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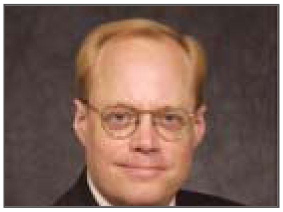

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What's FATCA? Global Banking Meets NSA But Reports To IRS

FATCA was quietly enacted in 2010 in a big messy bill called the Hiring Incentives to Restore Employment Act of 2010 (P.L. 111-147). Who names these bills? If you are paying higher healthcare premiums today, note that Obamacare is actually called the Affordable Care Act. And has any "Tax Simplification Bill" actually done it?

FATCA outdoes them all. Three years later, it is the centerpiece of IRS and Treasury Department efforts to curb tax evasion everywhere. Now the IRS has issued a draft agreement and proposed guidance for Foreign Financial Institutions—FFIs to those on the long FATCA adviser gravy train.

Some FFIs will report to the IRS voluntarily. Some will make agreements with the IRS. Some will report through an InterGovernmental Agreement (IGA). IGAs allow for a kind of back door meant to preserve a semblance of sovereignty. An IGA can allow a bank or other FFI to report to its own government on Americans.

The foreign government can then report to the IRS. Foreign banks can use this avenue so they do not need to report ***directly*** to the IRS. But report they must, and they are reporting on you. The IRS likes this enormously expanded web of global reporting. And while foreign banks and governments may not, there is little sign they will refuse.

In fact, they are generally lining up to take their medicine. Withholding agents must withhold 30% of certain payments to an FFI unless the FFI has entered into an agreement with the IRS. These agreements say the FFI will:

- Perform due diligence to identify accounts for U.S. persons;
- Verify compliance with the agreement;
- Report information on U.S. accounts to the IRS;
- Withhold on pass-thru payments (including foreign pass-thru payments) to recalcitrant account holders and nonparticipating FFIs;
- Comply with requests for additional information on its U.S. accounts; and
- Under some circumstances, close accounts of recalcitrant account holders.

What if foreign law prevents an FFI from reporting? No problem, the IRS has two different IGAs to fix this. To start, FFIs must register with the IRS. Registering financial institutions will receive a notice of registration acceptance and will be issued a global intermediary identification number.

So far, the Treasury Department has signed nine IGAs, has reached 16 agreements in substance, and is engaged in related conversations with many more jurisdictions. The IRS says the draft FFI agreement will be finalized by December 31, 2013.

The latest regulations are supposed to phase in FFI obligations over several years. For example, the regulations exempt all preexisting accounts held by individuals with $50,000 or less. For similar accounts with less than $1 million, an FFI is only required to search the account information that is electronically available.

In many cases, FFIs are permitted to rely on information that they already must collect for local anti-money laundering and know-your-customer rules. In fairness, these accommodations should make the difficult compliance job of FFIs more manageable, and the burdens FFIs face a little less overwhelming.

Withholding requirements begin in July 2014. The first report of FATCA information is due in 2015. But if you are eager, the FATCA registration website is already open so FFIs can begin testing the registration process and entering their information. It is thought to work much more smoothly than say healthcare.gov.

For the draft notice and FFI agreement, click here.

For updates and further information on the IRS FATCA page, click here.

Whether you think FATCA is a good idea or a travesty, the IRS and Treasury Department have gone to Herculean efforts to ramp it up and implement its protocols. FFIs may not like it, and may especially hate the big price tag many are paying for the new IT systems they need to implement. But the world seems to be learning to live with FATCA even if it isn't exactly embracing it with a bear hug. FATCA? It's here to stay.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.