

A FIDUCIARY'S SURVIVAL GUIDE

PAUL FOSTER MILLEN AND PETER COTORCEANU
OFFER ADVICE ON THE UPCOMING FATCA
RESPONSIBLE OFFICER CERTIFICATIONS

It's time to get going. After several postponements and substantial evolution over the past few years, the *Foreign Account Tax Compliance Act* (FATCA) Responsible Officer (RO) Certifications (the Certifications) are upon us. In a July flurry, the Internal Revenue Service (IRS) updated the FATCA Registration Portal, the Portal User Guide and the corresponding FAQs and began sending out notices to registered financial institutions (FIs) calling for Certifications by 15 December 2018 (or 31 March 2019 for sponsored and similar entities).¹ Fiduciaries should consider the below checklist before embarking on their Certifications journey.

SCOUT THE LANDSCAPE

The principal consideration for any journey is the destination. In the case of the Certifications, this means knowing which entities need to submit which Certifications, and how many.² The threshold question is, of course, whether your entity needs to submit one at all. As a rule of thumb, if you registered the entity on the FATCA Registration Portal, you will need to file a Certification. Exceptions, however, abound in both directions.

The most significant exclusion is for Model-1 intergovernmental agreement (IGA) FIs. Subject to a few exceptions where the FIs accessed a FATCA category via the Treasury Regulations,³ the ROs of these FIs are relieved of the Certification submission duty. In the other direction, exceptions to the general rule apply to certain entities that were not registered to the extent those entities entrusted another party to conduct FATCA compliance for their benefit, such as a Sponsored Closely Held Investment Vehicle (SCHIV) and Trustee-Documented Trust (TDT).⁴ The sponsor ROs for these entities will submit Certifications on their behalf if the SCHIVs or TDTs are in a Model-2 IGA jurisdiction or outside an IGA jurisdiction altogether (i.e. subject to the Treasury Regulations).⁵

Finally, some oddities crop up, such as the apparent absence of Certifications of Preexisting Accounts for TDTs and of any Certifications at all for the registered Swiss Investment Advisers category. These exclusions are, however, rare: once an RO outside a Model-1 IGA jurisdiction surveys their constellation of entities, there is a fair likelihood that a Certification will be needed.

START EARLY

The Certification obliges the RO, among other things, to review the FATCA compliance programme in place for the FI and certify that it is 'sufficient'.⁶ How do you establish such sufficiency? It's a

matter of your appetite for risk. While an account review is not a mandatory component of the RO programme review, few ROs can be certain that the design and implementation of their compliance programmes were foolproof. As such, most ROs will opt for caution and review a statistically significant subset of accounts before asserting a claim of programme sufficiency. These reviews will take time.

Another seemingly unavoidable aspect of the Certifications involves internal communications. ROs will need confirmation from various personnel, such as relationship managers or trust officers, that monitoring activities were properly executed and no efforts to aid clients in avoiding FATCA were tolerated.⁷ These exchanges will take time.

Further, the results of these preparatory actions may dictate a series of subsequent activities before a non-qualified (i.e. fully compliant) Certification may be submitted.⁸ Uncertainty about the effectiveness of a compliance programme for any newly installed regime is commonplace. Many ROs will lack insight into their FATCA compliance programmes prior to the review, meaning each RO ought to plan as if the review and communications will reveal defective chaos – and hope that they reveal flawless harmony instead.

PACK FOR ALL KINDS OF WEATHER

What are the consequences if the RO's review leads to the identification of compliance errors? They vary. Isolated errors that did not result in missed reporting, withholding or deposits may not need to be fixed. While the last two of these are of scant concern for most fiduciaries, any errors that resulted in any non-reporting of US citizens or tax residents must be remedied by means of the amended FATCA reporting process.⁹

The discovery of 'lost' Americans is not a hallmark of a poorly conceived or defectively executed compliance

→ KEY POINTS

WHAT IS THE ISSUE?

The deadline for the *Foreign Account Tax Compliance Act* (FATCA) Responsible Officer (RO) Certifications is looming, and fiduciaries, even those with tested compliance programmes, face more than a mere check-the-box exercise.

WHAT DOES IT MEAN FOR ME?

With personal liability exposure on the FATCA RO Certification submission, ROs must prepare in advance to ensure that ample time remains to remedy any failures, implement necessary compliance programme enhancements and collect all relevant materials and information prior to the 15 December or 31 March deadlines.

WHAT CAN I TAKE AWAY?

By following the steps set forth in this article, FATCA ROs of fiduciaries (including sponsor ROs) can expedite the submission process, minimise the burden of the Certification and, critically, avert any missteps with long-term consequences.

programme; even the best programmes might have missed one. The US citizen or tax-resident status of a financial account holder or a controlling person may be concealed, unknown or change over time, sometimes suddenly and without forewarning. For ROs of fiduciary companies responsible for the correct classification of beneficiaries with whom they may have minimal contact, latent surprises may emerge during the review process. Fixing the non-reports of past years is a multi-step process involving communication with and re-documentation of the client (including perhaps collecting waivers) and retroactive reporting for past years.

Moreover, what if the reporting defects are not isolated, but rather widespread and systematic? Often, the discovery of one failure to document or report a client links to other similar failures, and a pattern emerges of ignored responsibilities, substandard execution or human error. In circumstances where defects in the aggregate indicate a compliance

The following items are mandatory and need to be in place prior to the submission of the Certification:

- **Written sponsorship agreement:** The sponsor RO must affirm that every sponsoring relationship is documented under a written agreement.¹² There are no exceptions for intra-group sponsoring or even, say, a trustee sponsoring one of its trusts. All sponsorships must be reflected in writing, though a single standard document may be obtained and adjusted for multiple relationships.
- **Lists of SCHIVs and TDTs:** All SCHIVs and TDTs must be listed by name, presumably to allow the IRS to connect sponsors with the certified deemed-compliant entities they manage.¹³ This requirement does not apply to Sponsored Investment Entities, which are tied to the sponsor RO via their own mandatory registrations.
- **Descriptions of business activities:** ROs must provide a description of the entity's business as part of the

next Periodic Certification in two and a half years' time, the consequences of a qualified Certification appear mild. However, the submission of a false Certification may result in severe penalties, including possible personal sanctions along with the loss of a compliant Global Intermediary Identification Number and/or sponsoring status. Therefore, if your FATCA programme review yields errors that cannot be remediated or compliance programme holes that cannot be filled prior to the deadline, accept the limitations for this journey and reach the destination next time.

The sure message in this survival guide for fiduciaries is that the Certification submission process is not a mere check-the-box exercise for any RO. The less work you have done so far in testing your FATCA compliance, the more work there is to do by the coming deadline. Further, even if you have a top-notch compliance programme in place and previously scrutinised it for flaws and oversights, you still have some advance work to do. In any case, follow the steps set forth above, because you are far better off with unused contingency plans than with duties you cannot fulfil due to lack of preparation. Everyone brings along a Swiss army knife, but the best prepared only use the bottle opener on reaching their destination.

'So long as the RO can reasonably set out the plan for any pending remedial actions, the consequences of a qualified Certification appear mild'

programme flaw, enhancements are needed.¹⁰ As with other programme developments, the 'design-implement-test-deploy' mantra remains in effect before any enhancements should be regarded as operational.

And that assumes that the errors can be remediated and any enhancements added prior to the relevant deadline. If that timeline proves too tight, the RO will need to submit a qualified Certification (see 'Don't Compound Setbacks' below), one element of which is the need to prepare descriptions of the plans for remediation and enhancements, even if not yet implemented.¹¹ In this instance, even inaction demands forethought and preparation.

COME PREPARED

The better the compliance programme was implemented, the fewer defects an RO tends to uncover and the less demanding the Certification becomes. However, even a flawless compliance programme may not relieve the RO from the obligation of some preparatory work.

Certification submission process.¹⁴ The guidance offers no parameters for this free-text field and thus we recommend the duet of concision and precision (i.e. short and to the point).

DON'T COMPOUND SETBACKS

A tenet of mountaineering is that natural disasters alone do not result in fatalities; rash decisions in reaction to them do. The lesson for this far more mundane scenario is as follows: do not submit a non-qualified Certification if you ought to submit a qualified one.

While every RO will crave a fully compliant status, a qualified Certification is not as damaging as may be feared.¹⁵ So long as the RO can reasonably set out the plan for any pending remedial actions, and such actions are undertaken prior to the

¹ 'FATCA Certifications', question 13, 'FATCA - FAQs General', bit.ly/2xHYha9 ² There are two main categories: Certifications of Preexisting Accounts (COPAs) and Periodic Certifications (PCs); and various subcategories based on the entity's FATCA classification. ³ For further elaboration on the topic of Model-1 IGA FIs with RO Certification duties, please refer to our article in the March 2018 edition of the *STEP Journal*, 'The Small Print', (Vol26 Iss2), pp.62-63 ⁴ See generally, Prop. Treas. Regs. § 1471-5 ⁵ E.g. Treas. Regs. §§ 1.1471-5(f)(1)(i)(F), 1.1471-5(f)(2)(iii) ⁶ Treas. Regs. § 1.1471-4(f); Prop. Treas. Regs. §§ 1471-5(j)(2), 1471-5(l)(1) ⁷ Treas. Regs. §§ 1.1471-4(c)(7), 1.1471-4(f) ⁸ Treas. Regs. § 1.1471-4(f); Prop. Treas. Regs. §§ 1471-5(j)(3)(vi), 1471-5(l) ⁹ Treas. Regs. § 1.1471-4(f)(3)(ii)(C); Prop. Treas. Regs. § 1471-5(j)(3)(vi)(A)(3) ¹⁰ Treas. Regs. § 1.1471-4(f)(3)(ii)(B); Prop. Treas. Regs. § 1471-5(j)(3)(vi)(A)(2)(ii) ¹¹ Treas. Regs. § 1.1471-4(f)(3)(iii); Prop. Treas. Regs. § 1471-5(j)(3)(vi)(B) ¹² Prop. Treas. Regs. § 1471-5(j)(3)(v)(B) ¹³ FATCA Registration Portal Users Guide at pp.55, 60 ¹⁴ FATCA Registration Portal Users Guide at pp.54, 60 ¹⁵ See generally, Treas. Regs. § 1.1471-4(f)(iii); Prop. Treas. Regs. § 1471-5(j)(3)(v)(B)



PAUL FOSTER MILLEN IS FOUNDER AND PRINCIPAL OF MILLEN TAX & LEGAL, AND PETER COTORCEANU TEP IS FOUNDER AND CEO OF G&TCA AND OF COUNSEL AT ANAFORD ATTORNEYS AT LAW