

## **FATCA and Brazilian Citizens Holding Assets Abroad: Can the Apple Fall Far From the Tree?**

In force since March 18, 2010, the United States Foreign Account Tax Compliance Act (FATCA) was enacted due to pressure from the US government for transparency regarding US taxpayer bank accounts outside the country. The Act requires foreign financial institutions (FFIs) to report accounts held by US taxpayers to the US government, under penalty of having US source income payments to them withheld at a rate of up to 30%.

On September 23, 2014, Brazil and the United States celebrated an intergovernmental agreement (IGA) to improve information exchange and to create the required structure for Brazilian FFI compliance with the FATCA obligations<sup>1</sup>. The agreement imposes strict rules on Brazilian banks, requiring them to report information on US taxpayer account holders to the Secretariat of the Federal Revenue of Brazil, information which will be subsequently forwarded to the US authorities.

Reciprocally, US financial institutions will also be required to report information on US accounts held by Brazilian taxpayers.

The IGA establishes that accounts held by residents of Brazil in US banks – and certain investments made by them through such institutions – are to be reported to the US authorities and the information is to be later exchanged with the Brazilian authorities. The data to be obtained includes the identity of the account holder and the gross amount of US source income paid or credited to the account, but not its balance or value.

The reporting obligation concerns the following accounts:

- i) depository accounts, including term deposits and savings, if held by an individual resident in Brazil, and more than US\$10 in interest is paid to such account in the calendar year; and
- ii) participation in investment entities such as funds and other collective mechanisms, held by individuals and legal entities resident in Brazil, provided that quotas, shares or other titles representing the investment are not regularly traded in regulated markets.

The IGA also establishes the obligation to report "custodial accounts" – accounts holding any financial instruments, including shares, fixed-income investments, bonds, derivatives, etc. – for the benefit of third parties. Here an important restriction applies: in the case of a professional custodian, it will be the custodian, usually not Brazilian, which will be deemed the account holder. Such custodial accounts pertaining to Brazilian residents thus need not be reported in the vast majority of cases.

Accounts held by legal entities are subject to similarly liberal methodology. For reporting purposes, only the residence of the entity will be taken into account, irrespective of its partners or shareholders. Therefore, accounts held through any legal entity controlled by Brazilians, including legal entities in countries of favored taxation, would not be brought to the attention of the Brazilian authorities.

Much stricter rules apply to US taxpayers holding accounts in Brazilian banks. The account balance or value must always be informed, and the accounts held by Brazilian legal entities controlled by US taxpayers are to be reported. Moreover, severe auditing procedures established by Annex I of IGA, applicable exclusively to Brazilian banks holding US funds, require the reporting of assets held through professional custodial accounts.

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<sup>1</sup> See the recently-published Levy & Salomão Bulletin article for relevant background in this respect: <http://www.levysalomao.com.br/publications/LegalBulletin/the-iga-fatcas-new-ally-as-respects-brazil>

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Alongside the IGA, an Exchange of Information Relating to Taxes Agreement (TIEA) is also in force (entered into between Brazil and the United States on March 20, 2007, and published in Brazil by Decree No. 8.003, dated March 15, 2013). This agreement concerns specific information requests and provides for a better-balanced relationship between the countries. The TIEA is an instrument for targeted investigations, differently from the FATCA and the IGA, intended for the general prevention of tax evasion.

To be enforced, the IGA, with its many substantial new rules, must be ratified by the Brazilian Congress and published by a Decree. It will also require extensive regulation by the competent authorities, both Brazilian and in the US. The US regulation will be especially relevant for Brazilian account holders, since it is in the United States that information on their assets is obtained.

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