

# Assessing the broad impact of the FATCA on Algerian companies

December • 2014

## A substantial impact on companies outside the US



**Rafik Boussa**

Managing Partner

T +213 21 288 429

E rafik.boussa@dz.gt.com



**Salah Abci**

Partner

T +213 21 288 429

E salah.abci@dz.gt.com

On 1 July 2014 the withholding provisions of the Foreign Account Tax Compliance Act (FATCA), a US federal law, took effect. Although a US law, FATCA has had a substantial impact on companies outside the United States including Algerian companies. For example:

- FATCA requires US companies that are making certain types of payments to Algerian entities to withhold 30% of the payment unless the Algerian recipient provides the US company with documentation attesting to its FATCA status.
- FATCA requires non-US Foreign Financial Institutions (FFIs) to implement procedures to identify and report on account holders that are US citizens or residents. As a result, FFIs have been requesting that many of its account holders provide new types of documentation.
- In the near future, FATCA may require that Algerian companies withhold on gross proceeds of the sale of assets which give rise to US-source dividend or interest income (eg stock of a US company or US debt obligations).

For the most part, FATCA readiness for Algerian companies means being prepared to respond to requests for documentation, which may require the collection and analysis of data from many entities throughout the Algerian multinational affiliated group. As this can take significant time and resources, Algerian companies should act now rather than being caught unprepared and running the risk of being subject to the 30% withholding tax under FATCA.

### FATCA overview

FATCA is triggered when someone (usually a US entity) makes what is known as a 'withholdable payment' to a non-US entity. In order for a payment to be 'withholdable' it must:

1. be sourced to the US
2. be a payment for what is known as Fixed or Determinable Annual or Periodical (FDAP) income.

FDAP income is a very broad category that includes virtually every type of income other than capital gains from the disposition of property. Examples of withholdable payments include payments of US source interest, royalties, dividends, rents and premiums for insurance contracts.

Although the definition of withholdable payment under FATCA can be very broad, there are several types of payments which are excluded from FATCA's reach. The most prevalent is the exception for 'excluded nonfinancial payments', which provides that certain payments made within the ordinary course of business will not give rise to FATCA withholding or documentation requirements. Payments under this exception include payments for:

- services (including wages and other forms of employee compensation)
- the use of property
- office and equipment leases
- software licenses
- interest on outstanding accounts payable arising from the acquisition of goods and services.



*“FATCA was enacted to deter tax evasion by US taxpayers who are earning unreported income through accounts held directly or indirectly through foreign entities.”*

Importantly, most 'passive' type payments (such as dividends and interest not described above) do not qualify as excluded nonfinancial payments. However, an exception may apply for interest paid under certain debt instruments known as 'grandfathered obligations' that were outstanding on 1 July 2014, have a fixed term, and have not been materially modified after 1 July 2014.

If a payment is a 'withholdable payment' and no exceptions apply, the payor (also known as the 'withholding agent') must obtain documentation from the payee that contains information regarding the payee's FATCA status. If the payee does not provide this documentation, the withholding agent is required to withhold 30% of the withholdable payment and remit to the US tax authorities.

## FATCA and 'traditional' withholding

The objective of traditional US withholding is to collect tax on nonresidents who are not engaged in business in the US but whom earn FDAP income that is sourced to the US. The US has a domestic withholding rate of 30%; however this rate is often reduced under a tax treaty with the non-US recipient's country of residence. Algeria currently does not have a treaty with the United States.

In contrast, FATCA withholding was not designed to be a 'tax' on income. Instead, FATCA was enacted to deter tax evasion by US taxpayers who are earning unreported income through accounts held directly or indirectly through foreign entities. FATCA seeks to achieve this objective by using a withholding tax mechanism to motivate the foreign entities to report information about their US account holders and/or US owners. Tax treaties therefore do not apply to reduce FATCA's 30% withholding rate. FATCA rules must be applied before the traditional withholding rules. Ultimately, only one withholding tax (FATCA or traditional) will apply.

## Practical impact on Algerian companies

Because of its broad reach, FATCA can affect an Algerian company as well as its US and foreign subsidiaries as follows

### **Algerian entities (or their non-US subsidiaries) may need to determine and provide documentation attesting to their FATCA classification.**

The key question for an Algerian entity that must provide FATCA documentation is to determine its FATCA classification. FATCA divides payees into two categories - FFI and Non-Financial Foreign Entities (NFFEs). Most FFIs are banks that are involved in depository, custodial or investment activities - however holding companies, treasury centers and insurance companies can also be FFIs in certain circumstances.

NFFEs, on the other hand, are all entities that are not FFIs.

### **Pathways to compliance**

FFIs and NFFEs have different paths to achieve FATCA compliance and documentation. If the payee is an FFI, the path to FATCA compliance is generally more onerous and will depend on whether the FFI's country of residence has consummated an Intergovernmental Agreement (IGA) with the US and the type of such IGA.

Algeria has reached an agreement in substance to enter into what is referred to as, a 'Model 1 IGA' with the US which means that the Algerian FFIs may be required to disclose certain information related to US accounts to the Algerian government, which will in turn provide such information to US authorities. Algerian FFIs will also need to register with the US tax authorities and will receive a Global Intermediary Identification Number (GIIN) that must be included with FATCA documentation.

FATCA compliance and documentation for Algerian NFFEs is significantly less complex than for Algerian FFIs. Algerian NFFEs can comply with FATCA in one of two ways. First, an Algerian NFFE can provide documentation to the withholding agent that either discloses its 'substantial US owners' (generally a US person that directly or indirectly own more than 10% of the Algerian NFFE) or discloses that it has no substantial US owners. Second, an Algerian NFFE can determine whether it qualifies for an exception from FATCA withholding.

Two of the most common are the exception for publicly traded corporations (including certain affiliates) and the exception for 'Active NFFEs'. The publicly traded corporation exception exempts from FATCA disclosure requirements corporations (and certain affiliates) the stock of which is regularly traded on one or more established securities markets for the calendar year. The active NFFE test exempts an NFFE from FATCA disclosure requirements if less than 50% of its gross income for the preceding year is passive and less than 50% of the weighted average percentage of the assets held by it (tested on a quarterly basis) are held for the production of passive income. Both the publicly traded corporation exception and the active NFFE exception require the NFFE to apply US tax rules in determining whether the NFFE meets the test.

Once FATCA status has been determined, both FFI and NFFEs will then provide documentation to the withholding agent. In most cases, the withholding agent will require the FFI or NFFE to provide the newly revised 'Form W-8BEN-E'.

### **US subsidiaries of Algerian companies may have new documentation and withholding requirements**

As above, FATCA requires that US payors withhold 30% on withholdable payments from foreign entities who do not comply with FATCA documentation requirements. Therefore, US subsidiaries of Algerian companies may be required to obtain documentation from foreign payees and, if no documentation is provided, withhold on such payments.

Importantly, there are no general exceptions from FATCA documentation and withholding requirements for withholdable payments made to a related party. For example, FATCA might potentially apply to a dividend payment from a US subsidiary to its Algerian parent, or interest payments made to a sister corporation.

## **How can Grant Thornton help**

Algerian and other entities receiving payments from withholding agents should be prepared to provide documentation of FATCA status. Further, US subsidiaries of Algerian companies will need to determine whether they are making 'withholdable payments' under FATCA and, if so, whether they have the necessary documentation from payees or are otherwise withholding 30%.

Grant Thornton's global network of member firms has the experience and insight needed to help Algerian companies understand and manage potential FATCA issues. We can work with you to determine the FATCA status of entities within your multinational group and assist in your compliance with FATCA requirements. We can also work with you to determine which payments will be subject to FATCA withholding and ensure that your company fulfills the new documentation and withholding requirements. This may require review and analysis of your accounting systems ability to capture the relevant information as well as improving processes and procedures to ensure compliance.



© 2014 Grant Thornton International Ltd. All rights reserved.

'Grant Thornton' refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires.

Grant Thornton International Ltd (GTIL) and the member firms are not a worldwide partnership. GTIL and each member firm is a separate legal entity. Services are delivered by the member firms. GTIL does not provide services to clients. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions.

[granthornton.global](http://granthornton.global)