

The IRS Gets Serious

IRS threatens to kick uncooperative IGA countries out the FATCA program

By David Olenzak

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WASHINGTON, DC - The Foreign Account Taxation Act (FATCA) was enacted in 2010 by the US Congress as part of the Hiring Incentives to Restore Employment (HIRE) Act. Currently, US Citizens are required to self report foreign income earned overseas. Congress felt that this self-reporting mechanism was too weak and open to abuse. As such, congress instructed the the US' tax authorities, the Internal Revenue Service (IRS), to collect information from Foreign Finanacial Institutions (FFIs) on US Citizen assets and payments made overseas.

The question was: How can this be done? FFIs, located in a foreign country and as a sovereign nation are not subject to US law. Therefore, the US couldn't pass a law with penalties to instruct FFIs to report. Instead, the US established a voluntary program. If an FFI joins the program, they are required to identify U.S. accounts and report information about financial accounts held by U.S taxpayers and foreign entities in which U.S. taxpayers hold a substantial ownership interest. In addition, the FFI must withhold on certain U.S. connected payments to non-participating FFIs and account holders who are unwilling to provide the required information. If the FFI refuses to join the program, any US payments (for example, interest, dividends, and sale of real property even it is at a loss) would be have a withholding rate of 30%.

In today's globally connected economy, it is almost impossible to not do business with any US entity, or with any entity that in turn does business with the US. To date there are 206,004 foreign financial institutions that have registered for this voluntary program. Since almost all FFIs need to comply, 113 jurisdictions have gotten involved and entered into Intergovernmental Agreements (IGAs) with the US. With these IGAs the local government agrees to pass a local law to require the reporting of US taxpayer data, and the US agrees to deem all financial institutions in the jurisdiction as being compliant, and therefore not subject to the 30% withholding tax.

Last year, Trans World Compliance tracked nineteen Caribbean jurisdictions with signed IGAs that had committed to report US FATCA information. Of these nineteen, Financial Institutions in only six of these jurisdictions reported. Trans World Compliance filed a Freedom of Information Act request to find out how many financial institutions reported worldwide. As of this press release, the IRS has refused to comply with the Freedom of Information Act request.

In response to the lack of compliance, the IRS issued guidance in October 13, 2015. In part this read:

IRS Notice 2015-66¹. Many partner jurisdictions that have signed IGAs or reached an agreement in substance on the text of an IGA continue to work through their internal procedures to bring the IGA into force. Pursuant to its authority under section 1471(b)(2)(B), and consistent with Announcement 2014-38, for Model 1 IGAs that have not yet entered into force on September 30, 2015, Treasury intends to continue to treat FFIs covered by the IGA as complying with, and not subject to withholding under FATCA

¹ https://www.irs.gov/irb/2015-41_IRB/ar09.html

so long as the partner jurisdiction continues to demonstrate firm resolve to bring the IGA into force and any information that would have been reportable under the IGA on September 30, 2015, is exchanged by September 30, 2016, together with any information that is reportable under the IGA on September 30, 2016.

Trans World Compliance interpreted this guidance as a blanket extension for all Financial Institutions and governments with Inter-Governmental Agreements in regards to US FATCA reporting.

This year, the IRS has issued a new Announcement that takes a very different position. From the IRS Announcement:

IRS Notice 2016-27²: This Announcement provides that, on January 1, 2017, Treasury will begin updating the IGA List to provide that certain jurisdictions that have not brought their IGA into force will no longer be treated as if they have an IGA in effect. Each jurisdiction with an IGA that is not yet in force and that wishes to continue to be treated as having an IGA in effect must provide to Treasury by December 31, 2016, a detailed explanation of why the jurisdiction has not yet brought the IGA into force and a step-by-step plan that the jurisdiction intends to follow in order to sign the IGA (if it has not yet been signed) and bring the IGA into force, including expected dates for achieving each step. In evaluating whether a jurisdiction will continue to be treated as if it has an IGA in effect, Treasury will consider whether: (1) the jurisdiction has submitted the explanation and plan (with dates) described above; and (2) that explanation and plan, as well as the jurisdiction's prior course of conduct in connection with IGA discussions, show that the jurisdiction continues to demonstrate firm resolve to bring its IGA into force. With respect to the timing of the exchange of prior year information upon entry into force of a Model 1 IGA, Treasury does not intend to find FFIs to be in significant non-compliance with the IGA as long as any information for prior years is exchanged before the next September 30th after the obligation under the IGA to exchange information has taken effect.

This notice appears to state that any IGA country that is "Signed" or "In Force"³ that does not report this year, will be considered in default and maybe removed from the list. Those jurisdictions that have an "Agreement in Substance", but have yet to sign, must provide a definitive plan and timeline to finalize compliance with their agreements.

To date, the IRS has not removed a single Financial Institution from the list of registered and compliant Financial Institutions under FATCA. With this is latest strongly worded announcement, it would appear the IRS is getting serious about US FATCA compliance. Undoubtedly, Financial Institutions worldwide are waiting to see how the IRS proceeds in regards to enforcement of the FATCA program.

About Trans-World Compliance, Inc:

Trans-World Compliance Inc., ("TWC") provides cloud based and installed software solutions to simplify the compliance and regulatory requirements for US, Foreign Financial Institutions, tax regulatory bodies and governments. TWC saves time, lowers overheads and improves accuracy for compliance with international regulatory tax regulations and mandates by centralizing data, raising flags, tracking remediation, automated

² https://www.irs.gov/irb/2016-33_IRB/ar09.html

³ <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>



reporting, and providing an independent 3rd party audit of policies and procedures. TWC products include FATCA One for Financial Institutions™, FATCA One for Tax Authorities™, Country-by-Country Reporter™ and were developed for the purpose of FATCA and tax regulatory reporting, designed by international compliance and IT experts, adheres to a full range of international standards, and supports multiple rule-bases with specifics for different jurisdictions and reporting year.

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