

**REGULATORY RISK**

FATCA Adds to Brokers' Compliance Burden

Brokers prepare to comply with FATCA even as they seek exemption from the law's foreign insurance requirements.

BY KATIE KUEHNER-HEBERT

Brokers are working to comply with the requirements of the Foreign Account Tax Compliance Act that took effect July 1. At the same time, however, industry lobbyists are asking Congress and the Internal Revenue Service to exempt non-cash value premiums from the new tax evasion law.

"The compliance burden of this law is significant and there are some reports saying it could cost in the tens of millions of dollars," said Joel Kopperud, director of governmental relations for the Council of Insurance Agents & Brokers (CIAB).

Starting in July, brokers that collect premiums from their clients on behalf of foreign carriers

must obtain certain IRS-generated forms from the carriers that they are FATCA-compliant or FATCA-exempt. In addition, the brokers must report each carrier's status under that law to the IRS.

If an agency determines a carrier is not compliant or exempt, then a percentage of the premiums paid to them by their U.S. clients that have coverage with the foreign carrier will be withheld as taxes. (This part of the law was deferred and will apply to premiums paid on insurance and reinsurance policies with effective or renewal dates of Jan. 1, 2015 or later.)

Forcing brokers to withhold a percentage of an insurance pre-

mium "would cause major business disruptions to insurance customers including the potential for lapses in coverage," said Steve Chapman, partner with PwC's financial services tax practice in New York City.

J. Scott Tofil, senior vice president and chief financial officer of Beecher Carlson Holdings, Inc. in Atlanta, said his firm will collect the required forms from all of the foreign carriers that it works with, and they will be kept in an internal database shared with its parent company, Brown & Brown.

"If [the foreign carriers] cannot provide these forms, we cannot do business with them," Tofil said.

"As a fiduciary, the money we collect from our clients and put in trusts to pay premiums to carriers is never technically our money. So if we were forced to withhold 30 percent as this new law requires, we would not be able to submit full payment, and the carrier might cancel their insurance, which is why we will not place insurance with a carrier that cannot provide the correct paperwork."

While that likely won't happen for most of the foreign insurers, this new law places all brokers and agents in "an uncomfortable position," he said.

"When the government added these requirements into the law, I really don't think they paid attention to how brokers acting in a fiduciary capacity would be impacted," Tofil said.

Many states require brokers and agents to put the money for premiums into a trust and hold in a fiduciary capacity, he said. "Now you have the federal government telling you to take 30 percent from money and hold it, when the money isn't yours to begin with."

To aid broker compliance with FATCA, the CIAB will go live with

an online portal on July 1 that will provide access to the forms required by the IRS for each foreign insurer, Kopperud said.

“This way, brokers don’t have to reach out individually for the certifications from all of the foreign insurers they work with — we will have done that for them,” he said. “This will be a one-stop shop for these certificates.”

The withholding requirements will likely not affect most brokers, as most will simply not conduct business with a foreign insurer that is not FATCA compliant, said Vladimir Gololobov, CIAB’s director, international.

“But the reporting piece has a cost consideration that really comes into play, which will divert more brokers’ resources,” Gololobov said.

TAX EVASION SCHEMES

The reason insurance brokers were included in FATCA was that some foreign insurance products have an investment component, such as an annuity, that “unscrupulous” U.S. taxpayers could use to funnel money and evade paying taxes, said Dean Paik, a director at Rogers Joseph O’Donnell law offices in San Francisco.

Paik previously served as special counsel to the assistant attorney general in the tax division at the U.S. Department of Justice between 2010 and 2013. His work there included foreign account tax compliance, including the investigation and prosecution of U.S. taxpayers holding undeclared foreign accounts, and the banks and bankers that assisted them.

FATCA was intended to stamp out tax evasion schemes started by financial institutions such as Credit Suisse, Paik said. In the past, U.S. taxpayers who wanted to evade paying taxes would set up investment accounts at foreign institutions. The IRS wants

to ensure U.S. taxpayers can’t use insurance products with investment components to evade taxes, he said.

“The risk for brokers is dealing with the insurers who are not on the up and up; if they go outside of the world of participating with a legitimate insurer,” Paik said.

“They run the risk that these companies are noncompliant, and if something happens and there is a problem, brokers will be liable for penalties and fall out of favor with the IRS, which will then look at them more skeptically,” he said.

When the law was passed in 2010, the brokers’ group believed that non-cash value insurance was not intended to be part of the law, but the IRS included non-cash value premiums when they released final regulations implementing FATCA, Kopperud said.

CIAB is working with the IRS and Congress to clarify the situation, he said.

Non-cash value insurance is “simply irrelevant to FATCA’s goal of combating tax evasion, as property casualty insurance and reinsurance simply cannot be used as a vehicle to evade taxes,” Kopperud said.

Indeed, a bipartisan group of 17 members of the House Ways and Means Committee (the committee that authored the law) agree with the brokers’ group and sent a letter to the IRS supporting the request to exclude non-cash value insurance, Kopperud said.

“This law just creates more work for brokers and agents as the intermediary in placing insurance for their clients,” Tofil said. “Most of the large foreign carriers will be exempt from this tax withholding as they will have these forms ready, so I’m not sure what this law accomplishes as related to insurance, it really just creates more paperwork.”

Marsh told clients it will “only

use FATCA-compliant companies for in-scope business,” will collect forms from insurers, and will provide online access to them, according to the company. It also will help its U.S. direct bill clients obtain the appropriate documentation from the foreign insurers they use.

PHASING IN COMPLIANCE

PwC’s Chapman said that brokers have had to phase in compliance, as they wait for guidance from the IRS. As of now, the IRS has yet to publish instructions on completing the required forms.

“Brokers are looking to comply with the rules in the most practical way possible,” Chapman said. “Since insurance premiums have not previously been in scope for information reporting purposes, brokers are working to get up to speed quickly with a set of requirements that are new to their core business and are working to shape the legislation in a way that makes sense for the insurance industry.” Timing is the biggest concern — particularly the IRS has yet to release the necessary instructions to complete and return the required forms, he said.

Andy Jenn, a national practice leader at Aon, said the brokerage firm’s preparation for FACTA compliance has included a “very broad carrier outreach” that started last October to make sure their legal structures were “aligned with Aon’s” and they were “up to speed” on the requirements.

“We’ve been really pleased with the responsiveness of the carriers, and we’re all just in a waiting period right now until the FACTA forms become available,” Jenn said.

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