

FAHTCAweekly

Your snapshot of the week

Issue number 69
19 March 2014

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In light of the on-going decline in FATCA new items, Deloitte will cease the regularly-scheduled publication of the newsletter. Henceforth, we will distribute new editions in order to alert our readers to major announcements or to provide technical analysis concerning new materials and guidance and, as always, whenever breaking news demands it.

[The View from Deloitte](#)

Dear Reader,

In the past week, representatives of the U.S. Department of Treasury repeated at multiple FATCA-focused events that negotiations on 20 more FATCA intergovernmental agreements (IGAs) were "substantively complete" and an unspecified number more were in progress. Further elaboration of the meaning of "substantively complete" indicated that these IGAs were fully or almost fully negotiated and were waiting to be initialed and/or signed. Although no list of countries was released against which to validate these claims, the veracity of these statements were subsequently buttressed by the announcement of an IGA with the British Virgin Islands and mixed reports of fact and rumor concerning imminent IGAs with China, Luxembourg, South Korea, Israel, the United Arab Emirates and several other critical jurisdictions.

As Treasury representatives repeated the "substantively complete" formulations in different fora, presumably they intend it as a message to the financial community in an effort to combat widespread angst stemming from IGA uncertainty. With the FATCA registration deadline looming in approximately six weeks' time, Financial Institutions (FIs) located in jurisdictions long-reported to be actively negotiating Model 1 IGAs, but still lacking one, confronted a serious dilemma: At what point do you abandon the expectation and register as a participating

FFI (PFFI) under the Treasury Regulations? Devoid of guidance on this point, FATCA compliance programs had to determine the latest tolerable deadline by which they could still register, while factoring in space for error and an overwhelmed registration portal, and then work backwards based on the number of FIs suffering IGA uncertainty and the time needed to convert their classifications. This drop-dead date provokes further anxiety because the closer it nears without new IGAs in major financial centers to mitigate the overall problem, the higher the likelihood rises that a portion of FIs converted into PFFIs at the drop-dead date will need to be re-converted into Reporting Model 1 FIs if an IGA were subsequently announced. In short, you are damned if you don't convert and damned if you do.

One anticipated potential solution was an announcement from Treasury that it would loosen standards for treating an IGA as in place or release a list of initialed IGAs that could be treated as active for FI registration purposes, but that never came. Instead, this past week Treasury began the pattern of messages regarding "substantively complete". Likely, this messaging is an attempt to soothe the IGA uncertainty, while persuading FIs in likely Model 1 IGA jurisdiction to abstain from registration under the Treasury Regulations a while longer. In light of the IGA's negation of the local law conflict concern – in which existing domestic laws prohibit FATCA - mandated reporting or withholding, resulting in blanket FATCA non-compliance – and the six-month extension of the registration deadline under the Model 1 IGAs, as a general principle, the renewed expectation of forthcoming IGAs is most welcome.

As more IGAs are negotiated though and more details about the existing IGAs emerge, the long-touted fear of this newsletter, that the IGAs would not facilitate FATCA implementation, but fragment it into a hundred FATCAs, solidified. When Her Majesty Revenue & Customs (HMRC) released the first set of guidance notes last summer, FATCA stakeholders reacted approvingly, even those with no UK operations. It was a hefty set of guidance, but it was more concise and accessible than the Treasury Regulations themselves and appeared committed to addressing practical concerns directly. Furthermore, rumors swirled that HMRC had developed the guidance notes in close cooperation with Treasury and therefore other Model 1 IGA jurisdictions planned (or would be compelled) to adopt the HMRC guidance notes for their own IGAs.

However, on 31 January 2014, the release of the draft guidance notes for the Crown Dependencies (Isle of Man, Guernsey and Jersey) squashed that hope. While the Crown Dependency draft guidance notes did not radically differ from the HMRC ones, they were equally not a wholesale adoption of them. In light of the tight political and legal relations between the UK and its own Crown Dependencies, the likelihood that countries less connected to the UK would adopt their guidance notes in full dimmed considerably. Still, as both sets of guidance notes concurred on the broad understanding and structure of the FATCA IGAs, compliance programs could adapt to the differences by implementing whichever standard was stricter, thereby avoiding compliance deficiencies in both sets of jurisdictions. The strategy would be inelegant and inefficient, but adequate.

The recently-published Canadian IGA enabling legislation, however, upended that strategy. By, *inter alia*, omitting entities from the definition of FIs that will be treated as FIs in every other jurisdiction (so far), they unleashed massive operational complications, the worst of which will fall on the Canadian NFFEs omitted from the list of FIs. Wherever these Canadian NFFEs operate outside of Canada and submit a Form W-8BEN-E or other self-certification form to an account-holding institution or counter-party, these submissions will be reviewed on the basis of the reasonableness of the FATCA classification and challenged therefore on their claim of NFFE classification. This unwanted transaction burden will marginally increase the burden on the non-Canadian party for documenting Canadian companies, but for the Canadian company it will compose a part of every transaction not conducted inside of Canada or with non-Canadian parties specializing in Canadian business.

A short example illustrates the non-theoretical nature of this problem. Under the Treasury Regulations and every IGA other than the Canadian one, trusts will qualify as FFIs if they hold financial assets and are administered by a corporate trustee. As a blanket declaration, trusts are NFFEs under the Canadian IGA draft enacting legislation. Any bank holding assets for a trust will know whether there are financial assets in the account and whether the account is held in the name of a corporate trustee on behalf such trust. Any bank seeking to apply the FATCA standard of knowledge requirement for on-boarding new clients will include a provision to reject any trust documentation claiming NFFE status where the trust holds financial assets and is professionally administered. No Canadian trust can choose to be an FFI by law and therefore each time must undergo an exception process in order to be properly documented for FATCA purposes. The transaction costs will accumulate and potentially push the Canadian to adjust their operations at an economic cost.

So long as local entities bear the brunt of the cost, other jurisdictions should in theory eschew such counter-productive exemptions from the standard definitions in use elsewhere. However, due to the fathomless complexity of FATCA, tweaks to IGAs, made at the behest of an interest group that may not itself grasp the full consequences of what they wish for, could conceivably replicate the “Canadian Trusts” scenario in many circumstances with a variety of different financial institutions from a variety of different jurisdictions. At some tipping point, the problem grows into a significant liability for global banks, which can no longer standardize an approach for on-boarding even in a single jurisdiction, much less across multiple jurisdictions.

With a thousand small cuts, the IGAs and IGA enacting legislation guidance notes together might generate so many discrepancies amongst FATCA’s applications, varying FATCA rules from place to place and entity to entity, that they will overwhelm the effort of global banks to implement and oversee FATCA implementation centrally. As these global banks are the vanguard of FATCA enforcement, their challenges define the threats to the viability of the FATCA regime.

Regards,

Brandi Caruso

FATCA Leader, Switzerland

Paul Millen

FATCA Project Leader, Switzerland

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News Swiss

Swiss Financial Market Supervisory Authority (FINMA) Releases Updated IGA Guidance

On 28 February FINMA released Newsletter No. 59 (not yet available in English) regarding FATCA compliance under the Swiss IGA. It contains the following notable points:

- FINMA suggests that Financial Institutions in Switzerland complete their registration on the IRS platform by 25 April (Section 3);
- Section 4.3 outlines the requirements regarding a suitable Responsible Officer with sufficient authority to fulfil the requisite duties;
- In case FATCA-related changes are necessary in collective investment scheme documents that are subject to FINMA approval, Section 4.4 requires filing with FINMA on time in order to be effective 1 July; and

- The publication introduces in section 5 a reporting requirement to FINMA (by e-mail) with respect to the registration on the IRS platform (due date 30 April 2014).

One topic, alluded to in the publication but not covered in full detail, concerns the extent of the exemption from Criminal Code Article 271 granted by Article 5 of the Swiss IGA for entities complying with FATCA. Further confirmation that the scope of the exemption extends to all FATCA-related activities by Swiss Financial Institutions (i.e. when serving as a sponsor) would be welcome. **Deloitte contact: Markus Weber**

News U.S.

IRS Releases New Forms 1042, 1042-S and 8966 (the “FATCA Report”)

On 10 March the IRS published the final version of the Form 1042-S. The prior draft version was originally published in April 2013. The updated final version of the form aligns its content changes in the recently released temporary and final FATCA (Chapter 4) regulations. Based on the latest FATCA regulations, withholding agents will use the new Form 1042-S for reporting under both Chapter 3 (current non-resident alien withholding tax regime) and FATCA. On 7 March the IRS released the revised Forms 1042 and 8966, known as the FATCA Report, which serves as the paper example of the XML file by which compliant FFIs must report their Specified U.S., non-participating FFI and Owner-documented FFI account holders. **Deloitte contact: Paul Millen**

Deloitte FATCA Responsible Officer (RO) School Opens

Every PFFI and Reporting Model 2 FI must nominate an RO to sign the FFI Agreement, oversee the compliance program and periodically certify the entity’s compliance to the IRS. Deloitte is offering ROs a three half-day sessions over 12 months to better understand this new position. In the course of Deloitte’s FATCA RO school, you will obtain an understanding of the significance of the RO role and the obligations for this position. Specialists from Deloitte’s FATCA team will discuss requirements and current industry approaches. The first class will be held on 7 May at the Schweizerhof Hotel in Berne. For more information and to pre-register for the school, please contact **Kaitlin Barbier**.

FATCA-in-a-Box for Trusts is Here

FATCA-in-a-Box for Trusts merges the tax knowledge of Deloitte’s FATCA specialists and the expertise of a major Swiss Trust Company with software technology to deliver a unique FATCA compliance product for the Trust industry. Deploying interpretations and methodologies developed with external Swiss trust experts over the past year-and-a-half, FATCA-in-a-Box reduces the compliance process for trust administrators to a series of simple steps. For more information, please visit the Deloitte **FATCA-in-a-Box webpage** or contact **Brandi Caruso, Paul Millen** or **Kaitlin Barbier** directly.

Reason for the Spelling of our Title

The unusual spelling of our title indicates that the newsletter covers more than FATCA, encompassing all the current and upcoming issues concerning **F**oreign **A**ccount **H**olders by condensing key developments in all pertinent tax and regulatory matters into a compact, up-to-date and easily accessible digest of critical information.

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