

FATCA Responsible Officer

The United States IRS has issued draft Responsible Officer (RO) forms available here¹:

<https://www.irs.gov/businesses/corporations/draft-fatca-certifications>

As if US FATCA was onerous enough for Foreign Financial Institutions, the Responsible Officer duties adds another layer of reporting and complexity. When a Foreign Financial Institution in a Model 2 IGA or a jurisdiction not covered by an IGA signed up for the US FATCA program and received a GIIN, they had to name a person as the Responsible Officer (RO).

The good news is that 100 out of the 113 signed Inter Governmental FATCA Agreements (IGAs) are Model 1 and Foreign Financial Institutions filing FATCA forms in Model 1 IGA countries are exempt from these FATCA Responsible Officer certifications. But that is cold comfort to those in the thirteen Model 2 IGA countries and Financial Institutions in countries not covered by an IGA who are subject to these certifications.

From the IRS website in regards to the draft Responsible Officer forms:

The due date for submitting both FATCA certifications (one that relates to an entity's preexisting accounts ("COPA") and another that relates to the entity's compliance with various FATCA requirements ("periodic certification")) is July 1 following the third full calendar year after the date the entity registered and received a GIIN. The update to the FATCA Registration Portal containing FATCA certifications will not be available prior to July 2018. For entities that have certifications due by July 1, 2018, please note, any Responsible Officer (RO) that is required to certify will have no less than 3 months from deployment of the certifications on the FATCA Registration Portal to submit them. In an effort to assist ROs in preparing to complete the FATCA certifications, the IRS is releasing the draft certification questions.

These instructions aren't especially clear. What they are trying to say is that there are two types of forms that need to be submitted. The first is the COPA (Certification of Preexisting Accounts), which is a one-time certification that the Financial Institution has cleaned up pre-existing accounts². These COPA declarations only need be submitted once and will be due this year. The second are the Periodic Certifications. Both the COPA and Periodic forms need to be submitted, via the FFI (GIIN) Registration website by July 1st following three full calendar years, and for Periodic Certifications every three years thereafter. Most IGAs, regardless of when they were finalized, are effective as of 2014³ and therefore the full calendar years of 2015, 2016, and 2017 would make the forms due July 1st, 2018. For the Periodic Certifications, the next forms would be three calendar years later: 2018, 2019 and 2020 – making the next due date July 1, 2021.

¹ See IRS Notice 2016-08 in regard to the timing of these certifications.

² Note that in IRS Notice 2017-46 extends the time to collect Tax ID Numbers (TINs) to FY2019 (reporting in 2020). This is for all Financial Institutions regardless of IGA Model and requires that the FFIs to provide a birth date (in lieu of TIN) and annually attempt to get the TIN.

³ See the right most column at <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>. The one exception is Vietnam with an effective date of 7-7-2016, and that is a Model 1 IGA and therefore exempt from RO Certifications.

The second part of the instructions state the IRS FFI/GIIN Registration website updates are not complete, and therefore the new deadline will be three months after the website is released. Since there is no estimate on the completion of the website, there is no estimate on when this might occur and the RO will only have three months to recognize the website is active and fulfill their COPA and Periodic Certification responsibilities.

Note that these certifications are done under the threat of perjury. The RO is certifying that they have examined the Financial Institutions' processes and procedures and that they are in line with the commitments made under FATCA. In the event that a Financial Institution has had a Material Failure or an Event of Default, they must detail the problem and the steps taken to remedy the fault. If a Financial Institution is unable to successfully attest to the current state of the program, they can submit a Qualified Certification, but must detail the issues and the steps that will be taken to bring the program back into compliance. Note that the IRS can ask for additional information⁴ or proof of compliance. If significant non-compliance is found, the IRS can put the Financial Institution on notice and will provide an 18 month window to remedy any non-compliance. After that period, if the IRS deems the Foreign Financial Institution still in non-compliance, they can remove the FFI from the FATCA program and begin the 30% withholding of US Sourced FDAP income. Those FFIs operating under a IGA are operating under local law and may be subject to additional penalties.

What's next? There was some good news in IRS Notice 2015-66. From the notice:

In order to continue to facilitate an orderly phase-in of FATCA withholding, Treasury and the IRS intend to amend the chapter 4 regulations under section 1473 to extend the start date of gross proceeds withholding by providing that the definition of the term withholdable payment means any payment of U.S. source FDAP income, and for sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income. Additionally, Treasury and the IRS intend to amend the regulations under section 1471 to extend the start date of withholding on foreign passthru payments to provide that a participating FFI is not required to withhold tax on a foreign passthru payment made to a recalcitrant account holder or a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the Federal Register of final regulations defining the term foreign passthru payment.

The good news is that the date for withholding requirements has been pushed into 2019, however, the bad news is that FFIs will be required to do withholding. Withholding will occur using IRS form 1042/1042-S. As we all know, once you start messing with people's money, things really start getting interesting.

In addition, with the closure of the Offshore Voluntary Disclosure Program⁵ September 28th of this year, we should expect the IRS to begin tying FATCA reports to US taxpayer tax filings. If a US taxpayer discloses an asset in a Foreign Financial Institution, but that FFI has failed to provide a FATCA filing for that asset, the IRS knows the FFI is failing to adhere to its FATCA obligations. Likewise, if a FFI files a FATCA form and a US taxpayer fails to declare that asset, the US taxpayer is liable for penalties and fines⁶.

⁴ The full FFI agreement is available here: <https://www.irs.gov/pub/irs-drop/rp-17-16.pdf>

⁵ This program allowed a US Tax Payer to declare previously undeclared offshore assets. The IRS requires payment of back taxes, interest, and a 20% penalty which is less than the penalties for failing to file FBAR and 8938 Forms.

⁶ For penalties see <https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements>

As we can see, US FATCA is the gift that just keeps on giving.

About David Olenzak:

David Olenzak is the founder and President of Trans World Compliance, Inc. a provider of the CRS/FATCA One line of compliance software for Financial Institutions and Tax Authorities to support US FATCA and Common Reporting Standard regulations. David Olenzak is a serial entrepreneur with a background in IT and spent fifteen years in Compliance and RegTech.