● Article ●

An Analysis of FATCA Reporting Compliance in The Republic Of Korea*

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Abstract

This article analyzes how Foreign Account Tax Compliance Act (FATCA) impacted in the Republic of Korea (South Korea). The legal analysis of the FATCA addresses how financial institutions had to comply to the reporting requirements, and how the Korean taxation law has changed in repose to the compliance. Since FATCA is based on the intergovernmental agreement between the United States and Korea, this study analyzes the impact of non-reporting Korean financial institutions. Also, reporting requirements extended to pensions, insurance companies, passive investment companies, partnerships in Korea are analyzed. One of the crucial focuses is placed at the pass-through payments and how the computations have to be presented by Korean financial institutions.

I. Introduction

Foreign Account Tax Compliance Act is known as “FATCA” as an acronym which may insinuates a “fat cat.” It is an act that the Internal Revenue Service (IRS) in the United States has launched in 2010 to seek transparency of the U.S. persons or corporations engaged in financial transactions with non-U.S. financial entities. Under FATCA, not only U.S. individuals or entities but also non-U.S. persons or corporations have to comply to the reporting obligations. FATCA as a global tax compliance has two models.

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The Republic of Korea (South Korea)[1] and the United States entered into a Intergovernmental Agreement[2] (IGA), which took effect on June 10, 2015.[3] The bilateral FATCA agreement signifies mutual commitment of the two countries to enhance the effectiveness of information exchange.[4]

When the IRS announced its 2010 FATCA policy, Korea had already begun integrating information collection requirements into the domestic legal regime. Prior to the agreement, Korea had established anti-money laundering/Know Your Client laws, and designated June as "the month for reporting overseas accounts."[5] Korea did not oppose the implementation of automatic information exchange required by FATCA. FATCA was perceived as an event of momentum to strengthen the Korean Anti-money Laundering due diligence procedures. Immediately after the FATCA agreement in 2013, offshore accounts held by the Korean citizens were extensively investigated.[6] The National Tax Service (NTS) in Korea stated that the FATCA would "crack down on attempts at offshore tax evasion," and "will bring the underground economy into the open for taxation."[7]

The bilateral FATCA agreement states that the reporting financial institutions in Korea should "confirm the reasonableness" of self-certification with new individual accounts including "any documentation collected pursuant to Know Your Customer Procedures." For purposes of determining whether the account holder is a Passive Non-Foreign Financial Entity (PNFFE), the Reporting Korean Financial Institution "must obtain a self-certification" on an IRS Form W-8 or W-9 from the account holder.[8]

The US-Korea intergovernmental agreement establishes that local information reporting regimes pursuant to which Foreign Financial Institutions (FFI) that are subject to the IGA report FATCA-relevant information to the local taxing authorities. An FFI that is subject to a Model 1 IGA and that is required to report FATCA-relevant information to the partner-country taxing authority will not need to enter into an FFI Agreement, but will be required to register with the IRS and obtain a Global Intermediary Identification Number (GIIN).[9] For documentation of accounts maintained as of June 30, 2014, the U.S. Financial Institutions are "to obtain and report the Korean Tax Identification Number (TIN) of each account holder," and the Reporting Korean Financial Institutions "to obtain and report with the U.S. TIN."[10]

While a U.S. person is required to submit a Report of Foreign Bank and Financial Accounts (FBAR) and IRS Form 8938 (FATCA form), Korean information reporting requires Korean taxpayers to report overseas assets reporting using the form "Report of Foreign Bank and Financial Accounts, Form 21."[11] Taxpayers in Korea are subject to report overseas accounts including "any bank, securities, securities derivatives or other financial instruments accounts which are opened in the name of an overseas financial company." The National Tax Service stated that persons and entities exempt from filing Form 21 in Korea are a foreign resident who has/had his/her domicile or place of residence in the Republic of Korea for not more than five years in total from 10 years before the end of the relevant year subject to report.[12]

Pursuant to the Act on the Immigration and Legal Status of Overseas Koreans Article 2, a Korean national residing abroad who held a residence in the Republic of Korea from two years before the end of the relevant year is subject to filing Form 21.[13] For those who had failed to report overseas accounts, the National Tax Statistics office has been publicly disclosing on its homepage a list of "high and habitually delinquent taxpayers" with the taxpayer's name, age, and delinquent tax amount.[14]

Subsequently, the Enforcement Decree of the Adjustment of International Taxes Act Article 51(3) states that the penalty attaching to the unreported or under-reported amount is based on a progressively increasing percentage of the non-reported taxable amount.[15]

Below 200 million	Corresponding amount × 4%
Over 200 million	80 million + excess amount of 200 m × 7%
Below 5 billion	60 million + excess amount of 200 m × 6%
Over 5 billion	240 million + excess amount of 5 billion × 10%

The National Tax Service (NTS) in Korea also announced that it has begun the preparation for FATCA compliance identification review procedures for preexisting "lower value" individual accounts with a balance or value as of June 30, 2014 of at least $50,000.[16]

The financial institutions as well as the National Tax Service coordinated action to execute the reporting requirements of the IGA and declared that a nation-wide IT solution is of the upmost importance for financial institutions to be able to respond for FATCA and for other compliance reporting requirements such as Basel III. At first glance, Basel III compliance requirements are very different from those of FATCA. Basel III simulation functions include the bank profitability and long-term viability according to the net interest margin ratio and Net Economic Value, subject to balance sheet constraints,[17] but data associated with providing account information overlaps that necessary for Basel III simulation. Thus, for example, *Kukmin* Bank amalgamated its collection and reporting of information for FATCA compliance with that for collecting the diverse financial data required to support the Basel III simulation transaction functions such as Asset Liability Risk Management.[18]

Related entities' computerized systems of Korean reporting financial institutions will link financial accounts by reference to a taxpayer identification number.[19] The International Compliance Management Model Notification XML Schema User Guide by the IRS has become the IT model for Korean financial institutions' documentation.[20] FATCA Identification Numbers (FIN) for non-Global Intermediary Identification Number (GIIN) filers will serve as a base system, and FATCA XML files will further be used for FATCA notification schemas generated by the IRS.

The National Tax Service (NTS) published an estimate systems costs including software programming with FATCA, client reports, onboarding procedures, and data system maintenance. The NTS estimated a total of KRW 7,300 million Won beginning 2015 for six years to build the system and operating cost thereafter. The operating costs include new onboarding procedures, software programming, and program lease.[21] The National Tax Service projected 160 million Won would be the estimated for the FATCA compliance operating cost from 2017–2019 for establishing system.[22]

II. The Impacts in Korean Tax-related Law

The National Tax Service in Korea has sought tax compliance and transparency by adopting in 1996 that financial institutions report the beneficial owner of an account on tax self-certification forms. The beneficial owner disclosure policy (translated roughly as the "real name" policy) requires that if an account's nominal owner and actual owner are not the same, then both persons must be reported on the form. If an account has joint owners, all of the owners are subject to be reported on the form.[23] Beginning in 2010, Korea adopted changes to its national tax compliance laws and launched a nationwide tax compliance campaign by declaring June as a tax compliance month, especially for Korean nationals having banking accounts in overseas.

Existing laws have been extensively revised and new clauses inserted since 2013, including the data protection law, the ethnic-Koreans related law, and the privacy law. The Ministry of Strategy and Finance announced 2015 tax reform proposals to establish a foundation for an advanced taxation information reporting system. Major changes related to information exchange were made according to the Adjustment of International Taxes Act Article 31 and Article 49. Article 31 relates to the exchange of tax and financial information, and Article 49 relates to the report on overseas financial accounts.[24]

Article 31 on the exchange of tax and financial information includes the following aspects:

(1) Obtaining tax information required for the imposition and collection of taxes under the Real Name Financial Transactions and Confidentiality Act.[25]

(2) When the competent authority demands financial information, under Article 36 of Adjustment of International Taxes Act, the filed information will be kept confidential except for the cases listed in the Article 81-13 of the Framework Act on National Taxes.

(3) Based on the principle of reciprocity under a tax treaty, a competent authority may request the head of a financial company to provide financial information, including beneficial ownership information under Article 4 of the Act on Real Name Financial Transactions and Confidentiality.[26]

(4) No taxpayer may unreasonably obstruct or delay the exchange of tax or financial information.[27]

(5) Financial institutions offering financial information when a taxpayer is in violation of paragraph Article 31 (2) or (3).[28]

(6) Report on learned divulged financial information.[29]

(7) Article 31 (7) relates to FATCA U.S. indicia certification.[30]

(8) Limitation on the offer of financial information to a Contracting State on the principle of reciprocity.[31]

(9) The head of a financial company requesting the counter-party's financial transaction to submit data necessary to confirm personal information pursuant to the tax treaty.

Article 32 relates to Cooperation in Tax Audit[32] and includes:

(1) The competent authority may, where a tax audit is deemed required on a transaction with a person to whom a tax treaty shall apply, conduct a tax audit on such transaction concurrently with a Contracting State, or dispatch tax officials to a Contracting State in order to directly conduct a tax audit or to participate in the tax audit by the Contracting State.[33]

(2) Where a Contracting State requests his/her cooperation in a tax audit under a tax treaty, the competent authority may accept such request.[34]

Article 47 on Exchange of Tax Information and Financial Information was amended by Act No. 9914, January 1, 2010 (hereafter referred to as "request for financial transaction information")[35] and impacts The Act of Real Name Financial Transactions and Confidentiality.[36] Article 47 establishes procedures and time frames for information requests by a competent authority to a financial institution.[37]

Article 49 refers to the reporting of overseas financial accounts by a financial company or similar thereto established under any finance-related Acts or by subordinate statutes of foreign countries.[38] The amount prescribed for reporting by this article is of a threshold of one billion won or more.

Pursuant to the Act for the Adjustment of International Taxes Act Article 34-37 and Article 31(2), residents or domestic corporations holding an overseas financial account opened at an overseas financial company have to file information on the account if the aggregate balance exceeds KRW one billion for any last day of a month of the relevant year. The Act for the Adjustment of International Taxes Act Article 49-51 of the Enforcement Decree of the Act states that disclosure applies to residents and domestic corporations, including foreign residents in Korea who have a domicile in Korea or a "a place of residence for one year or more in Korea." Form 21 Report on Foreign Bank and Financial Account has to be filed to National Tax Service, which includes reporting "Statement of Foreign Bank and financial Accounts," and "statement of related owners."

While the National Tax Service worked on amendment of tax information exchanges, another legal framework focused on Koreans living overseas. The Registration of Korean Nationals Residing Abroad Act, Overseas Korea Foundation Act, and Act on the Immigration and Legal Status of Overseas Koreans have been updated pursuant to promote financial account reporting compliance.[39]

FATCA reporting requirements to the U.S. have made an immediate impact to Korean-Americans living in the United States in 2015. U.S. nationals of Korean heritage and also U.S. permanent residents of Korean nationality living in the United States have been estimated at approximately 2,000,000 persons.[40] Collection of Korean account information to be reported to the U.S. led to a temporary capital withdrawal by Koreans living in the United States. Some foreign resident Koreans used Korean resident family members' name to hold Korean assets.[41] Others transferred their Korean financial assets into the Korean insurance savings program in numerous accounts that each financial account did not exceed US$50,000.

However, FATCA reporting requires the aggregation of all financial accounts to determine whether the threshold has been reached. For purposes of determining the aggregate balance or value of financial accounts held by a person to determine whether a financial account is a high value account, a reporting Korean financial institution is required to aggregate all such accounts, in the case of any financial accounts that a relationship manager knows or has reason to know are directly or indirectly owned, controlled, or established by the same person.[42]

In 2013, reporting requirements for the National Tax Service were applied to both residents in Korea as well as Koreans in overseas who have foreign accounts. It is known that several high value account holders who were both resident in the U.S. and in Korea elected to abandon their U.S. residency, and U.S. nationality, in order to avoid the U.S. penalties from previous non-reporting.

III. Korean Financial Institutions and FATCA Compliance

1. Non-reporting Korean Financial Institutions

The determination of whether an entity is an Foreign Financial Institution (FFI) or a Non-Foreign Financial Entity (NFFE) and the requirements with which a FFI must comply to avoid FATCA reporting depends on the definitions provided in Annex II of the IGA between the U.S. and Korea. Annex II provides that certain entities may be treated as exempt beneficial owners or deemed-compliant FFIs.

Non-reporting Korean financial institutions (NRKFI) include the four categories common to the Model 1 IGA: (1) exempt beneficial owners, other than funds, (2) funds that qualify as exempt beneficial owners, (3) small or limited scope financial institutions that qualify as deemed-compliant, and (4) investment entities that qualify as deemed-compliant.

The first category of exempt beneficial owners that are Non-Reporting Korean Financial Institutions (NRKFI) includes four types of entities: governmental entities, international organizations, the central bank, and public institutions.

The second category includes six types of funds that may be NRKFIs: (1) a treaty-qualified retirement fund,[43] (2) a broad participation retirement fund,[44] (3) a narrow participation retirement fund,[45] (4) a pension fund of an exempt beneficial owner, (5) investment entity wholly owned by exempt beneficial owners, and (6) the Post Office Pension Service Agency.

The third category includes three types of banks as well as qualified credit card issuer that may be NRKFIs. The three types of NRKFI banks are (1) a Korean financial institution with a local client base, (2) a Korean local bank, and (3) a Korean financial institution with only low-value accounts.

The final NRKFI category includes six types of investment entities that may qualify as deemed-compliant: (1) a trustee-documented Korean trust, (2) a sponsored Korean investment entity and sponsored controlled foreign corporation, (3) a closely held Korean investment vehicle, (4) certain Korean investment advisors and investment managers, (5) certain Korean collective investment vehicles, and finally, (6) certain Korean restricted funds.

A Korean financial institution (KFI) must satisfy the following requirements in order to qualify as deemed-compliant FFI (DCFFI) small or limited scope financial institutions: (1) The financial institution is not an investment entity; (2) No financial account maintained by the financial institution or any related entity has a balance or value in excess of $50,000, applying the rules set forth in Annex I for account aggregation and currency translation; and (3) The financial institution does not have greater than $50 million in assets on its balance sheet, and the financial institution and any related entities, taken together, do not have more than $50 million in total assets on their consolidated or combined balance sheets.[46]

In cases of small and limited scope financial institutions with low value accounts in banks like National Credit Union Federation of Korea, Korean Federation of Community Credit Cooperation, or MG Community Credit Union (*Saemaul Gumgo*), annual re-determination of the status of their account is necessary. Annual re-determination of the status includes whether an underlying account holder is: (1) a specified U.S. person, (2) a Korean financial institution or other partner jurisdiction financial institution, (3) a participating Foreign Financial Institution, a deemed-compliant Foreign Financial Institution, or an exempt beneficial owner, or (4) an active Non-Foreign Financial Entity (NFFE)/passive NFFE. Controlling persons of a passive NFFE must be determined under Korea's Anti-Money Laundering/Know Your Customer procedures.

Six types of accounts are excluded from the definition of financial accounts and thus are not treated as U.S. reportable accounts. The six types of excludable, non-reportable, accounts are: (1) certain savings accounts such as retirement and pension accounts, (2) certain non-retirement savings accounts when the annual contributions are limited to $50,000 and the account is, other than an insurance or annuity contract, granted tax advantages as a savings vehicle, (3) certain term life insurance contracts, (4) account held by a Korean estate, (5) Korean escrow accounts, and (6) an account maintained in Korea and excluded from the definition of financial account under an U.S. IGA with another country.

2. Pensions

Pensions are an important subject because pension accounts in Korea do not necessarily obtain the same tax-advantaged recognition for U.S. tax filing purposes as a U.S. equivalent IRA, 401(k), or similar tax advantaged retirement and savings plan. Likewise, Korea does not necessarily recognize U.S. tax-advantaged accounts. For example, a Roth IRS in the U.S. generally obtains a tax exempt status whereas in Korea income earned by a Roth account may be taxable in Korea. The National Tax Service Form No. 42 (2) is for retirement income tax withholding and statement on retirement income payment have to be submitted by residents in Korea.[47]

Pensions in Korea are covered by the Special Tax Treatment Control Law and classified into one of four types: (1) notional pension (2) government employee pension (3) retirement pension and (4) private pension.[48] For Korean citizens with U.S. dual citizenship, Korean pensions may be reportable (and taxable) to the U.S.

The IGA definition of excluded accounts includes a retirement or pension account maintained in Korea and established by a resident of Korea as a Private Annuity Savings (*Gaein yeongeum jeochuk*) as defined in Article 86 of the Special Tax Treatment Control Act, the version pre-amendment by Act No. 11614 of January 1, 2013, or an Annuity Savings "(*Yeongeum jeochuk*)."[49] The IGA also excludes retirement savings accounts maintained in Korea and established under the Comprehensive Housing Subscription Savings (jutaek cheongyakjonghap jeochuk) as defined in the Housing Act. If a Korean individual transfers residence overseas, a conditional clause has to be met that the annual contribution to the account be limited to $50,000 in order to maintain this exemption from reporting.[50]

Korean pension funds of a Korean exempt beneficial owner include funds established in Korea to provide retirement, disability, or death benefits to beneficiaries or participants that are current or former employees of the Korean exempt beneficial owner.

3. Insurance Companies

Pursuant to due diligence obligations on U.S. reportable accounts, no reporting is required for a pre-existing individual account with a balance or value that does not exceed $50,000.[51] This exception also applies for a cash value insurance contract or an annuity contract with a balance or value of $250,000 or less as of June 30, 2014.[52] Regardless of the Intergovernmental Agreement exemption, residents of Korea are required to report insurance products including certain term life insurance contracts which are life insurance contracts maintained in Korea with a coverage period that will end before the insured individual attains age 90.[53]

As of September 2015, a sample list of Global Intermediary Identification Number (GIIN) portal registration by Korean life insurance[54] and Korean non-life insurance companies has been published.[55] Meanwhile, a new life insurance distribution program through banks called Bancassurance, has emerged. *Bacassuurance* is a tax-deductible life insurance product that offers high returns with a low premium rate and short premium payment period. Reporting Financial Institutions and taxpayers must determine how new insurance programs and products, like Bancassurance,[56] will be categorized for the Intergovernmental Agreement (IGA).[57]

A Reporting Korean Financial Institution (RKFI) may presume that an individual beneficiary of a cash value insurance contract receiving a death benefit is not a specified U.S. person and may treat the person's financial account as other than a U.S. reportable account unless the RKFI has actual knowledge, or reason to know, that the beneficiary is a specified U.S. person.[58] A RKFI has reason to know that a beneficiary of a cash value insurance contract is a specified U.S. person if the information collected by the RKFI and associated with the beneficiary contains any U.S. indicia of the IGA's Annex I.[59] If a RKFI has actual knowledge that the beneficiary is a specified U.S. person, then then RKFI must clearly report he account.[60] Foreign insurance companies issuing annuities or cash value insurance contracts that elect to be treated as a U.S. person for federal tax purpose but are not licensed to do business in the United States are treated as Foreign Financial Institutions.[61] Such foreign insurance company that elects to be treated as a U.S. person must submit a Form W-9 to certify its "U.S. status."

4. Passive Foreign Investment Companies

Determination of the status of a "passive foreign investment company" (PFIC) and its shareholder reporting obligations are by application of the U.S. tax principles.[62] The Korean notion of partnership may have to be adjusted to fit within the U.S. PFIC rules for the purpose of FATCA reporting. The U.S. PFIC definition subjects a U.S. shareholder to tax and interest charges on either the disposition of appreciated PFIC stock or on the receipt of an "excess" distribution from the PFIC. Collective investment vehicles such as a mutual funds or real estate investment trusts are classified as PFICs if they are not registered with the U.S. Securities Exchange Commission. U.S. reporting by a shareholder of a collective investment vehicle requires the submission of Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.[63]

Any distribution received by a Passive Foreign Investment Company's

(PFIC) shareholder in a taxable year that is greater than 125 percent of the average annual distributions in the three preceding taxable years is categorized as an excess distribution.[64] The gain on the disposition of appreciated PFIC stock or an excess distribution is considered to be earned over the U.S. shareholder's holding period. The amount allocated to each taxable year other than the current taxable year or any year prior to the year in which the corporation was a PFIC is subject to tax as ordinary income at the highest rate of tax in effect for the applicable class of taxpayer for that year, and an interest charge is imposed on the benefit of deferral.[65]

A collective investment vehicle is categorized by the IGA as a deemed-compliant FFI investment entity if established in Korea as a regulated collective investment vehicle whereby all of its interests, "including debt interests in excess of $50,000, are held by or through one or more exempt beneficial owners, or active NFFEs."[66]

The definition of Passive Foreign Investment Companies can be compared to that of a Korean "institution prescribed by Presidential Decree."[67] A Korean "Institution prescribed by Presidential Decree" in Article 34(5) 5 of the Act is: (1) An institution related to a financial investment business, collective investment organization, collective investment organization appraisal company, or bond appraisal company under the Financial Investment Services and Capital Markets Act; (2) A financial holding company under the Financial Holding Companies Act; (3) A foreign exchange agency and foreign exchange brokerage company under the Foreign Exchange Transactions Act; and (4) A credit information company under the Use and Protection of Credit Information Act.

5. Pass-through Payments

Pursuant to the FATCA regulations, a withholding tax will be applied to "pass-through" payments made by an Foreign Financial Institution to non-participating FFIs (NPFFI) and to recalcitrant account holders. Pass-through payments are withholdable payments from U.S. source income; and payments that are indirectly attributable to a withholdable payment. Pass-through withholding applies to payments made by a FATCA-compliant FFI to a non-FATCA compliant FFI or a recalcitrant account holder. However, the IGA suspends the withholding relating to recalcitrant accounts.[68]

The U.S. pass-through definitions are not identical to the pass-thru entity[69] and pass-through payment concepts[70] of Korea. Filing requirement of pass-thru entities in Korea are established by the Special Limitation Tax Law revised on March 14, 2014.[71] The Special Limitation Tax Law[72] Article 135 under the Restriction of Special Taxation Act defines pass-thru entities in Korea in reference to Income Tax Law Article 87 related to common business place or taxation under a special taxation based on similar, like-kind entities. Korean PFIC related laws include: Income Taxation Article 4 (2) and Income Tax Law Article 17 (5) which concern profits from investment trusts, and Income Tax Law Article 26 (2), and Foreign Exchange Regulations Article 7-6 (1) and (2) concerning reporting obligations for Special Purpose Companies. Although these laws may be related to the U.S. concept of a pass-through payment, determination of what constitutes a pass-through payment in Korea may not clear due to the different partnership structure.

For example, property related to the investment anonymous partnership or *Johap* and the *Johap* asset is deemed to have a collective ownership and not ownership by any individual underlying owner for pass-through purposes. Application of the Korean tax regime can lead to taxation of all the members of the *Johap* on the *Johap's* accumulated taxable income. However, in practice, the accumulated taxable income from an anonymous *Johap* is not allocated to all of its members and then taxed, the accumulated taxable income instead is calculated only for an "administrative formal purpose."[73]

IV. Conclusion

The impacts of FATCA in Korea have influenced both Korean corporations and financial institutions. Pass-through financial institutions are one of the focuses that need a particular attention. The IRS has indicated that the withholding amount of the pass-through entities will be based on a calculation of the percentage of U.S. assets held by the relevant financial institution. The "pass-through payment percentage" calculation will be used by the foreign financial institution to determine the percentage of any payment made to a non-FATCA compliant Foreign Financial Institution or recalcitrant account holder that is subject to the withholding tax. The percentage will be applied to all payments made to a non-FATCA compliant foreign financial institution, whether or not they are directly or indirectly attributable to any U.S. income.[74]

A sample example of calculation of Pass-through Payment Percentage can serve as a guide.[75]

Suppose Fund A is a participating Foreign Financial Institution (FFI) and has assets consisting of:

(a) an interest in Fund B, a non-participating FFI ($20 million);[76]

(b) an interest in Fund Korea, a participating FFI with a pass-through payment percentage of 50 percent ($30 million);

(c) an interest in Fund D, an FFI that does not calculate its pass-through percentage ($10 million);

(d) an interest in Fund E, a U.S. corporation ($40 million).[77]

Computation:

($20 million x Fund B non-participating FFI pass-through percentage of 0%)
+ ($30 million x Fund C participating FFI with pass-through percentage of 50%)
+ ($10 million x Fund D participating FFI that did not publish pass-through percentage of 100%)
+ ($40 million x 100% because Fund E is a U.S. entity).

Since U.S. source withholding on pass-through payments equals the U.S. assets divided by the total assets, Fund A's pass-through payment percentage for the relevant testing date is equal to $65 million which is the U.S. assets divided by $100 million which is the total assets, or 65 percent.

The IRS adopts a formulary approach that calculates the ratio of the FFI's assets with regards to the withholding payment on the U.S. assets to its total assets. The ratio requires Passive Foreign Financial Institutions to use the ratios to calculate the amount of pass-through payment subject to withholding status certifications. Following the IRS Notice 2011-34, the calculation of a pass-through payment made by a payor FFI is the amount of the payment that is a withholdable payment plus the amount of the payment that is not a withholdable payment multiplied by the pass-through percentage.

FATCA requires a participating FFI to deduct and withhold a tax equal to 30 percent of any pass-through payment made to a recalcitrant account holder or non-participating FFI. Suppose a Non-Financial Foreign Institution has $1,000,000, the pass-through payment according to the pass-through percentage and the withholding amount would result in $750,000: ($1,000,000 + ($3,000,000 x 50%)) x 30% = $750,000.

A Foreign Financial Institution's (FFI) equity or debt interest in a U.S. corporation will be treated as a U.S. asset. U.S. assets also include interests in another FFI.[78]

An interest is an amount equal to the value of the interest in the lower-tier FFI multiplied by the lower-tier FFI's pass-through percentage. An FFI may rely on a pass-through percentage from a lower-tier FFI that is Passive Foreign Financial Institution (PFFI) if the pass-through percentage is published. A PFFI must calculate the pass-thru percentage quarterly, otherwise the PFFI is deemed to have a 100 percent pass-through percentage. A Non-Participating Foreign Financial Institution is deemed to not have a pass-through percentage.[79]

Another area of impact influenced in Korea is partnerships in Korea[80] Due to the differences in the notion of partnership in the United States, categorization of partnerships in Korea into six entities had to be clarified.[81]

(1) *Chusik Hoesa* is not eligible to elect to be a disregarded entity.
(2) *Yuhan Hoesa* is an entity, which has 50 or more shareholders. For the U.S. tax purpose, it is equivalent to a pass-thru entity under the U.S. check the box regulation. It can elect to be disregarded entity for U.S. tax purposes.
(3) *Hapbyong Hoesa* is a partnership of no more than 25 unlimited liability partners that is subject to corporate income tax.
(4) *Hapja Hoesa* is as Limited Partnership which has two types categorized into limited and unlimited partnership, and corporate income tax is applied.
(5) *Yuhan Hoesa* is a limited liability partnership.
(6) *Hapja Johap* is a limited association which is equivalent to U.S. limited partnership.

Scholars have indicated the ambiguity of definition of partnerships in Korea. One of the reasons is that a Korean partnership may be established pursuant to the Civil Act or it may be undisclosed association under the Commercial Act. Taxation and distribution of profits to partners can be different depending upon the application of either Act.[82] Korean partnership taxation is applicable for domestic entities such as *Johap* and also for qualifying foreign entities that elect to be treated as a partnership for Korean tax purposes pursuant to Special Tax Treatment Control Law Article 100 (15) amended in 2013 under Partnership Taxation Regime Applicable for Foreign Entities Law.[83] A year later, in 2014 the IRS updated the "withholding foreign partnerships" reporting requirements that elect to assume certain U.S. withholding tax responsibilities.[84] Existing withholding foreign partnerships had to renew their status by June 30, 2014 to continue to qualify.[85]

If a withholding partner acts as a non-withholding foreign partnership with respect to an indirect partner, it cannot assume primary withholding responsibility for payments made to that indirect partner. The withholding partner is not required to withhold on amounts it pays to a qualified intermediary that assumes primary withholding responsibility with respect to the payment, or to a withholding foreign trust, or another withholding foreign partnership.[86]

Foreign Account Tax Compliance Act (FATCA) issued by the Internal Revenue Service (IRS) in the United States has influence the property reporting requirements to the U.S. persons who hold overseas assets to report the specified foreign financial assets on Form 8938, Statement of Specified Foreign Financial Assets. The U.S- Korea intergovernmental agreement based on FATCA states that funds from a financial asset that are deposited into an account in connection with the sale, exchange, or lease of the property must be reported.[87] Also, a U.S. person who has capital gain from a real estate property transfer in Korea has the reporting obligation pursuant to the Korean law under the Foreign Exchange Transaction Act Article 9(42) and the Overseas Korean Act in Korea. In conclusion, the impact of the Foreign Account Tax Compliance Act under the intergovernmental agreement between the United States and Korea has imposed both individuals and corporations in Korea to comply to the tax reporting requirements.

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1 The Republic of Korea is usually called South Korea and The Democratic Republic of Korea is North Korea. See Central Intelligence Agency, THE WORLD FACTBOOK, available at https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html.

2 A list of jurisdictions available at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx (accessed September 2, 2018).

3 U.S. Treasury, AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO IMPROVE INTERNATIONAL TAX COMPLIANCE, June 10, 2015 (hereafter, IGA). Available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-South%20Korea-6-10-2015.pdf (accessed September 2, 2018).

4 National Tax Law Information System, Korean Government Document No. 15976, 2015.

5 National Tax Service, *Haewe shingo* (*June as the Month of Reporting Accounts Held in Overseas*), available at www.nts.go.kr/wtsnts_skin/board_skin/mdl/mdlFileDown.asp (Kr) (accessed September 2, 2018).

6 Ministry of Strategy and Finance, International Tax Law, Data Protection Law, available at http://www.mosf.go.kr/law/law02b.jsp (accessed September 2, 2018).

7 *Korea, U.S to exchange accountholder data,* KOREA TIMES, March 18, 2015. Available at http://www.koreatimes.co.kr/www/news/biz/2015/03/488_175476.html (accessed September 2, 2018).

8 U.S. Treasury, IGA, ANNEX I, 2015, p.4.

9 http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

10 U.S. Treasury, IGA, ANNEX I, 2015, p.15.

11 National Tax Service, February 23, 2013, available at http://www.nts.go.kr/eng/data/(Form21)Filing%20Form.pdf (accessed September 2, 2018).

12 National Tax Service, HAEWAE GUMYUNG KYAEJAW SHINGO JAEDO (FOREIGN FINANCIAL ACCOUNTING REPORTING) June, 2015, p.73.

13 Act on the Immigration and Legal Status of Overseas Koreans Article 2.

14 National Tax Statistics, Article 85(5) Publication of Roll of High and Habitually Delinquent Taxpayers, available at http://stats.nts.go.kr/national/major_detail.asp?year=2015&catecode=A02011 (accessed September 2, 2018).

15 The most recent Enforcement Decree of the Adjustment of International Taxes Act was according to Presidential Degree No. 26546 on September 25, 2015. Article 51 (3) was added on February 3, 2015. See Ministry of Strategy and Finance, http://www.law.go.kr/) (Kr.). Also, National Tax Service, HAEWAE GUMYUNG KYAEJAW SHINGO JAEDO (FOREIGN FINANCIAL ACCOUNTING REPORTING), 11-121000-004510-14, May 2015, p.16, (Kr.).

16 National Tax Service, HANMI SAEGUM SANGSHIK (TAX KNOWLEDGE IN KOREA AND IN THE U.S.) March 2015, available at https://www.nts.go.kr/ p.95 (Kr.) (accessed September 2, 2018).

17 Banks for International Settlement, Basel III: The Net Stable Funding Ratio, October 2014.

18 Korean banks integrated Basel III compliance into data related to regulatory capital, liquidity, and reporting solutions. Basel III compliance is based on Basel I and Basel II which was initiated from International Convergence of Capital Management and Capital Standards. Basel III credit risk capital requirements, which evolved to the advanced data accuracy for calculating credit risk and consolidating leverage ratio.

19 National Tax Service, HANMI SAEGUM SANGSHIK (TAX KNOWLEDGE IN KOREA AND IN THE U.S.) March 2015, available at https://www.nts.go.kr/ (accessed September 2, 2018), (Kr.)

20 Publication 5216 (8-2015) Catalog Number 67683B Department of the Treasury Internal Revenue Service, available at www.irs.gov (accessed September 2, 2018).

21 National Tax Service, 2015, p.146.

22 See National Tax Service, 2015, p.230 for an itemized breakdown of the estimate.

23 National Tax Service, HAEWAE GUMYUNG KYAEJAW SHINGO JAEDO (FOREIGN FINANCIAL ACCOUNTING REPORTING), Document 11-1210000-000451-14, 2014, 69–70, (Kr.).

24 Korean Legislation Research Institute, *The Statutes of Republic of Korea*, available at http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=31814&type=new&key= (accessed September 2, 2018). Enforcement Date January 1, 2015, Act No.12845, December 23, 2014.

25 Amended by Act No. 10410, December 27, 2010.

26 Newly Inserted by Act No. 11606, January 1, 2013; Act No. 12164, January 1, 2014.

27 Newly Inserted by Act No. 10410, December 27, 2010; Act No. 11606, January 1, 2013.

28 Amended by Act No. 10410, December 27, 2010; Act No. 10854, July 14, 2011; Act No. 11606, January 1, 2013.

29 Amended by Act No. 10410, December 27, 2010; Act No. 11606, January 1, 2013.

30 Article 31(7) specifies the U.S. Indicia: (1) Individual's name, address, tax identification number, and other items indicated in tax treaties, (2) Name of the corporation, address, all relevant information related to identity confirmation including (a) The account holder's nationality or residence status, (b) The account holder's residence address and mailing address, (c) The account holder's telephone number(s) currently on file with the Reporting Korean Financial Institution. Amended by Act No. 12849. Newly inserted on December 23, 2014.

31 Amended by Act No. 10410, December 27, 2010; Act No. 11606, January 1, 2013.

32 Korean Legislation Research Institute, *The Statutes of Republic of Korea*, 2015.

33 Amended by Act No. 11126, December 31, 2011.

34 Amended by Act No. 11126, December 31, 2011.

35 Presidential Decree No. 22040, February 18, 2010.

36 Amended by Presidential Decree No. 19650, August 24, 2006; Presidential Decree No. 23600, February 2, 2012; Presidential Decree No. 24365, February 15, 2013.

37 Amended by Presidential Decree No. 19650, August 24, 2006; Presidential Decree No. 20720, February 29, 2008; Presidential Decree No. 23600, February 2, 2012.

38 Amended by Presidential Decree No. 24365, February 15, 2013.

39 Korean Legislation Research Institute, available at https://www.klri.re.kr/eng/category/main.do (accessed January 2, 2019).

40 Ministry of Foreign Affairs, KOREANS IN NORTH AMERICA, September 18, 2018.

41 *New tax has some Korean Americans wondering: Is U.S. citizenship worth retaining?* March 25, 2014.

42 U.S. Treasury, IGA, ANNEX I, 2015, p.17.

43 U.S. Treasury, IGA, ANNEX II, 2015, p.7.

44 *Id*, at p.2.

45 *Id*, at p.1.

46 U.S. Treasury, IGA, ANNEX II, 2015, p.7.

47 Enforcement Rules of the Income Tax Act in Form No. 24(2) was Revised on March 14, 2014.

48 National Pension Service, available at http://www.nps.or.kr/jsppage/main.jsp (accessed September 2, 2018).

49 U.S. Treasury, IGA, 2015, p.11.

50 U.S. Treasury, IGA, 2015, p.11.

51 U.S. Treasury, IGA, ANNEX I, 2015, p.12.

52 National Tax Service, HANMI SAEGUM SANGSHIK (TAX KNOWLEDGE IN KOREA AND IN THE U.S.) March 2015, available at https://www.nts.go.kr/ (Kr.), (accessed August 20, 2018).

53 U.S. Treasury, IGA, ANNEX I, 2015.

54 Hyundai Life Insurance Co., Ltd. The Prudential Life Insurance Company of BNP Paribas Cardif Life Insurance, Met Life Saengmyoung Insurance Company, Samsung Life Insurance Co., Ltd, Nong Hyup Life Insurance Co., Ltd. Woori Aviva Life Insurance ACE Life Insurance Company Ltd., Shinhan Life Insurance Co., Ltd. Hana Life Insurance Co., Ltd. PCA Life Insurance Co., Ltd Korea, Tong Yang Life Insurance, LIG Non-life Insurance Co., Ltd, LINA Life Insurance Company of Korea. Mirae Asset Life Insurance, Kyobo Life Insurance CO., Ltd. Kyobo Lifeplanet Life Insurance Company, Hanwha Life Insurance Co., Ltd., ING life Insurance Korea, LTD, Dongbu Life Insurance Co., Ltd., Heungkuk Life Insurance, KB Life Insurance Company, Allianz Life Insurance Co., Ltd., and IBK Insurance are the complete list.

55 Jae-Yeon Jeong Hae-Young Ryu, *The Impact of the Foreign Account Tax Compliance Act (FATCA) and the Korea-U.S. Intergovernmental Agreement (Korea-U.S. IGA) on Insurance Companies* DAEHAN KYUNGYUNG HAKOEJI (JOURNAL OF KOREAN MANAGEMENT) 28 (4) May 2015, 1345-1365. (Kr.)

56 Rebeena Alavudeen & Rosa K.D Bonfring, INTERNATIONAL JOURNAL OF INDUSTRIAL ENGINEERING AND MANAGEMENT SCIENCE, Vol. 5, No. 2, June 2015, available at http://www.journal.bonfring.org/papers/iems/volume5/BIJ-8016.pdf (accessed September 2, 2015). Seung-Hoon Song, *Suggestions to promote the growth of Bancassurance in Korea*, ATAE YŎNGU (Asia Pacific Research) 16 (2), December 30, 2009, pp.105-120 (Kr.). Available at http://iga.khu.ac.kr/kor/bbs/upload/iga_05_422_1_20120417094004.pdf (accessed September 2, 2018).

57 *FATCA Boprul Jaeng Gyom* (*FATCA and Legal Vulnerabilities*), JOSAE ILBO, May 27, 2014. Available at http://www.financetax.or.kr/?mid=menu4_2&order_type=desc&document_srl=683&listStyle=viewer (Kr.) (accessed September 2, 2018).

58 U.S. Treasury, IGA, ANNEX I, 2015, p.18.

59 U.S. Treasury, IGA, ANNEX I, 2015 on due diligence.

60 *Id*.

[61] William H. Byrnes, *FATCA Background and 2015 Update Lecture*, 2015, p.14.

[62] A PFIC is defined as any foreign corporation that meets either of the following two tests: (i) 75 percent or more of its gross income for the taxable year is passive income, or (ii) the average percentage of assets held by the corporation during the taxable year which produce passive income or which are held for the production of passive income is at least 50 percent.

[63] Treatment of Shareholders of Certain Passive Foreign Investment, Companies, 57 Fed Reg 11024, 26 USC § 1295(b) (1) (2012) on QEF regime.

[64] Aamir Mahboob, *FATCA and the Fat Cats: Foreign Passthrough Payments and the Blocker Problem*, TAX NOTES INTERNATIONAL, September 16, 2013, 1133-1145, p.1145.

[65] Jasper L. Cummings, Jr., *The Economic Substance Doctrine as Penalty*, TAX NOTES, March 25, 2013, p.1465.

[66] The U.S. Treasury, IGA, ANNEX II, p.9.

[67] Amended by Presidential Decree No. 23600, February 2, 2012.

[68] U.S. Treasury, IGA, 2015, p.13.

[69] Private equity funds are regulated according to The Capital Markets Act, Article 249, Regulations on Foreign Exchange Transactions.

[70] IRC § 1297(b) (1), IRC § 1298(b) (2), (3).

[71] Form 104.

[72] Ministry of Strategy and Finance, available at http://www.mosf.go.kr/law/law02b.jsp (Kr.), (accessed September 2, 2015).

[73] The Capital Markets Act, Article 279(2) on Foreign Collective Investment.

[74] U.S. Treasury, IGA, ANNEX I, 2015, p.93.

[75] Notice 2011-34—Internal Revenue Service, Part III—Administrative, Procedural, and Miscellaneous Supplemental Notice to Notice 2010-60, Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code, p.26.

[76] Michael Hirschfeld, Fred Murray, Peter Blessing, Kevin Downing, & Michael Plowgian, *New FATCA Information Reporting and Withholding for Non-U.S. Investments*, AMERICAN BAR ASSOCIATION, 2011, 64-66, available at www.americanbar.org (accessed September 2, 2018).

[77] Notice 2011 pp. 24-25, IRC § 1471 (b) (1) (D).

[78] *Id*.

[79] *Id*.

[80] Revenue Procedure 2014-47.

[81] Korean Legal Research Institute, available at http://elaw.klri.re.kr/kor_service/lawView.do?hseq=27406&lang=ENG (accessed September 2, 2018).

[82] Kang Lee, *Aggregate and Entity Approach in Partnership Taxation*, JOURNAL OF TAX STUDIES, 10(2), 2010, 476-510. Also, see Junhee Kim, *Review of Cases in* 2017 *Regarding International Taxation*, JOSEBŎP YŎNGU (RESEARCH ON TAX LAW), 24, 2018, 317-354 (Kr.).

[83] Ministry of Strategy & Finance, Statutes of the Republic of Korea, Restriction of Special Taxation Act, Act No. 11614 effective of January 1, 2013 on Special Taxation on Partnership Firm Article 100-15. Available at http://elaw.klri.re.kr/kor_service/lawView.do?hseq=27406&lang=ENG (accessed September 2, 2018).

[84] 2014-35 IRB 1 effective from August 8, 2014.

[85] Rev Proc 2014-47, available at https://www.irs.gov/pub/irs-drop/rp-14-47.pdf (accessed September 2, 2018).

[86] *Id*.

[87] National Tax Service, 2015, p.141 (Kr.).