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**Deloitte.**

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*FStaxworld*

**Your September snapshot**



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[Welcome to the Deloitte FSI tax team's revamped newsletter, re-formatted and re-focused in response to your survey feedback and featuring in this edition reflections on the first few months of a live and active FATCA regime.](#)

### Editor's Note on the Transition of the Newsletter

With the publication of issue number 1 of Deloitte's FStaxworld newsletter, we welcome our readership to a renewed version of the FAHTCAweekly newsletter. In an effort to transition the newsletter to serve a broader range of interests, while sustaining the technical quality that our readers expect, we will modify the frequency of publication, deepen our technical analyses and enlarge the topics presented beyond international tax transparency regimes such as FATCA or OECD CRS to include other pertinent topics such as Swiss Corporate Tax Reform III, TRACE, BEPS and 871(m) dividend equivalent rules.

In order to ensure that any developments remain aligned with the needs and wants of our readership, we solicited feedback on the revised concept from our readers via a survey on the Deloitte website. The survey results endorsed the general theme of expansion and heightened technical concentration, while expressing appreciation for the original newsletter as a beneficial resource whose primary mission ought to be preserved.

With thanks to the survey respondents, the new FStaxworld newsletter will retain the valued elements of the FAHTCAweekly newsletter, amplify the technical concentration and extend the scope of content into a wider variety of topics. We hope you all continue to read, use and enjoy it.

**Paul Millen**  
Editor, FStax*world* Newsletter

### Articles in this issue

[Editor's Note on the Transition of the Newsletter](#)

[The View from Deloitte](#)

## The View from Deloitte

Dear Reader,

On 1 July, the FATCA era began. So far, the activation of the dreaded regime appears fairly gentle with the more dire predictions about its consequences not substantiated.

The gravest fear as the onset date neared concerned an unready majority of smaller financial institutions suffering large-scale withholding on payments intermediated by larger financial institutions with FATCA controls developed, set-up and active. A derivative fear involved the threat of material capital flight from the U.S. markets or non-intergovernmental agreement (IGA) jurisdictions to escape any potential for withholding on U.S.-source payments imposed on those financial institutions unwilling or unable to be FATCA compliant by the 1 July deadline. Finally, the most plausible worry was that uncertainty of FATCA's impact due to either or both of the above two risks would trigger panicked reactions, disrupting financial markets. Fortunately, nothing of the sort took place.

The rather smooth transition into a post-FATCA landscape may be attributable to numerous factors, but the more prominent ones include:

- The large number of IGA jurisdictions, both where signed and where deemed active;
- The IRS announcement of a transitional period of soft-enforcement for compliance programs with documented good intentions;
- The optional relief on entity on-boarding provided in Notice 2014-33, deferring the beginning of FATCA-mandated on-boarding procedures for entity account openings until 1 January 2015; and
- The successful efforts of the non-U.S. financial institution (FFI) FATCA compliance programs to digest the unsettled and varied FATCA rule sets, operationalize the new processes and prepare themselves for 1 July.

Despite the absence of any systematic shock from the introduction of the regime, FATCA plainly altered the financial landscape, primarily by modifying the mechanics of the relationship between financial institutions and their account holders and counter-parties. After the first few months, we may already perceive both the contours of these new mechanics and potential longer-term consequences in the financial industry in the following areas:

### **Entity documentation and self-certification**

- As part of their duties under the FFI Agreement or relevant IGAs, FFIs assumed an enforcement role, obliging them to document and verify the compliance of other entities. Despite the Notice 2014-33 relief mentioned above, self-certification of their own entities and/or counter-party entities remained the primary FATCA activity over the past three months for most market participants, even for those financial institutions adopting the relief.
- Although the IRS released instructions for completing the relevant forms (please see our previous analysis, available [here](#)), questions persist amongst practitioners as to the precise requirements for these activities, including:
  - To which counter-parties do you communicate your GIIN and how do you communicate your GIIN to your counter-parties?
  - From which counter-parties do you request a GIIN and in what format do you need to obtain it and for what purposes?

- How to answer requests for external third party confirmations regarding a FATCA status without relying on a self-certification?
- Which Form W-8 do you complete and how do you complete it (especially where the entity in question is subject to an IGA under which it adopts a compliance path from Annex II)?
- How do you cope with a counter-party that demands more information than is required under FATCA due to, say, U.S DoJ Program exigencies, overzealousness or simple error?
- By what standards do you validate any Forms W-8 received?
- How do you handle the circumstance in which your financial institution and the counter-party devise different answers to any of the above questions?

### **Preparation of account reporting mechanisms**

- With entities registered, individual on-boarding processes implemented, entity on-boarding processes deferred and withholding a non-factor thus far, account reporting looms as the next major initiative within a FATCA compliance program.
- Due to the grace period for identification of pre-existing account holders and new on-boarding requirements to document Specified U.S. Person account holders, FFIs had reasonable expectations for a low number of reportable accounts for 2014.
- While this expectation remains sound, the initial processes for FATCA account reporting in general needed to be addressed and some proved trickier than originally imagined.
- As a threshold issue, FFIs outside the conventional banking spheres faced account holder identification uncertainties as they sought to analogize rules designed and written for bank and custodial accounts to their more niche areas. As a result, many had to determine the population of potential reportable account holders before embarking on the FATCA-mandated process of reviewing and remediating those accounts.
- For FFIs with a clearer sense of its account holder population, other issues emerged, a selection of which includes:
  - The prudent application of the transitional review deadlines to account identification for account holders already classified as U.S.;
  - The treatment of accounts closed prior to the expiration of the transitional review period; and
  - The Americanization and de-Americanization of account holders, seeking to rectify an inaccurate status profile in advance of any reporting or non-reporting consequences.

### **Absence of specific guidance in many jurisdictions**

- Many of the IGA jurisdictions, notably those deemed active, did not yet draft the relevant enacting legislation or draft and circulate the accompanying guidance notes.
- In addition to the absence of guidance notes, variations amongst the guidance notes that were published generate uncertainty as to which interpretations for IGAs will become standard (e.g. availability of non-written self-certifications?) and which will be unique to a single or a few jurisdictions (e.g. addition of Holding Company type FFI category or differing treatments of professionally managed investment entities?).
- Due to the flux in interpretation and variance across possible background source materials, Reporting Model 1 FIs in jurisdictions without settled guidance notes must

divine the correct answer to certain questions by reading the runes of inapplicable IGA guidance notes, trying to ascertain good ideas and trends and assume (or not) that they will be included in the guidance notes relevant to the entity in question.

### Documentation and review of policies

- With the opening phases of FATCA compliance executed, many FFIs are reviewing their programs to confirm that no key elements were overlooked or misapplied.
- In light of the soft enforcement allowance, the IRS seemed to promise generous tolerance for remediation of mistakes so long as the FFI actively strives for compliance, indicating that preliminary errors in interpretation or implementation are not fatal.
- Nonetheless, FATCA is an accretive compliance system in which one set of tasks informs and determines the efficacy of a subsequent set of tasks. Therefore, some of the more prudent FFIs will take some time now to review their earlier activities to ensure that they will not store up and compound past errors left unrepaired.

Please note that we intend to publish a similar, albeit shorter, section on “Notes from the FATCA Frontlines” in the newsletter on a recurring basis. If you encounter a topic in your work that you wish us to consider for inclusion, please send us an email explaining it. We cannot provide direct replies to any inquiries submitted in this fashion, but where a topic appears especially germane to our readership or multiple readers inform us of the same subject, we may provide some general analysis via the *FStaxworld* newsletter. All such inclusions will preserve, of course, the confidentiality of the submitter.

Regards,

Brandi Caruso  
Paul Millen

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