA interpretations and operational practices developed by the tax and compliance departments first endure actual implementation and challenge at the time entity account holder on-boarding. As a

result, some FIs must adjust long-held assumptions to cope with complications caused by errant, misguided or at least unpopular positions.

Based on our experience supporting clients contending with the above lessons from FATCA-enhanced entity account holder on-boarding, we developed the following advice:

- Train the front office personnel in the rules so that they can clearly explain the new on-boarding requirements without veering into the provision of inappropriate tax advice. The balance is delicate as the on-boarding personnel need to enforce strict regulatory requirements without alienating prospective or existing customers. It is also an opportunity to alert long-standing customers who are not yet FATCA-compliant of the consequences of such non-compliance before pre-existing account remediation results in withholding or forced account closure.

- Institute a rigorous escalation process able to accommodate the variety of plausible classification claims that may be submitted.

- Prepare for unexpected methods and formats for submissions, such as unsolicited forms, emails proffering GIINs and alternative IGA certifications (for further information on this topic, please refer to the Report from the FATCA Frontlines **here**). In its incipient form, FATCA on-boarding is an unsettled process and we advise our readers to prepare for the unknown unknowns, as well as the foreseeable ones we set forth above.

In sum and as evidenced in those jurisdictions and by those FIs that did not adopt the relief provision set out in IRS Notice 2014-33, the incoming FATCA-enhanced entity account holder on-boarding process is a manageable, if daunting, challenge. However, it stands out further as a new variant of FATCA obligation imposed on large FIs. In 2014 they arranged their own FATCA compliance. Beginning on 1 January 2015, they must further expand their role as deputy enforcer of the FATCA regime to ensure that smaller FIs incur the same (albeit proportionately less demanding and intrusive) obligations as they did.

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P.S. As this publication will be our final edition for 2014, we wish all our readers our warmest regards for this holiday season and success for 2015.

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