Who's afraid of FATCA?

withersworldwide

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We are now firmly in the FATCA era and moving on to the post FATCA era. With the first FATCA reports being submitted in March 2015, by now many FFIs have registered and obtained their GIINs, trustees are documenting their trusts, holding companies have entered into appropriate sponsorship agreements, and the financial world is a flurry of W-8BEN-Es and tax status questionnaires. Many have come to the realisation that, although an annoyance, FATCA compliance is manageable. As many of us predicted, for compliant Americans, it is really just another form.

However this has not stopped financial institutions from using FATCA as an excuse either to exclude US clients or impose special requirements (for instance, minimum account balances) on US clients wishing to open or maintain bank accounts. Some financial institutions are offering to help clients with FATCA compliance for a fee, which is a handy way to generate revenue from a government requirement.

Americans residing outside of the US have long bemoaned the pariah status that FATCA seemingly imposed on them from the beginning. As labourers in the FATCA vineyards we are now coming to the conclusion that FATCA is being blamed for all the ills of the financial system, in some cases unfairly. It seems, despite the efforts of the US and local jurisdictions to ease the reporting implications of FATCA, primarily through the Intergovernmental Agreements, Americans still face difficulty when dealing with banks and other financial institutions. Perhaps these banks with some exposure are still smarting from their dealings with the US Department of Justice, either under a criminal investigation or a non-prosecution agreement.

Banks will need to develop a reasonable approach to FATCA reporting since, relatively soon, the OECD's Common Reporting Standard (CRS) will also come into effect. The CRS is the first genuinely multinational automatic tax information exchange and will see OECD countries (including just about all European countries) voluntarily exchanging information about each others' residents. It is intended to be consistent with FATCA reporting – so US citizens will not be alone.

When the US introduced FATCA many European countries objected to the long arm of US tax jurisprudence and claimed that data protection rules prevented compliance. Gradually the EU and OECD countries came round to thinking that, if adopted it could provide a good basis for implementing the long standing OECD information exchange initiative, and so most of the OECD countries have entered into intergovernmental agreements with the US to implement FATCA consistent with data protection laws. These agreements have formed the basis for implementation of CRS. And they can blame the Americans when anyone complains.

But the problems that US citizens can face in opening and maintaining investment accounts outside the US are not really related to FATCA in our view. Instead the blame should be laid at the door of a different part of the alphabet soup of cross border regulations. The AIFMD (Alternative Fund Managers Directive) has combined with the SEC and Dodd Frank US regulations mean that managers offering fund investments on a retail basis now face a much higher degree of regulation. So Americans can still open bank accounts but finding an investment manager is more challenging. Partly this also reflects the competing US and UK tax issues for fund investors.

So Americans abroad can still have cash deposits, buy equities and bonds and trade currencies. But if they want to buy funds they will need to seek out the small, but growing, number of managers who are geared up for the new fund regulatory environment. So this Thanksgiving Americans should pardon the FATCA turkey and hunt for sophisticated fund managers for their investments.