

# CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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## INTRODUCTION



This month the e-Newsletter Committee is pleased to introduce its first "Finance Issue". All of the legal articles featured in this issue focus on legal developments relating to or challenges affecting the financial services sector in Barbados.

In light of the protracted instability in the global economy, it is unsurprising that foreign jurisdictions have become more aggressive in their revenue collection measures. Our first article outlines the problems posed by one of the more recent and controversial measures, the United States of America's Foreign Accounts Tax Compliance Act ("FATCA"). The article also discusses the effects FATCA is expected to have on certain types of local financial institutions, their customers and service providers.

In this issue we also continue our exploration of the pension plan regime in Barbados. Our second article on this area focuses on the duties and powers of the administrator of an occupational pension plan under the Occupational Pension Benefits Act, Cap. 350B.

Our final article concludes our series of articles examining some of the challenges faced by lenders in taking security from a company. This article focuses on the implications of section 53 of the Companies Act, Cap. 308, which restricts financial assistance by a company in certain circumstances.

Given the important role the financial services sector plays in Barbados' economy, we trust that you will find these articles to be enlightening, useful and enjoyable.

The e-Newsletter Committee

## ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.



Ms. Sabrina L. Maynard

# • The Foreign Account Tax Compliance Act and Its Implications For You •

By Ms. Sabrina L. Maynard, Associate

## Introduction

In March 2010, the government of the United States of America (the "US") enacted certain provisions under the Hiring Incentives to Restore Employment Act, 2010, collectively known as the Foreign Accounts Tax Compliance Act ("FATCA"), by which the US, through its Inland Revenue Service ("IRS"), proposes to counteract what it perceives as an abuse of its revenue laws, through the use of various offshore accounts and corporate structures, by persons deemed to be "US Persons" and who therefore are subject to taxation in the US.

This article will provide a general overview of FATCA and the implications of FATCA for certain classes of persons.

## Who is a US Person?

FATCA does not provide a definition of a US Person. Notice 2011-24 published by the IRS states, however, that the following factors should be considered indicia of US status and a US Person:

- US citizenship or lawful permanent resident status (this includes persons holding "green card" status);
- a US birthplace;
- a US residence address or a US correspondence address including a US P.O. Box;
- standing instructions to transfer funds to an account maintained in the US or directions regularly received from the US;
- an "in care of" address or a "hold mail" address that is the person's **sole** address; or

- a signatory or power of attorney granted to a person with a US address.

## What does FATCA require of a foreign financial institution?

Under FATCA, all foreign financial institutions ("FFIs")<sup>1</sup> and non-US financial entities ("NFFEs") that wish to retain access to the capital markets in the US, and avoid a 30% withholding on their accounts (discussed below) are required to enter into an agreement with the IRS, known as an "FFI Agreement", pursuant to which the FFI or NFFE will disclose to the IRS certain prescribed information concerning the status of the accounts of each client that possesses indicia of a US Person and whose accounts exceed US\$50,000.00.

If a customer of an FFI that enters into an FFI Agreement (a "Participating FFI") refuses to disclose to the Participating FFI the information prescribed by FATCA and requested by the Participating FFI, the customer will be deemed to be a "recalcitrant account holder". FATCA requires a Participating FFI to withhold 30% on all accounts of recalcitrant account holders ("FATCA Withholding") and remit the relevant amounts to the IRS.

## What are the implications of an FFI not complying with FATCA?

An FFI that does not enter into an FFI Agreement with the IRS will be subject to a 30% withholding on all accounts that the FFI maintains with a corporation, financial institution or any other entity that is resident in the US ("US Entity") which makes payments to the FFI such as interest, dividends, rents,

salaries, premium annuities, compensations or any other fixed or determinable annual or periodic gains, profits or other income.

## Why is FATCA compliance an issue for FFIs?

FATCA compliance is an issue for FFIs for three main reasons.

Firstly, its prescribed reporting requirements tend to violate the data protection laws of many jurisdictions. Even in jurisdictions such as Barbados that do not have general data protection laws in effect,<sup>2</sup> FATCA compliance still poses an issue for financial institutions in those jurisdictions since at common law a bank, and by extension a financial institution, is required by the principles established in the leading case of *Tournier v National Provincial and Union Bank of England [1924] 1 K.B. 461* to keep and maintain each customer's personal information confidential, unless permitted to disclose the information in prescribed limited circumstances which include instances where a customer expressly consents to the disclosure of its information. The duty of confidentiality enunciated in *Tournier* survives even after a

<sup>1</sup> A foreign financial institution (FFI) includes any entity that is resident or domiciled outside of the US that:

- accepts deposits in the ordinary course of banking or similar business;
- holds financial assets for the account of others as a significant aspect of its core business;
- is engaged in the business of trading financial instruments either for itself or for the account of others; or
- is an insurance company whose business concerns annuity contracts and the making of payments in respect of cash value insurance contracts.



# ✿The Foreign Account Tax Compliance Act and Its Implications For You (cont'd) ✿

By Ms. Sabrina L. Maynard, Associate

customer's account with a financial institution is closed.

Secondly, the prescribed withholding of 30% on the accounts of recalcitrant account holders is deemed to violate conventional common law principles relating to a country's recognition and enforcement of the revenue laws of a foreign jurisdiction.

Thirdly, the information systems currently maintained by many financial institutions and the due diligence procedures on customers which many financial institutions now undertake do not have the capabilities to capture, process and analyse the information on their customers as prescribed by FATCA. It is therefore expected that financial institutions will generally be required to undertake significant financial expense in order to put the necessary systems and controls in place that support FATCA compliance.

## How is FATCA likely to affect you?

### *Foreign Financial Institutions*

The IRS has announced that July 1,

2014 will be the effective date for the commencement of FATCA Withholding. A Participating FFI will therefore be expected to have the necessary technical and information systems that permit FATCA compliance in place by that date so as to avoid the 30% withholding.

### *Customers of Foreign Financial Institutions*

FATCA is intended to target US Persons. It is expected, however, that the enhanced due diligence procedures which a Participating FFI will be expected to implement are likely to result in all customers or potential customers of an FFI being subjected to enhanced scrutiny and disclosure requests, as a condition for the establishment or the continuation of the customer's relationship with the particular FFI. The disclosure requests are likely to include a request for each customer to provide its FFI with written consent to the FFI's disclosure of the customer's information to relevant authorities.

### *Service Providers*

In order to ascertain whether the beneficiaries of trust accounts are US

Persons, service providers may be requested by a Participating FFI to provide details concerning the identity of settlors and beneficiaries on whose behalf trust accounts are maintained at the Participating FFI. This is likely to erode some of the anonymity protection which now makes the offshore trust structure attractive to settlors and beneficiaries.

### *Governments*

Due to the legal impediments to the disclosure and the withholding on customers' accounts by FFIs, governments are expected to put the necessary legislative framework in place to support compliance by their FFIs with FATCA.

## Conclusion

To date, the US has proposed two model forms of intergovernmental agreements ("IGAs") which outline the legal framework that a jurisdiction may adopt in order to comply with FATCA. Each jurisdiction will therefore be expected to assess the two model IGAs and determine which IGA model is best suited for it, if any. In a subsequent article we will critically analyse the two model IGAs. ✿



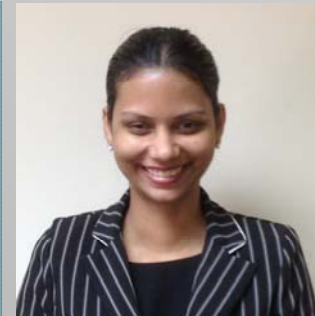
<sup>2</sup>There is a draft Data Protection Bill which is before the Parliament of Barbados for consideration. In addition, the Electronic Transactions Act, Cap 308B and the Computer Misuse Act, Cap. 124B provide for some protection of a person's confidential information. Such enactments are, however, limited in their scope and application.



Mrs. Rosalind K. Smith Millar

# ✦ The Administration of Occupational Pension Plans - Part 1 ✦

By Mrs. Rosalind K. Smith Millar, Partner  
and Miss Lisa N. Kadirullah, Associate



Miss Lisa N. Kadirullah

This is the second article in a continuing series of articles on pension plans. "The Pensions Regime in Barbados: An overview of retirement benefits" was published in our July 2013 issue.

This article focuses on important duties and powers of the administrator of an occupational pension plan under the Occupational Pension Benefits Act, Cap. 350B ("**the Act**") and regulations.

The term "occupational pension plan", as used in the Act, means a pension plan or registered retirement savings plan established by a private sector employer for its employees in Barbados, or to which the employer makes contributions for its employees, or a pension plan established outside Barbados that has a substantial connection with Barbados.

Anyone who establishes or administers an occupational pension plan should clearly understand the legal requirements, duties and powers of a pension plan administrator.

## Persons entitled to be Administrator

The Act lists persons eligible to administer a pension plan. The Supervisor of Pensions [whose role now falls under the purview of the Financial Services Commission ("**FSC**")]<sup>1</sup> may only register a pension plan if its administrator is one of the following:

- (a) the employer;
- (b) a body composed of one or more participants of the employer and of the active, deferred or retired members of the plan;
- (c) a body wholly composed of active, deferred and retired members;

- (d) a person, group or entity who or which under any law is given responsibility for administration of a pension plan or pension fund;
- (e) a board of trustees appointed under the plan or trust agreement establishing the plan. If the plan is a multi-unit or multi-employer plan<sup>1</sup>, at least half of the members of the board must be representatives of the members of the plan of whom at least 2/3 are Caricom citizens or residents; or
- (f) an insurance company providing and guaranteeing all benefits under the plan.

## Duties of Administrator

- (1) REGISTER THE PLAN:  
The administrator must apply to the FSC to register the pension plan within the time the FSC prescribes for the registration.
- (2) PAY CONTRIBUTIONS PROMPTLY:  
The administrator and any agent responsible for receiving contributions under the plan must ensure that contributions are punctually paid and must notify the FSC if any contribution has not been paid when due.
- (3) PROPERLY ADMINISTER PLAN:  
Ensure that the plan and related fund are administered in accordance with the plan documents, the Act and regulations and inform the Commissioner of Inland Revenue of benefit payments made under the Plan. For defined benefit plans<sup>2</sup>, the administrator must commute the benefit payable where it exceeds the maximum

benefit prescribed and must satisfy the Commissioner of Inland Revenue of this commutation.

- (4) PROVIDE PLAN INFORMATION TO EACH MEMBER:
  - (i) An explanation of plan provisions applicable to members or prospective members, and their rights and obligations under the plan;
  - (ii) An annual statement regarding the pension plan and the member's entitlement at the end of the previous fiscal year;
  - (iii) A statement showing defined benefit plan members their expected benefits on normal retirement date and commuted benefit upon termination;
  - (iv) A statement showing defined contribution plan members the amount of money accrued in their account for their retirement benefit; and

<sup>1</sup>A multi-employer plan is established for employees of two or more employers contributing to a pension fund by an agreement to provide a benefit in relation to the employee's service with one or more of the employers and does not include a plan where all the employers are affiliated. A multi-unit plan is one established by one employer for two or more affiliated employers.

<sup>2</sup>There are two kinds of employer funded plans: the defined benefit plan and the defined contribution plan. The benefits payable under a defined contribution plan are determined by the amount of accumulated contributions and yields credited to the individual pensioners account. The benefits payable under a defined benefits plan are determined in advance by reference to various factors including level of earnings and length of service.



# • The Administration of Occupational Pension Plans - Part 1 (cont'd) •

By Mrs. Rosalind K. Smith Millar, Partner  
and Miss Lisa N. Kadirullah, Associate

- (v) Permit inspection of plan and fund documents on written request by interested persons.

## (5) FILE APPROPRIATE DOCUMENTS:

- (i) On registration of the plan, an initial valuation report prepared and certified by an actuary<sup>3</sup>;
- (ii) Within four months after fiscal year end of the pension plan, an annual return in a form approved by the FSC containing the financial statements of the pension fund<sup>4</sup>;
- (iii) Within four months of the end of the first fiscal year<sup>5</sup>, a valuation of the fund;
- (iv) Within four months after the third fiscal year, a second valuation;
- (v) After submission of the second valuation, a valuation for every successive triennium to be submitted within four months of the end of the triennium;
- (vi) Certified copy of reciprocal transfer agreement regarding the plan, if applicable;
- (vii) Any additional report required by the FSC or regulations<sup>6</sup>; and
- (viii) A statement of investment policies and goals on or before the earlier of the day that is ninety days after adoption or two years after commencement of the Act.

## (6) OBSERVE DUTY OF CARE IN ADMINISTERING PLAN AND INVESTING FUND ASSETS:

- (i) Exercise the care, diligence and skill in administering the plan and investing fund assets

that a person of ordinary prudence exercises when dealing with another's property;

- (ii) Administer the plan and invest fund assets using all relevant knowledge and skill possessed, or which an administrator ought to possess considering its responsibilities and duties to be discharged; and
- (iii) Not allow interests to conflict with duties and responsibilities under the Act and regulations.

## (7) ESTABLISH AND ADHERE TO STATEMENT OF INVESTMENT POLICIES AND GOALS:

The administrator must establish and follow a written statement of investment policies and goals for the plan.

## Discretionary Powers of Administrator

The administrator may appoint agents such as an actuary or custodian.

If a custodian is appointed, it must be either an insurance company licensed under the Insurance Act, Cap. 310 or a financial institution licensed under the Financial Institutions Act, Cap. 324A.

The administrator shall ensure that the agent is suitable to perform its functions and offer prudent and reasonable supervision.

The duties and functions of the administrator are quite extensive and require careful attention to detail and comprehensive knowledge of the Act and regulations. 📌

<sup>3</sup>The Occupational Pension Benefits Act, Cap 350B defines an actuary for its purposes.

<sup>4</sup>This is not applicable to a defined contribution plan having no surplus assets.

<sup>5</sup>This is not applicable to a defined contribution plan having no surplus assets.

<sup>6</sup>This depends on the type of pension plan being registered.



# ● Challenges With Taking Security From A Company - Part 2 ●

By Mr. Creig R. D. Kinch, Associate



Mr. Creig R. D. Kinch

## Introduction

In this article we continue our look at the challenges with taking security from a company by looking at the second challenge- Prohibited Financial Assistance.

### What is Prohibited Financial Assistance?

Section 53 of the Companies Act, Cap. 308 says that a company or any affiliated company shall not directly or indirectly give financial assistance, whether by loan, guarantee or otherwise, to:

- a) a shareholder, director, officer, or employee of the company or affiliated company, or to an associate of these persons for any purpose; or
- b) to any person for the purpose of, or in connection with, a purchase of shares in the company or an affiliated company,

where there are reasonable grounds for believing:

- (1) that the company is or after giving the financial assistance would be unable to pay its liabilities as they become due ("**the Liquidity Test**"), or
- (2) that the realisable value of the company's assets (excluding the amount of the financial assistance whether in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee) would, after giving the financial assistance, be less than the aggregate of the company's liabilities and stated capital of all classes ("**Net Worth Test**").

Although the Companies Act restricts the provision of financial assistance, it does not define the term "financial assistance" but provides examples of the restricted activity, being a loan, guarantee or otherwise. The use of the word "otherwise" indicates that any other transaction of a similar kind will be caught by the provision. Transactions caught by the provision include (but are not limited to):

- (1) where company A gives security to a lender for funds that are advanced by the lender to company B (third party security);
- (2) where company A guarantees a loan to company B (third party guarantee but no security);
- (3) where a purchaser of shares in company A uses company A's assets to secure a loan to purchase the shares (company A is giving third party security for a loan to its shareholder);
- (4) where company A enters into a subordination agreement under which it agrees to subordinate the security it holds over the assets of company B in favour of a lender's security taken from company B; and
- (5) where company A enters into an agreement with a creditor of company B under which it agrees to indemnify the creditor for advances to company B.

The common thread in all of these transactions is that company A stands to lose if company B (or the shareholder) does not pay its loan.

## Exceptions

Section 53 does not apply where the company giving the financial assistance can pass the solvency tests mentioned above. It also does not apply where financial assistance is:

- (1) part of the ordinary course of business of the company, if the lending of the money is part of the ordinary business of the company;
- (2) on account of expenditures incurred or to be incurred on behalf of the company;
- (3) to a holding company of which the company is a wholly owned subsidiary;
- (4) to a subsidiary of the company; or
- (5) for employees of the company or any of its affiliates where the assistance is:
  - (a) to enable or assist them to purchase or erect living accommodation for their occupation;
  - (b) in accordance with a plan for the purchase of shares of the company or any of its affiliates to be held by a trustee; or
  - (c) to enable or assist them to improve their education or skills, or to meet reasonable medical expenses.

It should be noted that financial assistance by one "sibling" company to another (that is two companies that have the same holding company) is **not** included among the exceptions.



## ● Challenges With Taking Security From A Company - Part 2 (cont'd) ●

By Mr. Creig R. D. Kinch, Associate

### The effect of a breach of section 53 on Lenders

Any contract which contravenes section 53 is void and unenforceable unless the lender can show that acting in good faith it did not have notice of the breach. A lender just cannot turn a blind eye to whether or not the financial assistance offered by a company would be in breach of section 53. The test of whether a lender had notice or not is whether a prudent lender might infer based on the facts that the proposed financial assistance would not contravene section 53. This assumes that such a lender will have done its necessary due diligence and obtained full financial statements and reviewed them thoroughly, in order to determine if the company passes the Liquidity and Net Worth Tests.

Further, a prudent lender should also obtain some form of evidence showing that by giving the financial assistance the company would not contravene section 53. The best evidence that a company granting financial assistance would pass the Liquidity and Net Worth Tests is an opinion from an auditor saying so. However, the American Institute of Certified Public Accountants called into question the practice of an auditor providing written assurances to a lender respecting a prospective borrower's or guarantor's solvency. The Executive Committee of the Ontario Institute of Chartered Accountants has also taken issue with auditors providing these written assurances and has strongly discouraged its members from providing comfort opinions. As a result, local auditors are also very reluctant to provide a

comfort opinion on the solvency of a company to a lender.

The next best thing a lender can do is to obtain a certificate from a director of the company saying that the company would not become insolvent by giving the financial assistance.

However, the director's certificate does not relieve a lender relying on it in circumstances where a lender would or should have had notice of the breach. If a lender has not done sufficient or any due diligence or has reason to suspect that a company would breach section 53, then it should not rely on the director's certificate and accept the company's security. ●

## ● CGF NEWS ●

### National Walk/Run for Breast Cancer

On Sunday, October 6, 2013, staff members of Clarke Gittens Farmer showed their support for the Breast Cancer Screening Programme of the Barbados Cancer Society by participating in this year's National Walk/Run for Breast Cancer. The Walk/Run is one of the activities organised by the Barbados Cancer Society during its Breast Cancer awareness month in October.

Pictured right are some of the firm's members and their relatives who took part in the 5K Walk event, which began around 3 p.m. at the Garrison Savannah, St. Michael. ●



## ● CGF NEWS cont'd ●

### Congratulations

Our heartiest congratulations are extended to the following people:

Sir Henry De B. Forde, K.A., Q.C., a consultant to the firm, who received an Honorary Doctor of Laws degree from the University of the West Indies at the graduation ceremony held on October 19, 2013 at the Sir Garfield Sobers Sports Complex.

Miss Shena-Ann Ince, an associate in the Litigation Department of the firm, who was recently awarded a Chevening Scholarship to pursue a Master of Laws at the prestigious University of Cambridge in the United Kingdom. Chevening scholarships are the UK Government's global scholarship programme funded by the Foreign and Commonwealth Office and partner organisations. We wish Shena-Ann all the best in her studies.

Miss Olivia Cadogan, who recently joined the Commercial Department of the firm and was admitted to the Barbados Bar on October 18, 2013 at the Supreme Court in Barbados 🌸

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### Caribbean Commercial Law Workshop

From August 18-20, 2013, legal practitioners and academics from across the Caribbean converged at the Loews Miami Beach Hotel, in Miami, Florida, U.S.A. for this year's Caribbean Commercial Law Workshop. The conference was organized by the Faculty of Law of the University of the West Indies, Cave Hill Campus.

Attendees benefited from presentations that focused on the global economic crisis and its effects on the Caribbean's legal and economic framework.

Clarke Gittens Farmer was represented at the conference by Ms. Debbie Fraser, Partner and Head of the Commercial Department, and Mrs. Nicola Berry and Miss Sabrina Maynard, two associates in that department.

Ms. Fraser and Miss Maynard presented on "Where Do We Go From Here? The Challenges to Survival Facing the Region's Financial Services Sector" while Ms. Fraser and Mrs. Berry presented on "Raising Capital: Times May Be Hard But The Show Must Go On! Raising Capital During Hard Times".

Further information on the workshop can be obtained by visiting its webpage at:

<http://www.cavehill.uwi.edu/Law/cclw/home.aspx> 🌸



Pictured above (from left to right) are Miss Maynard, Ms. Fraser and Mrs. Berry at the workshop

● **CGF POINT OF LAW** published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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**Disclaimer:** IMPORTANT NOTICE: This e-Newsletter does not constitute and should not be construed as legal advice. Should further analysis or explanation of the subjects contained in this e-Newsletter be required, please contact us. Always consult a suitably qualified lawyer on any legal problem or issue.

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