



## **Foreign Account Tax Compliance Act (FATCA)**

### **FATCA Roundtable**

Monday, November 16, 2015

Industry Concerns and Suggestions



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## Roundtable Objective

The FATCA Roundtable provides a forum for members of representative industry associations and IRS officials to discuss FATCA implementation efforts to date, along with present and future FATCA compliance challenges from the perspectives of both industry and the IRS. Through this discussion, the IRS seeks, from industry, a “boots on the ground” perspective about FATCA implementation and compliance challenges. The Roundtable provides the opportunity to improve FATCA’s prospects of success for the proper reporting of offshore accounts and income and in a manner sensitive to burdens on financial institutions, account holders, and other affected parties.

## Topic 1 – Information Technology

*Functionality and ease of use of IRS IT systems pertaining to FATCA, including the FFI Registration Website, the IRS FFI List Search and Download Tool, and the International Data Exchange Service (IDES)?*

One of industry’s concerns is data security regarding data that is shared between Foreign Financial Institutions (FFIs) and the local Host Country Taxing Authority (HCTA) under Model 1 jurisdictions. Account data and customer information about account holders may not be properly encrypted at all stages (including prior to and during transmission by FFIs to HCTAs). Such information is vulnerable to incidents such as identity theft (IDT), which could cause serious problems for the FFIs and their customers whose data has been shared as required. Protecting data and customer information is very important to FFIs, and in a dynamic environment the standards for protection are recognized as continuing to evolve. There is a reliance on other countries to provide strong protections, and industry looks to IRS and the United States to be a global leader, compelling other countries to develop good data protection measures that are comparable to that of the US.

### **International Data Exchange System (IDES):**

IDES is not as easy to navigate as industry would like. Unlike the Registration Portal, IDES does not contain a tool that can prepare the submission package and do XML validation. The IDES helpdesk, which is available to help FFIs, is open only during business hours within the US eastern time zone, which does not work for many foreign jurisdictions around the world that are in different time zones.

Industry sees improvements to IDES and helpdesk support as important updates as IRS considers priorities within its finite budget.

### **Registration:**

Industry asked IRS to consider creating a comprehensive archive of Registration information, including tracking historical changes and updates to Registration information. Industry also discussed the dynamic nature of the business environment, where transactions such as mergers and acquisitions are frequent and result in changes to the structure of an expanded affiliate group (EAG). The Registration history would be useful in showing that an entity did register (and what was registered) on a particular date in the past (for up to ten years) and that its new GIIN is a result of changes in Registration data / entity structure. This could be very useful as a way for companies to demonstrate that an FI checked and validated a payee GIIN at the time of payment – possibly months or years before compliance enforcement action is initiated by the IRS.

### **Registration Portal:**

The Portal is user-friendly and mostly provides good experiences. However, there are lock-out issues that are quite frustrating. If a user gets locked out, it could take several hours before one is able to log back in. Also, the interface tends to crash when an attempt is made to perform “bulk upload” for Registration.

### **GIIN Validation and the FFI List**

FIs would like to have real-time updates to the FFI List. If there is an update to an FI’s GIIN, it takes a while for the update to be made on the IRS’s FFI List. Although FIs have a 90-day grace period to make the GIIN update

to a customer's record before running the risk of incurring a withholding tax liability, it is burdensome for the FIs to manually track and "tag" this information while they are waiting for the next version of the FFI List to be published. It would be easier and less burdensome if the IRS list is immediately updated so that FIs would not have the tedious task of tagging customer accounts for going back into the system to check and validate the GIIN before the end of the 90 day period. Additionally, FIs are also burdened when dealing with trades, since trades occur within a very short period and the payments are cleared immediately. At the time of payment, the GIIN is not updated and the account may no longer exist by the time the FFI List is updated with the new/correct GIIN.

The FFI List is not currently updated in real-time to provide the IRS time to review the Registration details or data input reflected in the GIIN update.

## Topic 2 – Tax Forms, Instructions and Job Aids

*Usefulness of IRS forms, instructions and job aids pertaining to FATCA?*

### **FATCA Frequently Asked Questions (FAQs)**

Industry suggests the IRS date new FAQs, keep an archive of the old FAQs published on the IRS website, and explain changes to modified FAQs. It was suggested that the IRS can take more advantage of IRPAC when looking to gather input and feedback from industry, particularly regarding reporting issues.

### **Providing for Review and Comment on IRS Forms and Instructions**

In general, it would be very helpful to the industry if the IRS provided draft forms (together with instructions) to afford industry an opportunity to offer input before they are made final. Industry cited examples of cases where draft forms were issued in draft and then finalized without sufficient time to collect and consider industry comments. The results in such cases have often been the need for additional effort by the IRS to issue supplemental instructions to resolve issues that could have been more easily managed with a longer comment period.

Another concern is changes to the various codes on the 1042-S. A better understanding of what code changes are being made to the form ahead of time would be very helpful. Thus, the opportunity to review and provide input on these changes before they are made final would be beneficial for the industry to make the changes to their own guidance for clients.

Industry expressed continuing willingness and interest in providing IRS comment and feedback during an established comment period, as input from industry could assist the IRS in providing improved clarity in the guidance and instructions when forms and/or form changes are going to be published.

### **Complexity of FATCA Forms**

The Form 1042-S has become so complicated that it is creating significant challenges for withholding agents (WA). The most recent version of the form contains over 150 codes and the draft 2016 version has added even more codes. This is making life very difficult for WAs because in many cases, the rules are not clear, so it is difficult to figure out what code they are supposed to use for certain types of entities, especially where it is possible that more than one code might be plausibly correct. In order to avoid penalties, most WAs are left "guessing and hoping they get it right." A common example and frequent question on the 1042-S is around trustee documented trusts and what code to use. It is a known status, but it does not show up on form W-8 BEN-E.

Simpler guides – ideally compiling all relevant information in a single place – would help explain such issues to users and especially for the foreigners who typically use most FATCA forms. Institutions sometimes have difficulties trying to figure out the correct boxes to check on these forms, and therefore, are unable to determine whether a customer has correctly filed out the form by checking the correct boxes.

Complexity is a big issue for FIs under FATCA. Regional/community banks that do not have the resources to make all of the changes needed to respond to the complexity are struggling with clarity and lack of

understanding of what the rules are. As a result, FIs run the risk of IRS sanctions if they mistakenly use incorrect codes for reporting or misinterpret the rules in validating W-8s. Thus, while they are making their best efforts to be compliant, the complexity of the forms and the rules are creating significant challenges. Simplification and clarification of what may constitute 'good faith efforts' under IRS published guidance would help significantly.

Form W-8BEN-E is also a complex form that creates challenges for the foreign persons that are required to complete the form. It is important that the instructions contain plain language guidance that will be helpful to both the requester and the provider. Even if the FI knows the correct boxes that should be checked, the FI must advise the customer to seek legal counsel, which is burdensome and costly to these customers. It is also suggested that IRS correct the GIIN box on the Form W-8BEN-E. The box is not able to take all the GIIN characters (depending on the format used), which inadvertently creates an invalid form when the provider does not even know that the last character was cut off from the GIIN. Industry also noted that differences in the definition of "controlling person" under the IGAs and the definition of "substantial U.S. person" under the regulations create complexity and uncertainty in filling out the form.

Withholding statements provided by intermediaries and flow-through entities are often rejected as invalid because they are not properly completed. The regulations contain what should be included on a withholding statement, but there is no prescribed template, and confusion and ambiguities remain in this area. The regulations are confusing and difficult to understand (even more so by foreigners). Many do not understand why a withholding statement should include both Chapter 3 and Chapter 4 status codes. For the most part, customers do not know what their Chapter 3 and Chapter 4 status codes are because they do not prepare a 1042-S, and as a result, they enter an incorrect status code. If the FI disagrees with the status code that the customer entered on the withholding statement, it is unclear whether the FI should reject the form as invalid or just go ahead and accept the status code entered by the customer. The IRS can further help clarify by providing a template of what a good withholding statement looks like.

Industry noted that any changes to the Form 8966, no matter how minor, create issues for FIs that need to input those changes in their systems. IRS did not release revised instructions when it made the changes and this created a lot of problems. At some point during the IT development cycle, FIs baseline (or "lock down") their system changes and are unable to input any changes into their systems, no matter how small the changes are. Industry asks that IRS be cognizant of this and work with industry on the timing of changes to forms.

Form 8966 is intended to report information that the IRS needs to identify non-compliance. However, other HCTAs might be slow in getting out information about what they need for their own domestic reporting rules, so it would be useful for the IRS to communicate and be better connected and coordinated with other HCTAs. This will be helpful as the IRS makes changes to the form so that the form reflects the information that the IRS and the HCTAs need. It would be of great benefit to everyone to have a standard template or document to convey the information IRS intends to gather.

Industry sees it as import that IRS is aware and can consider making allowances for the fact that most HCTAs need time to incorporate changes the IRS has made to the form into their own templates, so there is a lag between the when an IRS form change is made and when HCTAs incorporate those changes into their templates.

IRS has been working with the Organisation for Economic Co-operation and Development (OECD) in an effort to remain sequenced with them and so any changes between Common Reporting Standard (CRS) and FATCA are synchronous.

Industry observes that FATCA was designed as a reporting regime, but with the added complexities of the FATCA forms, the focus has shifted more greatly to withholding than reporting. The penalties for failure to withhold are severe, and this has shifted the focus of FATCA participants toward withholding above reporting.

### **Centralizing FATCA Guidance**

To further promote positive compliance, IRS could consider issuing "plain English" publications that are targeted towards the different players under FATCA. For instance, a focal-point publication (like Pub 515) that covers FATCA for FFIs would be a good resource; however there is currently no "one-stop-shop" for FATCA

guidance, and FFIs find it challenging to accurately interpret and interrelate the various FATCA-related resources and requirements. FIs must read through complex US regulations, IRS notices and publications, and other information (that may only be partially related to FIs or FATCA) in order to try to get information pertaining solely to their needs.

Centralizing FATCA guidance and organizing for USWAs and FFIs (in a Publication that is constantly updated) would be very helpful. Such a publication could contain everything that an FFI needs to know about FATCA, forms, etc. It could include helpful flow charts, decision trees, templates and examples, which would enable improved compliance and afford the IRS an opportunity to reduce complexity and make requirements more clear to those who are trying to comply.

#### **Electronic transmission of Forms**

Industry noted that it would be useful for the IRS to continue to provide guidance that clarifies and eases the rules for WA acceptance of forms signed, stored or transmitted electronically.

### **Topic 3 – External Stakeholder Communication and Outreach**

*Usefulness of IRS forms, instructions and job aids pertaining to FATCA? Usefulness and timeliness of IRS delivery of FATCA information, including the IRS FATCA website, the FATCA Newsletter, the IDES Global IT Forum sessions, and public presentations by IRS officials?*

#### **Difficulty Associated with Operating in Multiple Jurisdictions**

The industry has encountered difficulties in interpreting how FATCA should apply in the different jurisdictions where FIs operate. FATCA creates a huge network of reporting for FIs that operate in multiple jurisdictions.

Increasing IRS's education and outreach efforts can help institutions comply and work within FATCA. Many foreign jurisdictions are trying to interpret and comply with the complexities of FATCA requirements. However, a lack of familiarity with US tax rules and the lack of uniformity in the law in different jurisdictions makes compliance very difficult.

It would help to have country-specific information regarding how FATCA IGAs have been implemented under each country's local law. The IRS could achieve this by adding a section to the FATCA website that provides links to country FATCA guidance (which also will take into account CRS) that describes what is unique about each jurisdiction's FATCA/CRS interpretation. Users could then go there to look for differences between (1) how institutions are to comply with the FATCA in different countries and (2) how any country is applying FATCA and CRS.

In addition, industry sees it is important that IRS continue collaboration with the OECD, as the global reporting environment is broader than government-to-government. Understanding differences between how FATCA and CRS are being implemented in specific countries also would be enhanced if the OECD's Automatic Exchange Portal allowed for countries to provide specific information regarding their FATCA guidance (similar to the information that they are providing regarding their CRS guidance).

#### **IRS FATCA Website**

The website is a good resource that serves as a place for collection of information. However, industry suggested IRS look at the CRS Handbook that the OECD developed as a model for thoroughness. Industry believes the CRS Handbook is a very practical single document that includes everything required from onboarding to reporting.

The IRS FATCA website only works well if you know what you are looking for, and users who actually know what they are looking for most likely do not need the website. The site does not have a keyword search, and can be tedious to navigate. It is impossible to use the site to build flow charts or decision trees for FATCA in a way that is useful for FFIs. In reality, the local FFIs are waiting for guidance from the local jurisdictions, and they rarely use the IRS website for guidance. A publication with flow charts that helps users get to the right

information or to the right part of the website would be useful.

Industry groups are willing to help develop flow charts, checklists and decision trees that would be useful for FIs. Most of them have done this internally and have found them to be very useful. Such a publication could be helpful to get most people on the same page with respect to FATCA implementation and compliance.

One of the challenges is to find common understanding of how FATCA and CRS work. It might be helpful to create a section on the IRS Registration Portal where countries can put information about what is relevant to their regulations. This could help FIs who go to the Portal to see the differences between different countries. The Business Industry Advisory Committee (BIAC) to the OECD was instrumental in pushing for country-specific definitions of tax rules and relevant CRS information on the OECD website. The portal could thereby have a lot more information that is helpful to all the players.

## Topic 4 – Compliance/Enforcement

*What actions would be most effective in addressing the challenges it faces in enforcing FATCA compliance?*

### **Voluntary Compliance**

#### *Voluntary Compliance*

- *What are the most significant FATCA compliance challenges facing your members?*
- *What actions would be most effective in addressing the FATCA compliance challenges of your members?*
- *What are the most significant compliance challenges facing persons whose accounts are subject to FATCA reporting (including those residing in the U.S. and abroad)?*
- *What actions would be most effective in addressing the compliance challenges of account holders subject to FATCA reporting?*

Industry would prefer to view CRS and FATCA as one standard, rather than two different standards. Harmonizing FATCA with CRS would help reduce industry's burden with implementation and compliance. Interpreting the complexity of rules is challenging, and FIs are concerned that if they incorrectly interpret the rules, that they will be penalized. Industry, from a WA standpoint in particular, also worries that if the IRS disagrees with how industry has interpreted the rules, there may be additional assessments of tax and steep penalties.

The complex rules are ultimately leading filers to over-report and potentially over-withhold out of an abundance of caution; this may lead to unneeded or unhelpful data beyond what the IRS intends to gather. As a result, IRS may be handling and processing more data and information than is needed or even useful to carry out its compliance enforcement mission. Additionally, the ability for IRS to identify deliberate non-compliance will only become more difficult, as filings may be flagged for non-compliance when in fact the issue was a misinterpretation of complex rules. For example, the rules depend on whether a payment is made, and yet, there are some accounts to which payments are not being made but will be subject to reporting because of the presumption rules; as a result, FIs "over-report" on these accounts and payments. Over-reporting could also be as a result of duplicative reporting. For instance, the IRS could consider cases where the information needed is already obtained under FATCA and thus, reporting on Forms 1099 may be duplicative and unnecessary.

Industry suggests guidance would be helpful on how to properly report in order to avoid defaulting to more conservative reporting, which often results in over-reporting. For example, the strict requirement for every foreign person to complete a W-8BEN or BEN-E has an impact on trading and capital markets. Industry suggested that, for instance, their clients who have completed a CRS certification should not be required to provide a W-8 BEN or BEN-E if only due to the addition of US collateral into the portfolio; in this instance, can

CRS certification be deemed sufficient?

IRS can therefore consider making broader use of CRS documentation, which is the documentation that FIs are getting on a global basis. The W-8BEN-E has a very high error rate and if this continues, FIs will undertake excessive and unnecessary withholding and reporting, which may necessitate the IRS to issue refunds, which could have been preventable.

There is lack of clarity in the rules around Qualified Intermediary (QI) Responsible Office (RO) certifications. It appears that the person who is appointed as the QI RO is certifying more broadly to include FATCA under IRS rules. It would help to better understand if that same person can do both in a Model 1 country. When an FFI signs up as a QI under a model 1 IGA, the FFI is under the impression that it will be subject to IRS audits regarding FATCA. This creates serious concern for the QI ROs who are now under the rules, interpreting that they are making very broad certifications that cover the FFI's FATCA responsibilities.

Consistent understanding of the IGAs is important so that FIs operating in multiple jurisdictions are not subject to multiple sets of rules. This likely requires some coordination at the government-level. This is important because when contemplating enforcement action, IRS needs to enable the payers to follow the right set of rules. Some agreement and/or alignment between the US and the IGA country as to what provisions mean is needed so that FFIs are not put in the position of potentially violating one country's rules.

Consistency in forms is also seen as an important step towards better enabling compliance. FIs are continuously collecting forms from customers and payees, and these forms are continuously being revised by the IRS. For instance the W-8 is about to be changed, and FIs will need to train staff again for new forms. IRS should look at what is out there for CRS self-certification, and attempt to achieve some consistency. This would help to ease transition to new forms, and perhaps reduce error rates.

Industry is very concerned about gross proceeds withholding, which is coming up soon. Many areas (including trading and syndicated loans) will be impacted by gross proceeds withholding. It is highly suggested that the IRS make efforts to get clarity on this issue before the rules are finalized and become effective. Industry also questions whether withholding on gross proceeds would result in greater FATCA compliance and, if yes, whether this greater compliance would be substantial enough to justify the additional costs to FIs to implement this withholding.

Industry agreed that clearer FAQs, particularly outlining specific IRS expectations of compliance by financial institutions, would be of value; their internal auditors look at what defines a good faith effort, and auditors then want to see something concrete from the IRS.

Industry also would like the IRS to identify the types of issues it will actually be focusing on for enforcement.

It was suggested that the IRS could set the right tone with field agents before examinations start. Given FATCA's complexities and the ongoing guidance clarifications, a focus in the early years on the quality of the FATCA compliance effort (rather than the accuracy of the data provided) would be welcome. Form 8966 is about account reporting, and yet the regulations are focused on payments and withholding. Setting a proper environment for enforcement will be helpful to avoid the contentious issues that arose during the first round of Chapter 3 audits. The focus of audits should be significantly narrowed to address repeated non-compliance instead of any type of identified non-compliance. Part of this could include the IRS extending the "transition period" or "good faith effort" in Notice 2014-33, and providing guidance during this time; for example, guidance that the current IRS focus is on institutions' efforts to meet "good faith" standards as defined by the IRS.

Reporting on Non-Financial Foreign Entities (NFFEs) was discussed as a specific topic. NFFEs have different statuses depending on which country they report their statuses to. It is difficult for NFFEs to get their reporting right. For the WA, it is difficult to validate whether an NFFE is active or passive without having to engage in burdensome research.

Industry noted that the number of recalcitrant accounts are increasing, such as from beneficiaries of death benefits payments, many of whom cannot determine their FATCA status since the benefit must be paid, but then the beneficiary with US indicia has no reason to respond to a request for documentation and must then be treated as a recalcitrant account. Requesting documentation from people who are not impacted by FATCA has



also posed a problem to industry in terms of additional workload.

Industry expressed concern about what happens if an unregistered FI is acquired into an EAG. Technically, as soon as that entity is acquired, the EAG does not meet the legal requirements to be in compliance. For instance, the merging company may not know that an FI that it is merging with is unregistered and discovers that after the acquisition. The Tax Executives Institute (TEI) wrote a letter to ask that the IRS give merging company a reasonable timeframe to register the acquired FI and avoid destroying the EAG's registration. Industry reiterated its request that the IRS allow a reasonable time for the EAG to complete the registration for the acquired FI.

Many account holders do not know how they should be categorized for FATCA reporting. Moreover, a large number of customers are not impacted by FATCA, but because FIs are requesting FATCA documentation from them, and reporting and withholding out of an abundance of caution, many non-FATCA customers become impacted by FATCA. This again leads to over-reporting and excessive data that IRS must process and handle, and that may tend to obscure data of potentially greater value (such as may indicate deliberate, rather than inadvertent, non-compliance).

### **Enforcement**

- *What are the most significant challenges that the IRS may expect to face in enforcing compliance with FATCA?*

Industry noted that over-reporting, over-withholding, and misinformation could make it difficult for the IRS to use the information it is receiving as intended, and may lead to false-positives. Industry participants encouraged the IRS to distinguish between FFIs that are colluding with their local authorities to avoid FATCA and FIs that are making genuine, "good faith" efforts to comply, but are unable to because of the complexity of the law. In this respect, the IRS could consider focusing on FIs that are located in non-IGA/non-CRS jurisdictions. It is expected that the enactment of both FATCA and CRS will compel 90% of folks to comply in the covered jurisdictions.

With regards to alternative treatment streams for compliance issues/exam, industry suggested that IRS consider something similar to the B Notice process. This requires that the IRS send a Notice asking that the issue be corrected within a certain period, and in many cases, not raise the issue to the level of an exam or audit. Instead, the IRS can engage in back-and-forth correspondence with the taxpayer (similar to what goes on with the 1099 today), which provides a mechanism for gathering information, responding to IRS's questions, and providing the taxpayer an opportunity to self-correct.

Industry also emphasized that the focal point of enforcement should be on reporting (i.e., the 8966), and not on withholding (i.e., the 1042-S), which is much more complex and very likely to contain inadvertent errors. Industry also believes that there may be a need for the IRS to educate some IGA participating countries on the key points of complying with FATCA. In addition, the IRS could leverage its current 1042 withholding agent audits and look at the payments going to recipients in any countries that may be of particular interest.

Industry expressed that it is very concerned that a serious outbreak of noncompliance under Chapter 4 could lead to a new law or expansion of FATCA, resulting in another set of complicated rules. In this context, industry discussed the idea that IRS work to provide industry clarity as early enforcement activities are underway, as this additional clarity can serve to better guide industry towards the Service's intended goals with compliance. Considerations for a "transition period" will also provide USWAs with some insights around the issues arising with NFFEs.

Providing options for self-correction should be a priority to IRS, as it is working to change taxpayer behavior and promote positive compliance, which will lessen the need for future enforcement activities. IRS is currently working to leverage off of the data it already has, which could serve to enable future simplification of the FATCA reporting rules.



## Recap

Industry participants shared several important observations with IRS during the FATCA Roundtable discussion, notably that simplifying reporting rules, allowing industry input, centralizing guidance, and harmonizing FATCA with the CRS are items that could serve to improve voluntary compliance.

Industry participants offered to be a resource and to provide the IRS with additional input into prioritizing future FATCA implementation requirements moving forward.

The IRS recognizes good faith efforts to comply with FATCA and appreciates the “boots on the ground” perspective shared during the FATCA Roundtable.