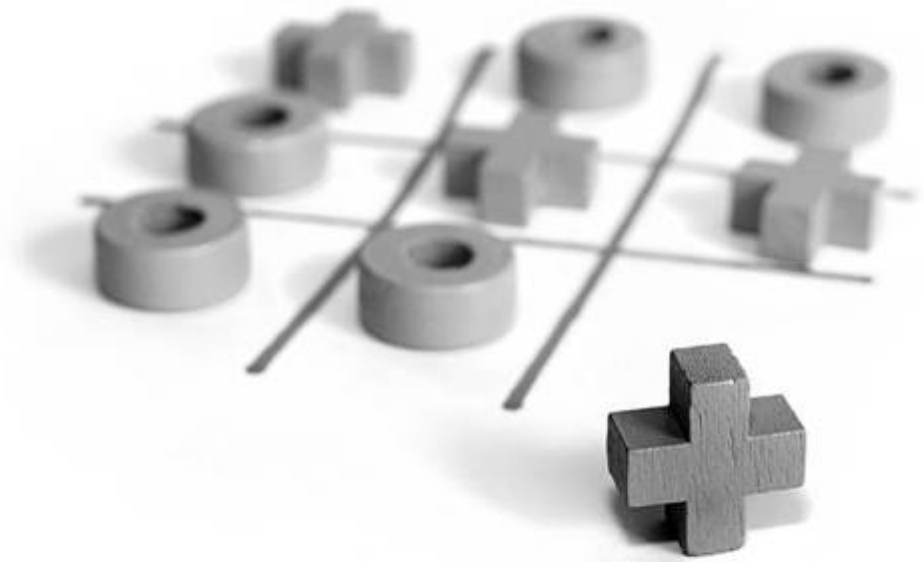


Prepared for Hong Kong Trustees' Association



Baker & McKenzie

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Private and confidential



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1

FATCA Compliance for Trust Companies

FATCA Compliance for Trust Companies

You have asked us to provide you with an overview summary of FATCA issues for trustees of private trusts.¹ This memorandum summarizes the FATCA considerations for trustees of private trusts.²

Executive Summary

With some exceptions, FATCA requires non-US financial institutions (including many private trusts and trust companies, "FFIs") to collect information, and identify and document account holders beginning 1 July 2014. There is limited time for FFIs to begin planning and implementing procedures for FATCA compliance. Trusts, trustees, and investment managers each face different FATCA compliance challenges and the private wealth management industry generally requires more bespoke FATCA compliance solutions than other FFIs.

FATCA and Non-US Trust Structures

FATCA was enacted into US law in 2010. The primary objective of FATCA is to detect and deter US taxpayers from avoiding US tax and reporting obligations on financial assets held through accounts with FFIs. To this end, FATCA imposes a new and additional 30% withholding tax on withholdable payments to FFIs and certain non-US non-financial entities.

FFIs may avoid FATCA withholding by entering into an FFI agreement with the US IRS, thereby becoming a participating FFI ("PFFI"). A PFFI must follow procedures to identify specified US persons for whom the PFFI maintains financial accounts. In order to mitigate some burdens of complying with FATCA, the US issued two model intergovernmental agreements to be implemented between the US and other jurisdictions.

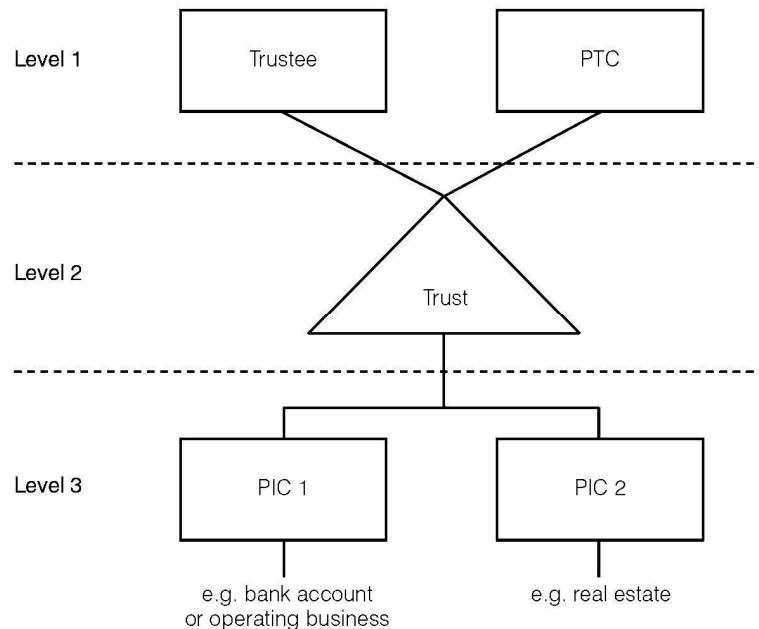
In order to determine what obligations FATCA imposes for trustees and trust structures, trustees will need to determine the FATCA classification of trusts, private trust companies ("PTCs") for which they are involved in compliance or administration, and private investment companies (i.e., PICs or underlying companies). Non-US trusts and non-US underlying companies will generally be considered FFIs if they have primarily investment income and are professionally managed by another FFI.

¹ Unless used otherwise, "FATCA" refers to sections 1471-1474 of the U.S. Internal Revenue Code of 1986, as amended (the "Code") and the published guidance issued by the U.S. Department of the Treasury and Internal Revenue Service thereunder.

² As used in this memorandum, the term "private trusts" refers to trust structures commonly used in the wealth management industry for various wealth management purposes. The term "private trusts" would exclude, for example, trusts with institutional trustees commonly utilized as retirement funds or other investment funds for employees or unrelated persons.

1. Typical Non-US Trust Structure

In a typical trust structure, trustees must consider the FATCA compliance obligations and withholding risks at three levels: (1) Level 1 - the trustee level; (2) Level 2 - the level of the trust; and (3) Level 3 - the level of the underlying companies or assets. The following chart illustrates a typical private trust structure and the levels at which FATCA applies:



Trustees must determine their FATCA compliance obligations at the trust company level, as well as at the level of the individual trust structures they maintain or oversee for settlors and beneficiaries. In addition, trustees must determine the obligations that other FFIs will have to report or withhold on the trustee and structures the trustee maintains.



2. FATCA Classification of the Entities

In many cases, the entities at each of the three levels may be investment entity FFIs. An entity is an investment entity if (1) at least 50% of its gross income is attributable to investing, administering, or managing funds or financial assets on behalf of customers; (2) at least 50% of its gross income is from investing, reinvesting, or trading in financial assets and the entity is managed by certain other FFIs, or (3) the entity functions or holds itself out as a fund or investment vehicle. Accordingly, trusts that are professionally managed by a corporate trustee that is an FFI will be FFIs if their income is predominantly attributable to investing in financial assets. Most corporate trustees will be classified as investment entity FFIs under category (1) above.

A PIC or underlying company of a trust will generally be considered an investment entity FFI if it holds investments in a bank account or shares in an operating business treated as a corporation for US federal income tax purposes. A PIC or underlying company of a trust may not be an investment entity if the entity holds only tangible assets, such as real estate, art, collectibles, or vehicles.

3. FATCA Compliance Framework for Trusts and Trustees

For trusts that are FFIs, the FATCA compliance and withholding obligations of the trustee and the trust itself depend on whether the trust has any "US owners" as determined for FATCA purposes, and the appropriate FATCA compliance framework for the trust and trustee.

3.1 US Ownership of Trusts


Trustees must determine whether the trust has US owners under FATCA. This is because an "equity interest" in a trust is considered a financial account. The holder of an "equity interest" in the trust context means (1) any person who is the owner of the trust under the US foreign grantor trust rules; (2) any beneficiary who is entitled to more than 10% of the trust; and (3) certain beneficiaries who receives a discretionary distribution from the trust during the applicable testing year.

Not all persons with an equity interest in a trust are considered to be "acountholders" for FATCA purposes. For example, a person who, although a beneficiary of the trust, may receive only discretionary distributions and does not receive any distributions in the applicable calendar year, and also is not considered an owner of any part of the trust under the grantor trust rules, would not be considered an "acountholder" of the trust.

3.2 Trust Compliance Framework

If an entity in a trust structure is an FFI and it has been determined that there is a US owner of the trust, then the trust will be required to report certain information regarding that US owner's interest in the trust to the US IRS. The specific obligations of the structure depend upon the applicable FATCA compliance framework that the trustee applies to the trust. FATCA includes several compliance framework with various compliance obligations and trade-offs. Broadly, these frameworks are as follows:

- Participating FFI;
- Registered Deemed-Compliant;
- Certified Deemed-Compliant;
- Owner-Documented;
- Trustee-Documented Status (under an applicable IGA).



Trustees should consider the appropriate compliance strategies available to them by analyzing these frameworks. Depending upon the particular circumstances of the trustee and the trustee's business, a trustee might choose among the following strategies:

- Each trust and/or underlying company becomes a PFFI.
- Each underlying company becomes an owner-documented FFI with the consent of an applicable withholding agent).
- Trustee may become a sponsoring entity and sponsor FATCA compliance for trusts that are FFIs and conduct reporting and other FATCA compliance obligations on behalf of the trust.
- Report on behalf of the trust as a trustee-documented trust where available, or
- Utilize a combination of strategies.

Each of the strategic frameworks have benefits and limitations. For example, the trustee-documented trust category is a streamlined compliance framework for trusts. However, the trustee-documented trust is only available under an IGA and will not be applicable to PICs. Accordingly, trustees should consider the benefits and limitations of various strategies available to them. For many trustees, a combined approach will be most preferable. In addition, certain client structures may involve more problematic or complex considerations and legacy issues requiring bespoke analysis and compliance strategies.

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This memorandum is limited to analysis of US federal income tax laws and practices in effect on the date hereof. We do not address the law of any US state or locality. We do not address the laws of any jurisdiction other than the US and we do not address non-tax laws of the US.

Pursuant to requirements related to practice before the United States Internal Revenue Service, any tax advice contained in this memorandum (including any attachments) is not intended to be used, and cannot be used, for purposes of (i) avoiding penalties imposed under the United States Internal Revenue Code or (ii) promoting, marketing or recommending to another person any tax related matter.

2 Our Practice

What sets our tax practice apart from the rest

The Baker & McKenzie difference

How we can help

- ✓ Tax withholding and compliance issues, information reporting, FATCA, information exchange
- ✓ Private banking, trust issues, family governance
- ✓ Wealth management solutions, wealth preservation and succession planning
- ✓ Taxation of financial products and insurance products
- ✓ Tax dispute resolution
- ✓ Real estate investment trusts
- ✓ International corporate tax planning and global tax optimization
- ✓ Corporate restructuring
- ✓ Transfer pricing planning, documentation and defense
- ✓ VAT planning and VAT audit-related work

An integrated, commercially focused approach to optimizing your tax and compliance position worldwide

The seamless management of all tax considerations in every relevant jurisdiction involved in structures, transactions, and international compliance matters can maximize the efficiency of your tax position and that of your clients. Our tax powerhouse of over 750 lawyers, economists and financial analysts brings unmatched fluency in tax codes and treaties, alternative dispute resolution methods and the subtleties of enforcement in more than 40 countries.

Defensible tax strategies by skilled tax litigators

Unlike accounting firms and many other law firms, we have tax dispute resolution lawyers who are seasoned litigators as well as tax advisers. Many of our tax litigators also focus on tax planning matters and can defend you before competent authorities and courts. Benefit from consistent, innovative and defensible strategies for your international operations and confidently defend your tax position in disputes arising from inquiries by revenue authorities or full-blown tax audits. We have set the standard in litigating complex tax disputes, and represented many of the world's largest corporations on matters with billions at stake in taxes, interest and penalties.

Forward-looking advice from recognized thought leaders

Keep strategies compliant with evolving tax regulations and enforcement policies worldwide. Understand the scope and impact of evolving tax rules through client briefings, newsletters, seminars, handbooks and other complimentary Baker & McKenzie resources. Our lawyers are regularly asked to provide input to global, regional and local policy decisions at the UN, OECD, EU and local government level.

The most recommended tax adviser among law firms worldwide

Our practice is consistently ranked in around 30 countries in **International Tax Review's World Tax directory** - with more than half of our rankings in the top two tiers.

The **2010 PLC Which lawyer? Yearbook** endorsed 51 of our tax lawyers in 28 countries, more than twice the number of lawyers and countries of the next global top 20 law firm.

What sets our wealth management practice apart from the rest

The
Baker & McKenzie
difference

More than tax lawyers, we act as industry advisers, developing pragmatic and comprehensive solutions for tax, regulatory, and commercial issues in wealth management

Our multi-disciplined project teams routinely handle high-value multi-jurisdictional transactions, surveys, and compliance frameworks with ease, advising on the best course of action for trusts and trustees, documentation, reporting and market expansion and enhancing wealth management products and services.

Fully integrated global team offers clients the resources they need to serve discerning wealth owners

We provide strategic assistance on the ground, whether in core investment centers or new wealth management jurisdictions. Governments call upon us to advise on policy direction or new legislation affecting wealth owners. We closely monitor developments in tax regimes around the world, keeping you informed and ready to respond to changing attitudes and conditions in tax enforcement, compliance, and information reporting.

Some of the ways we help

- We serve institutional needs by advising on anti-money laundering investigations and compliance, assisting in strengthening withholding tax compliance, creating custom compliance manuals, advising on US and international tax and securities laws issues.
- We help institutions with the broad array of government investigations focusing on the wealth management industry.
- We assist individuals, families, and companies to mitigate tax exposure in a wide range of personal and commercial undertaking, including estate and business succession, trust administration, compliance with trust, fiduciary, tax, and reporting obligations as well as international mobility planning.
- We help clients with undeclared monies legitimately regularize these monies through voluntary disclosure.

FATCA: Representative Engagements

Baker and McKenzie regularly counsels clients on compliance, U.S. withholding, and FATCA issues. Selected representative engagements include:

<p>BAKER & MCKENZIE</p> <p>Institutional Trust Company Affiliate of Major Global Bank</p> <p>Advising on FATCA issues for institutional trust services structures and clients focusing on trust-based retirement schemes</p>	<p>BAKER & MCKENZIE</p> <p>A Hong Kong Trust Company Affiliate of Major Global Insurer</p> <p>Advising on FATCA issues for institutional trust services structures and clients, advising on the impact of FATCA for the trust company and its affiliated group</p>	<p>BAKER & MCKENZIE</p> <p>Single Family Office of Ultra-High Net Worth Individual</p> <p>Advising the single family office of an ultra-high net worth individual on FATCA classification and compliance obligations for complex multi-jurisdictional real estate holding structure involving more than 200 entities and involving private trusts</p>	<p>BAKER & MCKENZIE</p> <p>Bankers Association</p> <p>Advising a jurisdiction's bankers association on comprehensive FATCA impact for banks in the jurisdiction, including drafting FATCA compliance manual</p>	<p>BAKER & MCKENZIE</p> <p>Bankers Association</p> <p>Advising a jurisdiction's bankers association on various IGA options and assisting the bankers association in educating the government regarding FATCA</p>
<p>BAKER & MCKENZIE</p> <p>Major Multi-National Insurance Company</p> <p>Advising a major multinational insurance company in 8 Asian markets on the local law limitations on FATCA compliance and drafting a waiver of applicable restrictions for use in all jurisdictions</p>	<p>BAKER & MCKENZIE</p> <p>Major North Asian Investment Bank</p> <p>Advising bank on FATCA compliance, managing affiliated group compliance, advising on FATCA withholding exposure for derivatives transactions.</p>	<p>BAKER & MCKENZIE</p> <p>Mid-Sized Swiss Bank Mid-Sized European Bank Mid-Sized Middle Eastern Bank</p> <p>Advising on U.S. tax, FATCA, and qualified intermediary rules for banks, advice covering FATCA impact on retail banking operations, private banking operations, and banks' funds business</p>	<p>BAKER & MCKENZIE</p> <p>Southeast Asian Investment Bank and Brokerage</p> <p>Advising investment bank and brokerage on FATCA impact on cross-border commission sharing agreements</p>	<p>BAKER & MCKENZIE</p> <p>Various International Banks and Financial Institutions</p> <p>Advising on FATCA issues for financial transactions from the FATCA compliance, reporting, and withholding perspectives; advise on syndicated lending transactions, derivatives transactions, and brokerage agreements</p>

3 Key Contacts



Richard Weisman – Partner, Hong Kong Tax; International Wealth Management

Practice description

Mr. Weisman advises on international tax planning matters with a focus on transactions and investment involving Asia and the US. He advises financial institutions and others on legal and tax issues including the application of FATCA. He advises corporations with respect to international tax aspects of direct foreign investment, joint ventures, mergers and acquisitions, restructurings, transfer pricing, permanent establishment concerns, tax treaty issues, and dispute resolution. He advises ultra high net worth Asia-based families on international tax and wealth planning matters. He also represents clients and coalitions with respect to tax-related government relations initiatives in Asia.

Mr. Weisman was the first Global Head of Baker & McKenzie's Tax Practice Group to be based outside the US. Mr. Weisman also previously served for five years on Baker & McKenzie's global Executive Committee. While a member of the Executive Committee, Mr. Weisman had overall responsibility with respect to the firm's Asia Pacific Region, Financial Committee, and Global Tax Practice Group.

Mr. Weisman has been based principally in the Hong Kong office of Baker & McKenzie since 1988. He has also worked in the Firm's offices in New York and Singapore.

Publications, presentations and articles

Mr. Weisman is a frequent speaker on international tax issues in general, in particular those involving Asia and the United States, participating in programs sponsored by Baker & McKenzie, the Tax Executives Institute, the International Fiscal Association, the Council for International Tax Education among others.

Professional affiliations

Mr. Weisman currently serves as Vice Chairman of the American Chamber of Commerce in Hong Kong ("AmCham"), as a member of the Executive Committee of STEP HK, and as a member of Hong Kong's Joint Liaison Committee for Taxation. He also has served on the Executive Committee of the Hong Kong branch of the International Fiscal Association and as Chairman of the Tax Committee of AmCham.

Awards and rankings

- Tax Controversy Leader (Hong Kong) – International Tax Review, Tax Controversy Leaders Guide (2013)
- Leading Lawyer (Tax: Hong Kong Law (International Firms): China/Hong Kong) – Chambers Asia (2013)
- Leading Lawyer (Tax: Hong Kong Law (International Firms): China) – Chambers Asia (2012)
- Leading Lawyer (Private Client/Wealth Management (International Firms): China/Hong Kong) – Chambers Asia (2013)
- Leading Lawyer (Private Client/Wealth Management (International Firms): China) – Chambers Asia (2012)
- Listed as a leading lawyer and regarded as "the most reliable US adviser in town. I recommend Richard strongly... a guru in his field.." by Citywealth Leader List (2012)

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Paul F. DePasquale – Associate, Hong Kong Tax; Insurance; Wealth Management

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Mr. DePasquale is an associate in Baker & McKenzie's International Tax and Global Wealth Management practice groups. He is based in the Firm's Hong Kong office.

Mr. DePasquale's practice focuses on issues relating to international taxation, withholding tax, information reporting, trust planning and succession, and life insurance and annuity products.

Mr. DePasquale regularly advises individuals and families with US connections and the financial institutions that serve them, including private banks, investment managers, trust companies, family offices, and insurance companies. He also advises on US and international tax planning for cross-border businesses and investment funds.

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Being global is part of our DNA.**

Our difference is the way we think, work and behave – we combine an instinctively global perspective with a genuinely multicultural approach, enabled by collaborative relationships and yielding practical, innovative advice. Serving our clients with more than 4,100 lawyers in 46 countries, we have a deep understanding of the culture of business the world over and are able to bring the talent and experience needed to navigate complexity across practices and borders with ease.

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a “partner” means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an “office” means an office of any such law firm.

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