FATCA PRESENTATION

EURA AUDIT CONFERENCE MIAMI, FL 2015

THE HENRY LEVY GROUP, A CPA FIRM

FATCA: Foreign Account Tax Compliance Act

- Enacted by the United States Congress
- Made effective as of March 18, 2010
- Part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010
- Became fully effective as of July 1, 2014
- The Treasury described the law and its purpose as:
  - “[FATCA is] a provision that targets the illicit activities of some wealthy individuals who use offshore accounts to evade millions of dollars in taxes. International tax evasion is illegal, adds to the federal debt, and contributes to the perception that the tax system is unfair because the wealthy can avoid the taxes other Americans pay.”

OBLIGATION TO REPORT WORLDWIDE INCOME

U.S. taxpayers are required to report and pay tax on their worldwide income.

U.S. taxpayers report worldwide income on their annual tax filing, Form 1040.
Investment income is reported on Schedules B and D of Form 1040.

The annual Form 1040 is due every year on the 15th day of April. A six-month extension of time to file may be requested. The extended due date would therefore be the 15th day of October.

Schedule B: https://www.irs.gov/pub/irs-pdf/f1040sb.pdf

FORM 1040, SCHEDULE B

Schedule B of Form 1040 asks the following questions to identify foreign accounts:

1. At any time during 2015, did you have a financial interest in or signature authority over a financial account located in a foreign country?
   1. If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority?
   2. If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located.
2. During the tax year, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520.

FOREIGN BANK ACCOUNT REPORT (FBAR)

If a taxpayer answers “yes” to the Schedule B Foreign Accounts and Trusts questions, they may be required to file an FBAR.

The legal name of this form is: FinCEN Form 114, *Report of Foreign Bank and Financial Accounts.* It is commonly referred to as the “FBAR”.

The form must be filed electronically and is due every year on the 30th day of June. No extensions of time to file the FBAR are available.

Criminal and civil penalties may be imposed for the failure to timely file the FBAR.

WHO MUST FILE THE FBAR?

U.S. Persons, which include U.S. citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold. This includes resident aliens of U.S. territories and U.S. territory entities.

WHAT IS THE FBAR FILING THRESHOLD

The FBAR filing threshold is:

1. Total aggregate value of all assets held in foreign accounts that reach *$10,000* in value at any time during the calendar year.

What is a "financial interest"?

1. If you are the owner of record or holder of legal title; the owner of record or holder of legal title is your agent or representative; you have a sufficient interest in the entity that is the owner of record or hold of legal title.

What is a "signature authority"?

1. If you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account.

EXAMPLE OF FBAR REPORTING REQUIREMENT

FACTS:

1. Jane Doe is a U.S. citizen and resident.
2. Jane has an account held at the Bank of China in Hong Kong
3. The account is a securities account. During the tax year, the account had a maximum value of $100,000.
4. At the end of the tax year, Jane sold the majority of her securities and the ending account balance was $9,500.
5. Does Jane have an FBAR filing requirement?

IS THE FBAR JANE'S ONLY FILING REQUIREMENT?

Answer: No!

In addition to the FBAR, US Taxpayers may also be required to file form 8938.

Form 8938, Statement of Specified Foreign Financial Assets

Use this form to report your specified foreign financial assets if the total value of all the specified foreign financial assets in which you have an interest is more than the appropriate reporting threshold.

FORM 8938 CONTINUED

Who must file:

Specified individuals, which include U.S citizens, resident aliens, and certain non-resident aliens that have an interest in specified foreign financial assets and meet the reporting threshold

What is the threshold?

$50,000 on the last day of the tax year or $75,000 at any time during the tax year (higher threshold amounts apply to married individuals filing jointly and individuals living abroad)

This form, like the Schedule B, is filed with the taxpayer's annual form 1040.

FAILURE TO COMPLY

Failure to file the FBAR:

The failure to timely file the FBAR can be subject to civil penalties and possibly criminal sanctions (i.e., imprisonment). The statutory civil penalties might be $10,000 per year for a non-willful failure but a willful failure to file could, by statute, be subject to civil penalties equivalent to the greater of $100,000 or 50% of the balance in an unreported foreign account, per year, for up to six tax years. Non-willful penalties might be avoided if there is “reasonable cause” for the failure to timely file the FBAR.

We recommend engaging a tax attorney if you have a client who has not filed their FBARs.

FAILURE TO COMPLY CONTINUED

Failure to file Form 8938:

If you are required to file Form 8938 but do not file a complete and correct Form 8938 by the due date (including extensions), you may be subject to a penalty of $10,000.

If you do not file a correct and complete Form 8938 within 90 days after the IRS mails you a notice of the failure to file, you may be subject to an additional penalty of $10,000 for each 30-day period (or part of a period) during which you continue to fail to file Form 8938 after the 90-day period has expired. The maximum additional penalty for a continuing failure to file Form 8938 is $50,000.

ARE THE FBAR & 8938 THE ONLY FILINGS?

No.

Other filing requirements to be aware of include IRS Forms 3520 and 5471

Form 3520: Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts: https://www.irs.gov/pub/irs-pdf/f3520.pdf

Form 5471: Information Return of US Persons with Respect to Certain Foreign Corporations: https://www.irs.gov/pub/irs-pdf/f5471.pdf

FOREIGN FINANCIAL INSTITUTION (FFI)

"The purpose of FATCA at an institutional level is to detect on an ongoing basis the non-US financial accounts of US tax payers and to collect and store information on them; it is not to exact a tax"

WHO MUST COMPLY?

Most Foreign Financial Institutions (FFIs) are subject to FATCA:

- Banks
- Mutual Funds
- Hedge Funds
- Private Equity funds
- (Certain types of accounts are excluded, for example certain retirement and tax exempt accounts are specifically excluded)
- Certain types of institutions are excluded as well including most governmental agencies, non profits and certain small financial institutions.

PROCESS FOR DETECTING SUBJECT ACCOUNTS

- FFIs are responsible for identifying potential US tax payers using "FATCA Indicia," as well as their own knowledge of the client. "FATCA Indicia," includes the following:
  - US place of birth
  - US Residence or Mailing Address
  - US phone Number
  - "In Care of," US Address
- A new form was introduced in February of 2014 to help FFIs identify US tax payers; this form is the W8BEN: https://www.irs.gov/pub/irs-pdf/fw8ben.pdf

- FFIs are expected to make all foreign Tax payers complete this form; not just US tax payers

PROCESS FOR REGISTERING WITH THE IRS

- FFIs must register with the IRS to share information on subject accounts. Registration is completed through the FATCA Registration website; once complete and FFI receives a Global Intermediary Identification Number (GIIN)
- This GIIN is used by the FFI to show that it has registered to both the IRS and Withholding Agents (Withholding agents may rely on the IRS published list of registered FFIs to verify GIINs)

PENALTIES

US Financial institutions (USFIs) and other types of US withholding agents are required to withhold 30% on certain US payments of source income made to non compliant Foreign Entities. Additionally FFIs that are compliant may be required to withhold 30% on payments to non compliant foreign payees

EXAMPLE

GOVERNMENTS

The US has collaborated with other governments to develop two model s of intergovernmental agreements (IGA) to implement FATCA.

All IGAs consider that a Foreign Government will require all FFIs to identify and report on all US accounts

Both models count on a foreign government requiring all FFIs to participate

Both models can be implemented without a tax agreement or treaty

Below is a list of all governments that have entered into an IGA

http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx

All FFIs that are in a jurisdiction without an IGA must register and agree to comply with the terms of an FFI agreement

PROCESS

The main difference between the two Models of IGAs is where the responsibility for reporting information to the IRS lies. Model one requires the jurisdiction to report to the IRS on all FFIs in their location while Model two relies on the FFIs to report directly themselves.

MODEL 1

- Jurisdiction agrees to report to IRS on all FFIs in their location
- FFIs identify US accounts via due diligence
- FFIs report to the jurisdiction
- Jurisdiction reports to the IRS
- IGA may either be reciprocal or nonreciprocal
- Data Safe guarding for the electronic transfer of information

MODEL 2

- Jurisdiction agrees to direct and enable FFIs to report directly to the IRS instead of through them
- FFIs identify US accounts in the same manner as Model 1
- FFIs then report on accounts directly to the IRS

CONTROVERSY

As a practical matter, many FFIs have decided simply to no longer accept clients they accept as being US taxpayers

Certain foreign governments have been publically vocal about the undue burden they feel this places on them as well as the potential privacy issues their citizens will face

The penalty on US income may force foreign investment dollars to flee the US

THANK YOU

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