

27 February 2015

Group Executive: Interpretation & Rulings
SARS Legal & Policy Division
Khanyisa Building
Brooklyn
PRETORIA
0001

BY E-MAIL: POLICYCOMMENTS@SARS.GOV.ZA

Dear Sir/Madam

RE: DRAFT GUIDE – US FOREIGN ACCOUNT TAX COMPLIANCE ACT (“FATCA”)

Thank you for the opportunity to contribute commentary on the draft guide on the compliance requirements of South African taxpayers with FATCA as required under the inter-governmental agreement.

Below are our comments in this regard for your consideration.

1 Paragraph 2.4: “Custodial Institution”

A “Custodial Institution” is defined as any entity that holds, as a substantial portion of its business, financial assets for the account of others.

In determining whether the entities in the group are required to register with FATCA, brokers should also be considered. In the short term insurance industry, brokers often hold the premium for 45 days before paying it over to the insurance companies. This creates a scenario where the brokers will fall into the definition of a “custodial entity”.

Most brokers will deal with pure short term insurance companies and will most likely only have SA residents as their customers.

Therefore a scenario may arise where a broker has to register, even though the short term insurance policies it sells are out of the scope of FATCA as well as all its counterparties. In that event, they would not have any accounts to report on.

Submission: More clarity is needed in respect of the above anomaly as the guide does state that “certain brokers and trust companies, custodial banks, and clearing organisations that hold assets on behalf of others are all likely to fall into the definition of “Custodial Institution”.

2 Non-compliance dispute

The intergovernmental agreement only seems to provide for the Financial Institution to be classified as a Nonparticipating Financial Institution which may result in the withholding tax applying.

However the guide states at 5.10 that the IRS and the SA Competent Authority at their discretion will determine compliance.

At 6.4 the guide states that penalties under the implementing legislation can be imposed for significant non-compliance.

However, the guide provides no details as to the procedure of how a Financial Institution would contest a finding of significant non-compliance and under the ambit of which local legislation this falls, for example is it covered in the Tax Administration Act.

No guidance is provided as to what the penalties are and what procedures the Financial Institution or such other party can follow to contest these penalties in a fair and administratively just manner.

Submission: More guidance should be provided on the consequences and the South African law penalties that may be imposed for non-compliance and the procedures how disputes are to be raised in respect of both a matter of non-compliance or penalties.

Lastly, as the compliance is in effect with foreign law as the local law refers to compliance with the information required by the IRS on the US Treasury website, guidance is needed as to how a court would have to approach this matter in terms of SA local law when determining any dispute as to whether non-compliance did exist?

Thank you for the opportunity to contribute to the development of the tax law. Should you have any enquires regarding our submission please do not hesitate to contact me.

Yours sincerely,

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Deputy Chief Executive Officer

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