THE U.S.–SWEDEN I.G.A.: A PRACTITIONER'S PERSPECTIVE

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Sweden recently entered into an intergovernmental agreement ("I.G.A.") with the U.S. to address the application of F.A.T.C.A. to Swedish financial institutions. The subsequent modifications to Swedish law to accommodate the I.G.A. were made public on August 11, 2014 in a proposal by the Ministry of Finance.[102] The proposal added numerous modifications to the requirements for compliance and published the reporting forms that will be due starting next year. The complexity of F.A.T.C.A. compliance will trigger a number of changes in many areas of Swedish legislation, which are likely to be approved by the Swedish Parliament in the fall of 2014. It is clear that F.A.T.C.A. will make life more complex for the regulated groups.

F.A.T.C.A. will have a broad, sweeping effect on Swedish financial institutions ("F.I.'s"), including large Swedish banks, insurance companies, and private equity companies. These F.I.'s have been planning for F.A.T.C.A. and have implemented technology, procedures, and training that have caused them to incur in significant costs. However, based on personal experience, it appears that there is a large group of "institutions" that do not understand that they are in fact F.I.'s and must act accordingly. Recently, when discussing due diligence procedures mandated by F.A.T.C.A. with management of a Swedish permanent establishment, the response was simply "thanks for the heads up," which indicated that the compliance requirements were not yet on the company's radar.

Some of these institutions may revert to the simplest solution – barring Americans from being accepted as investors or account holders. This solution, however, is suboptimal for an F.I. as it eliminates a large group of Swedish/U.S. dual citizens from the client base. Of greater importance is the fact that barring Americans does not mean an institution can ignore F.A.T.C.A. F.A.T.C.A. requires disclosure of U.S.-controlled foreign entities that may be account holders at these institutions, a task that will require creating new on-boarding procedures and a review of all pre-existing accounts.

The Swedish I.G.A. is a Model 1 I.G.A. that will require Swedish Reporting Financial Institutions ("R.F.I.'s") to provide F.A.T.C.A. reporting directly to the Swedish Tax Authorities, which may streamline the implementation process and greatly ease compliance for officers and practitioners. Having the Swedish

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government act as an intermediary for the information flow to the I.R.S. may help ease concerns of Swedish institutions that face confidentiality issues under existing Swedish law and practice. For most entities, the main issue will be navigating compliance and determining how to develop due diligence processes that are "sufficient" in the context of F.A.T.C.A.

The I.G.A. excludes a number of potential reporting obligations by adding exceptions. For example, pension plans can easily be caught within the scope of F.I.'s, but Annex II to the I.G.A. adds exceptions for Treaty-Qualified Retirement Funds, Broad Participation Retirement Funds, Narrow Participation Retirement Funds, and certain other funds that should ease the concerns of many Swedish pension plans. Local banks and financial institutions with a local client base are also subject to exclusion, and there is a *de minimis* exception. However, the reality is that many institutions will be affected and must take steps to set up extensive due diligence systems to secure compliance. While Annex II is well-intentioned, there will be some Swedish institutions that incorrectly perceive themselves as being excluded from attracting subsidiaries of U.S. companies and U.S. citizens resident in Sweden as investors. The *de minimis* exclusions may have a relatively high ceiling by Swedish standards, but when applied internationally. Additionally, there will be a risk that institutions will over-report rather than under-report to be on the safe side, at least initially. As a result, "failure to prevent" is likely to become a major concern for institutions.

Finally, it is logical and beneficial for institutions to adopt and adhere to compliance systems that will automate the compliance process. The implementation of compliance systems should be acceptable to stakeholders. F.A.T.C.A. compliance, if not handled properly, must now be added as an increased risk factor.

CONCLUSION

F.A.T.C.A. is the new irritating reality in Sweden and many other jurisdictions. It creates substantial workloads for the institutions for what is essentially no local benefit. What may be worse, implementation of F.A.T.C.A. requirements causes great uncertainty in the financial services sector as it is viewed as yet another compliance risk. To quote an auditor contacted by the authors, "It is difficult to see any benefit to the client," but the I.G.A. means that F.A.T.C.A. is now the law of Sweden, which puts us all on the bumpy path to compliance.