



FATCA & TRUST STRUCTURES

March 2014

With Hong Kong authorities warning trust companies and related financial institutions to be prepared for compliance with the US Foreign Account Tax Compliance Act (FATCA) and an intergovernmental agreement (IGA) between Hong Kong and the United States being finalized, the impending deadlines for FATCA implementation leave little time for any continued delay in addressing how to comply with FATCA's complex rules.

For non-US trusts and trust structures, including corporate trustees, private trust companies (PTCs), private investment companies (PICs) and similar entities, the time to act is now.

If classified as a foreign financial institution (FFI) or a certain type of nonfinancial foreign entity (NFFE), there will be information collection and withholding requirements beginning July 1, 2014 with related reporting beginning March 31, 2015. Any FFI or NFFE that fails to provide the required information could be subject to the 30% withholding tax imposed on certain U.S.-source income, including gross proceeds from the sale of stocks and securities. In order to be included on the list of registered FFIs, the deadline for online registration is April 25, 2014.

To determine its FATCA compliance obligations and the obligations of other FFIs to report and withhold on it, each entity in a non-US trust structure must first determine its FATCA classification (see chart below). This includes a determination by the non-US corporate or individual trustee or PTC, as well as the non-US trust itself and any underlying non-US private investment companies/PICs, with a focus on investment activity for others and professional management.

Most corporate trustees and PTCs will be classified as investment entities and FFIs. Trusts that have primarily investment income and are professionally managed will qualify as FFIs, but will be classified as NFFEs if not professionally managed by a trustee or PTC. For PICs, the determination is based on whether the assets held are bank accounts or shares in an operating business, but excluding holdings of only tangible, non-financial assets such as real estate, art, yachts or planes.

For trusts or entities that are NFFEs because they are not professionally managed or do not hold assets on behalf of others, there still would be certification and reporting requirements for substantial US owners (10% beneficial interest owners or the owners of grantor trusts). These rules do not apply to active NFFEs that are not primarily passive investment vehicles.

For trusts that are FFIs, there will be reporting and withholding obligations for US person's financial accounts and assets. US persons are defined by equity interests in the trust based on ownership under grantor trust rules, 10% beneficial ownership interests and receipt of discretionary distributions. With many non-US trusts, the application of the grantor trust rules and whether there are actual distributions will be determinative factors. Reviewing accounts for US owners will key off of listed indicia of US ownership such as passports and residence.

As part of the overall FATCA compliance and registration, corporate trustees and other FFIs will need to make important decisions. In addition to reviewing entities and then accounts and assets, there will ultimately be compliance decisions. There are several options, each with unique benefits and constraints. With "participating FFIs" there is full compliance for all entities in a structure, which obviously presents issues in many situations.

Alternatively, there is an "owner-documented FFI" regime whereby an FFI reports on all owners utilizing withholding agent principles with US owner disclosure but at a level of complexity not desired by all parties. A more attractive regime is for "sponsored FFIs" where one entity, generally a corporate trustee or the like, reports on behalf of the other entities in a structure, eliminating separate reporting for each FFI. Finally, depending on the exact terms of Hong Kong's inter-governmental agreement (IGA) with the US, a trust (not a trustee) may choose to become a "trustee-documented trust" and report under the IGA's special rules. In more complex structures, a combination of regimes may best serve the parties' varying interests.

Regardless of the compliance regime chosen, trust companies and other entities in a trust structure must begin dealing with the issues presented by FATCA. Time is running out for action and further delays can result in significant adverse consequences for all the parties involved.

For further information please contact:

Todd M. Beutler, International Tax Partner
DLA Piper Hong Kong
T: +852 2103 0493
E: todd.beutler@dlapiper.com

DLA Piper is an international law firm with over 4,200 lawyers working in offices throughout Asia Pacific, Europe, the Middle East and the US. With one of the largest teams of tax lawyers among law firms worldwide, the firm is well-known for its expertise in US and international tax planning and litigation, with a large dedicated team of specialists focused on FATCA and related tax withholding and information return reporting rules and related tax issues. With respect to trust structures, the firm represents financial institutions, trust companies, trustees and other fiduciaries, private clients and their investment companies, as well as other related parties facing FATCA planning and compliance issues. In addition to their specialized FATCA expertise, the Firm's lawyers offer clients their significant government and inter-governmental experience in tax policy, administration and litigation acquired at the IRS and related agencies, as well as their experience at Big Four accounting firms.

