

# MACFARLANES

## FATCA - FAQs

### INVESTMENT MANAGEMENT

#### WHAT IS FATCA?

- ◆ The Hiring Incentives to Restore Employment Act, signed into US law in March 2010, includes provisions generally known as FATCA. These provisions are intended to obtain information on assets held by US persons outside the US. To that end, FATCA requires financial institutions (which include UK funds) outside the US holding assets on behalf of US investors to report information to the US Internal Revenue Service (IRS).
- ◆ Where a non-US financial institution invests directly or indirectly into the US, payments of US-source income (**after 1 July 2014**) and proceeds of sales of US property including stock in a US corporation (after 1 January 2017) will be subject to 30 per cent withholding tax unless the financial institution complies with the requirements of FATCA.

#### DO I HAVE TO ENTER INTO AN AGREEMENT WITH THE IRS?

- ◆ Regulations have been implemented in the UK (the UK FATCA Regulations) to enable UK financial institutions to meet their FATCA obligations without entering into a direct agreement with the IRS.
- ◆ A UK fund will be required to comply with the UK FATCA Regulations, whether or not it has US investors or invests in the US.

#### I DON'T HAVE ANY US INVESTORS OR US INCOME. DO I STILL NEED TO COMPLY WITH THE REGULATIONS?

- ◆ Yes, UK funds will be required to comply with the UK FATCA Regulations whether or not they have US investors or invest in the US. The fund will be obliged to identify its investors and if those investors are "specified US persons"<sup>1</sup> the fund will have to report certain information about their identity and payments made to them to HMRC.
- ◆ A nil return will need to be filed if the fund has no investors who are specified US persons.

#### WHICH ENTITY IS SUBJECT TO REPORTING OBLIGATIONS?

- ◆ Reporting must be done at the level of the collective investment scheme as defined for FSMA purposes, not at sub-fund level.

#### WHAT DUE DILIGENCE REQUIREMENTS APPLY TO ME?

- ◆ Reporting financial institutions have both identification and reporting obligations:
  - they must have systems in place to enable them to identify any US reportable accounts (which are financial accounts held, or controlled through another entity, by one or more specified US persons); and
  - they must report details (such as the name, address, taxpayer number, the balance of the account and gross income paid into it) in relation to holders of US reportable accounts to HMRC.
- ◆ The requirement to maintain these systems is enshrined in the legislation and persists even if the fund does not and has no intention to have US investors.
- ◆ The due diligence requirements, will depend on, among other things, whether the account was opened before or after 30 June 2014. Broadly, all that is required where the account existed on or before 30 June 2014 is a review of existing information maintained for regulatory and KYC purposes to determine whether the account holder is a US person. In relation to accounts opened **from 1 July 2014**, the reporting financial institution is obliged in certain cases to obtain a self-certification from the account holder to establish the account holder's status.
- ◆ We advise all UK funds to engage with the fund administrator in order to determine who will be responsible for the identification and reporting obligations. The fund administration agreement may need amendment in order to clarify identification and reporting obligations.
- ◆ We also advise all UK funds to review their application forms to consider whether amendments are required in order to ensure the right information requests, representations and self-certification are included so that the due diligence requirements can be met.

#### WHAT IS THE DEADLINE FOR MY DUE DILIGENCE OBLIGATIONS?

- ◆ There are two sets of obligations:
  - obligations that a fund must comply with to ensure that payers of US-source interest, dividends, rents, royalties and compensation (US payers) do not withhold 30 per cent tax on payments; and
  - obligations that a fund must comply with in relation to its investors.

<sup>1</sup> A "specified US person" is a "US person" – broadly, a US resident, citizen, partnership or corporation but with certain exemptions, such as listed companies and their group companies, as well as banks and states.

- ◆ In relation to the former, the fund is required to register for a global intermediary identification number (GIIN) by 1 January 2015. The fund will need to provide its GIIN to any US payers (e.g. US investees or counterparties) to demonstrate that those US payers do not need to withhold tax on payments they make to the fund. Registration for a GIIN can be done online via the IRS portal (<https://sa1.www4.irs.gov/fatca-rup/>).
- ◆ To satisfy the latter, the fund must submit its first return to HMRC by 31 May of the year following the calendar year to which the return relates. The first report for the calendar year 2014 should therefore be submitted by 31 May 2015. The format for reporting and for financial institutions to transmit reports to HMRC has yet to be finalised.

#### **WHAT FATCA WORDING SHOULD I PUT IN MY PROSPECTUS?**

- ◆ There is no legal requirement to include information on FATCA in the prospectus, but it may be helpful for investors to set out the requirements. We can provide you with some drafting.

#### **DO I NEED TO WORRY ABOUT ANY JURISDICTIONS OTHER THAN THE US?**

- ◆ FATCA only involves the US, but the UK domestic implementing regulations apply whether or not a fund has UK investors or US investments. The UK has also entered into a series of tax information exchange agreements with the Crown Dependencies and several British Overseas Territories, providing for automatic exchange of information (AEOI). Funds based in Guernsey, Jersey, the Isle of Man, Gibraltar, the Cayman Islands, the British Virgin Islands, Bermuda, Anguilla, the Turks and Caicos Islands and Montserrat will be required to report information about their UK investors to the local authorities to be sent on to the UK, and HMRC will collect and send back information from UK funds about their investors from Guernsey, Jersey, the Isle of Man and Gibraltar. The UK domestic rules parallel those for FACTA, with new client identification requirements from 1 July 2014, and the first reports for 2014 and 2015 are due by 31 May 2016.

- ◆ In the medium term, the OECD's project to produce a common reporting standard is expected to result in AEOI between over 40 different jurisdictions possibly as soon as 2016. These developments reflect a new era of transparency and systematic exchange of information, but some may be concerned about the quantity of confidential information that will be disseminated and the potential compliance costs.

#### **CONTACT DETAILS**

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This note is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

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