

Joint Industry FATCA Seminar

Overview Session



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FATCA in Hong Kong

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FATCA: Is Everyone Now a U.S. Tax Collector?

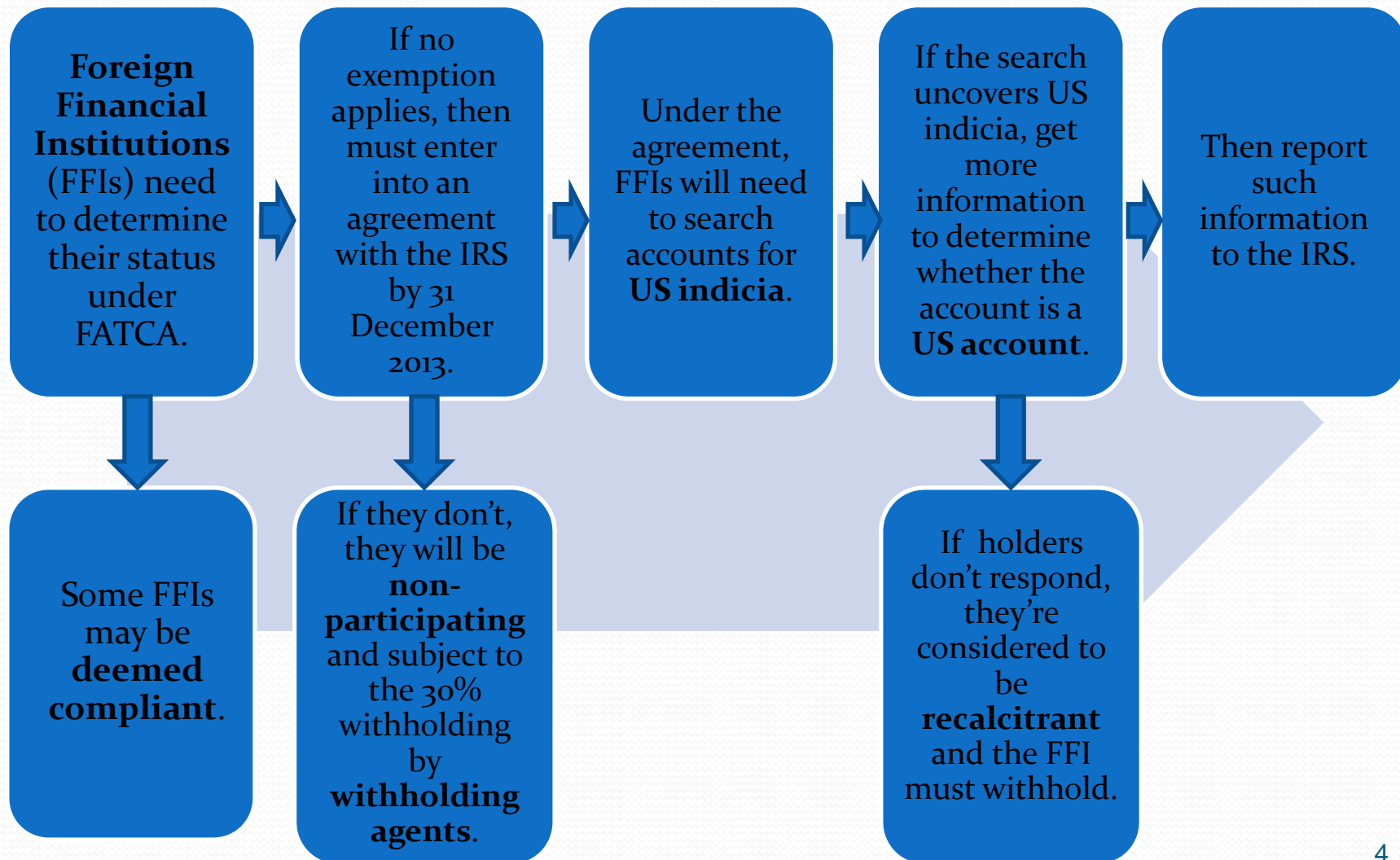
Who is affected? Almost everyone. Almost any non-US financial institution (including hedge funds, other private funds and brokers).

What is it? A US tax law that requires financial institutions to identify US investors that may be hiding assets from US tax authorities (the IRS).

What does it do? FATCA makes institutions choose one of two options:

- enter into an agreement with the IRS to identify “**US accounts**” or
- face a 30% withholding tax on “**US source**” payments.

FATCA – How It Works





Who Is Affected by FATCA?

“Foreign Financial Institutions” – these include any non-US entity that:

- (1) “Accepts deposits in ordinary course of banking or similar business;”
 - Banks
- (2) “As a substantial portion of its business, holds financial assets for the account of others,”
 - Trust relationships?
 - or
- (3) “Is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities...partnership interests, commodities... or any interest (including a futures or forward contract or option) in such securities, partnership interests or commodities”
 - Almost any type of fund, including private partnerships, private equity, hedge, venture capital, UCITs...

FATCA: Common Questions in Hong Kong

- “I don’t have any US shareholders. Does FATCA apply?”
 - Yes, FATCA is both an information gathering and a tax withholding law. Institutions must do the due diligence before they can avoid the tax withholding.
 - You may have US investors and not know it: FATCA’s definition of “US person” is different from the securities law definition.

FATCA: Common Questions in Hong Kong (cont'd)

- “I don’t invest in US securities. Will FATCA still apply?”
 - Yes, the IRS will still require that an FFI enter into an agreement.
 - An FFI could even be subject to the withholding tax if structured products are deemed to be US securities for FATCA’s purposes.
- FATCA-compliant entities may not be permitted to transact with non-compliant entities.
 - Does the FFI use USD for any purpose? USD must eventually be cleared through a US institution.

FATCA Step One: Can You Use an Exemption?

- “Deemed Compliance”
 - FFIs in countries that have entered into cooperation agreements with the United States;
 - Local FFIs;
 - Retirement plans;
 - Qualified investment vehicles;
 - Restricted funds.

FATCA Step One – Exemptions – Cooperation Agreements

- The United States and five European jurisdictions will cooperate to implement FATCA. There are considerable benefits:
 - FFIs won't need to enter into IRS agreements or report to the IRS (but they will report to local regulators).
 - Decreased scope of withholding on entities in cooperating countries.
 - Ability to tailor FATCA exemptions to local needs.
- Will we see cooperation agreements in Asia?

FATCA Step Two – The IRS Agreement

- Unless exception applies, FFIs must enter into agreements (“FFI Agreement”) with IRS, under which FFI agrees to comply with FATCA reporting & related requirements.
 - Otherwise 30% tax must be withheld by withholding agents.
- NOTE: all affiliates of an FFI must either enter into their own agreements or find an exemption. Otherwise, the FFI Agreement will not take effect!
 - But you may have “non-reporting” affiliates.

FATCA Step Two – The IRS Agreement

- Responsible officer will be required to certify that:
 - FFI had written policies and procedures in place as of the effective date of the FFI's FFI Agreement prohibiting its employees from advising U.S. account holders on how to avoid having their U.S. accounts identified.

FATCA Step Two – The IRS Agreement

- One year later, the responsible officer must certify that, between 6 August 2011 and the date of the certification:
 - FFI management personnel did not engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts under the procedures described above.
- Two years later, the responsible officer must certify that account identification procedures are complete.

Determine The Status Of Your Investors?

- You're not searching for US investors– you're searching for “US indicia”.
- There are two types of searches: electronic and manual, paper searches.
- The type of search will depend on the type and size of account.
 - Is the account new or pre-existing?
 - How big is the account?
 - Is the account for an individual, entity or insurance contract?

Determine The Status Of Your Investors?

- Pre-existing Individual Accounts
 - Accounts of US\$50,000 or less do not need to be searched.
 - Accounts greater than US\$50,000 but no more than US\$1,000,000 should be searched electronically.
 - Accounts greater than US\$1,000,000: manual search.
- Pre-existing Entity Accounts
 - Accounts of US\$250,000 or less do not need to be searched.
 - Accounts greater than US\$250,000 but no more than US\$1,000,000 should be searched electronically.
 - Accounts greater than US\$1,000,000: manual search.

Determine The Status Of Your Investors?

- Pre-existing Cash Value Insurance & Annuity Contracts
 - Accounts with a cash value of US\$250,000 or less do not need to be searched.
 - Accounts with a cash value greater than US\$250,000 but no more than US\$1,000,000 should be searched electronically.
 - Accounts with a cash value greater than US\$1,000,000: manual search.



Determine The Status Of Your Investors?

- New Accounts
 - Obtain the required information at account opening in order to ensure that the status of the person (individual/ entity etc) can be properly determined.



FATCA Step Three – What Information Is Relevant?

- Where were you born?
- Do you have a US passport?
- Standing instruction to transfer funds to a US account?
- POA to person with US address?
- Do you have a US phone number?
- “In care of” or “hold mail” address?

People That FATCA Actually Wants You To Identify?

- US Accounts, which are accounts owned by:
 - Specified “US Persons”
 - US-owned foreign entity
 - Exists if “substantial US owner”



FATCA Step Three – “US Persons”

- Tax concept may not match what you may think is a US person



- SEC Concept (Rule 902):
 - US Person = Any natural person resident in the United States
- Tax Concept:
 - US Persons = US citizens (no matter where they reside) & US residents
 - Much broader definition than SEC view

FATCA Step Three – “Substantial U.S. Owner”

- A substantial owner is a “specified U.S. person” that:
 - Owns, directly or indirectly, more than 10% of the:
 - Stock of a corporation (by vote or value) or
 - Profits or capital interests in a partnership
 - Comment: Lower threshold than what you have used before.
- “Specified U.S. person”: any U.S. person other than:
 - A publicly traded corporation (or its affiliates),
 - A tax exempt organization or IRA,
 - The U.S. government or a state government, or any subdivision or wholly-owned agency or instrumentality thereof,
 - A (US) bank, REIT, RIC, common trust, or exempt charitable trust.

FATCA Step Three – “Substantial U.S. Owner” (cont’d)

- Is treated as owner of any portion of a trust under grantor trust rules;
- Is treated as owning, directly or indirectly, more than 10% of beneficial interests in a trust (to the extent provided in forthcoming Regulations); or
- Owns, directly or indirectly, *any* portion of a non-U.S. investment or trading entity.

FATCA Step 4 – Due Diligence – Individual Accounts

US Indicia Have Been Found

- When indicia of US status are found, FFI has to **follow up** with account holder and obtain additional documentation
 - **Type of additional documentation required depends** on the type of US indicia found
 - If documentation not timely obtained, treat as **recalcitrant**
- **CCO or other “responsible officer”** has to **certify** completion of due diligence on pre-existing accounts
 - By 2 years after the FFI Agreement’s effective date , eg 1 July 2015
 - By 1 year after that effective date for high value accounts

Due Diligence –Individual Accounts

US Indicia Have Been Found

Indicia of potential US status (Preexisting accounts & new accounts)

1. Identification as US resident or US citizen

2. A US address (whether residence address or correspondence address)

3. A US phone number

4. A US Place of Birth

Documentation to establish as a US account or not

• Form W-9

• Form W-9 establishing US status, **or**

• Form W-8BEN **and** documentary evidence establishing non-US status

• Documentary evidence for this purpose is **non-US passport** or other similar govt-issued evidence of non-US citizenship

• If a **US birthplace** is provided, must further obtain:

-- Written explanation on renunciation of US citizenship,

-- Reason that the client did not acquire US citizenship at birth, or

-- Cert. of Loss of Nationality of the US



Due Diligence –Individual Accounts US Indicia Have Been Found

Indicia of potential US status (Preexisting accounts & new accounts)

5. Standing instructions to transfer funds to account maintained in the US
 6. A power of attorney or signatory authority granted to person with US address
 7. An “in care of” address or “hold mail” address that is sole address on file
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Required documentation to establish as a US account or not

- Form W-9 establishing US status, **or**
 - Form W-8BEN **and** documentary evidence establishing non-US status
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- Form W-9 establishing US status, **or**
 - Form W-8BEN, **or**
 - Documentary evidence establishing non-US status
-

FATCA Step 5 – Reporting & Withholding

- An FFI that enters into an FFI Agreement has to **report to the US Government** on:
 - **US accounts**
 - Accounts of non-US entities with **substantial US owners**, and
 - **Recalcitrant account holders**
- While an FFI's first reporting date under FATCA is September 2014, it will need **some systems and procedures to be ready by 1 January 2013**
- **Hong Kong privacy law considerations**
 - FATCA plans for FFI to **get customer waivers**

FATCA Reporting (cont'd)

<p>Due 2014 (30 Sept) For 2013 Info + Due 2015 (31 Mar) For 2014 Info</p> <p>- For reporting due 2014, identify account holders as of 30 June 2013</p>	<p>US account holders</p> <ul style="list-style-type: none"> • Name • Address • Taxpayer ID no. • Account number • Account balance 	<p>Non-US entities with substantial US owners</p> <ul style="list-style-type: none"> • Name (for entity and US owners) • Address • Taxpayer ID no. • Account number (for entity) • Account balance (for entity)
<p>Due 2016 (31 Mar) For 2015 Info</p>	<ul style="list-style-type: none"> • Payments paid or credited to the account (except gross proceeds below) – incl. dividend income and interest income • Plus above info 	
<p>Due 2017 (31 Mar) For 2016 Info</p>	<ul style="list-style-type: none"> • Gross proceeds from asset sales • Plus all above info 	



Withholding under FATCA

- To comply with FATCA, FFIs (or other relevant parties) are generally required to deduct and withhold US tax of 30% on **Withholdable Payments** and **Passthru Payments** they make to
 - A recalcitrant account holder or
 - An FFI that does not comply with FATCA
- “**Withholdable Payments**” have to be withheld upon
 - **From Jan 2014** -- US dividend income, US interest income, etc
 - **From Jan 2015** -- Gross proceeds on sale of US assets
- Withholding by FFI on **Foreign Passthru Payments deferred until at least 2017**
 - US Government evaluating how to implement FATCA here

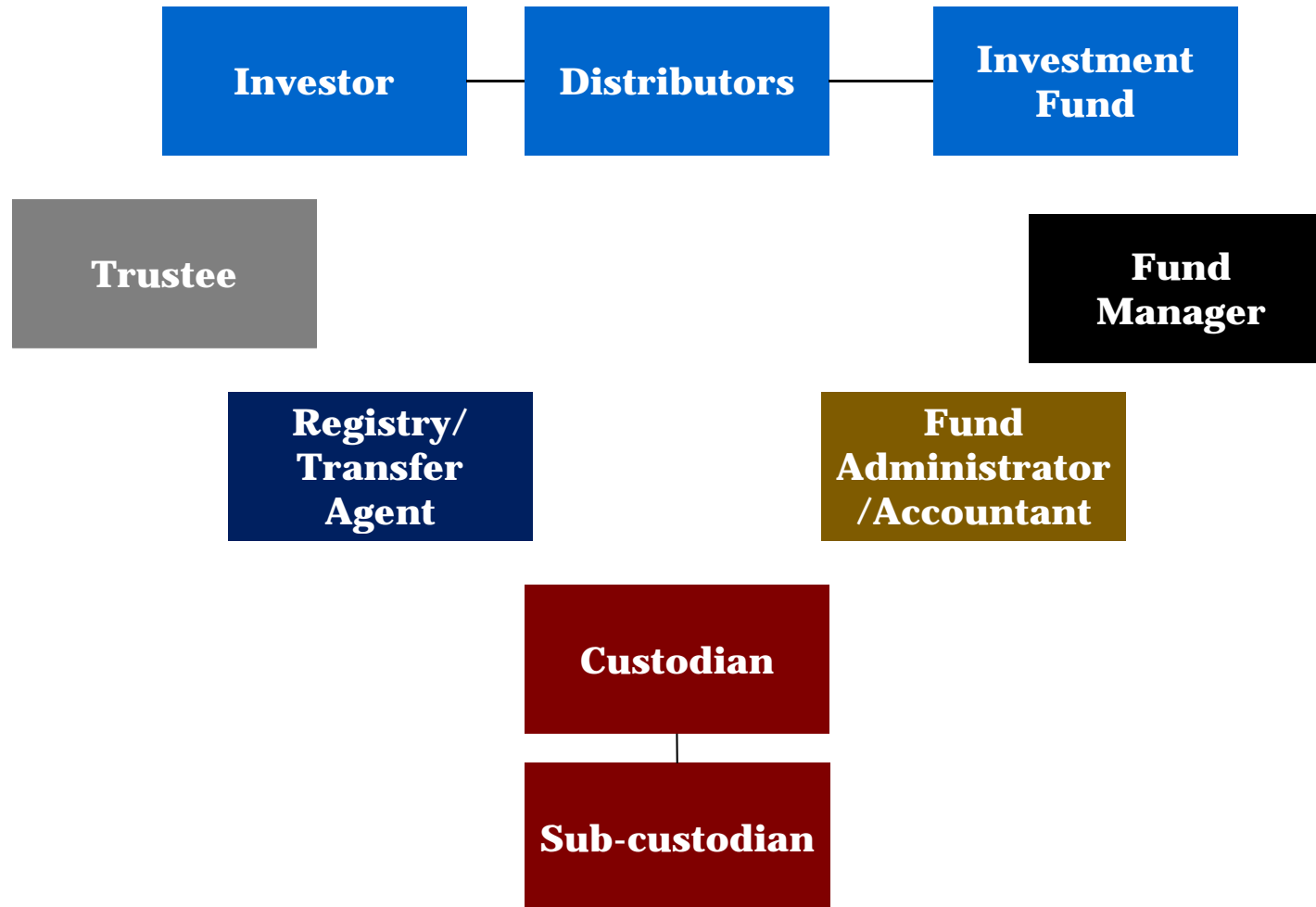
Withholding – Proposed Regs Add Complexity

- Withholding obligations under FATCA are **not limited to FFIs**
 - “Withholding agents”
- The FATCA proposed regs try to coordinate FATCA withholding with **“Chapter 3” withholding** (generally, US passive income)
 - Many concepts from Chapter 3 are added and introduce complexity to FATCA withholding rules
 - Whether an FFI has a **Qualified Intermediary** (“QI”) agreement with the US Government or is otherwise an “intermediary” is relevant

Withholding –If Withholding Not Done...

- Failure to withhold causes:
 - **Joint and several liability** to the US Government for US tax, plus any interest and penalties
 - Potential **breach of the FFI Agreement** entered into with the US Government
 - Chief Compliance Officer or other “responsible person” having to **disclose breach** in their certifications to the US Government

Asset Management



Thank you

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Thank You

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