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Rahman Rahman Huq
Chartered Accountants

(KPMG in Bangladesh)

The Foreign Account Tax Compliance Act (FATCA) and its Implications

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FATCA – The Basics

What is FATCA?

- FATCA stands for the “Foreign Account Tax Compliance Act”. It is a piece of U.S. tax legislation enacted in 2010, although most of the substantive requirements and consequences have not started to take effect in Bangladesh until now.
- FATCA seeks to combat tax evasion by U.S. taxpayers who hide assets in offshore accounts and offshore investment vehicles, held either directly or through non-U.S. entities.

Why should I be concerned with a piece of U.S. tax law?

- FATCA accomplishes its goal by requiring non-U.S. banks, custodians, insurance companies, investment funds, certain types of fund service providers, etc. (“foreign financial institutions” or “FFIs”) to identify and report certain information on “U.S. accounts” to the U.S. Internal Revenue Service (the “IRS”).

I am not a U.S. entity and have no U.S. branches or operations. How could the requirement apply to me?

- An FFI is expected to enter into a “Participation Agreement” with the IRS, under which the FFI agrees to report certain information on U.S. accounts and their holders to the IRS annually.

What if I do not enter into this Participation Agreement?

- An FFI that does not enter into a Participation Agreement would (subject to certain exceptions discussed below) be treated as a non-participating FFI (“NPFFI”) and as a result would, among other things, be subject to a 30% withholding tax under FATCA on most U.S.-source income (interest, dividends, etc.), as well as, beginning in 2017, gross proceeds from the sale of assets that can generate U.S.-source interest or dividends (e.g., U.S. stock and securities), even if they are not sold at a gain.

FATCA – Implications for FFIs

So if I do not invest in U.S. stock and securities, I can safely choose to not enter into a Participation Agreement?

- The industry generally believes that non-compliance is not a feasible long-term option even if the withholding can generally be avoided:
 - As a reputational matter, financial institutions generally do not want to be labelled as being non-compliant with legislation designed to combat tax evasion by wealthy individuals.
 - Other FFIs that you deal with (e.g., as counterparties) may be under an obligation to eventually terminate business relationships with you as a requirement of their continued compliance.
 - If you have any affiliate for which compliance with FATCA is important, your non-compliant status may result in its being treated as noncompliant as well (i.e., there is a “tainting” effect).
 - The U.S. Treasury Department and the IRS may promulgate rules that would extend FATCA withholding to payments that are non-U.S. source at some point after 2016. In other words, even dividends or interest paid by non-U.S. entities may at some point be (partly) subject to FATCA withholding.

What else do I need to do under a Participation Agreement?

- In addition to the reporting obligation mentioned above, you as an FFI would also undertake in the Participation Agreement to do the following:
 - perform due diligence on its pre-existing accounts (as of the effective date of the Participation Agreement) to identify U.S. accounts.
 - implement or modify new client on-boarding procedures with a view to identifying U.S. accounts.
 - withhold on certain payments made to (1) non-participating FFIs and (2) accounts held by “recalcitrant account holders” - account holders that do not respond to requests for information or documentation from the FFI as it conducts its due diligence or that are otherwise non-cooperative (e.g., by not providing a waiver of Bangladesh data privacy laws which prohibit you from sharing the required information with the IRS), including non-financial entity account holders that do not provide information regarding instances of substantial U.S. ownership.
 - report on accounts held by recalcitrant account holders on an aggregate basis, and report on financial payments made to non-participating FFIs (whether or not they are account holders).
 - identify a “responsible officer” of your entity to certify as to the its compliance with the Participation Agreement on a periodic basis.

FATCA – Implications for FFIs (cont.)

Can I eliminate my FATCA compliance burden by not accepting U.S. customers?

- While the absence of U.S. account holders may alleviate the reporting obligation under FATCA, as an FFI you would still need to perform the due diligence procedures to identify (or establish the absence of) U.S. accounts, including accounts held by non-U.S. entities with substantial U.S. owners.

How do I discharge my reporting responsibilities under FATCA?

- As there is no inter-governmental agreement in place between Bangladesh and the U.S. regarding FATCA, financial institutions in Bangladesh can register directly with the IRS and put in place the necessary reporting procedures.

Do local laws prohibit me from complying with these reporting requirements?

- Some required disclosures may breach existing data privacy and confidentiality laws in Bangladesh. In this regard, financial institutions should obtain consent from their customers before making such disclosures to the IRS.

What should I be looking to do to become FATCA compliant?

- The first step is to identify the entities in your group that are financial institutions, and to ensure that they are in a position to register as a participating FFI and enter into a Participation Agreement with the IRS, unless the entity qualifies under certain categories of “deemed compliant FFIs.”
- Please contact Mehedi Hasan, Partner to further discuss how Rahman Rahaman Huq can assist you in your FATCA compliance program.

Department of Financial Institutions and Markets
Bangladesh Bank
Head Office
Dhaka

DFIM Circular Letter No-03

Date: 28 January 2014

Managing Director/Chief Executive Officer
All financial institutions licensed under Financial Institution Act, 1993

Dear Sir,

Foreign Account Tax Compliance Act of the United States

The Foreign Account Tax Compliance Act (FATCA) enacted in 2010 in the United States (U.S.) requires a 'Foreign Financial Institution (FFI)' to report to the U.S. Internal Revenue Service (IRS) information about certain accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. According to the definition of FFI, all financial institutions as defined in the Financial Institution Act, 1993 have come within the provisions of FATCA.

As the Government of Bangladesh has not yet decided to execute an intergovernmental agreement with the U.S., these obligations can alternatively be discharged at individual financial institution level by registering and signing 'Participation Agreements' with the IRS. The National Board of Revenue (NBR) also consented on registering with the IRS if a financial institution has U.S. taxpayer accounts in its books.

Therefore, financial institutions concluding that FATCA may have implications for their customers and operations should register themselves with the IRS and put in place appropriate processes and controls to ensure compliance with FATCA. Concerned financial institutions are advised to visit the IRS's website, www.irs.gov/fatca-registration, for necessary guidance in this regard.

Because the agreement requires disclosures which would normally be breaches of the Financial Institution's general duty of confidentiality under prevalent Bangladeshi laws and practices, financial institutions are to obtain written consents from their customers before reporting the requested information to IRS. Financial Institutions should communicate with the existing customers well in advance of executing 'Participation Agreement' with the IRS enabling the accountholders to comply with reasonable requests for information or to provide acceptable documentation to meet the FATCA obligations.

This is for information and guidance.

Yours sincerely,
sd/-
(Md. Shah Alam)
General Manager
Phone: 9530178



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Contact us

Mehedi Hasan

Partner

Rahman Rahman Huq
Chartered Accountants
(KPMG in Bangladesh)
9 Mohakhali C/A (11th & 12th Floors)
Dhaka 1212

T +880 (2) 988 6450 - 2

E mehedihasan@kpmg.com

www.kpmg.com/bd

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