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CARIBBEAN REGIONAL COMPLIANCE ASSOCIATION

FATCA: “D” Day has finally arrived

- What should financial institutions be doing to ensure that whether they are FFI or a PFFI, they are compliant?
- The Law is now in effect
- How you can ensure Compliance with it and what steps are needed to be taken if you are not fully compliant as yet

Cherise Cox-Nottage, Bahamas

FATCA: “D” Day has finally arrived- Brief Overview



What is FATCA?

- How FATCA will affect your Institution
- Your Clients
- What Are the Reporting Requirements
- What Your Financial Institution Must do

FATCA: “D” Day has finally arrived- The Goal of FATCA



- To unearth US tax evaders who invest directly in offshore accounts or indirectly through ownership of foreign vehicles

It is an Adjunct to the US HIRE ACT - *Hiring Incentives to Restore Employment Act* of 2010

- FATCA requires a new foreign asset disclosure requirement on U.S. persons.
- A new chapter to the Internal Revenue Code (Chapter 4) is now in place which addresses tax abuse by U.S. persons through the use of offshore accounts.

FATCA: “D” Day has finally arrived- The Goal of FATCA



- A Withholding tax will be imposed on certain US source payments to foreign financial institutions (FFI's) which have not entered into agreements with the IRS to provide information on financial accounts held by in scope US account holders;
 - Punitive 30% withholding on the FFI can be avoided by entering into agreement with the IRS & becoming a participating FFI either by:
 - disclosing the US owners of the FF1 or

FATCA: “D” Day has finally arrived- The Goal of FATCA



- by certifying that the FFI has no substantial US owners.
- ANNUAL Reporting of US account holders to the IRS is required

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Withholdable Payments

- Any payment of U.S. source income (e.g. dividends, interest, rents etc.);
- Any gross proceeds from the sale or other disposition of a security that can give rise to the payment of U.S. source dividends or interest.

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Withholdable Payments

- FATCA also affects United States withholding agents by requiring them to identify whether their entity account holders are U.S. persons, EEs, NFFEs or excepted from FATCA compliance.
 - FATCA also requires US withholding agents to withhold when appropriate

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Does FATCA affect your jurisdiction?

- Assume that an IGA , i.e. Model 1 or Model 2 has been signed
- Assume that the Domestic law of your jurisdiction permits adherence to FATCA requirements

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Does FATCA affect your jurisdiction?

- Determine what Requirements or steps are necessary to be taken by your Institution
- Determine what Requirements or steps are necessary to be taken on behalf of your customers

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- Is your firm is a Foreign Financial Institution (FFI) or a
- Non Foreign Financial Entity (NFFE)?
- Within these two groups are sub-categories

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We can see that a Foreign Financial Institution...

- Accepts deposits in the ordinary course of a banking or similar business (e.g. a bank)
- Holds, as a substantial part of its business, financial assets for the account of others (e.g. a custodian)

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We can see that a Foreign Financial Institution...

- Is engaged, or holds itself out as being engaged, in the business of investing, reinvesting, or trading in financial instruments, including derivative contracts (e.g. mutual funds, hedge funds, private equity funds)
- Can be an insurance company issuing annuities or cash value insurance policies

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- **What is a:**

Participating FFI – defined as an FFI which is impacted by the agreement with the IRS and exempt from FATCA withholding

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- **What is a:**
- **Non-participating FFI** – no agreement with IRS and subject to FATCA withholding
- **Excluded FFI:**
E.g. a holding company involved in non-FI business
- Group hedge/financial company which is non-financial and restricted to affiliates

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What is a:

Non Foreign Financial Entities (NFFE)

- Foreign entities which are **not financial institutions**, but **may be affected** if they receive US income or hold US investments.
- These are required to disclose substantial US owners **or** certify that **no substantial US owners** exist.

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- The goal of FATCA is to require FFIs & NFFEs to **provide information** to the IRS identifying U.S. persons invested in non-U.S. bank and securities accounts
- FATCA’s lever to achieve this goal is a 30% withholding tax levied on “withholdable payments” made to non-participating FFIs & NFFEs
- “Withholdable payments” include all U.S. source income (“FDAP”) **and gross proceeds** from the sale or disposition of any property of a type that can produce interest or dividends from U.S. sources.

FATCA: “D” Day has finally arrived- Becoming Compliant



How to be a “Complaint” FFI i.e. Not subject to 30% FATCA withholding:

- Be a class of institution that Treasury/IRS designates as not subject to FATCA withholding;
- Enter into an “FFI Agreement” with the IRS with the attendant obligations (“participating FFI”); **OR**
- Comply with procedures to establish that the institution does not maintain “U.S. Accounts”; **OR**
- Be carved out of FFI treatment and treated more like an NFFE (the “FFI-Lite” concept).

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The FATCA statute deems certain FFIs to meet the FFI requirements if they can comply with procedures that establish that:

- they do not have and will not have “U.S. accounts”
- Many institutions assessing commercial effect of keeping U.S. accounts

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Obtaining a GIIN

- Depending on your type of entity your institution may need to register for a Global Intermediary Identification Number (GIIN)
- Is your institution an individual firm or is it part of an Expanded Affiliated Group (EAG)?
- Determine which of your affiliated entities your institution is responsible for OR, is another of your offices applying for a GIIN.

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- **Global Intermediary Identification Number (GIIN)**

The IRS website

<http://www.irs.gov/Businesses/Corporations/FATCA-Registration>

FATCA: “D” Day has finally arrived- What Must be Done for Your Clients



- **Pre-existing clients** - undertake Due Diligence on these accounts to identify Excluded Accounts or US Reportable Accounts for:
 - Specified US Persons ; or
 - Non-US Entities with one or more Controlling Persons as a Specified US Person
- Create a process for the **on boarding of any new clients**
I.e. considering your due diligence requirements.

FATCA: “D” Day has finally arrived- Dealing with US Indicia



- U.S. citizenship or lawful permanent resident (green card) status; U.S. birthplace;
- U.S. residence address or a U.S. correspondence address (including a U.S. P.O. box);
- Standing instructions to transfer funds to an account maintained in the US, or instructions regularly received from a U.S. address;
- An “in care of” address or a “hold mail” address that is the sole address with respect to the client; or
- A PoA or signatory authority granted to a person with a U.S. address.

FATCA: “D” Day has finally arrived- Due Diligence to Be Performed



Self certification will be the path that FFI's take with their underlying clients- W9, W8, or local self certification.

- **For US Persons: W-9**
- **For Non US Persons: -W-8:**

There are several alternatives for non-US Persons

- W-8BEN for individuals
- W-8IMY for intermediaries
- W-8BENE for other entities

FATCA: “D” Day has finally arrived- Reporting Requirements



These differ per jurisdiction

You will need to determine if your jurisdiction has signed either a :

- Model 1 IGA; or a
- Model 2 IGA

If it has not signed either of the above then you must report directly to the IRS

- Query adoption of FATCA by local laws i.e. if not provided for does complying place you and your firm at risk?

FATCA: “D” Day has finally arrived- IGAs



- **Model 1** : FFIs to report all FATCA-related information to their own governmental agency which would then report the FATCA-related information to the IRS
- An FFI covered by a Model 1 IGA will not sign a FFI Agreement but will need to **register** on the **IRS’s FATCA Registration Portal**
- **Model 2** : FFIs report information **directly to the IRS**, complying with the requirements of an FFI Agreement, including due diligence, reporting withholding

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The US Treasury Department provides Resources on its site that lists the jurisdictions that have signed Model 1 and Model 2 agreements

- <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>

FATCA: “D” Day has finally arrived- Policies & Procedures



Effective Policies & Procedures

- A participating FFI is required to have in place compliance program under the authority of the responsible officer of the participating FFI
- **A PFFI’s compliance program must include policies, procedures & processes which are sufficient for the PFFI to satisfy the due diligence, reporting & withholding requirements of the respective agreement**

FATCA: “D” Day has finally arrived- What I Need to Ensure



- Ascertain & Assess gaps between current processes and what is required
- What is the extent of IT involvement? Determine necessary information technology (“IT”) updates
- Re-Develop draft policies and procedures
- Undertake an Evaluation of existing files.
- Determine an approach going forward, inclusive of Costs
- Ensure that you Educate Management, yourself, your staff and your clients

FATCA: “D” Day has finally arrived- What I Need to Ensure



- Participate in your jurisdictional industry working committees ; Confer with those in the industry in your jurisdiction that are in the same boat
- Attend seminars, do webinars
- Read, re-read and read more
- Befriend a Lawyer and/ or Accountant who is '*au fait*' with FATCA requirements...'don't go it alone'

FATCA: “D” Day has finally arrived- Questions



- Thank You