

# Russian de-offshorisation legislation and voluntary disclosure: Which way now?

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The new law on the taxation of controlled foreign companies (the 'CFC' law) and other anti-offshore measures effective as of 1 January 2015 have raised a number of questions for clients and advisers. A number of changes to the new laws were long anticipated and have now been passed by the government. We briefly comment here on two key laws introducing amendments to the CFC rules (law of 8 June 2015 #150-FZ) and the so-called 'amnesty' law (law of 8 June 2015 #140-FZ) which sets out the rules and procedures for the voluntary disclosure of assets, in exchange for guarantees from prosecution and criminal, tax and administrative liability for past actions.

Below we provide a summary of key changes and overview of the opportunities that the new laws provide for individual Russian tax residents and citizens.

What are the main changes to the CFC rules?

Controlling person of a foreign non-corporate structure

The law #150-FZ extends the definition of a controlling person in a foreign non-corporate structure. Importantly, the definition of a controlling person is specifically extended to corporate entities which have no participating members (some forms of foundations, etc). This provision removes ambiguity on whether founders and other persons connected to the foundations would be covered by the wider control definitions set out for the structures.

The settlor/founder is by default considered as a controlling person, unless they are able to meet certain restricted requirements and does not execute actual control over a structure (the definition of control has not changed).

The conditions are strict and may not be suitable for some clients, as all of the below conditions must be met:

- settlor/founder has no right to receive (no right to request) profit (income) from the structure (directly or indirectly)
- settlor/founder has no right to dispose of the profit (income) of the structure
- settlor/founder cannot revoke or otherwise retain 'ownership' rights over assets transferred to the structure; and/or
- most importantly, the settlor/founder will still be considered as a controlling person if they can obtain the above mentioned rights in the structure

The law #150-FZ also extends the provisions under which other persons (other than settlors/founders) can be deemed as controlling persons of the structures and sets out specific criteria. It is an important provision which potentially will catch structures set up by nominee parties.

As a practical outcome of these changes, we would like to note that there is now more clarity on controlling provisions, although planning opportunities for the structures set up by Russian individuals will be substantially restricted. At the same time, risks cannot be excluded in relation to Russian resident beneficiaries, protectors and other connected parties to the structure and it is important to ensure that these risks are properly reviewed and addressed.

There is also much less ambiguity on the position of foundations versus trusts in the context of the new provisions.

*Other amendments*

Importantly, the law #150-FZ extends tax exemption to individuals on receipt of liquidation proceeds (except for monetary funds) following the liquidation of a foreign legal entity (including CFC) or a foreign structure, provided that it is completed before 1 January 2017 (with some exceptions).

The law #150-FZ introduces new tax exemptions for the CFC profits of active companies, active holdings and sub-holdings where profits predominantly consist of dividends distributed by active companies. Controlling persons are still required to submit documentation confirming their right to exemption to the tax authorities.

Earlier provisions which raised the issue of double taxation on dividends paid by Russian beneficial owners to foreign controlled entities have now been removed.

What are the conditions for voluntary disclosure?

The law #140-FZ introduces a voluntary disclosure program which is available to all Russian citizens, irrespective of their tax residency. Both foreign and Russian assets can be declared, including property (e.g. real estate, shares) owned by the taxpayer directly or via a nominee; personal foreign bank accounts, bank accounts where the taxpayer is the ultimate beneficiary (as determined by the Russian AML law #115-FZ); and CFCs. There is no requirement to declare all assets and the declarant can choose to declare individual assets under the program.

The declarants, nominees and other persons included in the declaration are guaranteed from prosecution and exemptions from criminal, tax and administrative liability imposed for violations of criminal, administrative, currency control and tax legislation committed before 1 January 2015 in relation to:

- acquisition and formation of the source of funds
- use or disposal of the property and (or) CFC
- transactions on disclosed bank accounts

There is no requirement for the declared assets to be repatriated to Russia, unless movable property is located in a non-treaty jurisdiction or in a jurisdiction included in the Financial Action Task Force List. There is no requirement to disclose the source of funds, however there is a question on whether this is beneficial for the declarants, given the nature of guarantees provided under the program.

Also, importantly, the law sets out tax exemptions and procedures on the transfer of assets from nominees (acting on basis of an agreement) to the actual beneficial owners of the assets.

What does this mean for you?

- Russian tax resident individuals need to consider the opportunities provided by the new set of laws, in particular:
  - to disclose assets or bank accounts in exchange for guarantees from prosecution and exemption from criminal, tax and administrative liability for past periods
  - to make a tax free transfer of assets from nominees to the beneficial owner
  - to liquidate foreign legal entities or structures before 1 January 2017 and receive liquidation assets tax free
- A non-Russian resident, who has been a Russian resident and/or has Russian-based assets, may use the voluntary disclosure program to regularize compliance issues relating to past periods
- International banks working with Russian resident clients will need to familiarize themselves with the new opportunities and changes in the rules, in order to be able to provide guidance to clients and are advised to seek appropriate advice
- Trustees of a foreign trust (or a foundation) with Russian resident settlors, beneficiaries or controlling persons, or directors of a foreign company holding Russian assets or controlled by Russian persons are required to re-assess their position and the risks associated with the structures/companies they manage in the context of the new changes and should also seek appropriate advice. They may also be requested to participate in the voluntary disclosure program by clients, in which case they should ensure that no duties are breached by acting in accordance with these instructions and appropriate advice is recommended

Where can we help?

- We can help you to understand the obligations and opportunities provided by the new anti-offshore laws and the voluntary disclosure program
- We can analyse your specific background circumstances and develop a diversified approach to restructuring your affairs in order to ensure compliance and to maximise the benefits and opportunities provided by the new rules
- We can advise trustees and directors on the obligations imposed by the new law and their conduct responsibilities in connection with the implementation of asset transfers requested by the clients
- We can review trust and foundation structures and advise on restrictions and planning opportunities in order to comply with the CFC law or minimize the tax and reporting exposure for individuals connected to the structures
- We can review your corporate structures (holding, financing and trading) and propose changes to the structures to ensure compliance with the law
- We can recommend appropriate guidelines for your group of companies so that they are managed and controlled in a tax efficient manner
- We can help you relocate to the UK and a number of other jurisdictions and provide pre-immigration tax planning advice

If you would like to know more

We would be pleased to advise you and your clients on the CFC and voluntary disclosure legislation. Please contact [Olga Boltenko](mailto:Olga.Boltenko@withersworldwide.com) [olga.boltenko@withersworldwide.com](mailto:olga.boltenko@withersworldwide.com) or your relationship partner at Withers.

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