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Global Tax Transparency and FATCA Implementation From a German Perspective

BY ANDREAS FILLMANN, JEFF LEVIN AND MITCH THOMPSON

In recent years, on national, European and international levels, there have been many initiatives designed to enable states to get information about the income earned and assets maintained abroad by their taxpayers and to collect related taxes accordingly.

Here we look at the situation from the perspective of Germany, offering a brief overview of several of these global compliance efforts and a more detailed examination of the implementation of the U.S. Foreign Account Tax Compliance Act (FATCA) and a recent related executed agreement between Germany and the U.S.

OECD Convention

The Organization for Economic Cooperation and Development's Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Convention) is a multilateral agreement that provides for administrative cooperation between states in the assessment and collection of taxes.[1] The original 1988 Convention was amended in 2010 following the April 2009 summit in London to provide, in Article 6, for the automatic exchange of information instead of, as previously, information on request.

As of Nov. 21, 2013, there were 63 signatories to the Convention, including Germany. However, to implement Article 6 of the Convention, an administrative agreement between two or more parties to the Convention is required. Apparently, the OECD developed with the Group of 20 (G20) countries a standardized multilateral model (otherwise known as the ''Common Reporting Standard'' or the CRS) for such agreements as a more efficient alternative to signing bilateral treaties based on Article 26 of the OECD Model Tax Convention.

The release of the CRS by the OECD is expected in February 2014. The CRS will require financial institutions around the globe to play a central role in providing tax authorities with greater access and insight into taxpayer financial account data including the income earned in these accounts.

'EU FATCA'

Germany, the U.K., France, Spain and Italy (''G5'') in April 2013 entered into a pilot multilateral exchange facility for automatic exchange of tax information.[2] The agreement is based on the five countries' model agreement to implement FATCA (described in more detail below) with the U.S.

Germany, the U.K., France, Spain and Italy entered into a pilot multilateral exchange facility for automatic exchange of tax information based on the five countries' model FATCA agreement.

Under the G5 program, the participating states agree to automatically share information about bank accounts held in their jurisdictions by taxpayers resident in another participating state. Under the agreement, banks in the G5 countries would be forced to reveal financial details of foreign clients, which would then be transferred to the client's tax domicile to be checked for compliance.

EU Directives

Also on an EU level there are efforts for the automatic exchange of information for tax purposes. There are two proposals for directives to modify the scope of the existing EU Savings Directive[3] and EU Administra-

[1] See http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm.

Dr. Andreas Fillmann is a partner in Financial Services and Jeff Levin and Mitch Thompson are partners in Tax Strategy & Benefits at Squire Sanders.

[2] The G5's letter to the EU Commission can be found on the website http://www.hm-treasury.gov.uk/hmtreasury_news.htm.

[3] Council Directive 2003/48/EC.

tive Cooperation Directive.[4] Their aim is to establish an automatic exchange of information for various types of income by 2015. These not only include interest income but also dividends, capital gains and all other types of income with respect to assets held in financial accounts.

The directives were to be adopted by the end of 2013 with exchanges of information starting in 2015. However, the Economic and Financial Affairs Council (ECOFIN) at a meeting Dec. 10, 2013, was unable to approve amendments to the EU Savings Directive due to objections from Austria and Luxembourg.[5] Article 115 of the Treaty on the Functioning of the European Union requires unanimity for adoption by the ECOFIN, before approval by the European Parliament. The objections of the two countries thus blocked the required unanimous approval.

Further, given the other OECD and EU initiatives to introduce a global multilateral system of automatic tax information exchange based on FATCA reporting, the relevance of the EU Savings Directive as a separate system beyond the short term appears doubtful.

FATCA Background

FATCA, which is the revenue piece of U.S. legislation that was signed into law March 18, 2010, is of particular interest.[6] The main objective of FATCA is to identify those U.S. persons who may be evading taxes through the use of offshore investment vehicles and to ensure that the U.S. Internal Revenue Service (IRS) can identify and collect the appropriate amount of tax from all U.S. persons attributable to undisclosed offshore assets.

Under the FATCA rules, indicia an account holder is a ''U.S. person'' include:

- citizenship or residency in the U.S.;
- a U.S. place of birth;
- a U.S. residence address or a U.S. correspondence address;
- a U.S. telephone number;
- standing instructions to transfer funds to an account maintained in the U.S.;
- an ''in care of'' address or a ''hold mail'' address that is the sole address shown in the foreign financial institution's electronically searchable information for the account holder; and
- a power of attorney or signatory authority granted to a person with a U.S. address.[7]

[4] The Council Directive 2011/16/EU on administrative cooperation in the field of taxation was adopted Feb. 15, 2011, repealing Directive 77/799/EC. This directive was supplemented by the Regulation 1156/2012 of Dec. 6, 2012, laying down detailed rules for implementing certain provisions of the directive.

[5] See http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/140041.pdf.

[6] http://www.opencongress.org/bill/111-h2847/show; Sections 1471-1474 of the Internal Revenue Code of 1986, as amended (the Code). FATCA was enacted March 18, 2010, as part of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147.

[7] Treasury Regulations Section 1.1471-4(c)(5)(iv)(B)(1).

FATCA therefore has a broad reach that includes all U.S. citizens and residents—even U.S. citizens and residents who have lived in Germany since they were infants but haven't renounced their American citizenship are covered. This legislation also covers, for example, German spouses of U.S. citizens who share bank accounts.

Principally, FATCA is designed to encourage disclosure for U.S. tax purposes of financial assets owned, directly or indirectly, outside of the U.S. by U.S. persons. This is accomplished, in part, by requiring foreign financial institutions (FFIs) to inspect their accounts and to report to the IRS ownership information of any accounts beneficially owned by U.S. persons.[8] If the FFI doesn't do so, any withholdable payment sent to the FFI from the U.S. will generally be subject to a 30 percent withholding tax.[9]

The starting date for certain obligations under FATCA, including the 30% withholding tax has been postponed until July 1, 2014. At this time, based on recent statements by U.S. Treasury officials, it appears unlikely that the commencement date of FATCA implementation will be postponed for a third time.[10]

Intergovernmental Agreements

There are certain exceptions to these FATCA withholding requirements. Notably, an increasing number of governments, including the government of Germany, have entered or will enter into intergovernmental agreements (IGAs) with the U.S., which will provide an alternative way of complying with FATCA.

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Initially, the U.S. Treasury has developed in collaboration with foreign governments two alternative IGA models, the Model 1 IGA and the Model 2 IGA. FFIs in Model 2 IGA countries generally aren't relieved from the requirement to enter into an FFI Agreement in order to avoid FATCA withholding.[11] By contrast, nonexempted FFIs located in Model 1 IGA countries generally are required to identify U.S. accounts pursuant to due diligence rules implemented by the respective IGA country and to report specified information to the relevant governmental authorities of the IGA country, which will then transfer the information to the IRS.

[8] Code Section 1471(b)-(c).

[9] Code Section 1471(a).

[10] Alison Bennett, ''Treasury's Rolfes Expects No Extension of July 1 Deadline for FATCA Reporting,'' International Tax Monitor (BNA), Issue No. 10, Jan. 15, 2014 (10 DTR G-3, 1/15/14).

[11] The first Model 1 IGA was released July 26, 2012, by the U.S. Treasury.

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The U.S. Treasury released updated Model IGAs dated Nov. 4, 2013, to improve international tax compliance and to further implement FATCA.[12] The Reciprocal Model 1A IGA was changed to adopt information security concerns.

Another significant development with the new releases is that the U.S. Treasury will now enter into IGAs with jurisdictions that don't have a preexisting tax information exchange agreement or bilateral income tax treaty with the U.S. To this end, the U.S. Treasury introduced two new model agreements, a Nonreciprocal Model 1B Agreement and a Model 2 Agreement.[13]

In addition to the new IGAs, the U.S. Treasury released four new versions of the IGA Annexes (two for Model 1 and two for Model 2).[14] Generally, each IGA will have an Annex 1 and an Annex 2. As in the prior versions of the Annexes, Annex 1 of the IGA provides documentation and due diligence requirements applicable to FFIs in the jurisdiction while Annex 2 provides the requirements for exempt entities and products in the jurisdiction. The Annex 2 has changed significantly in that it now appears to standardize the list of exempt entities and products for all countries as opposed to the previous approach of customizing the exempt entities and products on a country to country basis.

The IRS enumerated specific provisions regarding the U.S. Treasury's treatment of IGAs. First, those IGAs that have already been signed by the U.S. and the FATCA participating states are deemed to be ''in effect.'' Second, a country that is in active negotiations with the U.S. will also be treated as having an IGA ''in effect.'' IGAs deemed to be ''in effect'' will be listed on the U.S. Treasury's website.[15] FFIs in countries treated as having an IGA ''in effect'' will be permitted to register with the IRS as a deemed-compliant FFI or participating FFI.

Furthermore, the IGAs provide that the governments in each respective country will enact legislation or issue guidance on how FFIs can comply with the information reporting and withholding tax provisions commonly referred to as the FATCA regime. The details needed to implement changes to various processes such as account opening, customer due diligence, documentation, and further the tax reporting and withholding, will be derived from that guidance.

As a result, the signing of these IGAs should be regarded as a first stage where affected parties must wait until other guidance or legislation is enacted to have a full picture of what tasks, processes and system changes may need to be implemented.

Bilateral Agreement Germany—U.S.

Germany and the U.S. signed an IGA Feb. 21, 2013, which is substantially similar to the Model 1 IGA as of November 2012 (the ''German IGA'').[16] The German IGA doesn't incorporate many of the changes as updated in the Model 1 A IGA on May 9, 2013. The German IGA was accompanied by a brief Declaration of Understanding (DOU) providing some additional information.[17]

The German IGA includes the addition of two paragraphs in Article 4 that outline how FATCA will apply to FFIs in Germany. Given the delays in signing the German IGA and the timeline changes in the final regulations, paragraph 6 in Article 4 provides details to coordinate the timing of FATCA. Essentially, it coordinates the reporting requirements of Germany with the latest requirements applicable to FFIs under the final regulations. Article 4 paragraph 6 also states that the U.S. doesn't have to provide and reciprocate information to Germany until Germany is ready to exchange the reporting information under the agreement.

Additionally, because of changes in certain definitions in the final regulations, Article 4 paragraph 7 allows Germany to use the new definitions in lieu of the corresponding definitions in Article 1 or the Annexes, as long as such use doesn't ''frustrate'' the purpose of the German IGA.

The DOU won't apply to other IGA jurisdictions under the most favored nation clause of the IGA and will only apply if the jurisdictions enter into similar DOUs.

The good news for other countries that have already signed an IGA with the U.S. is that the most favored nation clause in those agreements will apply for these provisions allowing them to benefit from the changes in the German IGA. Similarly, as a consequence of the most favored nation clause in the German IGA, Germany would benefit from favorable changes in IGAs signed subsequently with other countries.

The German IGA includes a DOU that has been released alongside it. Contrary to the above, the DOU won't apply to other IGA jurisdictions under the most favored nation clause of the IGA and will only apply if the jurisdictions enter into similar DOUs. The German DOU clarifies four aspects of the German IGA:

- Germany intends to require that each reporting German FFI use a Global Intermediary Identification Number (GIIN) as its identification number, which Germany will use in its exchange of information with the U.S.;

[12] http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[13] See http://www.irs.gov/Businesses/Corporations/FATCA-Governments; http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[14] http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[15] US Treasury IGA List, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

[16] U.S. Treasury IGA List, http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx; Bilateral Agreement between the U.S. and Germany to Implement FATCA, May 31, 2013, http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Germany-5-31-2013.pdf.

[17] https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Verein_Staaten/2013-05-31-FATCA-einvernehmenserklaerung-englisch.pdf?__blob=publicationFile&v=2.

■ the Information Exchange provisions of the U.S.-German Treaty for the Avoidance of Double Taxation apply to the information exchanged;

■ Germany intends that German financial institutions comply with the registration requirements applicable to FFIs in other jurisdictions by registering and obtaining a GIIN from the IRS; and

■ depending on the date when the IGA enters into force pursuant to Article 10 paragraph 1, the U.S. acknowledges in the DOU that Germany intends to implement FATCA enabling legislation by Sept. 30, 2015, (with a possible year extension subject to certain assurances) and that the U.S. agrees to treat German FFIs as FATCA compliant from July 1, 2014, through Sept. 30, 2015 (subject to the year extension).[18]

Annex II of the German IGA defines categories of institutions that are treated as exempt beneficial owners for purposes of Section 1471 of the Code, such as governmental entities, the Central Bank of Germany, certain international organizations in Germany, and certain German pension funds.[19] The category of deemed-compliant entities under Annex II includes certain small financial institutions with a local client base, and certain collective investment vehicles regulated under the laws of Germany. Lastly, Annex II declares certain accounts or products as exempt (both retirement and non-retirement) and states that it may be updated to reflect mutual agreements between the competent authorities in Germany and the U.S.

Under the German IGA, German FFIs must obtain and report account holder information annually as outlined in the Model 1 IGA. The initial exchange date has been retained and also the obligation to include information related to the calendar years 2013 and 2014. More details about the exact dates and the definition of the term ''payments'' will probably be provided by guidance from the German Ministry of Finance (Bundesministerium für Finanzen).

Implementation Into German law

The German IGA will be implemented in Germany through the AIFM-StAnpG (AIFM-Steueranpasungsgesetz).[20] The AIFM-StAnpG was drafted by the previous German government and must therefore pass further legislative steps to come into force in 2014.

The draft AIFM-StAnpG contains modifications and amendments to various tax acts, whereby Section 117c of the German Fiscal Code (Abgabenordnung, or AO) covers in particular the FATCA implementation into German law. The current AO only permits tax information to be provided to other EU member states for administrative purposes and doesn't allow the collection of account information relating to U.S. persons resident in Germany.

Consequently, to address FATCA requirements, the draft Section 117c of the AO entitles the German Finance Ministry to issue rules in relation to the implementation of FATCA, which will then permit that tax information be obtained from German financial institutions through the German Bundeszentralamt für Steuern (BZSt) and forwarded to the IRS. Additionally, the new rules will permit tax investigations by the tax authorities and penalties in case of misconduct.

FATCA Data Exchange Standards

The IRS has finalized the format for automatically exchanging FATCA data with IGA jurisdictions.[21] The so called Intergovernmental FATCA XML Schema (version 1.1) has been drafted:

■ as a standard format developed in close cooperation with the OECD;

■ for the use of an automatic exchange with all FATCA jurisdictions;

■ to use elements from existing reporting schemas used by the OECD and the EU to reduce the burden on reporting entities;

■ to allow modifications in the event of legislative or regulatory changes in reporting rules; and

■ to facilitate safe and secure electronic data transmission using the International Data Exchange Service.

Additionally, the IRS is finalizing requirements for a Data Exchange service to allow for German financial institutions (FIs) and the German BZSt to automatically exchange FATCA data with the U.S. The Data Exchange service will also allow the U.S. to make reciprocal exchanges where called for by an IGA that is in force.

Withholdable Payments Under FATCA

Code Section 1471 defines ''withholdable payments'' made to FFIs.[22] A withholdable payment includes payments of ''interest . . . rents . . . and other fixed or determinable annual or periodical gains . . . from sources within the United States.''[23] However there are some exceptions in this regard.

The first exception is for so-called grandfathered obligations. The regulations don't require withholding on grandfathered obligations,[24] which includes any ''obligation'' outstanding prior to July 1, 2014.[25] ''Obligation'' is defined to include a ''debt instrument (for example, a bond, guaranteed investment certificate, or term deposit).''[26] Absent any modification, such obligations shall be treated as grandfathered obligations. However, if there is a material modification of the debt

[18] http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2013/2013-05-29-tax-compliance-agreement-with-us-dou.pdf?__blob=publicationFile&v=3.

[19] http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2013/2013-05-29-tax-compliance-agreement-with-us-agreement.pdf?__blob=publicationFile&v=2.

[20] http://dipbt.bundestag.de/dip21/brd/2013/0095-13.pdf.

[21] http://www.irs.gov/Businesses/Corporations/International-Data-Exchange.

[22] Code Section 1471.

[23] Code Section 1473(1)(A)(i).

[24] Treasury Regulations Section 1.1471-2(b)(1).

[25] Treasury Regulations Section 1.1471-2(b)(2)(i)(A)(1) currently lists ''January 1, 2014'' as the cutoff date. However, IRS Notice 2013-43 states that ''[t]he definition of grandfathered obligation will be revised to include obligations outstanding on July 1, 2014 (and associated collateral).''

[26] Treasury Regulations Section 1.1471-2(b)(2)(ii)(A)(1).

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subsequent to July 1, 2014, it will no longer be a ''grandfathered obligation.''[27]

A second exception is for payments to ''Participating FFIs.'' A Participating FFI is a foreign financial institution ''that has agreed to comply with the requirements of an FFI agreement''[28] Compliance can be achieved either under the regulations by signing an FFI agreement with the IRS or pursuant to an IGA.[29] Under these exceptions, withholding is generally not required.[30]

Notably, on July 29, 2013, the Treasury Department and the IRS issued Notice 2013–43, which revised the timelines for implementation of the FATCA requirements and provided additional guidance concerning the treatment of FFIs located in jurisdictions that have signed IGAs for the implementation of FATCA but haven't finalized those IGA negotiations.[31]

The IRS Aug. 19, 2013, announced the opening of its online registration system for FFIs that need to register with the IRS under FATCA, including FFIs that will be covered by an IGA.

The IRS Aug. 19, 2013, announced the opening of its online registration system for FFIs that need to register with the IRS under FATCA, including FFIs that will be covered by an IGA. Further, on Oct. 29, 2013, the Treasury Department and the IRS published Notice 2013–69, which provided a draft FFI agreement that substantially incorporates the provisions of Section 1.1471–4 of the final Chapter 4 Treasury regulations, as modified by Notice 2013–43 (e.g., to reflect revised timelines for FATCA implementation).[32]

Finally, on Dec. 11, 2013, the Treasury Department and the IRS released Announcement 2014-1, which provided that the FFIs have access to the registration website to create accounts or access existing accounts.[33] The IRS also released a FATCA Registration Online User Guide[34] and the actual FFI registration started Jan. 1.[35]

Compliance Requirements for German Banks

When German FIs will exchange personal data with the BZSt as the appointed national authority with regard to the FATCA implementation, such FIs will use trusted and secure communication channels that are accepted by customers, especially with regard to data protection aspects. It should be noted that German FIs have to observe the fulfillment of various obligations under the German Data Protection Act (Bundesdatenschutzgesetz) such as ''legal remedies of the data subject,'' ''defining and granting fixed processes to delete data and to prevent unprotected transmissions,'' ''granting data integrity'' and ''compliance with the principle of proportionality.''

Opposite thereof, in the case of direct agreements with the IRS, German FIs could be liable for any ''privacy infringements''—especially when acting in between national/European data protection legislation and the demands of the U.S. Treasury Department.

Under the German IGA the information to be obtained and exchanged relates to the name, address, U.S. taxpayer identification number, account number (or functional equivalent), the name and identifying number of the German FI, and the account balance (including reportable values as insurances and other financial assets) of a U.S. account holder.

The aforementioned information shall be exchanged not later than Sept. 30, 2015. However, the first year under review is 2013. Complex transactions won't be put under review until 2015 and 2016. The relevant reports will be due in the following years (2016/2017).[36]

Consequently, in accordance with the rules contemplated in the German IGA, German FIs have to identify U.S. account holders and make annual reports. There are no withholding responsibilities on behalf of the IRS and the German FIs only have to report on transactions to nonparticipating financial institutions. Further, German FIs with related entities or branches in foreign countries that are prevented by national jurisdiction from implementing FATCA abroad are still regarded deemed-compliant if they fulfill the obligations of the German IGA.[37]

The identification of relevant U.S. accounts is presumably the most complex and pressing task for German FIs. Presumably, most German FIs have already taken action, especially because the account review is a FATCA core requirement that is most likely to be operative shortly.

However, the identification of account holdings can be quite complex. German FIs have to review accounts of non-U.S. entities with one or more controlling persons who are specified U.S. persons. Yet, it still remains unclear how the term ''Controlling Persons'' has to be interpreted especially when defining criteria for the bank's digital record search.

Another issue is the great number of indicia specifying U.S. persons as such according to FATCA. These numerous indicia make the record search quite complex. This is especially true of accounts with a balance or value that exceeds $1 million. Here, the German IGA stipulates enhanced in-depth paper review procedures. Especially medium-sized private banks with many wealthy clients will have to make significant personnel and organizational efforts to detect such U.S. persons.[38]

From a compliance and operational standpoint, German FIs that have already used ''data pooling'' proceed-

[27] Treasury Regulations Section 1.1471-2(b)(2)(iv). If a debt isn't respected as debt for U.S. tax purposes, the determination of ''material modification'' will be a ''facts and circumstances'' test. Id.

[28] Treasury Regulations Section 1.1471-1(b)(85).

[29] Treasury Regulations Section 1.1471-4(a).

[30] Treasury Regulations Section 1.1471-2(a)(4)(iii).

[31] http://www.irs.gov/pub/irs-drop/n-13-43.pdf.

[32] http://www.irs.gov/pub/irs-drop/n-13-69.pdf. Rev. Proc. 2014-13, __ IRB 2014-3, Section 5, is the final text of the FFI Agreement for Participating FFI and Reporting Model 2 FFI; http://www.irs.gov/irb/2014-3_IRB/ar10.html.

[33] http://www.irs.gov/pub/irs-drop/a-14-01.pdf.

[34] http://www.irs.gov/pub/irs-pdf/p5118.pdf; additional information regarding FATCA registration is available at http://www.irs.gov/Businesses/Corporations/FATCA-Registration.

[35] http://www.irs.gov/irb/2014-3_IRB/ar10.html#d0e3217; see IRS Notice 2014-13.

[36] Article 2 No. 2 German IGA.

[37] See Article 4 No. 5 German IGA.

[38] See Annex I D German IGA.

ings will benefit from this when implementing FATCA. Information integration and consolidation of data from many distributed sources will facilitate the required identification of U.S. clients. Moreover, German FIs have extensive experience with the identification of clients in conformity with the Know Your Customer (KYC) principle as it is stipulated in the Money Laundering Act (Geldwaschegesetz).

In addition, most German FIs have already acquired valuable experience with U.S. fiscal authorities when applying for qualified intermediary (QI) status or renewing existing QI agreements.

Provided that a bank succeeds in reusing existing corporate knowledge and manages to reactivate routines from past implementation projects FATCA compliance shouldn't be unduly burdensome.

Consequences for Syndicated Loan Agreements With German Banks

One major discussion point in relation to FATCA is how German banks should deal with FATCA in syndicated loan agreements that might have a connection with the U.S.

First, if there is no U.S. connection and there is no U.S. borrower involved or where the U.S. borrower's interest or loan payments don't otherwise originate from U.S. sources there is no legal ground that tax will be withheld on payments from the borrower to the lenders seated in Germany. If the lender is acting as a facility agent it doesn't need to withhold on any payments to other banks in the syndicate. This applies irrespective of whether the borrower is a bank or whether the recipient of the payment is FATCA compliant or not. The same applies if the interest payments are originated by a U.S. guarantor.

Second, if the payments originate from a U.S. borrower, the German IGA eliminates FATCA withholding concerns for German banks that act as a lender in a syndicate or as facility agent. If one of the syndicate banks isn't FATCA compliant, the German facility agent has to provide the U.S. borrower with the related information that allows it to withhold tax on payments to the non-FATCA compliant bank.

Consequently, the German IGA considerably reduces the risk for German banks that payments made by a borrower to a German facility agent or payments forwarded to German syndicate banks won't comply with FATCA and might be subject to FATCA withholding. This will need to be taken into account during loan agreement negotiations in order to meet the interests of all those involved.

However, the legal position may become more complicated where the syndicate includes banks or branches located in countries that haven't entered into corresponding IGAs. In these cases, interest payments from U.S. sources may still be subject to a 30 percent FATCA withholding tax from July 1, 2014, onward (as well as certain proceeds including those from the sale of loans from Jan. 1, 2017, onward) where the loan agreement was entered into after July 1, 2014.

Internationally, many lenders have been and still are uncertain of their ability to comply with FATCA obligations. Therefore, the Loan Market Association (LMA)[39] has drafted three sets of riders, which provide various options for allocating FATCA withholding risk. In addition, LMA has issued ''Common Provisions'' to be used with the riders, which contain definitions of terms used in the riders.[40]

As drafted, the LMA riders should be used as a starting point for negotiations and documenting the allocation of FATCA withholding risk in lending transactions and should be amended as needed. Since the release of the original riders, FATCA implementation has internationally evolved, and accordingly the LMA riders have been updated several times to reflect many of these developments. Banks are gaining confidence in their ability to comply with FATCA, largely as a result of the growing network of IGAs, and accordingly, the use of Rider 3 has become relatively standard in Europe.

[39] http://www.lma.eu.com/.

[40] ''Rider 1'' places the risk of FATCA withholding on the borrower; ''Rider 2'' adopts a compromise approach by relying on the grandfathering rules to ensure that the credit facility won't be subject to FATCA; and ''Rider 3'' shifts the risk of FATCA withholding entirely to the lenders by allowing all parties to withhold as required.

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