ASIFMA Webinar: FATCA's Impact on Transactional Documentation

Tuesday, 20 August 2013, 9.00am HKT

Supported by:
Agenda

• INTRODUCTION
  Patrick Pang, Managing Director - Fixed Income, Compliance and Tax, ASIFMA

• FATCA UPDATE – IGA Model 1, IGA Model 2, non-IGA and associated documentation issues
  Paul DePasquale – Associate, Baker & McKenzie Hong Kong
  Angelica Kwan – Partner, US Tax, PricewaterhouseCoopers Hong Kong

• ISDA (International Swaps and Derivatives Association) FATCA PROTOCOL
  Mark New – Assistant General Counsel, ISDA Washington DC

• GMRA (Global Master Repurchase Agreement) FATCA PROTOCOL
  Sharon Kim – Counsel, Ashurst Washington DC

• LOAN AGREEMENTS
  Dauwood Malik – Partner, Clifford Chance Hong Kong

• Q&A
FATCA – Perspective

Goal
- Information reporting of US persons investing through a non-US ("foreign") financial institution ("FFI")

Sticks
- 30% withholding tax on certain US source payments to an FFI that does not participate
- Passthru payment withholding

Actions
- Enter into an agreement with the IRS
FATCA Framework

- Participating FFI Obligations
  - Due Diligence
  - Information Reporting
  - Identifying and Documenting Payees
  - Withholding on Payments to Non-Participating FFIs
  - Termination of Account or Obligation
FATCA Framework - Challenges

- Impact of Participating FFI Obligations on Counterparties
  - Compliance and payee identification
  - Withholding risk allocation
- Local law conflict
  - Intergovernmental approach
  - Dealing with IGA uncertainty
## Status of IGA Negotiations

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<thead>
<tr>
<th>IGA Status</th>
<th>Country</th>
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<tbody>
<tr>
<td>Signed or Initialed Model 1</td>
<td>Denmark, Germany, Ireland, Mexico, Norway, Spain, United Kingdom, Italy, Cayman Islands</td>
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<tr>
<td>Signed or Initialed Model 2</td>
<td>Japan, Switzerland, Bermuda</td>
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<td>Finalizing Negotiations</td>
<td>Canada, Finland, France, Guernsey, Isle of Man, Jersey, Netherlands</td>
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<tr>
<td>Negotiations in progress</td>
<td>Argentina, Australia, Belgium, Cyprus, Estonia, Hungary, Israel, Republic of Korea, Liechtenstein, Malaysia, Malta, New Zealand, Singapore, Slovak Republic, Sweden</td>
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<td>Exploring options</td>
<td>Brazil, BVI, Chile, Czech Republic, Gibraltar, India, Lebanon, Luxembourg, Romania, Russia, Seychelles, Slovenia, South Africa, St. Maarten</td>
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CIRCULAR 230 DISCLOSURE

Pursuant to requirements relating to practice before the Internal Revenue Service, any tax advice in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties imposed under the United States Internal Revenue Code, or (ii) promoting, marketing or recommending to another person any tax related matter.
FATCA Withholding Requirements

- FATCA requires that any **payor** of “withholdable payments” to a **counterparty that is an entity** withhold and remit to the US Internal Revenue Service a **new 30% FATCA withholding tax** unless –
  - Payor can properly document the FATCA status of the payee, and
  - Payee is not an FFI that does not comply with FATCA

- Similar FATCA rules require an **FFI complying with FATCA** to withhold on “withholdable payments”

- **Withholdable payments** include but are not limited to –
  - Interest income from US debt securities, loans to US borrowers and US Treasuries (starting mid 2014)
  - Dividend income from US stock (starting mid 2014)
  - Gross proceeds on sale of assets generating US interest income/US dividends (starting Jan 2017)

- Failure to withhold when required can **cause the payor to itself become liable to the IRS** for the taxes that the payor should have, but did not, withhold.
“US Dividend Equivalent Payments”

- US Tax Code Section 871(m) causes certain payments that are determined by reference to a US dividend to be treated as a "withholdable payment".

- The guidance on Section 871(m) is still evolving.

- This provision can capture certain payments on derivatives with US stock as underlying or involving indices that include US stock.

- Some other derivatives can generate "withholdable payments" (eg certain but not all derivatives where US counterparties are involved).
### FATCA Withholding Milestones

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date</th>
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<tr>
<td>FATCA Withholding Begins on Payments of US Interest Income, US Dividends, etc. Received by Non-Compliant FFIs (or Payees that Do Not Provide Documentation)</td>
<td>1 July 2014</td>
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<tr>
<td>Cut-Off Date for Issuance of “Grandfathered Obligations”</td>
<td>1 July 2014</td>
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<tr>
<td>Cut-Off Date for Issuance of “Grandfathered Obligations” Relating to “US Dividend Equivalent Payments”</td>
<td>TBD – Six Months After Issuance of Relevant Regulations under That Other Provision</td>
</tr>
<tr>
<td>FATCA Withholding Begins on US Stock, US Securities, etc. Sales Proceeds Received by Non-Compliant FFIs (or Payees that Do Not Provide Documentation)</td>
<td>1 January 2017</td>
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ISDA (International Swaps and Derivatives Association)
FATCA Protocol

Mark New, Assistant General Counsel, ISDA
ISDA Master Agreement

• Published standard agreement for privately negotiated derivatives transactions

• The agreement governs the relationship between two parties entering into privately negotiated derivatives transactions, and can be negotiated and customized by the parties

• Two forms in use - 1992 and 2002 versions. Both have similar provisions relating to withholding taxes

• Basic approach of the ISDA Master Agreement is to place the burden of most withholding taxes on payer

• Payer can manage this risk by determining whether withholding taxes would apply to payments under the derivatives transactions, and may rely on representations and documents received from the counterparty
2(d) (i) Gross Up. All payments under this Agreement will be made without any deduction or withholding for or on account of any Tax unless such deduction or withholding is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, then in effect. If a Party is so required to deduct or withhold, then that party ("X") will: …

(4) If such Tax is an Indemnifiable Tax, pay to Y, in addition to the payment to which Y is otherwise entitled under this Agreement, such additional amount as is necessary to ensure that the net amount actually received by Y (free and clear of Indemnifiable Taxes, whether assessed against X or Y) will equal the full amount Y would have received had no such deduction or withholding been required. However, X will not be required to pay any additional amount to Y to the extent that it would not be required to be paid but for: --

(A) the failure by Y to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d); or

(B) the failure of a representation made by Y pursuant to Section 3(f) to be accurate and true unless such failure would not have occurred but for (I) any action taken by a taxing authority, or brought in a court of competent jurisdiction, after a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (II) a Change in Tax Law.
“Withholding Tax imposed on payments to non-US counterparties under the United States Foreign Account Tax Compliance Act. “Tax” as used in Part 2(a) of this Schedule (Payer Tax Representation) and “Indemnifiable Tax” as defined in Section 14 of this Agreement shall not include any U.S. federal withholding tax imposed or collected pursuant to Sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986, as amended (the “Code”), any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b) of the Code, or any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement entered into in connection with the implementation of such Sections of the Code (a "FATCA Withholding Tax"). For the avoidance of doubt, a FATCA Withholding Tax is a Tax the deduction or withholding of which is required by applicable law for the purposes of Section 2(d) of this Agreement.”

• Existing Master Agreements can be amended to include the ISDA FATCA Provision by adherence to the ISDA 2012 FATCA Protocol
Timing considerations for derivatives (the “Grandfathering Rule”)

- No withholding is required under FATCA on any payment made under any fixed term non-equity obligation outstanding on July 1, 2014 or from the gross proceeds from any disposition of such an obligation.

- The Master Agreement itself would not qualify for grandfathering relief since ISDA Master Agreements do not typically have a fixed term.

- Transactions entered into under an ISDA Master Agreement may qualify for grandfathering relief, provided they are entered into on or before July 1, 2014 and provide for a fixed term.

- Material modifications to existing transactions may cause them to be treated as new transactions, which may cause them to lose the grandfathering protection if modified after July 1, 2014.
GMRA FATCA Protocol

Proposed FATCA Language

“Notwithstanding any other provision of the Agreement to the contrary:

(i) All payments under the Agreement made by, or on behalf of, a party (the “Payer”) to, or for the benefit of, another party (the “Payee”) shall be made subject to any U.S. federal withholding tax imposed or collected pursuant to FATCA and no additional amounts shall be payable in respect of such tax imposed or collected pursuant to FATCA. Except as provided in subparagraph (•)(ii) below, no party shall be required to indemnify the other party on account of any loss, liability or cost imposed as a result of such withholding or deduction.

(ii) If:

(A) the Payer is required to make any withholding or deduction for which the Payer would not be required to pay an additional amount under subparagraph (•)(i) above;
(B) the Payer does not so withhold or deduct; and
(C) a liability resulting from such tax is assessed directly against the Payer, then, except to the extent the Payee has satisfied or then satisfies the liability resulting from such tax, the Payee will promptly pay to the Payer the amount of such liability, including any related liability for interest and penalties.
(iii) For purposes of this paragraph (*) and the Agreement, the following definitions shall apply:

(A) “Code,” the U.S. Internal Revenue Code of 1986, as amended; and
(B) “FATCA,” Sections 1471 through 1474 of the Code, any current or future regulations or official interpretations thereof, any agreement entered into pursuant to Section 1471(b) of the Code, or any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement entered into in connection with the implementation of such Sections of the Code.
GMRA FATCA Protocol

Status of FATCA language

• Under consideration by ICMA
• Not a “protocol”; bilateral amendment to GMRA
• Other suggested provisions in addition to above
GMRA FATCA Protocol

Potential Concerns

• Definition of FATCA – narrow (limit to US and IGA with US) vs broad (any FATCA laws, whether or not related to US laws)

• Cover both US and non-US withholding

• Limitations to Payer indemnity
  – Limit entire indemnity or just interest and penalties to cases where “Payer reasonably fails to withholding or deduct”
GMRA FATCA Protocol

Additional provisions for consideration

- Substitute payments
  - Buyer permitted to withhold on substitute payment where withholding against buyer from issuer of underlying security due to seller’s non-compliance
  - Relevant where buyer is treated as agent of seller with respect to underlying security
  - Payments made subject to FATCA withholding, “including any such withholding tax imposed or collected on a payment to the Payer that is used to reference a payment to the Payee to the extent it would not have been deducted but for the Payee’s non-compliance with FATCA”
GMRA FATCA Protocol

Additional provisions for consideration (cont’d)

• Clarify that FATCA deductions apply to all calculations of amounts due
  
  – “any calculations of amounts due to a party under this Agreement shall be made without regard to any withholding tax that may be imposed or collected in connection with FATCA to the extent such withholding is due to non-compliance by the other party to the Agreement”

• Treat FATCA taxes remitted as an amount due from other party
  
  – Relevant where netting of payments but withholding on gross
  – “If at any time a party (the "first party") is required to remit an amount of tax with respect to a payment under a Transaction in connection with FATCA, then without duplication of any amount the first party has deducted on account of such tax from any amount previously paid to the other party (the "second party") pursuant to the Transaction, the amount so required to be remitted shall be an additional amount payable by the second party to the first party on the payment date on which a payment giving rise to remittance required under FATCA occurs. Upon the reasonable request of the second party with respect to any payment date, the first party will supply to the second party computations setting forth in reasonable detail the amount payable on such payment date pursuant to the preceding sentence.”
GMRA FATCA Protocol

Additional provisions for consideration (cont’d)

• Require tax documentation
  – “it will deliver to the other party or to such government or taxing authority as the other party reasonably directs, any form, document or certification that may be required or reasonably requested in writing in order to allow such other party to make a payment under this Agreement without any deduction or withholding for or on account of any taxes or with such deduction or withholding at a reduced rate (so long as the completion, execution or submission of such form, document or certification would not materially prejudice the legal or commercial position of the party in receipt of such demand) and any such form, document or certification will be accurate and completed in a manner reasonably satisfactory to such other party and will be delivered by the date specified in the written request (or if not specified, as soon as reasonably practicable)”

• Additional tax events
  – “in its reasonable determination, it is required, pursuant to FATCA, to terminate the relevant Transaction”
  – “it is required based on written advice of counsel to receive payments net of FATCA withholding taxes”
Approaches in loan documentation

Approaches to risk allocation:
- FATCA excluded from gross-up – LSTA approach and LMA Rider 3
- FATCA excluded from gross-up (but change in FATCA included)
- FATCA excluded from gross-up but rely on grandfathering with Lender ability to veto amendments - LMA Rider 2
- Borrower rep that Obligors’ status makes FATCA irrelevant – LMA Rider 1A
- FATCA gross-up/indemnities [with replacement / prepayment right] – LMA Rider 1B
- FATCA gross-up with no replacement / prepayment right

Other provisions:
- Information exchange – LMA common provisions
- Note that reliance on grandfathering (LMA Rider 2) ceases to be viable from mid 2014 for US source loans
IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.
Q & A
Biographies of Speakers

**Patrick Pang**
Managing Director - Fixed Income, Compliance and Tax
Asia Securities Industry & Financial Markets Association (ASIFMA)

Patrick Pang covers ASIFMA’s cross markets initiatives, including tax and compliance, and also works closely with various fixed income committees with a primary responsibility for government securities and funding/repo.

He joined ASIFMA from Credit Suisse in November 2012 with more than 20 years of industry experience and has a wide range of banking experience in structured finance products, including aircraft financing, capital structuring, single stock illiquid financing, direct principal investments, and other bespoke financing solutions. Additionally, Patrick possesses a wealth of experience in tax, accounting, legal documentation, transaction execution, and KYC/AML.

Patrick has held roles in the industry such as Director at Merrill Lynch, heading up the APAC Structured Equity Finance & Trading desk; Director at Deutsche Bank and part of the Strategic Equity Transactions Group; and Director at Citigroup, heading up the APAC Global Structured Solutions Desk. Prior to his career in banking, Patrick was a tax professional employed at Price Waterhouse and also a Vice President at Morgan Stanley Tax. He has spent time in the mining industry as well, consulting for a mining company in China.

A Chartered Accountant and Fellow of the Financial Services Institute of Australasia, Patrick also holds a Bachelor of Commerce degree from the University of Melbourne. He speaks English, Mandarin Chinese, Cantonese, and Bahasa Malaysia and Indonesia.
Paul DePasquale
Associate
Baker & McKenzie Hong Kong


Paul’s practice focuses primarily on US international tax planning and wealth management matters, including subpart F and PFIC planning, treaty issues, general and international tax planning, withholding tax, tax compliance, information reporting, qualified intermediary, and FATCA. Paul has handled numerous engagements for banks, insurance companies, family offices, trustees, pension funds, and industry associations regarding FATCA. Paul has given many speeches in Europe and Asia on FATCA and has co-authored several articles on FATCA’s impact on the financial services industry.

Paul mainly advises US and multinational clients, including banks, fiduciaries, insurance companies, and high net worth individuals and families on US federal tax issues.

Paul received his JD from the University of Michigan Law School. Paul is a member of the New York bar and has previously practiced in Baker & McKenzie’s Zurich office.

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Angelica Kwan
Partner, US Tax
PricewaterhouseCoopers Hong Kong

Angelica returned to Asia after having advised clients as a US tax lawyer in New York for 15 years. Prior to 2011, Angelica was a US tax partner at Sidley Austin LLP in New York.

Angelica has extensive US tax experience with cross-border structuring, M&A deals, and corporate and partnership transactions. Clients have ranged from private equity and hedge funds and their institutional investors, to AsiaPac and US multi-national corporations and leading financial institutions. Angelica’s practice includes US tax compliance as well as US tax consulting.

Angelica is a PwC lead partner in Hong Kong/China for the Foreign Account Tax Compliance Act (FATCA). She is part of the Joint Industry FATCA Working Group formed by the Hong Kong Trustees’ Association, the Hong Kong Investment Funds Association and the Hong Kong Federation of Insurers. Angelica is a frequent speaker on FATCA, including at events hosted by the Hong Kong Institute of Bankers, the Hong Kong Venture Capital and Private Equity Association, the Chinese Venture Capital Finance Organization, the Alternative Investments Management Association – Hong Kong Chapter, the Tax Executives Institute – Asia, and the Capital Markets Tax Committee.

Angelica is active as a lead tax partner on a number of global and local FATCA engagements. These engagements span the banking, asset management, MPF/ORSO retirement schemes, brokerage and insurance industries.

Angelica has a JD magna cum laude from Harvard Law School. She also has an MBA from Stanford, where she was an Arjay Miller Scholar. Angelica is licensed as an attorney in New York and the District of Columbia.
Biographies of Speakers

Mark New
Assistant General Counsel
International Swaps and Derivatives Association, Inc. (ISDA)

Mark New is Assistant General Counsel at the International Swaps and Derivatives Association, Inc. where he works primarily on credit derivatives documentation. In this role he has worked on a large number of ISDA projects, including the Big Bang and Small Bang protocols and the republishing of all credit derivatives documentation impacted by those protocols.

Mr. New coordinates a number of ISDA working groups relating to credit derivatives documentation, including indices, CDS on ABS and loan-only CDS, and he carries out ISDA’s functions relating to meetings and decisions of the Americas Determinations Committee. He is also a regular speaker at ISDA conferences on credit derivatives and the ISDA Master Agreement.

Prior to joining ISDA, Mr. New was a structurer on the European Structured Credit Products desk at Citigroup in London, where he worked on new product development and structuring a wide variety of synthetic credit transactions. Previously he worked as an associate in the Derivatives and Structured Finance group at Allen & Overy in London.

Mr. New graduated with first class honours in law at Oxford University and was a Fulbright Scholar at the University of California, Berkeley where he took an LLM degree. He is a member of the New York bar and a solicitor of England and Wales.
Biographies of Speakers

Sharon Kim  
Counsel  
Ashurst Washington DC

Sharon advises arrangers, issuers and investors on the U.S. tax aspects of capital markets transactions, including debt and equity offerings, investment funds, structured finance transactions, and derivative products. She also advises lenders and borrowers on the U.S. tax aspects of loan transactions.

She has co-authored several client briefing and articles covering the impact of FATCA on various capital market transactions. Sharon holds a JD from the University of Virginia School of Law.

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Biographies of Speakers

Dauwood Malik
Partner
Clifford Chance, Hong Kong

Dauwood is a banking and finance partner based in Hong Kong. As well as covering a variety of debt products, Dauwood specialises in real estate investment and development financing, acting for major banks and borrowers. Prior to relocating to Hong Kong in early 2007, Dauwood worked in London, Tokyo and Singapore.

Admitted in England and Wales and Hong Kong.

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ASIFMA

The Asia Securities Industry & Financial Markets Association (ASIFMA) focuses on issues related to the development of capital markets in Asia. ASIFMA staff consists of knowledgeable professionals who communicate industry perspectives to regulators, policymakers and the general public, while also supporting the day-to-day commercial activities of member firms through initiatives relating to market standardization and best practices.

On behalf of our members, we are committed to making constructive contributions to policy development and providing leadership in advancing the interests of all capital market participants in Asia, as well as lowering the cost of doing business in the region.

ASIFMA’s offices are located in Hong Kong and our staff travel frequently across the region and globally to ensure regular interaction with members, regulators, and other relevant stakeholders.

Mission

ASIFMA’s mission is to promote the development of liquid, efficient and transparent capital markets in Asia and facilitate their orderly integration into the global financial system.
Member Driven Priority Setting

ASIFMA membership includes global and regional banks, securities dealers, brokers, asset managers, credit rating agencies, law firms, trading and analytic platforms, and clearing and settlement providers. Members establish association priorities through a collaborative process at the board of director level and also within the 3 product specific divisions. We also address issues related to Global Financial Markets Association (GFMA) priorities.

Fixed Income
- Government Securities
- Funding
- Credit Markets
- Securitization and Structured Credit

Cross Markets
- Compliance
- Post-trade
- Offshore RMB Markets
- Tax
- Capital Markets/Corporate Finance

Foreign Exchange

Equities
- Securities Trading

GFMA Priorities
- Asia LEI (Legal Entity Identifier)
- TBTF Resolution
- OTC Derivatives
Global Alliance

ASIFMA operates as an independent regional organization with global integration through membership in GFMA, along with global alliance partners the Association for Financial Markets in Europe (AFME) in London and Brussels and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington, DC.


Leadership

ASIFMA is led by board of directors chairman David Ratliff, managing director, head of investor sales & relationship management at Citibank; vice-chairman Christopher Jackson, managing director, chief operating officer, Asia Pacific fixed income at Morgan Stanley; and around 30 other senior representatives from major global financial institutions who also sit on the board. Mark Austen is ASIFMA’s chief executive and also sits on the board.

History

ASIFMA was founded in October 2006 in order to replicate the work being done by SIFMA in the US and AFME in Europe. For the first five-and-a-half years, ASIFMA focused primarily on the development of debt capital markets in China, India and Korea. In June 2012, the board of directors voted to expand ASIFMA’s reach by creating an Equities Division, and, in August 2012, the Global FX Division (GFXD) appointed a managing director to lead GFXD initiatives in Asia Pacific.
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