




**Through the Lens of  
CARICOM: The  
Case for Exemption:**

**There Are Limits to the Cross-  
Border Enforcement of FATCA**

- Tax and Accounting Practitioners prepare FFIs for compliance rather than exemption.
- The US/IRS require compliance.
- US Treasury Department encourages inter-governmental agreements:
  - To ease the burden on FFIs.

**Compliance as the Option**

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- June 2012: Jamaica's Minister of Finance basically said compliance is an imperative – even though he accepts that it is a law aimed at eliminating tax havens.
  - September 2012: BOJ General Counsel said avenue open for IGA in principle
  - October 1, 2012 – Caribbean Bankers' Associations are calling on CARICOM to fight FATCA – Established a Nine Member Task Force
    - (they are to meet in November – here in Jamaica): ....

**The RESPONSE WITHIN CARICOM**



## Europe

- No Complaint about sovereignty or overreaching of foreign laws.
- Burdened European Taxpayers wanted scalps!
- First proposed model agreement (July 26, 2012 – G-5\*

## \*Chancellor of the Exchequer Osborne


- We need to be as tough on tax evasion abroad as we are at home. The Model Agreement constitutes an important step in tackling international tax evasion...

**Compliance Is Contextual**




# CARICOM'S CONTEXT

VERSUS FATCA'S OBJECTIVE

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- “Foreign tax havens like Switzerland, Liechtenstein and some Caribbean countries thrive by keeping their clients’ money under wraps and safe from tax authorities’ reach.”

**DEATH OF A LOOPHOLE!**

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- “It’s important that no group of people have immunity from U.S. laws, and this will go a long way to reaching these offshore accounts where U.S. citizens hide their earnings.”

**THE LONG ARM OF US LAW**

- CARICOM Members states are in the category of “some” Caribbean Countries:
  - Generally they do not fit within the category of off-shore jurisdictions or “Tax Havens”
  - CARICOM’S tax policies are inconsistent with the with the objectives of FATCA:
    - CARICOM since December 22, 2010 enacted its own reciprocal fiscal arrangement among some member states to prevent tax evasion.
    - Jamaica’s Finance Minister accepts that the purpose of FATCA is to fight eliminate tax havens

**Exemption Based on Context**



- "Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and The Prevention of Fiscal Evasion..."

December 22, 2010

**The Caricom Tax Agreement**

- FATCA is a Voluntary agreement
  - The exceptions under s. 44 of the FIA and the Banking Act are in relation to matters within the jurisdiction of the Court.
  - Consent must be “voluntarily and freely given”.
    - Mackinnon v. Donaldson Lufkin & Jenrette Securities Corp [1986] 1 All ER 653
    - Attorney General v. BNS, BNS Trust (Cayman) Limited (1985) CILR 418

**Conflicts with Local Law**

- A state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.
  - The most frequent insistence by her Majesty's Government has been as a result of its violation by the courts and government agencies of the United States....

**McKinnon v. Lufkin**

- Confidential Relationships (Preservation) Law:

A “consent directive” from a US court was held to be given under compulsion with the threat of contempt proceedings and fines and/or imprisonment in the event of refusal. CONSENT in those circumstances is not valid because consent must not be submission to force and must be voluntarily given.

**AG v. BNS & BNS Trust (Cayman)**

- CARICOM's position is not unreasonable
- There is no question of reciprocity.
  - Dual Citizen Problem – is US going to recognise and share that information?
- Is FATCA compliance truly voluntary?
- Is consent to release Banking information to IRS truly Voluntary?
- Data Protection Legislation

**Questions?**