FISA
THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA

4th Annual Conference
Wanderers Club    Johannesburg    18 September 2014
FATCA ALL ABOARD?

We are sailing cross border tax compliance ....

PLEASE NOTE:

- The applicable laws have not been published in many jurisdictions and are in any event novel. This presentation in many cases is based upon draft treaties, regulations and guidance and assumptions regarding implementation of FATCA in jurisdictions without such regulations or guidance and about structures and should be treated accordingly.
INTRODUCTION
Foreign Account Tax Compliance Act

1. FATCA/USA Tax System
2. Foreign Financial Institution (FFI’s) their role
3. Non-Compliance and Repudiation
4. 30% Withholding
5. Intergovernmental Agreement (IGA)
6. Immediate Tasks
7. Trusts
8. Compliance/GIIN
9. Pre-existing accounts
10. GATCA and major functions impacted: FATCA
11. Fake FATCA/FATCA Consequences
FATCA: USA TAX SYSTEM (US)

- US Internal Revenue Service (Tax Authority) IRS
- US citizens and green card holders
  - Submit tax returns IRS
  - Report on worldwide income
  - Citizenship-based taxation
- SA tax system: broadly determined by residence
FOREIGN INSTITUTIONS - THEIR ROLE

- Are Foreign Financial Institutions (FFIs) FATCA Fit?
- US annual tax revenue losses offshore tax structures
- US taxpayers Civil and Criminal penalties
- Enforcement issues: not resident in US
- IRS require annual reports from the worldwide financial industry:
  - Taxpayer’s Name
  - Tax Identification Number (TIN)
  - Associated Account Details
NON-COMPLIANCE AND REPUDIATION

- US repudiations of citizenship
- USA’s estimated 7.6 million expats
- Hefty fines non-compliance
- Lower cost: Repudiate or comply?
- Repudiation more final option?
- Tax Compliance and exit taxes
30% WITHHOLDING
“Speak Softly and Carry a Big Stick.”

- Enforce tax compliance
  30% withholding
  US largest recipient of inward investment

- Who qualifies as an FFI?

- FFI’s unsure if fall within definition

- “US person”

- Non-Compliant FFI

Classified as Non-Participating Financial Institution by counterparties [NPFI]

Counterparties report NPFI payments

Difficult to maintain relationships with FATCA compliant counterpart
INTERGOVERNMENTAL AGREEMENT (IGA)

- Cross-border enforcement issues
- Countries data protection prohibits compliance
- Under IGA, NO withholding, but REPORTING!

**MODEL 1 IGA (SOUTH AFRICA)**
- FFI’s must register IRS portal
- Report to local tax authorities

**MODEL 2 IGA (SWITZERLAND)**
- Register and report directly to IRS portal

Result: IGA
### IMMEDIATE TASKS

<table>
<thead>
<tr>
<th>Types of FFI’s</th>
<th>Depository Institutions</th>
<th>Custodial Institutions</th>
<th>Investment Entities</th>
<th>Specified Insurance Companies</th>
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</table>

An entity that accepts deposits in the ordinary course of a banking or similar business

An entity that holds, as a substantial portion of its business, financial assets for third parties as a substantial portion of its business
IMMEDIATE TASKS

**Types of FFI’s**

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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:
Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
Individual and collective portfolio management; or
Otherwise investing, administering, or managing funds or money on behalf of other persons.

An insurance company (or holding company of an insurance company) that issues, or is obligated to make payments with respect to, a cash value Insurance Contract or an Annuity Contract.
IMMEDIATE TASKS

FATCA classification - am I an FFI?

FATCA compliant Client On-boarding

FATCA GIIN registration (31/12/2014)

DD on Accounts & Reporting Obligation
TRUSTS

- Check accounts US taxpayers 30 June 2014
- Self-certify FATCA status
- Triple D’s:
  - Detect
  - Deter
  - Discourage Offshore Tax Evasion
- Trustees could be FFI
- Trust managed by FFI
TRUSTS

- Trust classified
  - US person
    - Courts in US authority under the applicable law
    - US Court renders orders concerning all issues
    - One or more US Persons have authority to control
      * An estate of decedent (person who has died) that is a citizen or resident of the US
  - FFI: Register Remediate Report
  - NFFE’s
    - Trust not a FFI outside reach of FATCA
      - Classified NFFE Passive or Active
            Lay/Individual Trustee
            Passive assets
TRUSTS

- Controlling Person?
  - SETTLOR
  - TRUSTEES
  - PROTECTOR (if applicable)
  - Beneficiaries or class of beneficiaries

- Report on Equity Interest?
  - Trustee FFI

- Investment Entity?
  - Trustee on behalf of Trust: FI Trustee/FI to manage Trust/FI to manage financial assets of Trust

- Custodial Institution?
  - Perhaps Employee Benefit Trust?
COMPLIANCE: GLOBAL INTERMEDIARY IDENTIFICATION NUMBER (GIIN)

FATCA went live – Implement on-boarding procedures

Before 31/12/2014: Identify exemptions – Determine Registration Strategy FFI

Registration deadline for IGA FFI: GIIN (R.O. appointed)

SARS 1st reporting period

Undertake due diligence and report

Remediation on existing investors end

01/07/2014  31/12/2014  01/03/2015  30/06/2015  01/01/2016  30/06/2016
**PRE-EXISTING ACCOUNTS**

- Pre-existing high value accounts (exceeds $1 million)
  - Electronically scanned “U.S. indicia”
  - Manually verified
- Accounts under *de-minimis* threshold: $50,000
- Refused to be declared: recalcitrant account holders

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### U.S. indicia

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<tr>
<th>U.S. citizenship or lawful permanent resident (green card)</th>
<th>U.S. birth place</th>
<th>U.S. residence address</th>
<th>U.S. correspondence address (including U.S. P.O. Box)</th>
<th>Standing instructions to transfer funds to an account maintained in the U.S.</th>
<th>“in care of” address or a “hold mail”</th>
<th>Power of Attorney or signatory authority granted to a person with a U.S. address</th>
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GATCA – MAJOR FUNCTIONS IMPACTED

- FATCA first step GATCA (Global Account Tax Compliance)
- OECD proposed a multi-jurisdictional extension of FATCA
- Early adopters group mutually exchange tax compliance information starting 1 January 2016
FAKE FATCA
FATCA CONSEQUENCES

• Responsible Officers IRS portal

• Consequences
  - Administration cost
  - Don’t rely: Lack of scrutiny tax affairs in certain jurisdictions

• Accidental “US” person

• FFF – FIRST FIX FATCA

• FFI’s classification exercise establish obligations

• FATCA complex
The trust is a Financial Institution

Does the trust have a reporting Financial Institution as trustee (i.e. typically a corporate trustee)?

The trust is a 'Trustee Documented Trust'

The trustee must register and report on the trust

The trust does not need to register or report

The trust can become

- an 'Owner Documented Financial Institution'
- a 'Sponsored Investment Entity'
- a 'Sponsored Closely Held Investment Vehicle'

Are you a:
- CUSTODIAL INSTITUTION
- DEPOSITORY INSTITUTION
- INVESTMENT ENTITY
- SPECIFIED INSURANCE COMPANY

The trust is a

The trust can register and report directly. If preferred it can appoint a third party to fulfill its reporting obligations

Either / Or
TRUST FFI TEST

Am I a FFI?

NO

Considered Non-Financial Foreign Entity (NFFE)
Refer to IGA definitions

ACTIVE

- CHARITY
- EXEMPT FROM INCOME TAX
- NO SHAREHOLDERS
- NPO/GOVERNMENT

PASSIVE

- LAY/INDIVIDUAL TRUSTEE
- HOLDS PASSIVE ASSETS

YES

- CUSTODIAL INSTITUTION
- DEPOSITARY INSTITUTION
- INVESTMENT ENTITY
- SPECIFIED INSURANCE COMPANY

EXEMPT

- GOVERNMENTS
- FOREIGN CENTRAL BANK
- INTERNATIONAL ORGANISATION
- RETIREMENT FUND
- EXEMPT BENEFICIAL OWNERS

YES

- REPORTING SA FINANCIAL INSTITUTION

- NON-PARTICIPATING FFI
- NOT FATCA COMPLIANT
IMPACT ON TRUSTS: ENTITY UNDER FATCA?

Trust Deed

Trustee

Trusts that are managed by Trust companies will be investment entities themselves

Custodian

Custodian: Reporting FI maintaining custodial accounts on behalf of the trustee / trust

Beneficiaries

A person who is an owner of all or of a portion of the Trust

A beneficiary that receives a discretionary distribution (either directly or indirectly) from the trust

A beneficiary that is entitled to a mandatory distribution (either directly or indirectly) from the trust

Trust Deed

Trust

Settlor / Grantor / Donor

Contribution: cash / assets

Investment Portfolio / Assets