

IRS Updates FATCA FAQs, Addresses January Temporary Regulations

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On April 6, 2017, the **Internal Revenue Service (IRS)** added three new [frequently asked questions](#) to its **Foreign Account Tax Compliance Act (“FATCA”)** compliance page, which is available only online.^[1] These additional FAQs clarify recent [temporary regulations](#) (the “Temporary Regulations”) requiring that a beneficial owner withholding certificate contain a foreign taxpayer identification number (“TIN”) and, in the case of an individual beneficial owner, such individual beneficial owner’s date of birth.^[2] The FAQs provide temporary relief for calendar year 2017, describing less stringent requirements that are effective through December, 2017.

FATCA is intended to prevent U.S. taxpayers from evading U.S. income taxation on offshore investments and assets, in part by penalizing certain foreign entities that do not report a variety of identifying information about their U.S. shareholders or investors to relevant tax authorities, including the IRS. Although the FATCA statute was enacted in 2010, the principal regulations implementing FATCA went into effect on July 1, 2014. Since the effective date of those initial and voluminous regulations, the IRS has released substantial additional regulatory and other guidance about how foreign entities, withholding agents and U.S. persons must comply with the FATCA reporting and certification requirements. On January 6, 2017, the IRS released the Temporary Regulations, which require (among other things) a withholding certificate contain a beneficial owner’s foreign TIN and a beneficial owner that is an individual’s (i.e., a natural person) date of birth. The new IRS FAQs, posted as questions 20-22 of the “General Compliance” section, address the effective time and operation of these portions of the Temporary Regulations.

Question 20 provides that a withholding agent must collect a foreign TIN in two situations. A foreign TIN must be collected where a foreign person is claiming a reduced rate of withholding on income for which a TIN generally is required under an income tax treaty,^[3] and a U.S. TIN is not already provided. A foreign TIN also must be collected where the withholding agent is an FFI and the foreign person is an account holder of a financial account that is maintained at a U.S. branch or office of that withholding agent.

Question 21 provides temporary relief from the new requirement of providing a foreign TIN for calendar year 2017 in the absence of the withholding agent's actual knowledge that the beneficial owner has a foreign TIN. Withholding agents must collect and report the date of birth for individual owners that are beneficial owners on withholding certificates collected on or after January 1, 2017.^[4] Question 21 clarifies that, for calendar year 2017 only, the withholding agent may also obtain the date of birth from its own files if the withholding agent already has access to that information.

Question 22 provides that a withholding agent may obtain the foreign TIN of a foreign beneficial owner or the reasonable explanation for the absence of a foreign TIN through a written statement provided by such beneficial owner. The written statement may be provided by email.

These new requirements impose a significant burden on certain foreign entities that are unable to obtain by the relevant deadlines the foreign TIN or, in the case of an individual, date of birth of beneficial owners that are substantial owners of such foreign entities. Covered foreign entities that fail to comply with the new requirements could be subject to FATCA withholding of 30% on payments from U.S. sources. Foreign entities that must provide beneficial owner certifications under FATCA therefore must take steps to ensure that they are meeting their legal obligations under the Temporary Regulations as clarified by the new FAQs.

[1] See <https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal#GeneralQ20>. "FATCA" is the common name for the withholding and information reporting regime codified at Sections 1471-1474 of the U.S Internal Revenue Code of 1986, as amended (the

"Code"). FATCA generally requires foreign financial institutions ("FFIs") and certain other foreign entities to undertake diligence to identify U.S.

accounts, and report certain information to the IRS with respect to such U.S. accounts, or suffer 30% U.S. withholding on certain U.S. source

"withholdable payments" and on foreign "passthru" payments that such foreign entities receive.

[2] Temp. Treas. Regs. Sec. 1.1441-1T(e)(2)(ii)(B).

[3] See Treas. Reg. Sec. 1.1441-6.

[4] See Temp. Treas. Reg. Sec. 1.1441-1T(e)(2)(ii)(B), first sentence.

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