

## FATCA update for fiduciaries

20 SEPTEMBER 2013

**CATEGORY:**  
ARTICLE

The Foreign Account Tax Compliance ('FATCA') provisions of the Hiring Incentives to Restore Employment Act of 2010, codified in sections 1471 to 1474 and section 6038D of the Internal Revenue Code, will be of interest to any foreign entity investing in the US securities markets, including trusts. Absent compliance with FATCA, non – US investors will face 30% withholding on certain US source payments (including many US source payments that relate to a return of capital).

Final US Treasury regulations implementing FATCA were published in January of this year. The online registration portal, which is to be the primary medium through which foreign financial institutions will demonstrate their FATCA compliance, is now available at [www.irs.gov/fatca](http://www.irs.gov/fatca), along with related instructions and other materials.

The FATCA regime will be modified in many instances by applicable intergovernmental agreements, or IGAs. Trusts covered by an applicable IGA will be subject to home country implementing legislation. If an IGA applies, compliance is likely to be mandatory under the implementing legislation. The IGAs are intended to provide some relief from the otherwise applicable rules under FATCA.

Under FATCA, every non – US trust, along with every other non – US entity, will either be classified as a 'foreign financial institution', or FFI, or as a 'non – financial foreign entity', or NFFE. Broadly speaking, the consequence of FFI status will be that the FFI must either register with the IRS and agree to undertake certain registration, due diligence, information reporting, withholding and verification obligations, or face the aforementioned 30% withholding. Trusts classified as NFFEs will generally need to review their beneficiaries, fiduciaries and office holders to determine if there is any 'substantial US owner' or, if an IGA applies, 'US controlling person', and be able to make appropriate certifications accordingly.

Under some circumstances, a trust or corporate trustee may qualify as 'deemed compliant' under FATCA or an applicable IGA. There are a number of 'deemed compliant' categories, each with different qualifying criteria and compliance obligations. The various deemed compliant categories are tailored to lessen the compliance burdens of FATCA for certain types of entities that are thought to pose a lower risk of being used by US persons to evade US income taxes. Qualifying as deemed compliant either under FATCA or an applicable IGA will likely represent the preferred classification for most private wealth vehicles. Many deemed compliant status categories allow professional institutions to assume the burdens of FATCA compliance on behalf of the affected entities.

In sum, non – US trusts and corporate fiduciaries must be prepared to identify their default or desired status under FATCA and understand what is required to prove and maintain that status.

2014

Portal available for online registration

**25 April**

Finalization of FFI registrations

**2 June**

Publication of first IRS FFI list

**30 June**

Initial effective date of FFI Agreements

**1 July**

Last day for grandfather status

Procedures to determine FATCA status must be in place

Withholding begins on US source FDAP payments to new accounts

**31 December**

Complete review of pre-existing individual high value accounts

2015

\*1 January

\*Withholding begins on pre-existing individual high value accounts

\*31 March

\*First reporting – 2014 US accounts and aggregate reporting of recalcitrant accounts (Form 8966)

\*31 December

\*Complete review of remaining accounts

2016

**1 January**

Begin withholding on remaining accounts

Limited branch and limited FFI relief ends for affiliated groups

\*29 February

\*First Responsible Officer certification deadline

\*31 March

\*Reporting – 2015

\*31 December

\*Responsible Officer reporting period closed

2017

**1 January**

Begin withholding on gross proceeds (& passthru payments)

\*31 March

\*Reporting – 2016

\*30 June

\*RO certification required

