



Simply Speaking

Obscure legal concepts or terms in a loan document explained in plain English

March 2019

“FATCA”

The U.S. Foreign Account Tax Compliance Act

Example

FATCA Deduction

- a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and no Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.
- b) Each Party shall promptly upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction) notify the Party to whom it is making the payment and, in addition, shall notify the Borrower, the Agent and the other Finance Parties.

What is it and what does it do?

FATCA is a United States law that is enforced internationally through a network of intergovernmental agreements. Non-U.S. financial institutions must either identify and report on certain U.S. account holders or be subject to a 30% withholding tax on certain payments of U.S. source income, including, potentially, interest payments. No FATCA withholding will be required if a recipient of an item of U.S. source income provides a tax form certifying that the financial institution is FATCA-compliant.

Simply Speaking

Why is it there?

Financing documents allocate the risk of withholding taxes applying to interest payments. Under certain financing documents, a lender may be entitled to a gross-up where an interest payment becomes subject to a withholding tax (that is, the lender receives the full amount of the interest free of withholding). However, generally, financing documents except FATCA withholdings from such tax gross-up obligations of the borrower, the rationale being that the lender has control by complying with FATCA requirements.

Why is it important (or not so important) to Lender?

A lender or subsequent lender under a loan or other finance agreement will be required to provide applicable tax forms or suffer possible withholding on interest payments. A failure to provide certain tax forms could result in withholding pursuant to FATCA.

How does it affect Borrower in practical terms?

FATCA does not affect most borrowers under their loan agreements because foreign financial institutions generally establish their FATCA compliance on an applicable version of IRS Form W-8.

How is it relevant to shipping?

FATCA is not specific to shipping, but in addition to financing documents, shipowners may sometimes be asked to provide a tax certification that contains statements about FATCA. These forms can be confusing and often vary between financial institutions, and it may be helpful for shipowners to generally understand what FATCA is.

How is it negotiated?

Generally, most FATCA provisions in loan documents follow the LSTA Model Credit Agreement FATCA provisions. Notably, not all loan agreements contain FATCA provisions. Loan documents exclusively between non-U.S. persons sometimes omit these provisions because FATCA is not relevant.

Simply Speaking

Questions?

Please contact any member of [S&K's Maritime Practice Team](#).



Lawrence Rutkowski
+1.212.574.1206
rutkowski@sewkis.com



Mike Timpone
+1.212.574.1342
timpone@sewkis.com



Hoyoon Nam
+1.212.574.1640
nam@sewkis.com



James Cofer
+1.212.574.1688
cofer@sewkis.com

The information contained in this newsletter is for informational purposes only and is not intended and should not be considered to be legal advice on any subject matter. As such, recipients of this newsletter, clients or otherwise, should not act or refrain from acting on the basis of any content included in this newsletter without seeking appropriate legal or other professional advice. A recipient of this newsletter shall not be treated as a client of Seward & Kissel LLP by virtue of its receipt or readership of this newsletter. Seward & Kissel LLP does not warrant that the information contained in this newsletter is accurate or complete and hereby disclaims any and all liability to any person for any loss or damage caused by any actions taken or not taken based on any or all of the contents of this newsletter.

© 2019 Seward & Kissel LLP

New York
One Battery Park Plaza
New York, NY 10004
+1-212-574-1200

Washington
901 K Street, NW
Washington, D.C. 20001
+1-202-737-8833

www.sewkis.com