FATCA - What Does it Mean for Bahamian Financial Institutions?

Bahamian and Bahamas-based financial institutions, investment managers and private investors may have heard of "FATCA" for months now and, prudently, are concerned to know what, if any, are the implications for the local operations.

This briefing gives you a summary of FATCA, its relevance for you, and what you should be doing.

What is FATCA?

"FATCA" refers to the United States of America's Foreign Account Tax Compliance Act, enacted in 2010. It is designed to correct perceived deficiencies in the US tax system's ability to prevent US persons evading US taxes by means of non-US investments.

A non-US financial institution (called 'foreign financial institution' or 'FFI') will be required to report directly to the US Internal Revenue Service ('IRS') information about financial accounts held by US taxpayers or by foreign entities in which a US taxpayer holds a substantial ownership interest.

To be compliant with FATCA, FFIs must be 'deemed compliant' or enter into an agreement with the IRS to be a so called 'participating FFI' and, under which it must:

- Carry out due diligence procedures to identify its US account holders;
- Report to the IRS annually on account holders who are US persons or foreign entities with substantial US ownership;
- Withhold and pay to the IRS 30% of any payments of US source income and gross proceeds from the sale of securities that generate US source income, made to:
    - Non-participating FFIs;
    - Individuals who have not provided information adequate for determining whether or not they are US persons; or
    - Foreign entity account holders that have not provided adequate information about the identity of its substantial US owners.
- Request a waiver from any US account holder if disclosure of the account information to the IRS would be prohibited by bank confidentiality or privacy, and close the account if the holder refuses to cooperate;
- Implement written policies and procedures for FATCA compliance which are to be periodically reviewed; and
- Provide periodically to the IRS a certification by a responsible officer that the FFI

has complied with FATCA.

If a FFI does not enter into an agreement with the IRS it will be a so called 'non-participating FFI' and subject to 30% withholding of any payments it might receive of US source income, for example, dividends paid on shares in US companies or the gross proceeds from sale of those shares.

How does FATCA impact Bahamian banks and trust companies?

The obligations upon a Bahamian bank or trust company under a FATCA agreement with the IRS may give rise to conflicts with their legal duty of confidentiality to customers under contract (Tournier principles) and by statute (Banks and Trust Companies Regulations Act and Data Protection (Privacy of Personal Information) Act).

Does FATCA impact Bahamian investment funds?

Yes. Confidentiality issues arise for investment funds, investment managers and firms organized in The Bahamas that deal or trade in securities as they are within the definition of a FFI. Under Bahamian statute law investment funds have a duty of confidentiality and are subject to privacy constraints (Investment Funds Act and Data Protection (Privacy of Personal Information) Act), which must be addressed in the context of the FATCA requirements.

Will cross-checking of information by the IRS be possible?

As US persons are required under other FATCA rules to report to the IRS information related to their 'foreign financial assets', the IRS would have the capability of cross-checking the information provided to it by the FFI.

Can your financial institution remain a QI without becoming FATCA compliant?

No. QIs must become FATCA compliant or they will lose the QI status. Further, the IRS recently published that QI agreements that fall due for renewal 31 December 2012 have been extended (IRS Notice 2011-53) to 31 December 2013. QIs may achieve the renewal via the online FATCA FFI registration system, which the IRS states will be available no later than 01 January 2013. "QI" refers to a non-US bank or other non-US financial institution that has entered into a 'qualified intermediary' agreement with the IRS for purposes of the US' tax withholding regime. QIs are authorized to withhold taxes from clients on behalf of the IRS.

When does FATCA take effect?

Withholding will take effect over 3 stages with the first stage beginning 1 January 2014, the second on 1 January 2015 and the third on 1 January 2017.

Participating FFIs will be required to report information on account holders as of 2014 regarding the year 2013.

FATCA regulations are expected to be finalized during this summer.

What should Bahamian financial institutions do now?

- Improve your understanding of FATCA and its impact on your institution.
- Determine the impact of FATCA on your existing contractual and statutory duties under Bahamian law.
- Begin a review of your account holders' information.

How may we help?

Our team has leading expertise in Bahamian financial services laws and regulations, having had prior experience in policy, legislative and regulatory aspects of the Bahamian financial laws and extensive private industry experience in advising on every area creating a combination of qualifications which distinguishes us. In addition, we have correspondent arrangements with major US law firms with tax expertise to ensure that our Bahamian clients receive sound US tax advice.

We can ensure that you receive sound advice on all Bahamian and US issues related to FATCA, assist with issues arising in the course of your review of account holder information, and provide advice as to best practices going forward.

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