The Foreign Account Tax Compliance Act (FATCA) is a US law enacted in 2010 as part of the HIRE Act. The final FATCA regulations were issued on January 17, 2013. FATCA will be effective July 1, 2014, while some obligations will be implemented during a period of 2.5 years. Based on announcements by the US Treasury, we all are shortly expecting revised FATCA regulations and further guidance. The deadlines are getting quite pressing now.

FATCA is aimed at combating tax evasion by US taxpayers with overseas financial accounts. It requires non-US entities to identify US taxpayers who hold directly or indirectly certain foreign financial accounts and to report related information to the IRS (Internal Revenue Services). Parties that do not comply will be subject to a 30% withholding on certain US source payments and may also be in violation of local country laws.

The US Government is entering into Inter-Governmental Agreements (IGAs) with many partner countries to overcome certain legal impediments, to reduce compliance burdens for local financial institutions and to effectively implement FATCA in their local jurisdictions. Two Model IGAs have been developed - Model 1 and 2. Currently, 22 IGAs have been signed and approximately 40 countries are in negotiation with the US to enter into an IGA (see below list).

FATCA and IGAs impact not only US individuals and entities, but also impose extra disclosure and compliance requirements on many non-US entities and may even impact non-US individuals. Many requirements under FATCA and IGAs apply even if there are no US beneficiaries or no US investments involved. While awaiting mentioned expected guidance, the probable impact of FATCA and IGAs, as well as the key steps and facilities to become compliant, are discussed below.

Key Aspects of FATCA and IGAs

FATCA and IGAs classify non-US entities either as Foreign Financial Institutions (FFI) or as Non-Financial Foreign Entities (NFFE).

Each type has different FATCA/IGA obligations as explained below:

### Foreign Financial Institutions (FFI)
- FFIs need to register with the IRS, to identify which of their account holders are US taxpayers and US owned foreign entities and to report financial information about them to the IRS, or in case of Model 1 IGA report to local tax authorities (LTA).
- Some FFIs may be subject to additional compliance or withholding obligations. Certain FFIs may be exempt or deemed compliant, or may defer or avoid registration with the IRS. FFIs residing in a non-IGA country and in model 2 IGA countries have to sign a FFI Agreement with additional requirements to comply with FATCA.
- Upon registration at the IRS Portal, the FFIs will obtain a GIIN and will be listed on the IRS website.
- If the FFI remains non-compliant, it will be treated as a non-participating FFI.

### Non-Financial Foreign Entities (NFFE)
- Certain passive NFFEs are required to disclose certain information to the respective financial institutions where they are account holders, who on its turn report that info to the IRS or LTA.
- A Passive NFFE must either:
  - certify and disclose the names, address and TIN of its substantial US owners (i.e. more than 25%),
  - certify that it is not US owned or US controlled.
- Excepted NFFEs have no disclosure requirements under FATCA.
- If a NFFE does not comply, it becomes a recalcitrant account holder.

Also individuals who are holders of financial accounts should disclose to the respective financial institutions where they are account holders, certain details about their tax status to enable proper identification as a US Person or individuals with US Indicia. If they fail to comply, they become a recalcitrant account holder.

### Key differences between FATCA and IGA Models 1 and 2

There are 3 regimes and each non-US entity will be subject to one of the 3 regimes based on its country of residence. Certain definitions and obligations imposed on FFIs under the IGAs may vary in important respects from those described in the Regulations.

### FATCA Regulations
- Applicable if the entity resides in a jurisdiction that has not signed an IGA.
- To become compliant the FFIs register with IRS as Participating FFI and enter into a FFI Agreement with the IRS which includes additional requirements.
- PFFIs are required to withhold 30% tax on US source payments made to non-compliant account holders, to request the US account holder to waive the privacy or secrecy rights, to close the account if a waiver is not provided and to provide a certification of compliance by a responsible officer.

### IGA Model 1
- Most commonly applied IGA is Model 1A and it requires its local so-called Reporting FIs to report to local tax authorities who will in turn report to the IRS.
- Model 1A also includes reciprocity of exchanging information of residents in IGA countries with US bank accounts. The non-reciprocal version is Model 1B.

### IGA Model 2
- Model 2 FFIs have to sign a FFI Agreement with the IRS and comply with the FATCA regulations (almost similar to Participating FFIs in non-IGA countries), except to the extent expressly modified by their IGA.
- Under Model 2 the local Reporting FIs report on US accounts directly to the IRS.

### Classification of non-US entities as FFI or NFFE

FFIs act as intermediaries for foreign investments of US taxpayers. FFIs are therefore considered to be in the best position to identify and report on their US customers. This classification as FFI or NFFE is important since a FFI (unless exempt or deemed compliant) has in general more reporting and documentation requirements compared to a NFFE.

The definition of FFI in the FATCA regulations includes the following 5 categories:

1. Depository Institution: accepts deposits in the ordinary course of a banking or similar business;
2. Custodial Institution: holds as a substantial portion (20% or more) of its business, financial assets for the account of...
Under the FATCA regulations an Investment Entity is an entity:

A. that primarily (at least 50%) conducts as a business: trading in market instruments, portfolio management, or otherwise investing, administering, or managing funds, for or on behalf of a customer (Class A).
B. whose gross income is primarily (at least 50%) attributable to investing, reinvesting or trading in financial assets, and the entity is managed (which means any of the activities described in A are performed on behalf of the managed entity) by a FFI that is a depository institution, custodial institution, specified insurance company or class A investment entity (Class B), or
C. that functions or holds itself out as a fund (collective, mutual fund, private equity fund, hedge fund, or similar investment vehicle with an investment strategy of investing, reinvesting or trading in financial assets (Class C).

The definition of an Investment entity under the Model 1 and 2 IGAs is somewhat simplified: ‘The term “Investment Entity” means any entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer (for example an account holder):

1. trading in market instruments (bonds, stocks, foreign exchange); exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
2. individual and collective portfolio management;
3. Otherwise investing, administering, or managing funds or money on behalf of other persons.

C. Beneficial Owners and Deemed-Compliant FFIs

For trusts and investment entities that qualify as FFIs but have solely investments and do not act as intermediaries, there are basically a few ways to comply yet reduce the administrative burden of FATCA and IGAs, including the following classifications:

1. Gross Income test is met if the entity’s gross income is primarily (at least 50%) attributable to investing, reinvesting or trading in financial assets. The ‘50% gross income test’ is to be measured during the shorter of the three-year period ending on 31 December of the year preceding the year in which the determination is made, or the period during which the entity has been in existence.
2. Managed By test is met if the entity is managed by, or the financial assets are managed by, another FFI that is a depository or custodial institution, specified insurance company or class A investment entity.

Classification of trustees, trusts, investment entities, funds

Based on above dual test and assuming the “50% gross income” test is met, the following non-US trusts, foundations, limited partnerships, private investment entities, etc., will probably be classified as FFIs provided they meet the “managed by” test:

- Trustees

The typical offshore corporate trustees are likely to be classified as FFI, under class A of Investment Entities. This can be concluded from examples in FATCA Regulations and the guidance to the UK IGA.

- Trusts

A foreign non-US trust which is managed by a trustee company (as this trustee is a FFI), or where trustee engages an FFI to manage the trust, or whose investments are discretionary managed by an investment manager whom they themselves are FFI, will likely be classified as FFI. However, a trust may be considered a non-FFI if the trustee is an individual and the investments of the trust are not managed by an investment manager entity that is a FFI. The relevant entity is the entity that holds all shares in an underlying entity that acts as a holding or Investment Company. A foreign Trust that is treated as a FFI would have to provide details of its US owners, mandatory beneficiaries (each year) and even of its discretionary beneficiaries (in the year of distribution).

- Underlying Entities and Private Investment Companies

Private investment entities, including partnerships, if managed by a FFI or where their financial assets are professionally managed by investment managers (based on mandate) who themselves are FFI will be categorized as FFI. Please note that entities purely acting as company directors are probably not a FFI. In such cases, if the financial assets are also not professionally managed by an investment manager entity that is a FFI, it is not likely to be considered as a FFI but instead as a NFFE.

- Funds

Mutual funds, hedge funds, or similar funds with an investment strategy of investing, reinvesting or trading in financial assets are to be classified as FFIs. There is no gross income test or “managed by” test for funds.

Passive investment entities that are not professionally managed by an FFI (for example managed by an individual) are generally treated as passive NFFEs rather than as FFIs. An Investment Entity whose assets are non-financial (real property or land), even if managed by another FFI would not be an Investment Entity.

Beneficial Owners and Deemed-Compliant FFIs

Certain categories of FFIs and NFFEs are excepted from identification and reporting requirements if in general they present a relatively low risk of being used for tax evasion by US Persons. They are categorized as Exceptional Beneficial Owners and Deemed Compliant FFI and a list of FFIs that qualify under each category is provided in FATCA regulations and IGAs.

Deemed-compliant FFIs (DC FFIs) need to enter into a FFI agreement and they will not be subject to the 30% withholding on US source income, provided they meet certain conditions and fulfill certain obligations. In general there are 2 types of DC FFIs:

A. A registered deemed-compliant FFI is required to register with the IRS and is required to confirm to the IRS every three years that it meets the condition to qualify as a deemed-compliant. Reporting FFIs resided in IGA Model 1 countries are also treated as deemed-compliant but to maintain that status they have to fulfill the various identification and reporting steps as defined in the applicable IGA.

B. A certified deemed-compliant FFI is generally not required to register with the IRS, but will be required to certify to any withholding agent on IRS Form W-8 that it meets the requirements of its deemed-compliant category.

Owner-Documented FFI or Sponsored FFI

For trusts and investment entities that qualify as FFIs but have solely investments and do not act as intermediaries, there are basically a few ways to comply yet reduce the administrative burden of FATCA and IGAs, including the following classifications:

<table>
<thead>
<tr>
<th>Trustee Documented Trust</th>
<th>Registered sponsored FFI</th>
<th>Certified sponsored FFI</th>
<th>Owner-Documented FFI</th>
</tr>
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<tbody>
<tr>
<td>In case of trusts whose trustees are Reporting FFI, Participating FFI or Reporting USFI, these trustee FFI agrees</td>
<td>The Sponsored FFI entities (trusts, funds, PICs, LLPs) will be deemed compliant provided that the</td>
<td>The Sponsored FFI must be a closely held vehicle, i.e. owned by maximum 20 individual investors. The sponsor must be</td>
<td>The entity is not required to register with the IRS, but is required to provide to any withholding agent all required</td>
</tr>
</tbody>
</table>

Testing of FATCA compliance for trusts, foundations and private investment entities

Based on above definitions, the examples in the FATCA regulation and the guidance to the UK IGA, one could conclude that the non-US investment entities may be classified under the FATCA regulations and IGAs as a FFI, provided they meet the dual test:

A. Gross Income test
B. Managed By test

The definitions under IGAs may need further clarification and guidance. So far, only the UK and Ireland released guidance to the IGAs and some definitions therein have been aligned with FATCA final regulations. The compliance requirement in other IGA jurisdictions will be known for certain only after guidance is issued by these IGA countries.

Recommendations.
FATCA is generally effective from 1 July 2014. However, a phased implementation schedule is established addressing four key areas:

**Key Dates and Grandfather Rules**

- FFIs who fail to comply with their obligations will be treated as Non-Participating FFI.
- NFFEs and other account holders that refuse to identify themselves and disclose consequences of non-compliance to FATCA regulations.

The 30% withholding will be imposed by Withholding Agents on certain withholdable US sourced payments to mentioned non-compliant parties, which payments include:

- Non-compliant FFIs and recalcitrant account holders may face the risk of termination of their accounts by banks. Moreover, due to the potential risk and withholding required information will be treated as recalcitrant account holders. These parties who fail to comply will face risks and penalties including a 30% withholding on certain US withholdable payments, and under IGAs they may also violate the respective local law.

The FATCA regulations set out specific due diligence requirements and thresholds with respect to individual accounts and entity accounts, and also for pre-existing accounts and new accounts. All US financial accounts of individuals with an aggregated value of US $50,000 or more must be reported to the IRS. Pre-existing entity accounts of US $250,000 or less are exempt from review. Enhanced review is required for high value accounts as of US $1,000,000.

US Indicia

In case during the due diligence process of the FFI an account holder with the following US Indicia is found the person is assumed a US Person:

- Citizenship or residency in US;
- US place of birth;
- US residency address or mailing address;
- US telephone number;
- any standing instructions to transfer funds to a US account;
- any power of attorney or other signatory authority to any person with a US address; or
- Whether the account holder has provided any verified ‘in-care’ or ‘hold mail’ address with the US.

When persons with US Indicia are identified it is required to cure items 2-7 with specific described counter evidence in order to remain treatment as a non US person.

**IRS Registration and GIIN**

- The IRS portal will be the primary means for FFIs to interact with the IRS to complete and maintain their FATCA registrations and agreements. FFIs can register by submitting information on the IRS portal as of January 01, 2014.
- Upon approval by IRS, the registering FIs will receive a notice of registration acceptance and subsequently will obtain a Global Intermediary Identification number (GIIN).
- An FFI will use its GIIN as the ID number for establishing its FATCA compliance status and informing withholding agents that it is a compliant FI and properly registered.
- The IRS will electronically post the first FFI list with the GIIN by June 2, 2014 and will update the list on a monthly basis thereafter. To ensure inclusion in the June 2014 FFI list a FFI will need to finalize its registration by April 25, 2014.
- Model 1 Reporting FFIs have additional time beyond July 1, 2014 to register and obtain a GIIN as verification of a GIIN is not required for a Model 1 Reporting FFI prior to January 1, 2015. During that period the FFI can establish its status by providing a certificate.
- A resident in a jurisdiction that has signed an IGA (listed on US Treasury website), but which IGA is not yet in force because the jurisdiction has not yet completed the necessary internal procedures to implement the IGA, should register under FATCA as if the IGA is in force.

Consequences of non-compliance to FATCA regulations

FFIs who fail to comply with their obligations will be treated as Non-Participating FFI. NFFEs and other account holders that refuse to identify themselves and disclose required information will be treated as recalcitrant account holders. These parties who fail to comply will face risks and penalties including a 30% withholding on certain US withholdable payments, and under IGAs they may also violate the respective local law.

Non-compliant FFIs and recalcitrant account holders may face the risk of termination of their accounts by banks. Moreover, due to the potential risk and withholding exposure, there is also the possibility that certain large financial institutions may not conduct business with entities that are not FATCA compliant.

**Withholdable Payments under FATCA**

The 30% withholding will be imposed by Withholding Agents on certain withholdable US sourced payments to mentioned non-compliant parties, which payments include:

- US source payments from interests, dividends, premiums, annuities, etc., and other periodic (FDAP) payments from US sources effective July 01, 2014.
- Gross proceeds from the sale or disposition of property that can produce interest or dividends from sources within US effective January 1, 2017.
- As of 2017 30% withholding will also be applied on certain foreign pass through payments

The withheld amounts should be reported by these withholding agents to the IRS.

**Key Dates and Grandfather Rules**

FATCA is generally effective from 1 July 2014. However, a phased implementation schedule is established addressing four key areas:

<table>
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<tr>
<th>Actions</th>
<th>Implementation Schedule</th>
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</thead>
<tbody>
<tr>
<td><strong>Registration</strong></td>
<td>FFIs can start registration at the IRS Portal as of January 1 2014. Especially FFIs not located in IGA countries are recommended to register by 25 April 2014 to obtain a GIIN, be published on the first FFI list per June 2 and to avoid withholding as of 1 July 2014. FFIs residing in IGA countries are recommended to register by 25 October 2014 to obtain a GIIN, be published on the FFI list per December and to avoid withholding as of 1 January 2015.</td>
</tr>
<tr>
<td><strong>Identification and Documentation</strong></td>
<td>New account due diligence procedures commences July 1, 2014; accounts maintained prior to July 1, 2014 are pre-existing accounts. Documentation of prima facie FFIs and high value individual accounts by December 31, 2014, respectively June 30, 2015, deadline for other accounts is June 30, 2016.</td>
</tr>
<tr>
<td><strong>Reporting</strong></td>
<td>The first reporting year is 2014. The deadline for information reporting on US accounts for FY 2014 is March 31, 2015, while for Reporting FI in IGA countries the deadline for such reporting is September 30, 2015.</td>
</tr>
</tbody>
</table>
Withholding on US source payments starts July 1, 2014, but withholding on foreign pass-through payments or on gross proceeds from sales or dispositions of property starts January 1, 2017.

Various grandfather rules apply. The most important ones are:
- Obligations outstanding on June 30, 2014 are exempt from FATCA withholding.
- Certain obligations that may give rise to dividend equivalent or foreign pass-through payments under future regulations once issued are also exempted, provided that these obligations are outstanding six months prior to the release of implementing regulations.

Acronyms
FATCA: Foreign Account Tax Compliance Act
HIRE Act: Hiring Incentives to Restore Employment Act
FFI: Foreign Financial Institution
NFIE: Non-Financial Foreign Entity
USFI: United States Financial Institution
IRS: Internal Revenue Service of the US
GFIN: Global Intermediary Identification Number

Definitions
US Account:
- Any financial account held by one or more specified US persons or US-owned foreign entities, with certain exceptions.

Financial Account:
- Depository account
- Custodial account
- Equity or debt interest in an investment entity: investors, beneficiaries
- Insurance and annuity contracts (some are excluded)

Financial Assets:
Financial assets include securities, partnership interests, commodities, insurance or annuity contracts, or any related interest in these, but do not include real estate.

Account holders of Investment Entities
- The account holders of investment entities are the holders of equity and debt interest. The definition is depending on Investment or type of Financial Institutions.
  - Partnership: Equity Interest means capital or profit interest in the partnership
  - Fund and Investment Companies: the account holders are the equity investors
  - Trust: Equity interest means interest held by Persons treated as settlor or the beneficiaries of all or portion of the trust, while under IGA this also includes any other natural person exercising ultimate effective control over the trust.
  - A beneficiary of a foreign trust includes persons who have the right to receive directly or indirectly a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.

Foreign Financial Institution (FFI)
See detailed definition and categorization above

Non-Financial Foreign Entity (NFIE)
- Any foreign entity which is not a foreign financial institution

Excepted NFIEs
- Include publicly traded corporations and affiliates, territory NFIEs that are directly or indirectly wholly owned by bona fide US territory residents in the NFIE’s country of organization or active NFIEs.
- These types of entities generally will not be likely vehicles for US persons to hide their assets because of the nature of their activities.

Active NFIEs
- Entities that conduct an actual business activity other than holding assets that produce investment income such as interest, dividends, rents, etc.
- Any entity may be classified as an Active NFIE if:
  - Less than 50 percent of its gross income for the preceding calendar year is passive income; and
  - Less than 50 percent of the weighted average percentage of assets (tested quarterly) held are assets that produce or are held for the production of passive income.

Passive NFIEs
- Any NFIE that is not otherwise excepted or active NFIE will be a passive NFIE and must provide withholding agents with a certification regarding its substantial US owners (if any), or if none exist, with a certification to that effect.

Substantial US owner
- Includes any “specified US person” who holds more than 10% interest in the entity. Under the Model IGAs, the term threshold is replaced by “controlling persons”, which is more than 25% control threshold, based on AML/KYC standards.

Recalcitrant Account
- Fails to comply with reasonable requests for required information necessary to determine if the account is held by a US person;
- Fails to provide the name, address, and TIN of each specified US person and each substantial US owner of a US owned foreign entity; or
- Fails to provide a waiver of any foreign law that would prevent a FFI from reporting the required information to the IRS.

US Person
- A citizen or resident of the United States
- A domestic partnership
- A domestic corporation
- Any estate (other than a foreign estate within the meaning of 7701(a)(31)), or
- Any trust if:
  - A court within the United States is able to exercise primary supervision over the administration of the trust, and
  - One or more US persons have authority to control all substantial decisions of the trust
- Any other person that is not a foreign person.

Withholding Agent
- All persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment
- US financial institution (USFI) acting as a withholding agent will need to determine whether a FFI or a NFIE is compliant or non-compliant for withholding purposes while making payments/disturbances. Likewise, a FFI can also be a withholding agent.

IGAs
- Model 1 IGA signed by: Canada, Cayman Islands, Costa Rica, Denmark, France, Germany, Guernsey, Hungary, Ireland, Isle of Man, Italy, Jersey, Malta, Mauritius, Mexico, The Netherlands, Norway, Spain, and the U.K.
- Model 2 IGA signed by: Switzerland, Japan and Bermuda.
- The US announced that it is in the process of finalizing IGAs, or is actively engaged in dialogue and working on exploring options for IGAs, with circa 40 more countries.

For more information or clarifications on FATCA, please write to: fatca.helpdesk@amicorp.com

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