The American Chamber of Commerce in Cambodia welcomes you to our discussion on

FATCA & FBAR

Disclaimer

This presentation does not constitute legal or tax advice. It is for information purposes only.

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Presentation Outline

1. **Introduction**
2. Foreign Account Tax Compliance Act (FATCA)
3. Report of Foreign Bank and Financial Accounts (FBAR)
4. Financial Institution Perspectives

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1 Introduction

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3 Report of Foreign Bank and Financial Accounts (FBAR)

4 Financial Institution Perspectives

What is FATCA?

The Foreign Account Tax Compliance Act (FATCA) is a regulatory tool used by the US government to prevent and detect tax evasion by US persons holding foreign bank accounts and other foreign financial assets.

- FATCA was enacted into law on 18 March 2010 as part of the HIRE ACT
- Chapter 4 of the US Internal Revenue Code

What does FATCA require?

- Requires US tax filers meeting statutory thresholds to report to the US Internal Revenue Service (IRS) on Form 8938 together with their income tax return

- Requires foreign (non-US) financial institutions (FFIs) to report US account holders to the US Internal Revenue Service (IRS)

- Enforces reporting on all US persons by imposing punitive withholding tax on FFIs who do not cooperate

- Relates to reporting and does not impose additional taxes

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Who must file?

The IRS requires you to file Form 8938 if:

1. You are a specified individual.

A specified individual is:

A US citizen

A resident alien of the United States for any part of the tax year

A nonresident alien who makes an election to be treated as resident alien for purposes of filing a joint income tax return

A nonresident alien who is a bona fide resident of American Samoa or Puerto Rico

AND

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Who must file?

2. You have an interest in specified foreign financial assets required to be reported.

A specified foreign financial asset is:

Any financial account maintained by a foreign financial institution

Other foreign financial assets held for investment that are not in an account maintained by a US or foreign financial institution, namely:

- Stock or securities issued by someone other than a US person
- Any interest in a foreign entity, and
- Any financial instrument or contract that has as an issuer or counterparty that is other than a US person

AND

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Who must file?

3. The aggregate value of your specified foreign financial assets is more than the reporting thresholds that applies to you:

Thresholds for Taxpayers living in the US:

Unmarried taxpayers living in the US: The total value of your specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year

Married taxpayers filing a joint income tax return and living in the US: The total value of your specified foreign financial assets is more than $100,000 on the last day of the tax year or more than $150,000 at any time during the tax year

Married taxpayers filing separate income tax returns and living in the US: The total value of your specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.

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Who must file?

Thresholds for Taxpayers living abroad:

You are a taxpayer living abroad if:

You are a US citizen whose tax home is in a foreign country and you are either a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year, or
You are a US citizen or resident, who during a period of 12 consecutive months ending in the tax year is physically present in a foreign country or countries at least 330 days.

If you are a taxpayer living abroad you must file if:

You are filing a return other than a joint return **and** the total value of your specified foreign assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the year; or
You are filing a joint return **and** the value of your specified foreign asset is more than $400,000 on the last day of the tax year or more than $600,000 at any time during the year.

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Failure to file form 8938

Non-Compliance with Form 8938 Reporting Requirements

If you must file Form 8938 and do not do so, you may be subject to penalties: a $10,000 failure to file penalty, an additional penalty of up to $50,000 for continued failure to file after IRS notification, and a 40 percent penalty on an understatement of tax attributable to income from non-disclosed assets.

If failure to disclose is due to reasonable cause and not due to willful neglect, no penalty will be imposed.

“Reasonable cause” is determined on a case-by-case basis, considering all relevant facts and circumstances.

Form 8938 Does Not Relieve Filers of FBAR Filing Requirements

Foreign Financial Institutions under FATCA

To avoid being subject to withholding, Foreign Financial Institutions (FFIs) may register with the IRS and agree to report to the IRS certain information about their US accounts, including accounts of certain foreign entities with substantial US owners

FFIs that enter into an agreement with the IRS to report on their account holders are required to withhold 30% on certain payments to foreign payees if such payees do not comply with FATCA

FFIs include, but are not limited to:

- Depository institutions (for example, banks)
- Custodial institutions (for example, mutual funds)
- Investment entities (for example, hedge funds or private equity funds)
- Certain types of insurance companies that have cash value products or annuities

The FATCA regulations exempt many categories of FFIs from the requirement to register and report, including

- Most governmental entities
- Most non-profit organizations
- Certain small, local financial institutions
- Certain retirement entities

Unless otherwise exempt, FFIs that do not both register and agree to report face a 30% withholding tax on certain US-source payments made to them.

Determining US accounts

Financial Institutions will need to look for 7 indicators of a person's US status. These indicators are:

1. US citizen or resident
2. US place of birth
3. US mailing or residence address (if not temporary)
4. US telephone number
5. Standing instructions to transfer funds to an account maintained in the US
6. POA or signing authority granted to a person with a US address
7. An "In-care-of" or "hold mail" address that is the sole address on file for the account holder

Basic requirements for financial institutions

US financial institutions (USFIs) and foreign financial institutions (FFIs) may be required to:

- Identify and report to the IRS with respect to:
  - accounts owned directly or indirectly by specified US persons, and
  - financial institutions that do not comply (or "participate") with FATCA (so-called "non-participating FFIs")

- Withhold 30% from certain US source income when paid to:
  - Non-participating FFIs,
  - Non-compliant passive non-financial foreign entities, and
  - Recalcitrant accounts

FATCA Withholding

30 Percent FATCA Withholding

- Imposed on payments, including:
  - US source income from securities
  - Interest on bank deposit accounts maintained in the United States or in a foreign branch of a US bank
  - Gross proceeds from the sale or redemption of US securities
- When made to FFIs unless:
  - The FFI qualifies as a participating FFI, a registered deemed-compliant FFI, a certified deemed-compliant FFI or an exempt beneficial owner

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4 Things to be Aware of

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What is FBAR?

US Persons who have signatory authority over or a financial interest in an offshore account must file an FBAR - Form FINCEN 114 for accounts with combined balances over 10k US dollars

- FBAR is not an income tax return. Filing online: http://bsaefiling.fincen.treas.gov/main.html
- FBAR must be submitted on or before April 15 of the following year to US Department of the Treasury
- Unlike income tax returns, requests for extensions of time to file an FBAR are not granted
- FINCEN stands for Financial Crimes Enforcement Network, a bureau of the Department of the Treasury
- Enforcement has been delegated to the IRS
- Duty to report under FBAR independent of and not affected by duty to report under FATCA

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FBAR Applicability

- U.S. Persons = U.S. Citizens and U.S. residents (aliens) and US entities
- US entities = corporations, partnerships, trusts, or limited liability companies created, organized, or formed under the laws of the United States
- Anyone who meets the IRS "substantial presence" test is also considered a US person

The substantial presence test is met if you are physically present in the US on at least:

1. 31 days during the current year, and
2. 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:

All the days you were present in the current year, and

1/3 of the days you were present in the first year before the current year, and

1/6 of the days you were present in the second year before the current year

When do you have a financial interest in an offshore account or asset?

- you are the owner of record or holder of legal title
- your agent or representative is the owner of record or holder of legal title
- you have a sufficient interest in the entity that is the owner of record or holder of legal title
- you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account

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Financial Interests under FBAR:

- Offshore bank accounts whether held at a foreign bank or a foreign branch at of a US bank
- Offshore financial accounts for which you have signature authority
- Foreign stock or securities held in a financial account at a foreign financial institution
- Indirect interests in foreign financial assets through an entity if you have a greater than 50 percent interest in the entity
- Foreign mutual funds
- Foreign accounts held by foreign or domestic grantor trust for which you are the grantor
- Foreign-issued life insurance or annuity contract with a cash-value

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Penalties for failing to report under FBAR:

Penalties assessed per account, not per unified FBAR (Example: you own 3 different accounts that have not been reported for 3 years = 9 separate penalties)

If more than one account holder or if a person other than the account owner has signature authority over the account then each person can be liable for the full amount of the penalty

if failure is **non-willful**, up to $10,000 / no jail

if **pattern of negligent (non-willful) action**, additional penalty up to $50,000 for each violation

if failure is **willful**, up to the greater of $100,000 or 50% account balances at time of violation / up to $250,000 and/or 5 years prison

if failure is **willful while breaking certain other laws**, up to the greater of $100,000 or 50% account balances at the time of violation / up to $500,000 and/or 10 years prison

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Willfulness Test:

- Voluntary, intentional violation of a known legal duty?

- Did the person know of reporting requirements and make a conscious choice not to comply with the requirements?

- Includes “willful blindness,” which describes any “person who made a conscious effort to avoid learning about the FBAR reporting and recordkeeping requirements.”

What is non-willful conduct:

- Conduct due to negligence, inadvertence, or mistake
- Conduct resulting from a good faith misunderstanding of the requirements of the law

Examples of non-willful conduct:

- Forgot to File
- Did not know that I had to file
- Thought account balance was below reporting threshold
- Did not know my account qualifies as foreign
- Account statement not received in time
- Account statement lost
- Late receiving missing required account information
- Unable to obtain joint spouse signature in time

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Proof of willful conduct:

- Willful FBAR violations, like any alleged criminal act, must be proven by evidence

- Burden of proof is on the IRS

Evidence against the taxpayer:

Bank statements and other bank records

Debit card and credit card statements associated with the account

FBAR documentation supplied by the taxpayer in previous years

Emails, phone conversations, etc. between taxpayer and his tax preparer proving that FBAR came up in discussion

Financial information uncovered by the IRS examiner during interviews with taxpayer

Old tax returns dating back three or more years before the taxpayer opened the foreign bank account (and continuing henceforth)

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Evidence against the taxpayer:

A signed income tax return with Schedule B (Form 1040A or 1040, Interest and Ordinary Dividends) attached

Part III of Schedule B contains questions specifically addressing the FBAR requirement

Question 7a asks, **“At any time during 2015, did you have a financial interest in or signature authority over a financial account located in a foreign country?”**

If the taxpayer checked "**No**", and this is not true, he may be subject to a felony criminal charge of filing a false income tax return

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Avoiding Penalties for Non-Willful Violations:

In order to avoid being penalized, the taxpayer must be able to prove

(1) “the violation was due to reasonable cause,” and

(2) that any delinquent FBARs were filed and reported

If (1) and (2) can both be established, no penalty should be assessed

IRS definition of “reasonable cause” is vague

Avoiding Penalties for Non-Willful Violations:

"… most important factor is the extent of the taxpayer's effort to assess [his] proper tax liability. *Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances*, including the experience, knowledge, and education of the taxpayer."

"Reliance on an information return or on the advice of a professional tax advisor… constitutes reasonable cause and good faith *if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith*."

The better educated and/or more financially experienced a taxpayer is, the greater reason the IRS will have to believe that he or she essentially "should have known better" when consulting with tax professionals."

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Conduct that Shows a Purpose to Disobey the Law

A purpose to disobey can be inferred by conduct meant to conceal:

- Setting up trusts or corporations
- Filing some forms and not others
- Reporting one account but not another
- Using another passport
- Telling your bank not to send statements
- Using code words in communications
- Cash deposits and withdrawals
- Moving money from one bank or country to another
- Not telling your return preparer

If you get Notice from the IRS that you've Failed to Report / Your Accounts Have Been Frozen

#1 Do not talk to anyone until you talk with your attorney

IRS agents/other federal officers, your friendly banker, your accountant, your business associates, your friends, etc. are potential witnesses against you

Your exposure to criminal liability is uncertain and you might inadvertently expose yourself to criminal prosecution

A defendant in a criminal case – even before it becomes a criminal case - has an absolute right not to testify; not so for a witness

Your privilege against self incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory

The 5th Amendment applies to civil proceedings because the nature of the protection goes to the questions asked, not the proceeding itself

The 5th Amendment applies to responses that would furnish a link in the chain of evidence necessary to prosecute the person claiming the privilege

The 5th Amendment applies to discovery requests for documents. You cannot be compelled to produce records if the act of production is incriminating, but the records themselves are not privileged

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- **Member of EXCO of Association of Banks in Cambodia**

FATCA

FATCA

- Foreign Account Tax Compliance Act
- Reports ultimately to IRS

Purpose

- Find income and assets of Americans who are avoiding including foreign income on tax returns

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Banks and Financial Institutions Reporting

Worldwide Reporting

Cambodia – September 2016 deadline

- **Report Accounts for 2014 and 2015**

Currently in process

What is Reported

Financial Institutions

- **Account name**
- **Account number**
- **High balance in the account in the calendar year**

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How It Flows

Financial Institutions report to GDT

GDT checks the report

Information is released to IRS

Entities

US Entities

- US Corporations
- US Partnerships
- Trusts
- Any account where one or more Americans control the decisions of the entity
- A US court has administrative control

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INDIVIDUALS – Reports and Confusion

American Passport Holders – as signer

Dual citizen with one being American

Green Card holder - as signer

Someone born in the USA – as signer

Primary address on account in USA

Reports and Confusion – Page 2

Phone number in the USA

Standing instructions to transfer funds to the USA

If a person in USA has a Power of Attorney over the account

Any signer spends 183 days a year in the USA.

Reports - 2017

Financial Institutions

- Same as previously disclosed
- Interest earned in year

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Precautions

US Companies

- Dropping Americans as signers
- Companies filing FBARs on behalf of individuals

Precautions

Financial Institutions

- **May not open accounts for Americans**
- **May close accounts**

Planning

Mail to us in Cambodia

Riel income converted to USD

How will our disclosure match the FI's reported amounts?

Child goes to school in USA

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EXAMPLES

Singaporean bank refused to open account because 50% of shareholders were American – not officers or directors.

Banks in Cambodia have looked at closing accounts of Americans.

Do not know of any FI planning to close, but all plan to report.

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Thank You!

Q & A