



Foreign Account Tax Compliance Act (FATCA)

FATCA recalcitrant account holder guidance notes



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Background

This guidance is for Reporting New Zealand Financial Institutions (Reporting NZFIs) carrying out Foreign Account Tax Compliance Act (FATCA) due diligence and reporting under New Zealand's FATCA Inter-Governmental Agreement (IGA) with the United States.

The guidance focuses on how Reporting NZFIs should report **recalcitrant accounts** for FATCA purposes; and assumes that the relevant financial account is not exempted or excluded under the IGA (for example, there is generally a U.S. dollar 50,000 threshold exclusion for individual depository accounts).

Meaning of recalcitrant account

A recalcitrant account holder is any account holder which fails to comply with reasonable requests by the Reporting NZFI that maintains the account for:

- (a) information that is necessary to determine the account holder's FATCA status; and/or
- (b) information that needs to be reported about the account for FATCA purposes.

Reporting of recalcitrant accounts

The IGA provides that Reporting NZFIs will need to report recalcitrant accounts just like any other U.S. Reportable Account (i.e. treating the account holder or, where applicable, controlling person,¹ as a Specified U.S. Person).

This **includes** the Reporting NZFI reporting the following identity information for these accounts:

- the name, address, and U.S. Tax Identification Number (U.S. TIN) of each Specified U.S. Person account holder; and
- if the account is held by a passive non-financial foreign entity (passive NFFE), the name, address, and U.S. TIN of each Specified U.S. Person controlling person (along with the account holder's name, address and U.S. TIN – if any).

The Reporting NZFI would also be required to report **financial** information (such as the balance of the account, and income and payments to the account) about these accounts and other prescribed information, just like any other U.S. Reportable Account. Please refer to Inland Revenue's FATCA "U.S. Reportable Accounts" guidance notes (IR1083) for further details about the information that Reporting NZFIs need to report for U.S. Reportable Accounts (including such recalcitrant accounts).

Importantly, this reportable information **includes** the account holder's (or, where applicable, controlling person's) U.S. TIN.

IRS notification that a Reporting NZFI is significantly non-compliant

The U.S. has provided guidance² that if a FI (which would include a Reporting NZFI) fails to report required U.S. TINs for U.S. Reportable Accounts, the IRS may notify Inland Revenue that the Reporting NZFI has been significantly non-compliant in accordance with the IGA. If the Reporting NZFI remains non-compliant for 18 months after such notification, the U.S. may treat the NZFI as a non-participating financial institution that is subject to 30% withholding.

Therefore, if a Reporting NZFI maintains such accounts, but has not already collected the required U.S. TIN information, they should promptly take steps to obtain this information, so that they are in a position to comply with their reporting obligations. Inland Revenue has produced a brochure *Foreign Account Tax Compliance Act: provision of US TINs (IR1090)*, which Reporting NZFIs can use to assist them when making requests for this information.

¹ This will apply (i.e. needing to identify controlling persons) if the account holder is a type of entity known as a passive non-financial foreign entity (NFFE). Where a Reporting NZFI has not otherwise been able to determine that an entity account holder is a financial institution, Specified U.S. person, or active NFFE, they should treat the entity account holder (by default) as a passive NFFE.

² See IRS Notice 2017-46 (at page 5) issued on 25 September 2017 <https://www.irs.gov/pub/irs-drop/n-17-46.pdf>.

Transitional procedures allow additional time for Reporting NZFIs to collect U.S. TINs for recalcitrant *pre-existing* accounts

However, the U.S. has acknowledged³ that some FIs may need additional time to implement practices and procedures to obtain and report required U.S. TINs for **pre-existing accounts** (accounts maintained by the Reporting NZFI as of 30 June 2014) that are U.S. Reportable Accounts.

With respect to such **pre-existing accounts**, for the 2017-2019⁴ FATCA reporting periods, the IRS will not determine that a Reporting NZFI has been significantly non-compliant solely because of a failure to obtain and report **each** required U.S. TIN, **provided that** the Reporting NZFI takes the following steps; if it:

- obtains and reports the date of birth of each individual account holder (and any applicable controlling person) whose U.S. TIN is not reported (this information will need to be obtained and reported to Inland Revenue by 30 June 2018 – for the 2017 FATCA period ending 31 March 2018);
- requests annually from each account holder any missing U.S. TIN;
- before reporting information that relates to the 2017 FATCA period (ending 31 March 2018), it searches electronically searchable data that it maintains for any missing required U.S. TINs that have not previously been reported; and
- implements practices and procedures promptly to ensure that U.S. Reportable Accounts are documented and reported in accordance with the IGA in future years.

Further guidance

- The IRS intends to provide further instructions regarding appropriate electronic reporting for the TIN data element for **pre-existing** accounts that are U.S. Reportable Accounts, but with missing required U.S. TINs.
- We will update this recalcitrant accounts guidance once the IRS has clarified the electronic reporting solution that will apply to such accounts. This will include providing further guidance about how **all** of the various data elements should be reported if a recalcitrant account holder has not provided the requisite information.

³ See IRS Notice 2017-46 (at page 5), issued on 25 September 2017.

⁴ The 2017-2019 FATCA reporting periods are references to the calendar year ended 31 December, the equivalent NZ FATCA reporting periods are the periods to 31 March 2018 – 2020.