

Kluwer International Tax Blog

FATCA Update of March 2015

William Byrnes (Texas A&M University Law) · Thursday, March 19th, 2015

GIIN Lists Analysis: June 2014 through March 2015

In the words of my English colleague Haydon Perryman, March was a “bit of a damp squib”. Financial institution FATCA registrations have slowed to a trickle with only 2,479 additional ones seeking a GIIN, bringing the ultimate total to 156,276.

Of this total, the UK and its dependencies are 70,361, representing 45 percent. An additional 53,028 belong to the remaining 33 OECD members. The four BRICs, seen as an industry barometer of non-OECD FATCA GIIN acceptance, trudged forward from 7,852 to 7,962. Less than 6,000 registrations, representing four percent of the total, are from the 131 countries and dependencies without an Intergovernmental Agreement (IGA). 5,666 of this total are the lead entity of an expanded affiliated group (EAGs).

Since the publication of the U.S. Treasury’s original GIIN list 1 June 2014, [Haydon Perryman](#) (FATCA systems designer for several tier 1 financial institutions) and myself (primary author, [Lexis Guide to FATCA Compliance](#)) have been analyzing on a monthly basis the list that the USA provides of “approved FFIs” (foreign financial institutions). On 1 March, the IRS published its third 2015 FATCA GIIN list of “approved FFIs” (a list of the financial firms that have registered on the IRS FATCA portal). The results of our study is as follows:

FATCA IGA Scenarios	GIINs	Jurisdictions
Model 1A IGA	96,855	95
Model 1B IGA	34,473	3
Model 2 IGA	18,060	14
No IGA	5,987	131
US	835	1
US Territories	66	6
Total	156,276	250

GIIN List (2014/2015) Total Registrations

June	77,354
July	82,994

August	95,239
September	99,861
October	104,344
November	116,104
December	122,881
January	147,043
February	153,797
March	156,276

FATCA International Data Exchange Services (IDES) Updates

- An IDES sample test file has been added to the [IDES Data File Preparation](#) page.
- The [IDES User Guide](#) has been updated for March 2015 and includes a revised data preparation section, user enhancements, and additional instructions.

On 12 January 2015 the Internal Revenue Service launched the International Data Exchange Service (IDES) for enrollment. The 156,276 registered financial institutions or host country tax authorities must use IDES to securely send their information reports on financial accounts held by U.S. persons to the IRS under the Foreign Account Tax Compliance Act (FATCA) or pursuant to the terms of one of the 110 intergovernmental agreement (IGA), as applicable. Reciprocally, whereby a jurisdiction has entered into a “reciprocal IGA” with the U.S. and the jurisdiction has the necessary safeguards and infrastructure in place, the IRS will also use IDES to provide similar information to the host country tax authority on accounts in U.S. financial institutions held by the jurisdiction’s residents.

The [IDES User Guide](#) Publication 5190 was updated in March 2015. This guide is intended to serve as a tool for FIs and Host Country Tax Authorities (HCTAs) who enroll in the International Data Exchange Service (IDES) to transmit FATCA data. The document assumes that the reader is familiar with the FATCA regulations and is experienced with extensible markup language (XML) and schema technology.

The main function of IDES is to provide authorized users with secure exchange services for FATCA data transmissions, with the additional protection of a Public Key Infrastructure (PKI). The primary features of IDES are:

- Enrollment
- Certificate Management
- Account Management
- Secure Data Transmission
- Status of Data Transmission (Alerts and Notifications)

IDES runs on all major browsers, including Chrome, Internet Explorer, Safari, and Firefox and will

support application-to-application exchanges through the SFTP transmission protocol enabling a wide variety of users to interact with IDES without building additional infrastructure to support transmission. Using IDES, a web application, the sender encrypts the data and IDES encrypts the transmission pathway to protect data transfers. Encryption at both the file and transmission level safeguards sensitive tax information. From 10 March through 12 March the IRS allowed financial institutions and foreign competent authorities to submit test files for protocol and process validation.

Host country tax authorities in Model 2 IGA jurisdictions and financial institutions have already begun the enrollment process well in advance of their reporting deadline. The online address for IDES enrollment can be found [here](#). To begin transmitting information in IDES, a financial institution or tax authority will need to first obtain a digital certificate. Digital certificates bind digital information to physical identities and provide data integrity. IDES stores each user's public key and related digital certificate. All IDES enrollees (including host country tax authorities) must obtain a proper digital certificate in order to enroll; there is a list of approved Certificate Authorities available ([see previous post](#)).

Form 8938 (Reporting of Specified Foreign Financial Assets) Instructions Updated

In the Final Regulations effective 12 December 2014, [Form 8938 Reporting of Specified Foreign Financial Assets](#), the IRS addressed such issues as dual residents, valuation challenges, foreign currency, virtual currency (left for another time), retirement accounts and insurance policies. The Final Regulations can be found on the [FATCA – Regulations and Other Guidance](#) page in the For Individual Taxpayers section. However, as of 10 March 2015, the IRS updated December's changes to the Form 8938 reporting requirements, as well as including additional information not in the December instructions. A summary of important points follows.

Dual resident taxpayers

The [6038D final regulations](#) have changed the reporting rules for dual resident taxpayers, effective for taxable years beginning after 19 December 2011. For this reason, the published 2014 instructions and the instructions for Form 8938 for prior years are modified as provided in this update.

The following Form 8938 reporting rules apply to a dual resident taxpayer who determines his or her income tax liability for all or a portion of the taxable year as if he or she were a nonresident alien:

- *Specified individual filing as a nonresident alien at the end of his or her taxable year*

A specified individual who computes his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year is not required to report specified foreign financial assets on Form 8938 for the portion of the individual's taxable year covered by Form 1040NR, "U.S. Nonresident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents," as applicable, if the individual complies with the filing requirements of [§301.7701\(b\)-7\(b\) and \(c\)](#). These requirements include the requirement to timely file Form 1040NR or Form 1040NR-EZ, as applicable, and attach Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)."

- *Specified individual filing as a resident alien at the end of his or her taxable year*

A specified individual who computes his or her U.S. income tax liability as a resident alien on the last day of the taxable year is not required to report specified foreign financial assets on Form 8938 for the portion of the individual's taxable year reflected on the schedule to Form 1040, "U.S. Individual Income Tax Return," or the schedule to Form 1040EZ, "Income Tax Return for Single and Joint Filers With No Dependents," as applicable, if the individual complies with all of the filing requirements of §1.6012-1(b)(2)(ii)(a). These requirements include the requirement to timely file Form 1040 or Form 1040EZ, as applicable, and attach a properly completed Form 8833 to the schedule to such Form 1040 or Form 1042EZ.

Accounts excluded from the definition of a financial account under an applicable Model 1 or Model 2 IGA

For taxable years *beginning on or before* 12 December 2014, if the jurisdiction in which a financial account is maintained has an IGA in effect, or is treated as having a Model 1 IGA or Model 2 IGA in effect, on or before the last day of the taxpayer's taxable year, retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those that are excluded from the definition of financial account in such IGA are not required to be reported on Form 8938.

But for taxable years *beginning after* 12 December 2014, the final section 6038D regulations provide that, in addition to retirement and pension accounts and non-retirement savings accounts, any retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those that are excluded from the definition of financial account in an applicable Model 1 IGA or Model 2 IGA *must be reported* by the taxpayer on Form 8938. Thus, such accounts are subject to uniform reporting rules and must be reported without regard to whether the account is maintained in a jurisdiction with an IGA.

Joint Form 5471 or Form 8865 filing

A specified person that is included as part of a joint Form 5471 filing or a joint Form 8865 filing and who notifies the IRS as required will be considered to have filed a Form 5471 or Form 8865. Accordingly, the taxpayer does not have to report any asset on Form 8938 if the asset is reported on such Form 5471 or Form 8865 that is timely filed with the IRS for the same tax year and the taxpayer reports on Form 8938 the filing of the form on which the asset is reported.

Individuals Resident in the United States Under Non-Immigrant Visas

Because all U.S. residents are taxable on worldwide income, excluding categories of residents from the scope of section 6038D reporting is not consistent with the purposes for which the provision was enacted.

Persons That Do Not Owe U.S. Tax for the Taxable Year

If the law requires the filing of a tax return, information reported on a Form 8938 concerning the taxpayer's specified foreign financial assets is an important component of that return, even if no tax liability is shown.

Assets Held by a Disregarded Entity

The final rule provides that a specified person that owns a foreign or domestic entity that is a

disregarded entity is treated as having an interest in any specified foreign financial assets held by the disregarded entity. As a result, a specified person that owns a disregarded entity (whether domestic or foreign) that, in turn, owns specified foreign financial assets must include the value of those assets in determining whether the specified person meets the reporting thresholds and, if so, must report such assets on Form 8938.

Jointly Owned Assets

The final rule clarified that each of the joint owners of a specified foreign financial asset who are not married to each other must include the full value of the asset (rather than only the value of the specified person's interest in the asset) in determining whether the aggregate value of such specified individual's specified foreign financial assets exceeds the applicable reporting thresholds, and each joint owner must report the full value of the asset on his or her Form 8938.

In addition, the final rule clarified that, in the case of joint owners who are married to each other and file separate returns, each joint owner of a specified foreign financial asset must report the full value of the asset (rather than only the value of the specified person's interest in the asset) on the individual's Form 8938, even if both spouses are specified individuals and only one-half of the value of the asset is considered in determining the applicable reporting thresholds.

Retirement and Pension Accounts and Certain Non-Retirement Savings Accounts

The final regulations modified the definition of a financial account in order to require consistent reporting under section 6038D with respect to retirement and pension accounts and certain non-retirement savings accounts regardless of whether the account is maintained in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA. For financial accounts that are maintained by a foreign financial institution that is not located in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA, the definition of a financial account in the final rule continues to include the retirement and pension accounts and non-retirement savings accounts consistent with the section 6038D coordination rule in that section.

Reporting on Both FinCEN Form 114 (FBAR) and Form 8938?

Both forms are independently required, annually.

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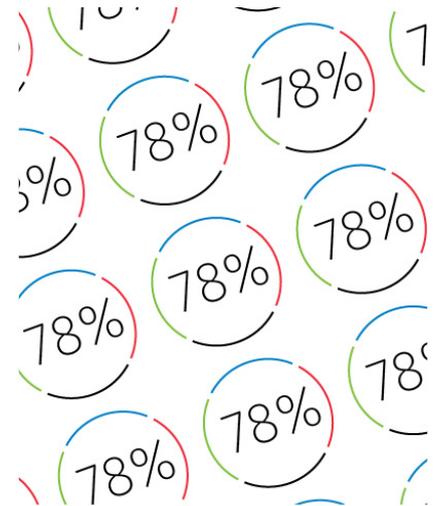
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