



**Anne Klein**

# The Foreign Account Tax Compliance Act

## Fiduciary Matters

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The Foreign Account Tax Compliance Act's (FATCA's) principal objective is to reduce potential tax evasion by United States citizens. It imposes registration, due diligence and reporting obligations upon Foreign Financial Institutions (FFIs) and their clients. FATCA requires FFIs to obtain information about account holders across all of their affiliated entities. Entities that do not comply face the prospect of a US withholding tax as well as other penalties.

The scope in South Africa is not limited to US persons as per the FATCA requirements as the South African Revenue Service (SARS) has further formally advised that a broader goal is to obtain financial information on all persons and entities with possible foreign tax liabilities. The intention is to report such information to treaty partners under the OECD Automatic Exchange of Information.

### Intergovernmental Agreements

In view of the consequences of FATCA on their local financial industries and the difficulties of applying the US rules, many governments propose to enter into Intergovernmental Agreements (IGAs) with the US to implement FATCA in their local jurisdiction. There are two IGA models - (see below.)

### Who has to comply?

Banks, custodians (including nominees), certain insurance companies, investment managers and advisers, and most entities connected with investment funds are likely to be classified as 'Financial Institutions'. Some entities, for example professional trustee companies, and other entities, for example, companies and partnerships, which are managed by Financial Institutions, will also be deemed a 'Financial Institution' for FATCA purposes.

FFIs must review their records to ascertain the requirements specific to each client relationship. There is limited time to comply with FATCA

### What is the impact of FATCA on non-Financial Institutions?

Entities and individuals which are NOT 'Financial Institutions' will be impacted by FATCA because FFIs will require additional due diligence to ascertain whether:

- Any holder of an account is, or is controlled by, a person who is a US citizen or taxpayer (as appropriate); and if so, whether that account is reportable.

This information will be required for all new accounts opened after **1 July 2014**. The timing and extent of the collation of appropriate due diligence documentation on pre-existing accounts will depend on the value of the account and the information already held.

### Compliance with FATCA and the proposed South African legislation

FFIs will have to prepare themselves and their clients to meet the challenges imposed by the FATCA provisions and the South African regulatory requirements. Entities in the UK crown dependencies and other overseas territories will have similar obligations imposed by the UK government to

reduce potential tax evasion by UK residents.

### Legislative challenges

Not all the rules relating to FATCA have been finalised and some are still subject to on-going consultation with industry role-players. While a large number of countries have expressed an intention to sign IGAs with the US, most of these have not yet been signed.

### Actions required

'Financial Institutions' for FATCA purposes and which are not otherwise exempt will be required:

- in most cases, to register as such with the US IRS. The Registered User Portal (RUP) was made available by the IRS on 19 August 2013. Entities that wish to appear on the initial list of FATCA compliant entities must complete their registration through the RUP by **25 April 2014**.
- to report on US account holder interests as at **30 June 2014** and each 31 December thereafter.
- to collect and maintain 'due diligence' information and documentation commencing on **1 July 2014**.

FATCA compliance will cause FFIs and their clients to incur increased operational costs and additional risk.

Maitland recommends that FFIs monitor developments

**FATCA** - Foreign Account Tax Compliance Act  
**FFI** - Foreign Financial Institution  
**IGA** - Intergovernmental Agreement

in preparation for the implementation of FATCA and consider the practical aspects of meeting those requirements. FFIs should take proactive steps to comply with the relevant legislation and keep abreast of the latest developments. This note is simply for high-level awareness.

*This article was written by FISA member Anne Klein, an attorney with Maitland.*

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### Different IGA models

#### Model 1

The FFIs report to their local tax authorities in the foreign government with which the US concluded the IGA. A number of jurisdictions have indicated that they are willing to enter into Model 1 IGA agreements. They include the British Virgin Islands, the Cayman Islands, the Isle of Man, Luxembourg, Malta, Mauritius and South Africa.

#### Model 2

A Model 2 IGA is an IGA where the FFI reports directly to the US Inland Revenue Service (IRS). This is the model concluded by the US with Japan and Switzerland.