

# Alert

## UK FATCA Compliance for Investment Funds

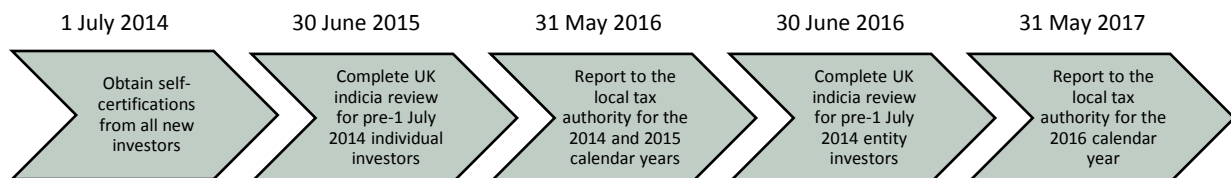
7 November 2014

### The Scope of UK FATCA

The United Kingdom has signed intergovernmental agreements ('IGAs') with its Crown Dependencies and Overseas Territories in order to improve compliance with UK tax laws, a regime often referred to as 'UK FATCA'. The jurisdictions that are part of the UK FATCA regime ('UK IGA jurisdictions') include a number of common investment fund jurisdictions, such as:

- Cayman Islands
- Bermuda
- British Virgin Islands
- Guernsey
- Jersey
- Gibraltar

Funds located in these UK IGA jurisdictions become subject to UK FATCA review and reporting obligations over time, so that there is a series of dates by which various steps in the process must be completed. The following is an outline summary of the relevant UK FATCA implementation dates:



Managers should note that UK FATCA is applicable to all funds located in UK IGA jurisdictions regardless of where the managers of those funds are located or whether such funds have UK-based shareholders or receive UK source income. In particular, US managers should be aware that if they have offshore funds located in a UK IGA jurisdiction, those funds are required to be fully compliant with UK FATCA obligations.

## **Basic Requirements of Investment Funds Subject to UK FATCA**

The basic obligation of an investment fund subject to UK FATCA is to implement due diligence procedures that will enable the fund to identify any of its investors (and, in limited cases, its indirect investors) who are 'Specified UK Persons' and to report annually to the fund's local tax authority in respect of such investors. Subject to a number of specific exceptions, Specified UK Persons are generally investors who are tax-resident in the United Kingdom.

It is important to note that a fund's UK FATCA obligations arise only under the local law and regulations of the relevant UK IGA jurisdiction, which the UK IGA jurisdiction has introduced to implement its IGA. As a result, the only sanctions for non-compliance with UK FATCA are fines and other penalties imposed by the relevant IGA jurisdiction for failure to comply with its local law and regulations. Unlike the US FATCA regime, there are no withholding taxes on the fund's income as a consequence of non-compliance with UK FATCA.

## **Investor Review and Due Diligence**

UK FATCA distinguishes between 'pre-existing' investors — those who invested in the fund on or before 30 June 2014 — and 'new' investors — those who invested on or after 1 July 2014. Funds have different due diligence obligations in respect of pre-existing and new investors.

For new investors, a fund is required to obtain a form of self-certification upon their subscribing for interests in the fund, which enables the fund to identify whether the investor is a Specified UK Person or a Passive Non-Financial Foreign Entity (a 'Passive NFFE').<sup>1</sup> An investor who self-certifies itself as a Specified UK Person is also required to provide certain identifying information, such as his or her date of birth and UK national insurance number if the investor is an individual. An investor that self-certifies itself as a Passive NFFE is also required to certify whether any of its 'Controlling Persons' (the natural persons who exercise control over the Passive NFFE) are Specified UK Persons and provide the identifying information with respect to such Controlling Persons.

There is no prescribed form of UK FATCA self-certification. Funds have therefore three main options as to how they obtain self-certifications from their investors. Many funds have opted to insert UK FATCA self-certification questions into the body of their subscription documents for new investors. Alternatively, some administrators and service providers have prepared their own forms of self-certification, which are sent to investors either as a supplement to or together with the subscription documents or on a stand-alone basis. Finally, funds located in the Cayman Islands (and potentially also other UK IGA jurisdictions) may wish to adopt the self-certification forms prepared by the Cayman Islands FATCA Working Group and circulated by the Cayman Ministry of Financial Services, Commerce and Environment. The suitability of these forms has been confirmed by the Cayman Tax Information Authority, and so some have treated them as having 'semi-official' status. In many cases, funds will wish to utilise their administrators and other outside service providers to assist in the obtaining of self-certification forms from investors and otherwise in meeting their UK FATCA obligations.

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<sup>1</sup> Any entity investor that is not a Financial Institution (as defined in the IGA) is treated as a Non-Financial Foreign Entity (NFFE). An NFFE may, depending on the nature of the entity and its business activities, be either an Active NFFE or a Passive NFFE. Every NFFE is required to determine its own status as either Active or Passive and, where necessary, self-certify that status to the fund in which the NFFE is invested. Note that there is scope here for divergence between US FATCA and UK FATCA. For example, a US entity, such as a tax-exempt US investor, would not be an NFFE under US FATCA but might be for UK FATCA. Further, a charitable or nonprofit entity that is an NFFE under both US FATCA and UK FATCA will generally be classified as an Active NFFE for US FATCA but may be a Passive NFFE for UK FATCA (because the 'deemed Active NFFE' classification that exists under US FATCA has been omitted from the relevant UK IGA).

Some funds in UK IGA jurisdictions may not have obtained self-certifications from ‘new’ investors — those subscribing to the fund on or after 1 July 2014 — at the time of their subscription. However, the United Kingdom has indicated that financial institutions (including investment funds) located in the United Kingdom that have not obtained appropriate self-certifications upon account opening may still be considered compliant if they remediate this omission and obtain the missing self-certifications from ‘new’ investors within a reasonable period. It is anticipated that the UK IGA jurisdictions would adopt a similar position to the collection of self-certifications from such ‘new’ investors, although this issue has not yet been addressed by such jurisdictions. Investment funds that find themselves in this situation may therefore wish to contact their administrator or other FATCA services provider and seek to collect the appropriate self-certifications from any ‘new’ investors who have not so far provided a self-certification as soon as practicable.

With respect to ‘pre-existing’ investors — those who invested prior to 1 July 2014 — investment funds should solicit self-certifications as to their investors’ status under UK FATCA. In addition, funds are required to undertake due diligence searches of their investor records to determine whether these contain any ‘UK indicia’ or other evidence of the investor’s UK FATCA status. UK indicia might include, for example, a UK mailing or residence address or an instruction to transfer funds to a UK bank account. Where apparent UK indicia are found, a fund may also be required to obtain additional documentation from the investor in order to confirm its UK FATCA status, such as a certificate of incorporation or an individual’s valid identification issued by an authorised government body of a jurisdiction other than the United Kingdom. Funds are obliged to complete these due diligence reviews for UK FATCA purposes by 30 June 2015 for individual investors and by 30 June 2016 for entity investors.

In order to streamline communications with investors, managers who intend to reach out to their ‘new’ and ‘pre-existing’ investors for UK FATCA purposes might also wish to include concurrent requests for US FATCA certifications (such as new Forms W-8 and W-9).<sup>2</sup>

### **Annual Reporting**

Investment funds that have identified investors as reportable generally must report certain information with respect to those investors to their local tax authority on an annual basis. The information to be reported includes identifying information in respect of the investor, such as date of birth and UK national insurance number, and also information as to the investor’s account balance or value with the fund. Investment funds should plan to file these reports with the local tax authority by the date specified in such UK IGA jurisdiction. For example, the tax authorities of the Cayman Islands and British Virgin Islands<sup>3</sup> have indicated that funds in each of their jurisdictions will be required to file returns by 31 May following the year for which information is being reported. Investment funds that do not have any investors in respect of whom reporting is needed will generally be required to file a ‘nil return’.

The first reports to be filed under UK FATCA are due in 2016 in respect of the 2014 and 2015 calendar years. For the 2014–2015 years, a fund is only required to include information about an investor in its report for the year in which it has identified that investor as reportable (so that, for example, a Cayman

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<sup>2</sup> For US FATCA generally, funds should obtain certifications and identify the status of: (1) pre-1 July 2014 individual investors by 30 June 2015; and (2) pre-1 Jan. 2015 entity investors by 30 June 2016. US FATCA certifications with respect to subscriptions by individuals on or after 1 July 2014 and entities on or after 1 Jan. 2015 should be obtained as a pre-requisite to investment in the fund.

<sup>3</sup> As of the date of this *Alert*, the British Virgin Islands has published proposed guidance on UK FATCA which has yet to be finalized. The 31 May date assumes that the final version of these regulations will match the date in the proposed guidance.

Islands fund that completes its review in relation to a 'pre-existing' entity investor between 1 Jan. 2016 and the 30 June 2016 deadline for reviews for this type of investor will include information in relation to the investor in its report filed by 31 May 2017).

### **Reminder on Important Dates and Deadlines for US FATCA**

**Registration.** Many investment funds have already registered with the US Internal Revenue Service ('IRS') for US FATCA purposes and received their Global Intermediary Identification Number ('GIIN'). Funds located in jurisdictions that have signed Model 1 intergovernmental agreements with the United States ('Model 1 IGAs'), such as the Cayman Islands and the British Virgin Islands, that have not yet registered should be aware that they have until 31 Dec. 2014 to register with the IRS for a GIIN.<sup>4</sup> The IRS has also indicated that in order for funds to appear on the 1 Jan. 2015 official IRS list of US FATCA registered entities, funds should register by 22 Dec. 2014.

**Due Diligence.** Additionally, pursuant to IRS guidance that has been incorporated under most Model 1 IGAs, including those entered into by the Cayman Islands and the British Virgin Islands, investment funds may treat entity investors subscribing to the fund through the end of the 2014 calendar year as 'pre-existing' investors. As a result, funds that do not obtain valid certifications on such entity investors' US FATCA status as part of the subscription process generally have until 30 June 2016 to perform the necessary due diligence to identify the US FATCA status of those entity investors. However, individual investors who subscribe on or after 1 July 2014 must provide valid certifications on their US or non-US status as a pre-requisite to investing in the fund. Starting 1 Jan. 2015, all investors (entities and individuals) subscribing to the fund should provide certifications on their US FATCA status to the fund as part of the subscription process. Investment managers should make sure that their funds' subscription documents contain comprehensive certifications (including the latest versions of IRS Forms W-8 and W-9) for US FATCA and that they have appropriate due diligence mechanisms in place to validate such certifications.

### **Contact Us**

As with US FATCA, the rules and regulations surrounding UK FATCA continue to develop, and the compliance requirements can be quite complex. If you have any questions concerning this *Alert* or UK FATCA generally, please contact your attorney at Schulte Roth & Zabel or [Nicholas Fagge](#) or Steven Whittaker.

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<sup>4</sup> Investment funds that are not located in Model 1 IGA jurisdictions had until 1 July 2014 to register with the IRS.