

IRS Notice 2014-33 Provides Relief on Implementation of FATCA and Coordination Rules

Closing the distance

Global Financial Services Industry



Further Guidance on the Implementation of FATCA and Related Withholding Provisions

On May 2, 2014, the IRS released Notice 2014-33 announcing that any enforcement actions for the calendar years 2014 and 2015 under FATCA and the temporary coordination regulations under chapters 3 and 61, and section 3406 will take into consideration the good faith efforts of foreign financial institutions (FFIs) and withholding agents to comply with those provisions. The Notice also provides some additional relief under FATCA and chapter 3; including relief for onboarding entity account holders from July 1, 2014 to December 31, 2014.

Specifically the Notice addresses the following changes:

1. Limited IRS enforcement action for good faith efforts

Calendar years 2014 and 2015 are now regarded as a transition period for purposes of IRS enforcement and administration of FATCA due diligence, withholding and reporting as well as the changes included in the temporary coordination regulations for chapters 3 (non-resident alien withholding and reporting) and 61 (domestic reporting), and section 3406 (backup withholding). During the transition period, the IRS will take into consideration the extent to which a participating or deemed compliant FFI, direct reporting non-financial foreign entity (NFFE), sponsoring entity, sponsored FFI, sponsored direct reporting NFFE, or withholding agent has made "good faith" efforts to comply with the FATCA regulations and the temporary coordination regulations. The primary reason for the relaxed enforcement is the ongoing delays in guidance. The IRS noted that while all new Forms W-8 have been published, some instructions are still pending and will be released "in the near future." The IRS also provided that calendar years 2014 and 2015 would not be considered a

transition period with respect to compliance under chapters 3 and 61, and section 3406 to the extent those provisions were not modified under the temporary coordination regulations.

2.Limited 6-month relief for onboarding entity account holders

New entity accounts opened on or after July 1, 2014 and before January 1, 2015 will now be considered preexisting accounts subject to the same preexisting account remediation deadlines¹ as under the current regulations. However, entity accounts opened during that time period and that would otherwise qualify for the \$250,000 de-minimis exception for preexisting accounts may not be excluded from review. The relief applies not only to entity account holders but to entity payees of obligations “issued, opened or executed” within the noted time frame.

Model IGAs will be updated to incorporate these due diligence changes. Further, these changes will apply to all existing signed IGAs, as well as those agreed to in substance, under the Favored Nations clause (Article 7) once a new IGA incorporating the changes is signed. For most IGA jurisdictions, the Favored Nations clause will apply automatically unless the country rejects the change in writing. However, the United Kingdom has previously indicated in their FATCA guidance that it must expressly approve any U.S. regulatory changes.

3.Relief from certain new chapter 3 documentation rules

The Notice provides that, under the chapter 3 non-resident alien rules, a withholding agent is no longer required to apply the new reason to know standards related to a U.S. telephone number or U.S. place of birth if an account holder is documented prior to July 1, 2014 - even if the withholding agent must later renew expired documentation or withholding certificates (e.g., collect a new Form W-8BEN because the prior form has expired). However, if there is a change of circumstance to an account on or after July 1, 2014 and the new U.S. indicia is present, the withholding agent must collect the appropriate additional documentation for the account holder to be considered a non-U.S. person.

4.Coordination of chapter 3 and FATCA requirements with respect to an individual’s reasonable explanation supporting a claim of foreign status

Under the chapter 3 regulations, an individual account holder with certain U.S. indicia on file (e.g., U.S. mailing address) must provide a reasonable explanation supporting the individual’s claim of foreign status. The individual can either (i) provide a written statement, or (ii) complete a checklist provided by the withholding agent stating that the individual meets one of the enumerated requirements (e.g., is a student, diplomat, or teacher; does not meet the substantial presence test, etc.). According to the IRS, the wording used in a similar section in the FATCA regulations could be interpreted to limit the reasonable written explanation supporting the claim of foreign status to one of the enumerated requirements for the checklist provided by a withholding agent. The IRS will update the FATCA regulations to adopt the approach reflected in the chapter 3 regulations. This change appears to allow an individual’s written statement to be any reasonable explanation supporting the claim of foreign status rather than to require the statement to be limited to the enumerated requirements that must be in a checklist provided by the withholding agent.

¹ The preexisting account due diligence timeline is December 31, 2014 for account holders that are prima facie FFIs and June 30, 2016 for all other account holders. A prima facie FFIs means any payee if (1) the withholding agent has available as part of its electronically searchable information a designation for the payee as a qualified intermediary or non-qualified intermediary, or (2) for an accounts maintained in the U.S., the payee is presumed to be or is documented as a foreign entity for chapter 3 or 61 purposes, and the withholding agent has recorded as part of its electronically searchable information the payee as a financial institution using either a Standard Industrial Classification code (SIC code) or a North American Industry Classification Code (NAIC code).

5.Limited FFIs and limited branches allowed to open U.S. accounts or accounts held by nonparticipating FFIs (subject to certain requirements)

Under the final and temporary FATCA regulations, limited FFIs and limited branches² are prohibited from opening new accounts (or accepting transfers from other members of an expanded affiliated group (EAG)) of U.S. persons or accounts of nonparticipating FFIs. The Notice modifies this prohibition by allowing limited FFIs and limited branches to open such accounts if the account holders are residents in the local jurisdiction and the limited FFI or limited branch is not used by another FFI in the EAG to circumvent FATCA (e.g., by transferring otherwise reportable accounts to the limited FFI or limited branch to avoid reporting).

6.Relief for affiliated groups with limited FFIs in jurisdictions that prohibit such FFIs from registering with the IRS

FATCA requires limited FFIs to register on the IRS FATCA registration website even though they cannot fully comply with FATCA. However, certain jurisdictions are prohibiting such entities located in their jurisdiction from registering. The Notice provides affiliated groups with relief by not preventing the FFIs in the group from obtaining participating FFI or registered deemed-compliant status even if a limited FFI in the group is prohibited from registering. However, to qualify, the lead FI must identify the limited FFI in Part II of the FATCA registration website. If the lead FI cannot identify the limited FFI by name, it can use the term "Limited FFI" along with the jurisdiction of residence or organization.

By identifying the limited FFI in the FATCA registration website, the lead FI is also confirming the following:

1. The limited FFI made a representation to the lead FI that it will meet the limited FFI status conditions;
2. The limited FFI will notify the lead FI within 30 days after it ceases to be a limited FFI (either because it can comply with FATCA or it can no longer comply with the requirements of a limited FFI); and
3. If the lead FI receives the notification in number 2 above (or knows one of the conditions exists), the lead FI will update the FATCA registration website within 90 days and will no longer be required to act as a lead FI for the FFI.

Closing Remarks

This latest IRS notice was released as withholding agents and FFIs around the world scramble to meet the upcoming deadlines imposed under FATCA. While the relief may not be as extensive as many hoped, the Notice does give some level of comfort to those withholding agents and FFIs that have made good faith efforts to comply with FATCA and the new changes in the temporary coordination rules.

A copy of the Notice 2014-33 is attached.

² These are FFIs or branches that cannot fully comply with FATCA in their local jurisdictions and that are part of an expanded affiliated group with FFIs that can otherwise comply with FATCA.

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