FATCA & Anti-Money Laundering

Implications for Trustees

Sean Smith
Policy Manager

policy@step.org
www.step.org/policy
Game changers for trustees

- FATCA
- CRS
- 4th MLD
Hiring Incentives to Restore Employment (HIRE) Act 2010
Foreign Account Tax Compliance Act

The provisions commonly known as the Foreign Account Tax Compliance Act (FATCA) became law in March 2010.

- FATCA targets tax non-compliance by U.S. taxpayers with foreign accounts
- FATCA focuses on reporting
  - By U.S. taxpayers about certain foreign financial accounts and offshore assets
  - By foreign financial institutions about financial accounts held by U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest
- The objective of FATCA is the reporting of foreign financial assets; withholding is the cost of not reporting.

**Individuals**
U.S. individual taxpayers must report information about certain foreign financial accounts and offshore assets on Form 8938 and attach it to their income tax return. If the total asset value exceeds the appropriate reporting threshold,

Form 8938 reporting is in addition to FATCA reporting.

**Financial Institutions**
To avoid being withheld upon, a foreign financial institution may register with the IRS, obtain a Global Intermediary Identification Number (GIIN), and report certain information on U.S. accounts to the IRS.

**Governments**
If a jurisdiction enters into an Intergovernmental Agreement (IGA) to implement FATCA, the reporting and other compliance burdens on the financial institutions in the jurisdiction may be simplified. Such financial institutions will not be subject to withholding under FATCA.

Related Items:
- Regulations and Other Guidance
- Registration Instructions, User Guide, Frequently Asked Questions, and Other Resources
- International Data Exchange
- FFI List Resources
- Revenue Procedure

UK-US Intergovernmental agreement (IGA)

Model 1A

- Reciprocal
- Register with IRS
- Report to HMRC

Or face 30 per cent withholding tax
1. Only applies to you if you are American
   False

2. Only applies to trusts with US connections
   False

3. Only applies to trusts above the value of USD 250,000 / 1,000,000
   True and false

4. Registering and reporting is best avoided
   False
• Trusts are entities
  
  i. Investment Entities
     a type of Financial Institution (FI)
  
  ii. Non-Financial (Foreign) Entities (NFFE)

• Which entity? Depends on who ‘manages’ the trust
• Trusts that are FIs may need to

Register

IRS

Report

HM Revenue & Customs

+ 

• NFFEs don’t need to register or report
• They will be reported on by any FIs they use
• If the ‘account’ is above a certain threshold level
Trust is a Financial Institution when…

• Trustee is an FI

• Trustee engages FI to manage the trust

• Trustee engages FI to manage the financial assets of the trust
Categorising trusts: UK-US IGA

FATCA: UK trusts under the UK/USA Intergovernmental Agreement (IGA)

- Is the trust a charitable trust?
  - Yes: The trust is a charitable trust.
  - No: Proceed to the next question.

- In the trust carrying on business in the UK and is more than 50% of the trust's gross income attributable to property in the UK, is the trust's income more than 75% derived from income, interest or gains in respect of investments?
  - Yes: The trust is a financial institution.
  - No: Proceed to the next question.

- Does the trust have a reporting financial institution as trustee (or, typically, a corporate trustee)?
  - No: The trust is not a reporting trust.
  - Yes: Proceed to the next question.

- Does the trust have any United States economic interests? (including information about United States financial accounts)
  - Yes: The trust is a reportable trust.
  - No: The trust is not a reportable trust.

- Does the trust have a United States economic interest as a trust?
  - Yes: The trust is a reportable trust.
  - No: The trust is not a reportable trust.
UK-US IGA: any trusts not covered?

Is the trust UK tax resident?

- **Yes**: Is the trust a charitable trust?
  - **Yes**: The trust does not need to register or report.
  - **No**: The trust must consider its status under the FATCA regulations applicable to its tax residence.
- **No**: Registered charities

**Trusts that are not UK tax resident**
Fl tests for trusts

1. Is the trust carrying on business in the UK and is more than 50% of the trust's gross income attributable to trading in money market instruments, portfolio management or the investment and administration of funds?

   YES

2. Is more than 50% of the trust's income attributable to investing, reinvesting or trading in financial assets?

   YES

   The trust is a Financial Institution

   NO

3. Is the trust 'managed' by an entity carrying on business in the UK where more than 50% of gross income is attributable to trading in money market instruments, portfolio management or the investment and administration of funds?

   YES

   The trust is a Non-Financial Foreign Entity (NFFE)

   NO
• If the trustees appoint a discretionary fund manager to manage the assets of the trust
  - Fund manager likely to be an FI
  - Trust is FI for FATCA purposes

• If the trustee is a corporate trustee
  - Trustee likely to be an FI
  - Trust is FI for FATCA purposes
Non-Financial Foreign Entities (NFFEs)

- Do not register or report
- Are reported on by FIs
- Need to confirm their status as NFFE
- Due diligence – any ‘Specified US persons’?
Non-reportable accounts

- **Deceased** persons

- Court order, judgment or other **legal matter**

- Sale, exchange or lease of real or personal property where monies are held to **secure obligations**
**FI options for trusts**

1. **Does the trust have a reporting Financial Institution as trustee (i.e. typically a corporate trustee)?**
   - **YES**: The trust is a ‘Trustee Documented Trust’
   - **NO**: The trustee must register and report on the trust

2. **Global Intermediary Identification Number**
   - The trust can register and report directly. If preferred it can appoint a third party to fulfil its reporting obligations

Either / Or

The trust does not need to register or report
FI options for trusts

3. The trust can become an ‘Owner Documented Financial Institution’
   The trust need not register
   The trust must appoint a ‘Designated Withholding Agent’
   The trust must provide the Designated Withholding Agent with all necessary information
   Option of providing auditor’s letter stating that the trust meets all requirements

4. The trust can become a ‘Sponsored Investment Entity’
   The sponsor must register the trust as a sponsored entity if there are reportable accounts
   Sponsoring investment entity must undertake all FATCA compliance

5. The trust can become a ‘Sponsored Closely Held Investment Vehicle’
   Only available if 20 or fewer individuals own all debt or equity interests
   The sponsor will need to register as a sponsoring entity but need not register the trust
   Sponsor must undertake all FATCA compliance
Timeline

1 January 2014
- IRS portal open for FI registration

2 June 2014
- Initial published list of FIs

25 October 2014
- Deadline to register

31 May 2015
- Reporting to HMRC

1 January 2015
- Final published list of FIs
- Withholding begins

Status of the trust?
Who gets reported

- US Specified Persons who are beneficial owners
- AML due diligence information
- Plus new requirement to establish tax residency of all account holders
- N.B. HMRC requires ‘nil returns’
What gets reported

- Trust is NFFE - FIs report **value of accounts** held
- Trust is FI - ‘**equity interests**’ are reported
  - **Settlor** - all **assets** as of **last valuation**
  - **Mandatory beneficiaries** - Net Present Value (**NPV**) of payments
  - **Discretionary beneficiaries** - based on **actual payments** that tax year
Summary: key tests

1. 50 per cent income test
2. Corporate trustee
3. Discretionary fund manager
1. UK IGAs with Crown Dependencies (CDs) and Overseas Territories (OTs)
2. Organisation for Economic Cooperation and Development (OECD) Common Reporting Standard
• Same FI rules and GIIN registration

• N.B. different ‘indicia’ - tax residence

• FATCA + 12 months
Same approach as IGAs - no need to register

No withholding tax

Focus on tax residence

FATCA + 18 months

Over 60 early adopters
4th (Anti) Money Laundering Directive: Public registers of beneficial owners

Should there be a public register of beneficial owners of companies?

YES

1. What about when a trust is the beneficial owner of a company?

2. Why should trusts be treated any differently?

BUT

www.gov.uk
• Central **register** of trusts

• **Shows** beneficial owners

• **Public** access

• **Member States:** ‘**risk-based approach** when publishing **trust deed** and **letter of wishes**’
Families must reveal trust fund secrets under EU plan

David Charter Berlin

Families would be forced to reveal details of financial affairs kept in trusts under European proposals to crack down on money laundering and tax avoidance.

The European Parliament votes on Thursday on the introduction of a public register of the owners and beneficiaries of all EU companies with an amendment to include trusts.

EU member states will have the final say over the proposals, originally intended to make off-shore companies more transparent and pushed by David Cameron during Britain's chairmanship of the G8 last year.

"Far from being the preserve of the elite, trusts are in fact part of everyday life in the UK — so much so that we often do not even notice them. Though they may not realise it, any couple that owns a home, has a will and life assurance will probably have several trusts. The result is that while the concept of trusts is almost unknown across much of the EU, there are millions in existence here. Most are very low risk from a money-laundering point of view."

Mr Field warned of the huge potential bureaucracy and cost of establishing a comprehensive trust register to record millions of family trusts.
EU Next Steps: trialogue

Commission

Compromise:
Register only available to ‘competent authorities’
(Best option if register does indeed go ahead)

Member States

Access to information without alerting entities

Parliament

Voted in favour of a public register
Summary: be prepared

1. FATCA is here – take action **NOW**

2. If in doubt, register

3. Use the guidance

[www.step.org/policy](http://www.step.org/policy)
[policy@step.org](mailto:policy@step.org)
020 7340 0500
Summary: key tests

1. 50 per cent income test
2. Corporate trustee
3. Discretionary fund manager