USA, a nation of over 313 million people with one of the highest GDP in the world, approximately 18 times of Indonesia's yearly Gross Products is now going around the world to find and catch her own citizens and green cardholders (US persons) who earn income and accumulate wealth outside of the country. The objective is to collect US Government's share of their global income or else hand them hefty monetary penalties and even imprisonment for ignoring or violating the US income tax law; in some cases retroactively for eight years.

United States is the only member nation of Organization for Economic Cooperation & Development (OECD) which requires its people and their businesses to report global income on their US income tax returns; irrespective of their place of residence. Despite such a rule, US economy suffers an estimated loss of over $500 billion per annum in lost tax income due to tax evasion on foreign source income and assets hidden outside of the country. This alarming trend was a key motivating factor behind the promulgation of FATCA legislation which was part of the HIRE Act (Hiring Incentives to Restore Employment) in 2010. The underlying objective of the new legislation was to improve tax compliance for financial assets held by US persons in bank accounts and other financial vehicles outside of the country and strictly impose historical law of yearly reporting of global income to eventually facilitate the US administration in its efforts to reduce country's ongoing budget deficit.

The Act requires US persons to report bank accounts and other financial assets to the IRS on form 8938 i.e. “Statement of Specified Foreign Financial Assets”. This global tax regime does not stop here. On the parallel, the legislation through its Inter-Governmental Agreements – IGA (Model 1 or 2) between US and foreign governments; requires Banks, Foreign Financial Institutions (FFIs), Investment Companies, Brokers, certain Insurance carriers and even some Non-Financial Foreign entities to report to the US taxing agency i.e. the Internal Revenue Service (IRS), information about financial accounts or assets held by US individuals or foreign entities in which he/she holds a controlling interest and ownership.

Many developed countries such as Germany, France, United Kingdom and several other have already signed such IGA’s with US to start reporting the required financial data effective from June 30, 2014. At the same time several other nations have either already entered or are seriously
considering to enter into IGA’s soon but have not yet made it public. However, they will be considered in agreement with the US as of the rollout date i.e. June 30, 2014. Standard IGA models with slight adjustments are made country specific and subjected to certain terms including due diligence rules applicable to reporting as defined in the Final Regulations TD 9610 may also contain favored nation and coordination provisions.

FIGHTING TAX EVASION – High on Agenda

Tax avoidance and tax evasion threaten government revenues. It is therefore not surprising that fighting tax evasion is amongst the top priorities of US administration to help manage the burgeoning budgetary deficits. The Government has already started investigations against International Banks for helping US persons to hide financial assets and evade US income taxes. One recent example is Switzerland’s oldest Bank Wegelin & Co., founded in 1741, which closed its doors and paid huge penalties to the US authorities after admitting to maintain accounts of US persons who had concealed their wealth from US tax authorities. Global financial giant UBS had to provide information on over 4,500 US account holders and paid millions of dollars in fines to the US authorities. Similarly there are convincing media reports about US investigations against Banks in India for possible tax evasions by US persons of Indian origin. It is alleged that the Indian unit of a large British Bank potentially helped thousands of Americans to dodge US income taxes.

Even within the US, some residents of foreign origin as well as US persons have entered into guilty plea in US courts for hiding their wealth in foreign accounts maintained in Banks operating outside of the US. In the coming days and weeks, this onslaught on tax evasion is expected to become more forceful and fierce; thus making it all the more important for US persons in and outside of the US to bring their tax affairs and income/assets disclosure requirements current with the US authorities without any further delay.

FATCA & Indonesia

FATCA will affect virtually all financial institutions in Indonesia such as banks, insurance companies, custodial institutions, hedge funds, mutual funds, superannuation funds, trustees, investment companies and managers, securitization vehicles, and private equity firms operating in and outside of the country. In general, any institution in Indonesia holding financial accounts/assets with the following type of clientele is exposed to FATCA implications:

- Indonesian residents who hold US Citizenship or Lawful Permanent Resident status (Green Card holders) of United States of America.
- Indonesia Citizens with an H1B, H4, L1B, L2, J1, or J2 visa working and living in the USA, and are obligated to file a US income tax return.
- Indonesia companies with substantial ownership of US person(s).

Institutional Framework

A key step towards FATCA compliance would be the signing of Inter Governmental Agreement between the US and Indonesian Government. Though the Indonesian officials have not made it public when it intends to execute IGA with the US however one can safely assume that the relevant Government functionaries must be considering FATCA implementation and its implications very seriously. In particular, the possible conflict with the existing Banking laws & regulations in Indonesia needs to be appropriately addressed. For instance as per Banking Law No. 7 of 1992, a bank’s discretion to disclose customer information for tax disclosure purposes is quite restricted. Article 41 of the Banking Law stipulates that a bank may disclose customer information only to the Ministry of Finance and upon request from the Minister. Such request must in turn be approved by Indonesian Central Bank. Similarly, the Electronic Information and Transaction Law (EIT No. 11/2008) provide both civil redress and criminal sanction against unauthorized disclosure of private information. Article 26 provides that
unless stipulated otherwise by law, a person’s consent is required before his data may be used. Infringement of this right entitles a person to file a civil claim for damages. Meanwhile, Article 32 criminalizes every person who transmits or assigns private information owned by another person onto another party without a right to do so or unlawfully. In the absence of an Intergovernmental agreement and suitable amendments to the existing legal framework, banks will face a serious dilemma as to how they may proceed with FATCA compliance.

It is also not clear whether Indonesia would opt for model 1 or 2 of the IGA while deciding on how to implement FATCA. Many FATCA experts suggest Model 1 to be the better option amongst the two choices. Under this model, all local and foreign banks operating in a country become legally bound to share account data of their clients subjected to FATCA requirements. However, the channel through which this reporting is made is different as they will first report the data to their domestic authorities which on a Government to Government level will electronically forward it to the US tax agencies. If Indonesia decides to opt for this model, relevant authorities involved in FATCA implementation could be the Directorate General of Taxation (DGT), Financial Service Authority (OJK), Bank Indonesian (Central Bank), Ministry of Finance, Indonesian Capital Market and Financial Institution Supervisory Board (Bapepam-LK), Ministry of Law (Kemenkumham) and Ministry of Foreign Affairs.

**POTENTIAL INSTITUTIONAL FRAMEWORK UNDER IGA MODEL 1 WITH US**

**FATCA effects on American Citizens and Green Card Holders in Indonesia**

Almost eight million US born and naturalized American citizens and twice or so Green Card holders reside out of US. However, no authentic source has yet come up with a reliable estimate of those who earn income, maintain bank accounts and other financial assets, own businesses & properties in Indonesia. Starting calendar year 2011, FATCA has subjected all such US persons to report on Form 8938 their Bank, investment and brokerage accounts as well as other specified financial assets including but not limited to cash value of life insurance contracts and accumulation in certain retirement plans.

Reporting of global income on US income tax return, including income earned in Indonesia, has undoubtedly is an important legal obligation of all US persons living in Indonesia. This is in addition to the long-standing requirement for US persons in Indonesia to report their bank accounts on Form 114 i.e. “Report of Foreign Bank and Financial Accounts (FBAR)” to the US Department of the Treasury. Those who have not yet complied with the above obligations should seriously consider getting current and up to date in mandatory filing required by the US tax authorities. They can also take advantage of the currently open amnesty program by the US officials offering considerably lighter consequences. However, by continuously ignoring and further violating the law, US recalcitrant living in Indonesia who are subject to FBAR and FATCA as well as reporting of global income are exposing themselves to heavy financial penalties and even criminal prosecution by US authorities. Being unaware of law may not constitute an excuse or immunity from the serious consequences of violation.

**FATCA Penalties**

The penalties for US persons living in Indonesia who are subject to FATCA and are in violation of their legal obligations starts with a minimum of $10,000 straight and additional penalty of up to $50,000 for continued failure to file after IRS notification,
40 percent penalty on understatement of tax attributable to non-disclosed assets or a big chunk of maximum asset value, even jail time or combination of all. In the near past a fair number of individuals in different countries have been penalized and sentenced for not reporting global income on their US tax returns, a violation of long-existed rule applicable to US citizens, resident aliens and people of certain other status.

**FATCA implications for the Financial Sector in Indonesia**

Globally, Banks and Financial Institutions subject to FATCA compliance are estimated to be over half a million. Indonesian banks and financial institutions operating in and out of the country are required to register with the US taxing authority. Upon approval (under IGA Model 1) they will obtain a Global Intermediary Identification Number (GIIN) and status of Registered-Deemed Compliant Foreign Financial Institution (RDCFII). Once the roll out begins, they will have no choice but to ensure full compliance as per the agreement to be made between the US & Indonesian Government. In general, **FATCA would require Indonesian financial institutions to report to the IRS data on financial accounts held by US taxpayers, or by Indonesian entities in which US taxpayers hold a controlling interest. The initial such reporting will be due by June 30, 2015.**

The regulation under IRS Section 1471 thru 1474 has described certain provisions for opening new accounts w.e.f. July 1, 2014 requiring segregation of US persons account and sub-classifying those in disclosed US status by customer, undisclosed US status by customer and non-compliant and non-registered financial institutions when opening an account with FATCA registered-deemed compliant bank and financial institution. Separate guidelines have been provisioned for examining and reporting pre-existing accounts based on account balances as of June 30, 2014. Ongoing compliance structure, reporting and eventual withholding guidelines regarding US persons’ accounts will be described in the IGA to be signed between the governments of US and Indonesia. Moreover, FATCA regulation will be independent of the KYC and AML requirements that Banks & other financial institutions may already be subject to under the current regulatory regime.

Subsequently, US Departments of Justice, Treasury and respective agencies subjected to IGA may instruct Indonesian banks, financial institutions and other entities to withhold 30% of gross proceeds of certain financial transactions mainly of contenders and non-compliers and remit the same to the IRS through Qualified Intermediaries (QI), Withholding Foreign Partnerships (WP) as well as Withholding Foreign Trust (WT). Periodic internal certification by responsible officers at Indonesian banks and financial institutions and their year end compliance audits by the independent auditors have also been provisioned in the newly published final resolution under IRS 26 CFR Parts 1 and 301 to ensure FATCA compliance.

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**FATCA ROADMAP FOR FFIs...**

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<tr>
<td>Revise Procedures for New Account Opening</td>
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<td>Report account data to the IRS</td>
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<td>Start withholding 30% on noncompliant accounts</td>
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Given the complexity of fairly long phased global implementation of FATCA continuing through 2017 as provided for in the final regulations entails a big price tag of over $25 billion in estimated implementation costs. This cost estimate itself speaks loud of the significance and wide scope of FATCA and its implications for financial institutions across the globe. A proportionate share of this cost is to be borne by banks and financial institutions in Indonesia. There has been no indication of US Government or any of its agency's financial and logistical support for Indonesia's Banking and Financial Industry to carry out the costly implementation and ongoing compliance. In such a scenario, the
costs without a doubt will be indirectly passed on to the end customers of Indonesian Banks and Financial Institutions who are subjected to the legislation.

**CONSEQUENCES:**

Financial Institutions in Indonesia failing to comply with FATCA face a 30-percent withholding tax on their U.S. source income. The deduction would be made by US financial institutions (USFIs) and other types of US withholding agents such as US Banks and Financial Institutions, Non-US Banks and Financial Institutions, U.S. and Non-US Businesses. In addition, Non Complaint Indonesian Banks and Financial Institutions can also face Clearing house restrictions in the US which could severely cripple their overseas operations, black listed status with US banks and companies, restrictions on banking operations in the US and its territories, legal proceedings in US courts etc.

Considering the resolve that the US authorities have shown concerning FATCA, it is obvious that any impediment in the path of regulations smooth implementation by any Government or institution may not be taken lightly and may broaden challenges in its relationship with the US Administration. One can therefore safely assume that Indonesia, being a responsible nation synchronized with the rest of the world will take necessary measures to lay down groundwork for smooth FATCA implementation. Therefore it is of utmost importance for Indonesian Banks and other financial institutions to keep FATCA compliance on their top priority. On the other hand, institutions opposing FATCA or formulating policies to discontinue or discourage banking/financial relationships with US persons to avoid FATCA compliance may not only loose lucrative business opportunities but also face reciprocal treatment by US institutions, ultimately doing more harm than good to themselves and to the country.

Similarly, US persons opposing the legislation may very well be hard pressed to crystallize their disagreement with US Government's exercising its right to bring its own people in compliance who otherwise benefit being a US person from country's resources. However, it would be fair and perhaps reasonably acceptable by policy makers and even masses in other countries if their Government assists in safeguarding US interest by implementing FATCA without any financial burden on its resources and with the assurance of not sacrificing country's national interest in any manner.

Similarly, it is also a possibility that US persons residing in Indonesia who are affected by FATCA in an attempt to avoid US taxes and penalty as well as the risk of possible imprisonment may possibly consider rescinding their US Citizenship or giving up residency. In other words, if they opt for a path similar to Facebook co-founder Eduardo Saverin who renounced his US citizenship to apparently avoid US taxes, they will not only be required to get in compliance by fulfilling outstanding tax filing, reporting global assets and income and pay taxes but will still remain subject to consequences of FATCA; even after disconnecting from their US status, since FATCA in certain cases allows US agencies up to eight years of look back period. Though US and Indonesia may not have “wanted person” swap policy in effect, however, affirmative comments of law specialists on US authority's ability to possibly prosecute former US citizens, green card holders and others subject to FATCA in international court in addition to US Justice system further intensifies the consequences for non-compliers and contenders. US expatriates may have no immunity available from being tried in international courts which in certain circumstances is available to US citizens.

Indonesian Banks and FIs subjected to FATCA, being the key stakeholders of regime’s implementation as well as ongoing compliance in Indonesia are in a relatively better position as they have been given a generous timeline for preparation and compliance. Although in the pre FATCA regime, only a few reputed global institutions were charged with hefty penalties by US authorities for not providing information on American account holders; however once the act is fully operational, non-cooperating and
non-compliant Indonesian Banks and FIs will be subjected to heavy penalties i.e. 30% withholding tax penalty from their US source deposits and proceeds, risk of losing US clearing privileges, being blacklisted and banned from doing business in and outside the US as well as with its businesses and partner nations.

Conclusion
Parties involved in and affected by FATCA including Banks, Financial Institutions, US persons and others in Indonesia now have to make a tough choice to end their dilemma i.e. either START complying and face complications Or GIVE UP and face complications? Most experts, for obvious reasons, recommend the first option as it offers flexible, less risky, appropriately tailored and better controlled solution starting off with the negotiated terms and conditions of IGA. Furthermore, appropriate record keeping, equipped with imminent adjustments to the existing system as well as willingness and preparedness for ongoing compliance may very well provide a strategic plan in line with Indonesia's internal laws, banks and financial institution's own budgetary concerns and adoption of overall improved reporting standards. Thus, eventually making FATCA a smooth journey for Banks, Financial Institutions, US persons as well as for the Government of Indonesia.

* The views expressed in this article are those of the author and do not necessarily represent the views of and should not be attributed to, any other agency or authority whatsoever. For more information or to share your own views on the subject, you may contact the author at squadri@swqpc.com or by calling the direct line at +1-516-236-9109.