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US FATCA

http://www.bepartners.pro/documents/BRatDrs_234-14B.pdf

The countdown for the introduction of the US Foreign Account Tax Compliance Act (US FATCA) has started. This US law presents a great challenge to the financial services sector.

1. Details

With the US Foreign Account Tax Compliance Act, FATCA, which forms part of the US HIRE Act under US law, the US legislator obligates foreign financial institutions to surrender extensive information on earnings received in foreign accounts held by US persons. This law is designed to close various loopholes that currently allow tax evasion. It focuses on individuals and companies with liability for taxation in the USA (referred to therein as „specified US persons“) who hold assets invested outside the USA.

Passed in March 2010, FATCA envisages that all foreign financial institutions must conclude a contract directly with the US Internal Revenue Service (IRS), the US fiscal authority, in order to pass on comprehensive data concerning their clients for tax purposes. This is designed to help prevent any form of tax evasion on the part of US citizens worldwide. All accounts belonging to US taxpayers must be identified and disclosed as US citizens are taxed on the basis of their global income. By FATCA's effective date of 1 July 2014 at the latest, financial institutions will have to make extensive adjustments to their internal procedures to enable the regulatory requirements to be fulfilled.

FATCA is an essential requirement of the market, which no financial institution, be it a bank, insurance company or investment company, etc., can effectively circumvent, as most of the financial institutions will be within the scope of the new definition of a "foreign (non-US) financial institution" (FFI) introduced by FATCA. Furthermore, companies and affiliated groups not active in the financial sector could also fall within the scope of FATCA.

Under FATCA, FFIs will be obligated to provide the IRS with information about customers with tax liabilities in the USA. The provisions of FATCA specify that under certain circumstances FFIs must withhold tax on income from US sources on behalf of the IRS. If the institutions are not prepared to carry out these obligations as of 1 July 2014, a 30% tax at source will be levied on earnings from certain forms of income such as interest, dividends and sales revenue which financial institutions receive for their own account or their customers from US sources and which may only be refunded, where applicable, through complex refund procedures. The QI regime continues to apply parallel to FATCA.

The Final Regulations to FATCA, which provide more details about the legal requirements, were published on 17 January 2013.

In addition to the individual obligations of the FFIs vis-à-vis the IRS ensuing from the Final Regulations dated 17 January 2013, a further implementation variant is available by way of an intergovernmental agreement (IGA). The bilateral agreement between the USA and the respective state, which will have to be implemented in supplementary domestic legislation, renders direct agreements between FFIs and the IRS superfluous.

In the light of this implementation variant, the USA, France, Germany, Italy, Spain and the United Kingdom have agreed to explore a common approach to FATCA implementation through domestic reporting and reciprocal automatic exchange and based on existing bilateral tax treaties. The US Treasury Department has issued two different intergovernmental agreement models in this regard (so-called Model I and Model II).

The most commonly applied IGA is the Model IA. It requires its local so-called "reporting financial institutions" to report to local tax authorities, who will in turn report directly to the IRS. Model IA also includes reciprocity of exchanging information of residents in IGA countries with bank accounts in the US. The non-reciprocal version is the Model IB.

In contrast, Model II FFIs must 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 II, the local reporting FIs report on US accounts directly to the IRS.

Germany and the USA have signed and published a IGA Model I on 31 May 2013; the German transition law was published in the German Federal Gazette on 15 October 2013. The IGA Germany-USA entered into force as of 11 December 2013.

The German transition decree to the IGA, which implements the obligations under the IGA into German domestic law, has been adopted at 11 July 2014 and enter into force retroactively as of 1 July 2014.

In the course of the FATCA negotiations with the USA, Luxembourg opted for a Model I IGA, according to which the tax authorities of Luxembourg and the USA will automatically exchange data concerning bank accounts held in Luxembourg by US citizens and Luxembourg persons resident in the USA.

These agreements will afford increased legal certainty and make procedures less complex for the institutions and their customers. The relevant data will not be exchanged directly between the FFIs and the IRS, but instead between the domestic and foreign tax authorities, similarly to the procedure under the EU Savings Directive. To reduce other national concerns (e.g. concerning Luxembourg data protection law and/or banking secrecy) and the legal risks, Luxembourg entered into a bilateral agreement with the USA. The final FATCA IGA Model I was signed by the governmental representatives of the USA and Luxembourg on 28 March 2014.

FATCA will have a model character with regard to the international automatic exchange of (tax) information. Using FATCA as guidance, the OECD and the EU will introduce further reporting obligations for financial institutions. Therefore it can be recommended to set up systems and processes to fulfill the future requirements introduced by the OECD and the EU and thereby leverage the experience gained from FATCA implementation.

2. Next Steps

Based on the gap and impact analysis the initial FATCA classification of the companies and their products, a verification of the classification undertaken and an analysis of potential and better alternative solution(s) of the FATCA classification of the products in line with the processes of the company must be performed.

Depending on the result of the FATCA classification, a registration with IRS may be required. As a consequence, an analysis and, potentially, a modification of all legal documents regarding FATCA compliance must be done.

The internal and external operational processes transitioning FATCA into day-to-day business must be amended. This would include, inter alia, modifications of the due diligence processes, the acquisition processes of target investments (incl. filling the respective tax forms), set up and monitoring of outsourced tasks and obligations.

3. Our service offering

At each stage of the FATCA project, bepartners offers the following services

- Project management
- Gap- and impact analysis
- Classification of the products taking into account the respective IGA and the guidelines of professional associations
- Review of the classification of products
- Recommendation of classification and registration
- Support regarding registration with the IRS
- Support of set up and verification of processes (internally required processes as well as processes to be set up with outsourcing partners)
- Drafting and/or review of required modifications of legal documents (incl. application forms)
- Advice regarding acquisition of target investments
- Advice on filling tax forms (e.g. W8ben-e, W8imy etc.)
- Client communication
- Communication with external parties / outsourcing partners
- (Client-) Seminars
- Ad hoc support and advice regarding all questions concerning FATCA

be in touch: If you have any questions, please do not hesitate to contact us!

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