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IRS Temporary Relief for Foreign Financial Institutions Required to Report U.S. Taxpayer Identification Numbers Under FATCA: Potential Implications for 'Accidental Americans'

Go-To Guide:

- Notice 2023-11 provides temporary relief for foreign financial institutions to provide U.S. TINs for preexisting accounts.
- Allows the IRS to gather information about why FFIs are having trouble complying with FATCA.
- Potential implications for 'accidental Americans' who receive FATCA notices but do not have U.S. TINs.

On Dec. 30, 2022, the IRS issued Notice 2023-11, which provides temporary relief for certain foreign financial institutions (FFIs) required to report U.S. taxpayer identification numbers (U.S. TINs) under the Foreign Account Compliance Act (FATCA). The temporary relief applies to FFIs subject to Model 1 Intergovernmental Agreements (Model 1 IGAs). FATCA compliance has been particularly difficult for U.S. citizens living abroad, many of whom are unaware of their U.S. citizenship ("accidental Americans") but have the same U.S. tax reporting obligations as those citizens and permanent residents living in the United States. Some accidental Americans learn about their U.S. citizenship when they receive letters from their foreign banks threatening to close their accounts if they do not provide their U.S. TINs. For those individuals who never obtained U.S. TINs, FACTA compliance has been onerous.

Although the IRS has provided relief for FFIs that cannot provide U.S. TINs for preexisting accounts, it continues to receive reporting that does not include the required information. Notice 2023-11 responds to feedback that FFIs are: (i) closing bank accounts of U.S. citizens; (ii) refusing to open new accounts for U.S. citizens residing in the FFI's jurisdiction; and (iii) providing less favorable terms to U.S. citizens. Notice 2023-11 also allows the IRS to gather information about why Mode1 IGA FFIs are having difficulty obtaining U.S. TINs for preexisting accounts so that it can enhance future compliance.

Background on FATCA

FATCA was enacted in 2010 to curtail non-compliance by U.S. taxpayers who hold foreign bank accounts and other assets. Under FATCA, certain FFIs are required to report information about foreign financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold certain ownership interests. Where an FFI refuses to comply with the reporting requirements, FATCA requires withholding agents to withhold 30% on U.S. source payments going to the FFI.

The Treasury Department worked with foreign governments to develop two model intergovernmental agreements to implement FACTA: Model 1 IGAs and Model 2 IGAs. Notice 2023-11 concerns Model 1 IGAs. Under Model 1 IGAs, FFIs are required to report certain information on U.S. reportable accounts, including the U.S. TINs, to the Model 1 IGA jurisdiction. The Model 1 IGA jurisdiction automatically exchanges that information with the U.S. Competent Authority. If the IRS determines that an FFI is in substantial non-compliance with the reporting requirements and fails to remedy the issue within a certain period of time, the FFI may be subject to the 30% withholding under I.R.C. § 1471. Therefore, the financial stakes for failing to comply with FATCA are high.

Because many FFIs did not collect U.S. TINs prior to FATCA, complying with FATCA has been difficult with respect to preexisting accounts. Under the Model 1 IGAs and Notice 2017-46, U.S. citizens who reside abroad have had up to six years to obtain U.S. TINs or renounce their U.S. citizenship. Moreover, in 2019, the IRS issued relief to persons who wanted to relinquish their U.S. citizenship but would be adversely affected under the expatriation process. U.S. citizens are eligible for relief where: (1) they have less than $2 million of net worth and aggregate tax liability of less than $25,000 for the year of expatriation, and the prior five years were eligible for this relief; and (ii) their failure to file tax returns and pay tax was non-willful. Eligible individuals will not be treated as "covered expatriates" for purposes of the expatriation tax, nor will they be liable for any unpaid taxes and penalties for the six years at issue or prior years. Nevertheless, the IRS continues to receive incomplete information under the Model 1 IGAs.

Temporary Relief under Notice 2023-11

Under Notice 2023-11, for calendar years 2022, 2023, and 2024, FFIs in Model 1 IGA jurisdictions will not be treated as being in substantial non-compliance with a Model 1 IGA solely for failing to report a required U.S. TIN for a preexisting account where certain requirements are satisfied. The relief does not apply to new accounts opened after the determination date specified in the applicable Model 1 IGA. This includes new accounts opened by preexisting account holders.

- **FFI Obligations**
  - The FFIs must: (i) obtain and report the date of birth of each account holder where a U.S. TIN has not been provided; (ii) starting in 2023, make an annual request for the missing U.S. TIN; (iii) starting in 2023, perform an electronic search of its data for the missing U.S. TINs; and (iv) report the reason why it cannot obtain the missing U.S. TIN using codes the IRS provided.

- Regarding the annual request for U.S. TIN information, the FFI must use the method that in the FFI's reasonable judgment is most likely to reach the account holder. The communication must include: (i) the web address of the State Department's Joint FATCA FAQs (which provide information about how to obtain a U.S. TIN and how to renounce U.S. citizenship); and (ii) information about the IRS relief procedures.
- FFIs must maintain records of the policies and procedures adopted to comply with Notice 2023-11 through the end of 2028.

- **Obligations of Model 1 IGA Jurisdictions**

Additionally, within a certain time period, each Model 1 IGA jurisdiction must take the following good faith measures to improve FATCA compliance:

- Encourage U.S. citizens who reside in the jurisdiction to provide their U.S. TINs when they are requested by FFIs;
- For all FFIs identified by the U.S. Competent Authority as potentially non-compliant, the Model 1 IGA jurisdiction must take measures to ensure compliance;
- Encourage FFIs not to discriminate against U.S. citizens who provide U.S. TINs; and
- Cooperate with the U.S. Competent Authority on various measures.

Conclusion

The IRS remains committed to obtaining information about U.S. taxpayers who are not complying with their U.S. tax reporting obligations. The relief under Notice 2023-11 is temporary. Because the financial stakes are high for FFIs that do not comply with FATCA, banking may become increasingly difficult for Americans who refuse or are unable to provide U.S. TINs. Individuals who have received letters from their FFIs about FATCA and who do not have U.S. TINs should consult with their advisors to understand how Notice 2023-11 affects them.

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