

An Update on FATCA for United Kingdom Pension Schemes.

Background

There have been a number of developments since our March 2012 [U.S. Tax Alert](#) setting out the impact on UK pension schemes of the proposed U.S. regulations implementing the Foreign Account Tax Compliance Act provisions of the Hiring Incentives to Restore Employment Act ("**FATCA**") published by the U.S. Internal Revenue Service ("**IRS**") on 8 February 2012.

At a very high level, FATCA seeks to encourage foreign (non-U.S.) financial institutions ("**FFIs**") to provide certain information to the IRS (regarding their clients or members) by imposing a 30 per cent. withholding tax on certain payments received by the FFI unless the FFI enters into an agreement with the IRS (an "**FFI Agreement**") or is otherwise deemed compliant with or exempt from FATCA. Under the broad statutory definition of FFI, it is likely that pension schemes would be treated as financial institutions and therefore would be required to comply with FATCA, unless an exemption applies.

Withholding under FATCA on U.S. source payments generally will not begin until 1 July 2014 and withholding in respect of gross proceeds from the sale of assets that generate U.S. source interest and dividends will not apply until 1 January 2017. Further, withholding on "foreign passthru payments" (payments from FFIs that have entered into an FFI Agreement to other FFIs that have yet to enter into an FFI Agreement and are not deemed compliant or otherwise exempt from FATCA and payments to accountholders who do not provide proof of their U.S. or non-U.S. status) will not begin until 1 January 2017 at the earliest.

The UK IGA and the Final Regulations

In order to facilitate compliance with FATCA, the IRS has developed an approach based on the use of intergovernmental agreements ("**IGAs**"), whereby FFIs would perform prescribed due diligence to identify their U.S. accounts (e.g. U.S. persons to whom they might make payments). Information regarding these accounts would then be reported to the authorities in the relevant jurisdiction, which would in turn share the information with the U.S.

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In exchange, an FFI in any of the relevant jurisdictions would avoid certain requirements that would otherwise be necessary to avoid FATCA withholding, including the need for the FFI to enter into an FFI Agreement. For further details see our U.S. Tax Alert [Treasury Releases Model Intergovernmental Agreement for FATCA](#) dated 10 August 2012.

The UK-U.S. intergovernmental agreement on FATCA (the “**UK IGA**”), which adopts this approach, was signed on 12 September 2012 and revised on 7 June 2013.

Further, on 17 January 2013, the IRS issued the long-awaited final regulations implementing FATCA (the “**Final Regulations**”), which clarify and provide guidance on the account identification, information reporting and withholding requirements for FFIs and U.S. withholding agents under FATCA. For further details of the Final Regulations, see our U.S. Tax Alert [Final FATCA Regulations Released](#) dated January 2013.

Impact of the UK IGA on UK pension schemes

Where a pension scheme is established as a trust under English law (or the law of another jurisdiction within the UK) and is a registered pension scheme for the purposes of Finance Act 2004, the scheme should fall within the definition of an “**exempt beneficial owner**” under the UK IGA. All this definition requires is that the scheme is a pension scheme established in the UK which falls within Article 3 (*General Definitions*) of the main UK-U.S. double tax treaty (the “**Treaty**”). **UK registered pension schemes are generally considered to fall within this definition. This analysis is supported by the HM Revenue and Customs (“HMRC”) Guidance Notes on the implementation of the UK IGA.**

As an exempt beneficial owner, trust-based UK registered pension schemes should not be subject to withholding under FATCA as it currently stands, and should not need to enter into an FFI Agreement or undertake any due diligence or reporting in relation to their U.S. members.

Other types of UK pension schemes may also qualify as exempt beneficial owners but this would need to be considered on a case by case basis.

As an exempt beneficial owner under the UK IGA, a pension scheme would also be an exempt beneficial owner under the Final Regulations. The Final Regulations clarify that the pension scheme needs only to be a payee of income and certify that it is a pension scheme that is eligible for the benefits of the Treaty in order to qualify as an exempt beneficial owner for FATCA purposes.

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Implementing the UK IGA

Finance Act 2013 includes a power enabling HM Treasury to make regulations to give effect to the UK IGA (the “**UK Regulations**”). The most recent draft of the UK Regulations was published on 31 May 2013. However, until the final form of the UK Regulations is available, it is not possible to say with certainty what administrative obligations may be imposed on a pension scheme seeking to rely on the UK IGA.

Other points to note

The HMRC Guidance Notes on the implementation of the UK IGA which accompanied the 31 May 2013 draft of the UK Regulations state that exempt beneficial owners will not be required to register with the IRS. However, a pension scheme may still have certain filing and other procedural obligations as a result of FATCA. For example, when receiving a U.S. source payment, a UK pension scheme which is an exempt beneficial owner for FATCA purposes is expected to be required to provide the payer or its withholding agent with a W-8BEN-E form certifying its status under FATCA. A draft version of the W-8BEN-E form is available [here](#) and a final version is expected to be published before the end of the year.

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