



FATCA – QUESTIONS AND ANSWERS

FATCA – Questions and Answers about registration with IRS and reporting to HMRC

FATCA is designed to ensure that US citizens don't avoid paying their taxes.

However, the arrangement between the US and UK authorities means that UK entities, which can include professional practices, trusts and other entities which manage financial assets have to decide whether they need to register with the IRS and what subsequent reporting requirements they will have with HMRC (at the time of writing, October 2014, there is no information about what reporting will be put in place).

More detailed information about FATCA is available on the Tax Faculty website including detailed guidance notes produced by ICAEW, STEP and the Law Society and a link to the HMRC Guidance Notes. The guidance note plus this Q&A should, we believe, answer most of the straightforward questions that people have about FATCA.

The basic question to be answered is whether the entity in question is a Financial Institution, as defined, and has to register with the IRS and report to HMRC or whether it is an NFFE (Non-Financial Foreign Entity) in which case it does not have to register but it needs to determine whether it is passive or active. If it is passive (which broadly means a non trading vehicle but see the HMRC Guidance for the detail) then it may have to provide identification information to the FIs with which it interacts.

If the entity gets most of its income from financial assets ie more than 50% then it will be an FI if a trustee is an FI ie one of the trustees is a corporate trustee or if the trustees engage an FI to manage the trust or to manage the financial assets of the trust.

Common Trust Scenarios

The ICAEW, STEP and Law Society joint Guidance in Appendix III takes readers through a number of common trust scenarios and analyses them as to how they fit in to FATCA and what has to be done. These common trust scenarios and the FATCA conclusions are explained immediately below. For background information about the circumstances surrounding these trusts please refer back to the joint Guidance.

At the end of this Q&A we cover a number of other questions that have been raised with us.

COMMON FATCA QUESTIONS ALREADY COVERED IN THE GUIDANCE

'£10' Pilot trusts

These are NFFEs and do not need to register or report to HMRC.

Nil-rate bank discretionary trusts established after a first death of a couple

As above these are NFFEs and do not need to register or report to HMRC. A note to this effect should be placed with each trust deed and the position should be reviewed after the surviving spouse dies.

Trusts of land

Again these are NFFEs and do not need to register or report to HMRC.

Legacy trusts held on an age contingency

Such trusts typically hold for instance money dependent on the beneficiary attaining a certain age. In the circumstances set out in the guidance notes such trusts are NFFEs and do not need to register nor report.

Family trust invested with a discretionary fund manager

The trust is an FI and either it must register or the trustees can appoint a withholding agent and opt for deemed compliant status. If it is considered appropriate the existing trustees could appoint a corporate trustee, which is an FI, as an additional or replacement trustee, and it would be the corporate trustee that would register on behalf of that trust and all other trusts for which it acts as corporate trustee.

Trusts which are registered charities

Such trusts are specifically exempted from registration and reporting.

The trust is a FURBs

FURBS and other similar unapproved retirement benefit schemes need to be reviewed on the basis of the normal FATCA rules and if there is an FI involved then registration and reporting will be required.

What if there is a corporate trustee?

The corporate trustee can register and report on all the trusts for which it is the corporate trustee.

OTHER QUESTIONS WHICH HAVE BEEN RAISED WITH US

What is an NFFE required to do under FATCA?

As we have noted above an NFFE does not have to register with the IRS. If they have an account with an FI they will need to confirm their status as an NFFE. This will be done either by certification or by provision of a form W9 or W8-BEN-E. The W9 form identifies a US person and will disclose

their US taxpayer identification number (TIN) whereas the W8-BEN-E will certify that the entity is not a US person. If it is a passive NFFE, where the majority of its income is from non trading activities, then it will usually be required to identify its owners to the FI with which it has a relationship and in particular whether it is owned by any US person.

What if a trust manages its own financial assets?

This is in contrast to the discretionary management of those funds, which is discussed above, and which creates an FI. If the trustees are looking after the funds themselves and using an investment house on an execution only basis then the trust is an NFFE unless of course there is a corporate trustee involved.

A professional services firm also provides financial planning and investment advice

If the firm just provides advice then it will be an NFFE. If it manages clients' portfolios and investments and more than 50% of its gross income is from that source then it will be an FI. Any income that comes from administering pension funds would also count towards that 50%. The relevant test is whether those businesses are 'investing, administering or managing funds or money on behalf of other persons.'

A professional firm holds money on client account in addition to its normal professional service work

If the money is managed by the firm there is no FI involved, the bank is merely holding the money and is not managing it, and the firm will be an NFFE.