

**INVEST
BARBADOS**



REPORT

ON THE OUTCOME OF BARBADOS'

NEGOTIATIONS WITH RESPECT TO THE

FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

April 30, 2014

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FATCA Negotiating Team Members

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EXECUTIVE SUMMARY

On July 18, 2013, the Cabinet of Barbados agreed to negotiate a FATCA Model 1A Agreement (“IGA”) with the Government of the United States (“US”). Cabinet’s said directive was carried into effect by a letter dated August 9, 2013 under the hand of HE John Beale, Barbados’ Ambassador to the US. The US replied to Barbados’ indication of its willingness to negotiate an IGA by letter dated October 22, 2013 under the hand of Mark J. Mazur, Assistant US Treasury Secretary (Tax Policy).

In the interim, relevant authorities in Barbados would have designed an action plan and negotiating questions that ultimately would lead to full FATCA implementation in Barbados. In addition Barbados was heavily involved in regional developments pertaining to FATCA via its participation in the CARIFORUM Task Force on Financial Services as well as the CARICOM FATCA Task Force. Regular updates on Barbados’ FATCA progress were given to the Council of Finance and Planning of CARICOM (COFAP).

In or about January 2014, pursuant to a request from the Minister of International Business, a special FATCA Negotiating Team comprising the Central Bank of Barbados, Invest Barbados, the Inland Revenue Department, the Ministry of International Business and the Financial Services Commission (FSC) was convened to oversee the negotiation of the IGA. This action was taken partially because the IGA is not a treaty (no formal ratification process) but rather, in the case of Barbados, is an adjunct agreement between States that use the existing Double Taxation Agreement between Barbados and the US as a platform.

On February 3 2014, The Minister of International Business announced that Barbados was negotiating a FATCA IGA with the US. This announcement received local, regional and international press coverage. The FATCA negotiating team then proceeded with its work by studying and engaging US authorities on the draft FATCA IGA and Annexes. Sensitisation of both the financial industry and the public at large was also undertaken through seminars, meetings, discussions and media appearances.

In due course the draft IGA and Annexes were returned to the US with Barbados’ suggested changes highlighted. On or about April 16, 2014 the US Treasury Department responded to Barbados’ suggested changes to the IGA and Annexes. The US declined to make any alterations to its documentation, citing the need to maintain IGA textual uniformity across countries.

It therefore became clear that with the deadline to sign IGAs (June 30, 2014) looming, there was not much point to further debating the text of these documents. The FATCA negotiating team thus advised the Minister of International Business as well as HE Ambassador Beale that Barbados should proceed to sign the IGA and seek to benefit from the Most Favoured Nation provisions contained therein, in the future. The Ministry of International Business has advised that appropriate instructions for certification of the IGA and Annexes have been given to the Chief Parliamentary Counsel.

The foregoing notwithstanding, it should be noted that there are at least three outstanding FATCA issues in relation to which some determination needs be made. These issues mainly concern the former Inland

Revenue Department now subsumed under the Barbados Revenue Authority and may be summarised as follows:

1. The preparation of a needs assessment to identify what capacity and costs will be required to operationalise FATCA on October 1, 2015. This information was requested by COFAP to determine what, if any technical assistance can be provided to Barbados through the Caribbean Development Bank with respect to FATCA.
2. Provision for the negotiation of the Competent Authority Agreement by virtue of which both the US and Barbados will be able to certify their FATCA operational readiness to each other. Without such certification by September 30, 2015, the IGA will terminate and the withholding penalty of 30% will apply. Thus, the negotiation of the Competent Authority Agreement which will touch such matters as to who will bear the cost of FATCA operations; the still unresolved issues of data collection, transmission and security; is extremely important. **It is certainly arguable that the Competent Authority Agreement is just as important if not more so than the IGA itself.**
3. The identification of the FATCA Competent Authority. Based on the existing DTA between Barbados and the US, the Competent Authority should probably be the Minister of Finance or his designate. This authority could then be delegated to the Barbados Revenue Authority.

In the circumstances, of all the matters raised above, the following recommendations are made for consideration by the Minister of International Business:

1. Given (1) the US reluctance to change the text of the IGAs and Annexes: (2) the looming deadline: and (3) some apparent anxiety on the part of the financial industry, Barbados should proceed to initial the FATCA IGAs and Annexes according to what would now be an agreed text between Barbados and the US and so certified by the CPC. Barbados is in no worse position than any other country that has signed so far and will receive the benefit of any more favourable terms that are unveiled to the world in due course.
2. That drafting instructions be given to the CPC to prepare FATCA specific regulations under the Income Tax Act to give life and domestic enforceability in Barbados to the elements of the FATCA IGA that require such.
3. That a partnership be forged between Government, the Barbados International Business Association, the Bankers Association and other FATCA stakeholders to fund and embark on a public education campaign. This campaign would *inter alia* introduce members of the public to the enhanced due diligence requirements that will occur when they open new bank and other accounts on or after July 1, 2014.
4. Consideration be given to how the outstanding matters referred to above, will be addressed.

BACKGROUND

1. On July 18, 2013, the Cabinet of Barbados ("Cabinet") agreed to negotiate a FATCA Model 1A Agreement ("IGA") with the Government of the United States ("US") and that the US should be informed of this fact. A copy of the said correspondence from the Permanent Secretary, Ministry of International Business confirming this fact is hereto annexed as Appendix 1.
2. The agreement of Cabinet to negotiating a Model 1 IGA Agreement was obtained after the report of the FATCA Implementation Task Force dated June 10, 2013 and recommending this said course of action, had been considered by Cabinet.
3. Cabinet's said directive was carried into effect by a letter dated August 9, 2013 under the hand of HE John Beale, Barbados' Ambassador to the US, a copy of which is annexed hereto as Appendix 2.
4. Pursuant to an invitation from the US Treasury Department a delegation from Barbados met with the US Treasury Officials in Washington DC on August 28, 2013. The delegation comprised HE John Beale, Mrs. Sabina Walcott-Denny Commissioner of Inland Revenue (as she then was), Mrs. Simone Rudder, Minister-Counsellor in the Barbados US Mission, Mr. Kaeron Venner, Director of International Business and Mr. Elson Gaskin, Chairman of the FATCA Implementation Task Force.
5. The US delegation comprised Mr. Robert Stack, Assistant US Treasury Secretary, Ms. Elena Virgadamo of the Office of International Tax Counsel and a representative of the US State Department.

OUTCOMES OF AUGUST 28 MEETING

6. It was established that the meeting was not strictly a negotiating one and that therefore, no binding understandings could be reached. It was thus agreed that the purpose of the meeting was merely to open discussions between Barbados and the US on matters of mutual interest regarding FATCA.
7. The US delegation indicated that it had received Barbados' notification of its willingness to negotiate a FATCA Model 1A Agreement and that the response of the US government had been prepared in draft but had not yet been signed.
8. The meeting then considered the latest versions of the various FATCA implementation instruments namely the Model 1A Reciprocal Agreement (2013-08-19), Annex I to the Model 1A Agreement (2013-07-12) and Annex II to the Model 1A Agreement (2013-08-19).

9. The US delegation took the view that the FATCA instruments referred to above were fairly well settled and not much negotiation on the text thereof was envisaged.
10. The Barbados delegation countered that the FATCA instruments had evolved over time and given that MFN provisions were included in the model IGAs, there ought to be no impediment to making such changes as a particular situation might warrant.
11. Barbados was particularly concerned about the wording of Article 3 paragraphs 9 and 10, the import of which was that if the US was not in a position to guarantee information security or was not able to transmit its FATCA reciprocal information by September 30, 2015, the IGA would terminate through no fault of Barbados' and Barbados' financial institutions would become subject to the 30% withholding. These provisions are not fair or balanced but the US officials were vague on how they could be resolved. In the end, Barbados indicated that it would let these provisions fall to be further considered when negotiations commenced.
12. The Barbados delegation was also concerned about Article 6, paragraph 1 which only deals with reciprocity in aspirational rather than specific terms. Clearly there was need for more certainty in an agreement touted to be of a "reciprocal nature".
13. Barbados enquired of the US delegation as to whether any research had been conducted on the number of US persons in Barbados to whom FATCA might relate. This question was answered in the negative.
14. The question of administrative costs and burdens associated with FATCA was raised. The US delegation indicated that direct financial assistance was unlikely but technical assistance might be a possibility. Barbados indicated that this would remain a live issue.
15. The US delegation was unable to advise on the state of the universal data collection schema being designed by the IRS and referred the Barbados delegation to that body.
16. Barbados also indicated that it would wish to be notified in advance of any enquiries made of its financial institution by the IRS.
17. Thereafter, the meeting concluded with the US delegation undertaking to communicate with Barbados at the earliest with respect to its willingness to commence formal FATCA negotiations.

STEPS TOWARDS NEGOTIATING THE IGA

18. The US replied to Barbados' indication of its willingness to negotiate an IGA by letter dated October 22, 2013 under the hand of Mark J. Mazur, Assistant US Treasury Secretary (Tax Policy). The said correspondence is annexed to this report as Appendix 3.

19. The FATCA Implementation Task Force designed an action plan to lead to full FATCA readiness in Barbados and stood ready to participate in the negotiations. In addition, Barbados' then current position was communicated to local and regional stakeholders including the Joint Policy Working Group, CARICOM via COFAP and the Regional Task Force on Financial Services established by CARIFORUM on which Barbados is represented. The action plan is included with this report as Appendix 4.
20. In or about January 2014, pursuant to a request from the Minister of International Business, a special FATCA Negotiating Team ("the team") comprising the Central Bank of Barbados, Invest Barbados, the Inland Revenue Department, the Ministry of International Business and the Financial Services Commission was convened to oversee the negotiation of the IGA. This action was taken partially because the IGA is not a treaty (no formal ratification process) but rather, in the case of Barbados, is an adjunct agreement between States that use the existing Double Taxation Agreement between Barbados and the US as a platform.
21. This special team met on January 22, 2014 and *inter alia* adopted the draft action plan previously prepared by the FATCA Implementation Task Force. The team set itself a deadline of April 30, 2014 to conclude an IGA with the US. Other major action items were (1) a sensitisation seminar on FATCA for the financial services industry; (2) the collation of data from financial institutions which would help in determining the general state of readiness of these institutions as well as the likely volume of information that would have to be transmitted by Barbados each year; (3) the preparation of a needs assessment by the Inland Revenue Department including costs of implementing FATCA; and (4) the initiation of contact with the US Treasury Department so as to commence the actual negotiation process.
22. The team also established major areas to be worked on including review of the draft IGA and Annexes and a legislative audit. Lead persons for each area were identified, as well as relevant timelines. Notes of the meeting of January 22, 2014 are exhibited hereto as Appendix 5.
23. On January 31, 2014, the draft IGA and Annexes that were pertinent to Barbados were received by the negotiating team. These were distributed for review. Barbados also received information on the universal data collection format from the US Internal Revenue Service. It appeared that the IRS had completed the universal data collection schema and it was ready to be rolled out to FATCA partner jurisdictions. The method of data transmission and security still needed to be properly addressed however.
24. Thereafter, a number of aspects of the FATCA action plan were operationalised including but not limited to:
 - (a) Formal notification to the general public that Barbados was involved in negotiating a FATCA IGA with the US via a statement issued by the Minister of International Business on February 3, 2014.

- (b) Correspondence to financial institutions (“FIs”) by the Central Bank and the FSC requesting information on FATCA readiness and aggregate levels of US reportable accounts. The negotiating team was of the view that since the US was not in possession of this information, it was incumbent upon Barbados to obtain it. The information would assist Barbados in knowing the level of readiness of its FIs as well as the capacity required by the Competent Authority to operationalise FATCA.
 - (c) The hosting of a one day FATCA seminar on March 3, 2014 that included participation by US Treasury and IRS officials via teleconference which was well received by the financial industry.
 - (d) An appearance by members of the negotiating team on the television programme “The People’s Business” to further inform the public about FATCA and its requirements.
25. A report of the information received by the Central Bank and the FSC from FIs is attached as Appendix 6.
26. On February 21, 2014, some members of the team attended a COFAP meeting which *inter alia* dealt with issues pertaining to FATCA across the region. Each CARICOM member state provided an update of its FATCA readiness and it was clear that Barbados was among the leaders of the region in terms of readiness.
27. The COFAP meeting also requested each member state to provide a needs assessment in relation to FATCA. These needs assessments it was hoped, would be used to help provide member states with technical assistance through the Caribbean Development Bank (“CDB”).
28. The team then convened a meeting on February 27, 2014 at the offices of the FSC. At the meeting team members reported on a number of deliverables that had previously been assigned including:
- (a) Comparison between Barbados’ draft IGA and previous IGAs that have been signed which revealed nothing remarkable or thitherto unknown;
 - (b) A review of Annex I which revealed nothing remarkable or thitherto unknown;
 - (c) A review of Annex II which revealed nothing remarkable or thitherto unknown;
 - (d) The findings of the legislative audit which revealed that based on section 83 of Barbados’ *Income Tax Act* no stand-alone FATCA statute needed to be enacted and that all that might be necessary was for FATCA regulations and guidance notes to be made;

(e) An indication by the Inland Revenue Department that the aforementioned schema provided by the IRS appeared to be compatible with their existing systems.

29. Arising from this said meeting, a number of negotiating questions were compiled, particularly in relation to Annex II. The questions raised by the Barbados delegation to the meeting of August 28, 2013 were once again included for consideration by the US Treasury Department. Another pertinent question was that the obligations of reporting US Banks in relation to the accounts of Barbadians living in the US are not addressed in Annex I. The notes of the meeting of February 27, 2014 are included with this report as Appendix 7.
30. The negotiating questions were sent to the US Treasury Department and a conference call occurred on March 28, 2014 to discuss the questions. Following the said conference call, the answers given by the US were summarised and sent to the US for written confirmation. In addition, the draft IGA and Annexes were returned to the US with Barbados' suggested changes highlighted. A list of the questions raised by Barbados and the answers provided by the US are annexed hereto as Appendix 8.
31. On or about April 16, 2014 the US Treasury Department responded to Barbados' suggested changes to the IGA and Annexes. The US declined to make any alterations to its documentation, citing the need to maintain IGA textual uniformity across countries.
32. It therefore became clear that with the deadline to sign IGAs (June 30, 2014) looming, there was not much point to further debating the text of these documents. Prior to the team coming to this realisation, a preliminary discussion was held between members of the team and the Chief Parliamentary Counsel's Office (CPC) with a view to having the CPC certify the text of the IGA and Annexes as ready for initialing.
33. All members of the team and the Minister of International Business was apprised that there did not appear to be much point to seeking to have any textual changes made to the draft documents and that instead, Cabinet approval for the initialing should be sought.

OUTSTANDING ISSUES

34. There are at least three outstanding FATCA issues in relation to which some determination needs be made. These issues mainly concern the former Inland Revenue Department now subsumed under the Barbados Revenue Authority and may be summarised as follows:
 - (a) The preparation of a needs assessment to identify what capacity and costs will be required to operationalise FATCA on October 1, 2015. This information was requested by COFAP to determine what, if any technical assistance can be provided to Barbados through the CDB with respect to FATCA.

- (b) Provision for the negotiation of the Competent Authority Agreement by virtue of which both the US and Barbados will be able to certify their FATCA operational readiness to each other. Without such certification by September 30, 2015, the IGA will terminate and the withholding penalty of 30% will apply. Thus, the negotiation of the Competent Authority Agreement which will touch such matters as to who will bear the cost of FATCA operations; the still unresolved issues of data collection, transmission and security; is extremely important. **It is certainly arguable that the Competent Authority Agreement is just as important if not more so than the IGA itself.**
- (c) The identification of the Competent Authority for FATCA. Based on the existing DTA between Barbados and the US, the Competent Authority should probably be the Minister of Finance or his designate. This authority could then be delegated to the Barbados Revenue Authority.

RECOMMENDATIONS

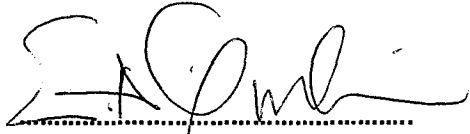
35. In the circumstances of all the matters raised above the following recommendations are made for consideration by the Minister of International Business:

- (a) Given (1) the US reluctance to change the text of the IGAs and Annexes; (2) the looming deadline; and (3) some apparent anxiety on the part of the financial industry, Barbados should proceed to initial the FATCA IGAs and Annexes according to what would now be an agreed text between Barbados and the US and so certified by the CPC. Barbados is in no worse position than any other country that has signed so far and will receive the benefit of any more favourable terms that are unveiled to the world in due course.
- (b) That drafting instructions be given to the CPC to prepare FATCA specific regulations under the Income Tax Act to give life and domestic enforceability in Barbados to the elements of the FATCA IGA that require such.
- (c) That a partnership be forged between Government, the Barbados International Business Association, the Bankers Association and other FATCA stakeholders to fund and embark on a public education campaign. This campaign would *inter alia* introduce members of the public to the enhanced due diligence requirements that will occur when they open new bank and other accounts on or after July 1, 2014.
- (d) Consideration should be given as to how the outstanding matters referred to at paragraph 34 above, will be addressed.

The foregoing is submitted for the consideration of the Minister of International Business.

April 30, 2014

Special FATCA Negotiating Team

A handwritten signature in black ink, appearing to read 'E. Gaskin', written over a horizontal dotted line.

per Elson A. Gaskin
Chairman

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYS 435

PROFESSOR