

# FATCA – It Is Here, Now Do Something About It!

---

- Peter R. Altenburger, Altenburger LTD, Küsnacht, Switzerland
- Stanley C. Ruchelman, The Ruchelman Law Firm, New York, NY, USA
- Laura Charkin, SJ Berwin, London, England
- Lizzy Conder, Sapiient, London, England
- Stefano Grilli, Gianni, Origoni, Grippo, Cappelli & Partners, Milan, Italy
- Fabrizia Lapecorella, Ministry of Economy and Finance – Department of Finance, Rome, Italy
- Stefan Ritter, Advokatur Ritter & Partner AG, Triesen, Liechtenstein  
Peter Utterström, Stockholm, Sweden

---

# **INTRODUCTION THE ROLE OF THE IGA**

# Background

---

- ❑ It started by a congressional outrage over U.S. taxpayers hiding money in offshore accounts
- ❑ It has developed to a demand by the U.S. for the rest of the world to adapt or accept the consequences
- ❑ The end result is that there will be an automatic flow of financial information from the IGA-partners to the U.S. re U.S. taxpayers, assuming that IGA Model 1 is used

# Background

---

- Privacy and confidentiality issues are key issues that require local law changes
- Significant investments in IT-systems required
- Benefits of an IGA
  - Restricted definition of “U.S. Account”
  - Elimination of withholding obligation for pass-thru payments
  - Most favored nation approach to IGA
  - Procedures are established with regard to penalties
- Many countries see the benefit of a mutual exchange of information

Slide 4

---

W7

Worth discussing that there are disadvantages to the IGAs

WIN764BIT, 3/18/2013

# Background

---

- Open questions:
  - Are there disadvantages of having an IGA in force?
  - Is the elimination of withholding tax on pass-thru payments absolute?
  - Will China enter an IGA?
  - What happens if the answer is no

Slide 5

---

W14

Worth discussing that there are disadvantages to the IGAs

WIN764BIT, 3/18/2013

# Three Types of IGA

---

- ❑ Model 1 A, Model 1 B, and Model 2
- ❑ Annex II – the part of the IGA that in practice can be negotiated – includes the financial institutions that are deemed exempt.
- ❑ The U.S. is engaged in negotiations with more than 50 countries



# IGA Model 1 vs. Model 2

---

- Model 1 IGA: Partner jurisdiction agrees to adopt rules to identify and report information on U.S. accounts to home government who will pass information onto I.R.S.
  - United Kingdom, Denmark, Germany, France, Italy, Mexico, Norway and Spain have signed or initialed agreements.
  - The U.K. has released (proposed) regulations, directing its F.F.I.s how to implement F.A.T.C.A.
  - F.F.I.s are not obligated to enter into a F.F.I. Agreement and do not have to apply the final Regs. released by the U.S.
  - F.F.I.s still have to register with the I.R.S. as registered deemed compliant F.F.I. and obtain a G.I.I.N

# IGA Model 1 vs. Model 2

---

- Model 2 IGA: obliges Reporting F.F.I.s to register with the I.R.S. and report specified information about U.S. accounts directly to the I.R.S. in a manner consistent with Chapter 4
  - So far only Japan and Switzerland have announced the intention to enter into Model 2 IGAs.
  - U.S. final Regs. are generally applicable (544 pages!), except to the extent expressly modified by the Model 2 IGA (16,18)
  - Model 2 IGA will be supplemented by government-to-government exchanges of Information
  - Switzerland intends to release a federal law implementing the IGA Model 2

---

# **ISSUES ARISING IN SPECIFIC IGAs**

---

**U.K.**

# Issues That Have Arisen in IGA Implementation

---

- U.K. were first movers
  - First to enter into IGA
  - First to publish regulations implementing IGA
- HMRC's aim is to assist in creating coherent cross jurisdictional system
  - The hope is that others will follow their lead
- Difficulties in importing U.S. law concepts into U.K. law
  - Defined terms under U.S. tax law – i.e., is an LLP characterized as a partnership or an entity?
  - Interaction with data protection law, etc.

# Issues That Have Arisen in IGA Implementation

---

- ❑ Final U.S. Regulations published after U.K./U.S.A IGA was signed
- ❑ Query: To what extent will the final Regulations and the IGA be conformed regarding items such as:
  - Sponsoring FI concept?
  - Definition of financial institution?
- ❑ Specific provisions in U.K. Regulations and guidance expanding on scope of U.S. law/IGA

---

# Switzerland

# IGA Model 2 U.S. - Switzerland

---

- ❑ Was initiated on December 3, 2012 and signed on February 14, 2013
- ❑ According to Swiss law there is no such thing as an “Intergovernmental Agreement”
- ❑ The Agreement must be approved by the Swiss Parliament during 2013 and will be subject to a facultative referendum before it can be enacted
- ❑ Switzerland intends to release a federal law implementing the IGA Model 2



# Preserving Bank Secrecy?

---

- ❑ Holders of U.S. Accounts existing as of December 31, 2013, must sign a waiver allowing the Swiss F.F.I. to exchange information with the I.R.S.
- ❑ The identity of non consenting account holders (and N.P.F.F.I.s) will not automatically be exchanged, but “aggregate account information” must be reported to the SFTA, which may pass it on to the I.R.S.
  - It can in turn use it in connection with a group request pursuant to the Protocol amending Art. 26 DTC
  - The information is by definition “relevant” for the administration of the enforcement of U.S. tax laws

# Preserving Bank Secrecy?

---

- A U.S. taxpayer's right to appeal to the Federal Administrative Court has been preserved
  - The appeal may no longer be viewed to be further act of concealment
  - But a rejected U.S. request can be modified and re-launched with no *res judicata* effect
- Non-consenting account holders will become "recalcitrant" account holders and thus subject to F.A.T.C.A. withholding within 8 months from the I.R.S.'s request to the SFTA

# Direct Reporting

---

- P.F.F.I.s remain subject to regular Chapter 3 withholding on payments of fixed and determinable annual and periodic income from U.S. sources, but will avoid F.A.T.C.A. withholding on withholdable and passthru payments
- Direct reporting from a P.F.F.I. to the I.R.S.
  - A P.F.F.I. will have to report to the SFMSA in general, and with respect to U.S. accounts, will have to report directly to the I.R.S.
  - What happens in case of contradictory interests?

---

# Italy

# IGA Discussions

---

- General approach in discussions
- Timetable for entering an IGA
- Other comments

---

# Treasury Inquiry

# Treasury Fact Finding

---

- In IGA discussions, Treasury reportedly asks F.A.T.C.A. partner country to identify:
  - Smaller financial institutions that service the indigenous market place (similar to S&L's or credit unions in the U.S.)
  - Retirement arrangements
  - Not-for-profits
  - Comparable arrangements
- These are deemed-compliant F.F.I.'s with reduced compliance obligations

# Treasury Fact Finding

---

- Deemed-compliant F.F.I.'s are
  - Registered Deemed Compliant F.F.I.'s (R.D.C.F.F.I.) – registered with I.R.S.
  - Certified Deemed Compliant F.F.I.'s (C.D.C.F.F.I.) – certifies status to withholding agent; no registration with I.R.S.
  - Owner Documented F.F.I.'s (ODF.F.I.)
- Difficult for an entity to be a Deemed-compliant F.F.I. if it is not a small or regional financial institution with limited client base



---

# Industry round-up

---

# The In-House Perspective

# The In-House Perspective of F.A.T.C.A.

---

- First aim is to get the internal tax function out of leading F.A.T.C.A. projects
  - Tax should be technical support rather than project sponsors
  - F.A.T.C.A. projects are only successful if business operations buy into the business need to be F.A.T.C.A. compliant, beginning with the Financial Director

# The In-House Perspective of F.A.T.C.A.

---

- F.A.T.C.A. projects keep growing
  - Originally thought that it would be one set of onerous. U.S. regulations to deal with
  - With IGAs, F.F.I.s need to factor in 50 different sets of reporting, subject to MFN approach of Treasury
- No prizes for implementing a “gold plated” F.A.T.C.A. solution
  - Pragmatic efficient flexible compliance is the goal
  - Paralysis by analysis should be avoided

# Key Tasks in any F.A.T.C.A. Compliance Plan

---

- Identify all legal entities within the FI's group, including geographic location
- Review business plans in light of final regulations or IGA rules
- Define standard to determine U.S. owned accounts in each business unit
- Identify active or dormant U.S. owned accounts

# Key Tasks Continued

---

- Rationalize entities, jurisdictions, accounts that make sense from a business perspective
- Adopt action plan for compliance teams action in 2013
- Avoid last-minute start-up of action plan in 2014

---

# How Funds are Reacting

---

**U.K.**



# Funds

---

- Mid to Large Cap Firms have already run legal entity analysis but these need to be refreshed after the changes in the IGA and regulations
  - The addition of investment manager to the F.F.I. definition is a major change
- Small Firms generally only have one Finance Department person who has to determine how to tackle F.A.T.C.A. as well as other significant regulatory changes
- Can the compliance obligation be effectively outsourced, assuming responsibility remains

# Funds

---

- Position that partnerships are resident where their GP is located is helpful but still waiting to know how the Channel Islands and Cayman Islands will implement their F.A.T.C.A. compliance off the back of an IGA.
- Outstanding questions:
  - If a partnership has two GPs or delegated investment management based in another country, then where is the partnership resident for F.A.T.C.A. purposes?
  - Can you have an EAG if the group is headed by a partnership?
  - Is sponsoring FI concept better than IGAs for fund managers, but does this concept work across all IGAs?

# Funds

---

- Is it better to stay a nonwithholding foreign partnership or become a withholding partnership?
- Planning communication with investors –
  - W-8BEN and W-9 letters
  - Adopting communication channels with funds of funds
- How to communicate/work with portfolio groups who are suddenly caught by F.A.T.C.A. because their Topco was set up as part of the acquisition by the fund?

---

# Liechtenstein

# Liechtenstein Declaration

## March 12, 2009

---

- OECD standards
  - Global standards of transparency and exchange of information
  - Compliance with foreign tax laws
  - Liechtenstein Declaration

# High Pressure on the Financial Markets

---

- Implementation of foreign tax law
- Poor regulation of the past
- Uncertain future

# Liechtenstein Funds

---

- Fundamental solution
  - QCIV – status
  - W-8Ben
- Final regulation – compliant status
  - Obligation of means
  - Obligation of results

---

# How Banks are Reacting



---

# Italy

# General Reaction of Banks

---

- QI is a misleading precedent
  - The impact of U.S. legislation and regulations in the daily operations of Italian banks is not unknown
  - QI has been a precedent in Italy
  - However the scope and the impact of QI is small in comparison to of F.A.T.C.A.
    - QI is designed to focus on treaty benefit entitlement of non-U.S. investors
    - F.A.T.C.A. is designed to focus on indirect ownership by U.S. persons

# General Reaction of Banks

---

- Shift in the F.A.T.C.A. related internal functions
  - F.A.T.C.A. working projects were initially borne under the responsibility of the tax department
  - F.A.T.C.A. is now seen as a compliance project that parcels out organizational functions
- Lack of full comprehension
  - Incomplete understanding of pervasive impact of F.A.T.C.A. on the daily business operations of banks
  - F.A.T.C.A. is perceived as a “check-the-box” or “cookbook recipe” duty and as a highly IT-driven matter
  - The IT system of the bank will master the subject and make sure that the bank is F.A.T.C.A. compliant

# General Reaction of Banks

---

- Different Legal Systems
  - Difficulties in importing U.S. law concepts into Italian law
  - Defined terms in F.A.T.C.A. regulations, interaction with data protection law in Italy are examples
- High Reliance on the IGA
  - Expectation that the IGA would will sort out most of the complexities related to F.A.T.C.A.
  - The IGA establishes a direct relationship between Italian tax authorities and the I.R.S.
  - Widespread expectation that Italian bank officers will deal with Italian tax authorities rather than I.R.S.
  - But no one knows when Italy will sign an IGA

# General Reaction of Banks

---

- Change in bank forms reflect a view that in case of doubt be F.A.T.C.A. compliant
  - Although F.A.T.C.A. reporting is not yet required, banks are changing their forms
  - F.A.T.C.A.-driven provisions are now in loan contracts and in any other contract that may be theoretically affected by F.A.T.C.A. regime

---

# Switzerland

# Swiss Banking

---

- A reporting F.F.I. ("P.F.F.I.") must enter into an F.F.I.-Agreement with the I.R.S. and must obtain a GIIN
  - The wording of which is not yet known
- Dodd-Frank implies that U.S. accounts will be clustered in special Swiss-resident-but-S.E.C.-approved "advisory units"

# Swiss Banking

---

- The nondiscrimination provision set forth in IGA Model 2 contradicts Dodd-Frank and will be disregarded
- At best, the nondiscrimination provision will apply only to:
  - A Swiss F.F.I. that has obtained a GIIN but has no U.S. accounts of its own or
  - A Registered Deemed-Compliant F.F.I., such as credit-card issuers



---

**U.K.**

# U.K.

---

- Banks originally focused on extending their AML/KYC procedures as a solution to F.A.T.C.A. but now realize they must prioritize efforts on reporting, withholding and client interaction in order to be compliant
  - Now re-scoping the project plan from a data gathering exercise to a much bigger project looking more broadly at tax operations.
  - Have had project teams in place with significant budgets for F.A.T.C.A. compliance
  - Looking to see if they can expand their Chapter 3 reporting process into Chapter 4

# U.K.

---

- Multiple new regulatory and tax requirements on banks
  - Looking to see how they can manage projects across departments and requirements so that they only have to “dig up the regulatory highway once”
  - Looking to technology to help automate processes and control framework
- Can an F.F.I. register first (in July) and sort out its compliance program afterwards?
- Big emphasis on understanding how and whether derivatives are caught by F.A.T.C.A.

# U.K.

---

- Issues in common with other jurisdictions affect negotiation of finance documents
- Who should bear the risk, bank or borrower?
  - LMA produces precedent facility documents
  - They have produced F.A.T.C.A. riders to use with different options as to risk allocation.
  - Unlike U.S., no set U.K. position yet – arguably within bank’s control, but issues for banks too with this.
- Syndication
  - F.A.T.C.A. clauses are common in the market
  - Banks wish to avoid policing F.A.T.C.A. compliance of others

---

# Liechtenstein

# Challenge to integrate U.S. law into Civil Law

---

- Bank secrecy
- Approval of the FATCA agreement by the Liechtenstein government
- Different levels concerning data protection law

# Impact on Liechtenstein Banks

---

- Banking secrecy
- Privacy of the account holder
- Size of the banking sector
- Timeframe until 2014 very narrow
- Costs (IT, training)

---

# Country Round-Up “Sons of FATCA”?



---

# Liechtenstein

# Comparison to Agreement with Great Britain

---

- Self-Declaration
- Automatic information

# Impact on Liechtenstein Trusts

---

- Completely different approach to dealing with clients
- No regulation of the past
- Privacy
- Estate planning

# General Approach in Liechtenstein

---

- Play by the international rules
- Too small to influence any development
- Extremely high costs
- Very complex system to implement

---

# Switzerland

# Checking Tax Compliance

---

- Draft for an Amendment of the Federal Law on Money Laundering
  - Duty of a financial intermediaries (FI) to ascertain tax compliance of their customers
  - Existing Accounts: If the FI has reasons to believe that an existing customer is not tax compliant, and if the Customer is unable to prove that he is compliant, the FI has to rescind the relationship with such customer
  - New Accounts: If the FI has reasons to believe that the customer is not compliant, he must refuse to enter into a business relation with said customer.

# Implementing FATF Recommendations

---

- Proposal regarding bearer shares of non-publicly quoted companies
  - Reporting obligations for purchasers of bearer shares and
  - Reporting on the beneficial owners of participations exceeding 25% of the company's total equity
  - Board of Directors or Financial Intermediary must keep a list of shareholders
  - Change from bearer to registered shares will be facilitated

# Implementing FATF Recommendations

---

- Proposal on Politically Exposed Persons (“PEPs”)
  - Special duty of care requirements for PEPs;
  - Foreign PEPs are always subject to special duty of care requirements
  - PEPs working for domestic governments or international organizations are only subject to a special duty of care if there is evidence for additional risk elements involved



# Implementing FATF Recommendations

---

- Proposal regarding the tightening of tax evasion provisions
  - Money laundering is a crime in the context of which somebody tries to obscure the source of money which originates from predicate offences;
  - Undeclared but tax relevant facts and circumstances ("*nicht deklarierte Steuerfaktoren*") amounting to at least CHF 600,000 will be subject of a prison term of up to five years and amount to predicate offenses.



# Nordics

April 11, 2013

F.A.T.C.A. -- Its here, Now Do  
Something About It!!

64

# Seven Countries

---

## □ Sweden

- Recently the Swedish Tax Authorities announced that there will be a “Nordic Task Force” of 400 tax assessors (Sweden 200) who will chase the Swedes with foreign accounts.

## □ Finland

- Like Sweden, the question is whether they will close an IGA before Sweden

## □ Baltics

- Estonia, Latvia and Lithuania
- Each claims to be working on IGA, but Baltics will not be prioritized by the U.S.



# U.K.

# U.K.

---

- ❑ Announced discussions with Isle of Man and Guernsey to introduced FATCA style agreements to enhance cross border tax information
- ❑ Already entered into a similar agreement with Switzerland in 2012



# **What is on the Horizon**



# Liechtenstein

April 11, 2013

F.A.T.C.A. -- Its here, Now Do  
Something About It!!

69

# Liechtenstein

---

- ❑ Settlement of non-tax complying structures
- ❑ Leading location for investment and wealth management





# Switzerland

April 11, 2013

F.A.T.C.A. -- Its here, Now Do  
Something About It!!

71

# Switzerland

---

- What will the Swiss Parliament do about the IGA Model 2 Agreement?
- Which laws/regulations apply?
  - The U.S. final regulations?
  - The IGA Model 2 Agreement between the U.S, and Switzerland?
  - The Swiss MoU (unpublished)?
  - The "*Botschaften*" of the Federal Council?
  - The guidelines ("*Wegleitung*") issued by the Federal Council?
  - The yet to be adapted Swiss implementation law?

---

# Global

# Globalization

---

- Trend towards a multinational exchange of financial information?
  - How might this work?
  - If all the financial information in the world is collected on one giant database, what is the exposure to hackers?
  - Do the tax collectors care?
-

# Thank You!

---

<b>Co-Chair: Peter R. Altenburger</b>	<b>Firm:</b> Altenburger Ltd.
	<b>Email:</b> <a href="mailto:altenburger@altenburger.ch">altenburger@altenburger.ch</a>
<b>Co-Chair: Stanley C. Ruchelman</b>	<b>Firm:</b> The Ruchelman Law Firm
	<b>Email:</b> <a href="mailto:Ruchelman@ruchelaw.com">Ruchelman@ruchelaw.com</a>
<b>Speaker : Laura Charkin</b>	<b>Firm:</b> SJ Berwin L.L.P.
	<b>Email:</b> <a href="mailto:Laura.Charkin@sjberwin.com">Laura.Charkin@sjberwin.com</a>
<b>Speaker : Lizzy Conder</b>	<b>Firm:</b> Sapient Group
	<b>Email:</b> <a href="mailto:lconder@sapient.com">lconder@sapient.com</a>
<b>Speaker: Stefano Grilli</b>	<b>Firm:</b> Gianni Origoni Grippio Cappelli Partners
	<b>Email:</b> <a href="mailto:sgrilli@gop.it">sgrilli@gop.it</a>
<b>Speaker: Dr. Fabrizia Lapecorella</b>	<b>Firm:</b> Ministry of Economy and Finance – Department of Finance
	<b>Email:</b> <a href="mailto:fabrizia.lapecorella@finanze.it">fabrizia.lapecorella@finanze.it</a>
<b>Speaker: Stefan Ritter</b>	<b>Firm:</b> Advokatur Ritter & Partner
	<b>Email:</b> <a href="mailto:stefan.ritter@ritter-partner.li">stefan.ritter@ritter-partner.li</a>
<b>Speaker: Peter Utterstrom</b>	<b>Firm:</b> Attorney at Law
	<b>Email:</b> <a href="mailto:peter@utterstrom.org">peter@utterstrom.org</a>