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FATCA and Non-U.S. Trusts and Trust Structures— Compliance Options Exist

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Practitioners may not realize how extensively FATCA entity classifications apply to non-U.S. trusts and trust structures, and the resulting impact. There are different options these entities have for FATCA compliance, however.

As the deadlines for FATCA implementation grow closer, more and more foreign entities are facing the hard questions: Does this apply to us, and if so, what are we going to do about it? Although the recently released Notice 2013-43, 2013-31 IRB 113, provides a much welcomed six-month delay in FATCA implementation, there is still not much time. This is particularly true for institutions that are not the types of large financial institutions that have been collecting and reporting information on their clients in some fashion already. In particular, for non-U.S. trusts and trust structures, including the corporate trustees, fund managers, and others who work with these structures, the application of FATCA classifications and how to handle compliance are less straight-forward.

OVERVIEW OF FATCA

The Foreign Account Tax Compliance Act was signed into law as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010.¹ Final Regulations implementing FATCA were published earlier this year (TD 9610, 1/17/13).²

The principal purpose of FATCA is to “detect, deter, and discourage offshore tax evasion” by U.S. citizens, resident aliens, and entities (defined as “U.S. persons”)³ through the use of financial institutions outside the U.S., and to close certain information reporting loopholes that have allowed U.S. persons to avoid disclosure of offshore assets and income.⁴

To achieve its goal, FATCA requires foreign financial institutions (FFIs) and certain nonfinancial foreign entities (NFFEs) to identify and document certain U.S. beneficial owners of accounts

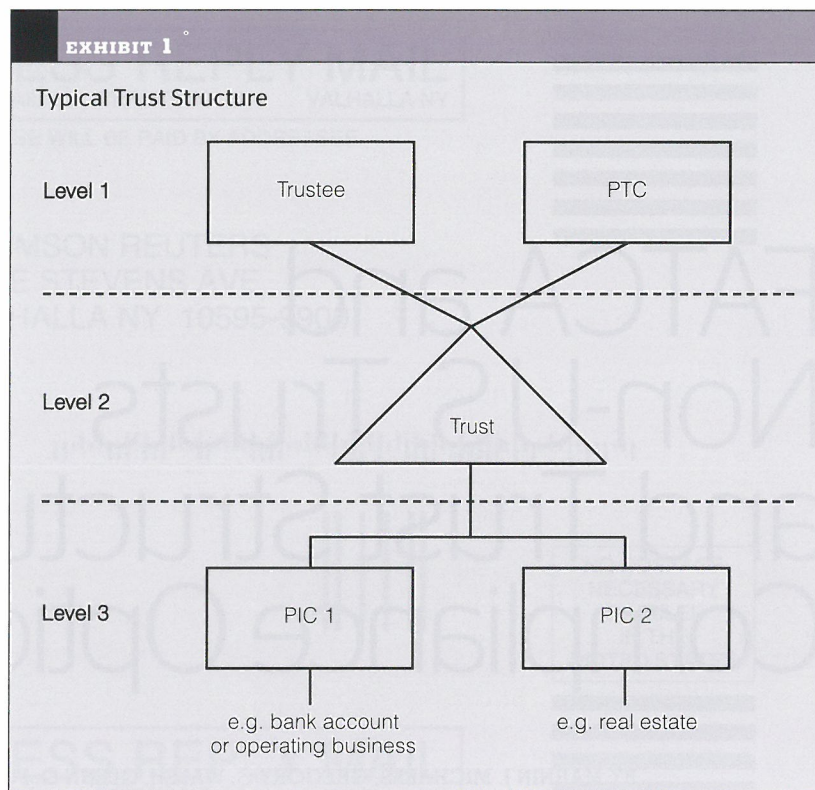
and U.S. source payments. Under the final Regulations, FFIs that are required to report information to the IRS will be required to enter into an agreement with the Service ("FFI agreement") setting forth the information reporting requirements mandated by the final Regulations. Any FFI or NFFE that fails to provide the required information risks having a 30% withholding tax imposed on payments to it of certain U.S. source income—that is, fixed or determinable, annual or periodic (FDAP) income—and on gross proceeds from any dispositions occurring after 2016 of any property that can produce U.S. source interest or dividends ("withholdable payments").

In order to ease the burdens of FATCA implementation and compliance, the U.S. issued two model inter-governmental agreements (IGAs), the "Model 1 IGA" and "Model 2 IGA," to be implemented between the U.S. and other countries (each such country a "FATCA partner"). The IGAs represent an alternate means to implement FATCA in a way that is designed to increase reporting compliance by FFIs while addressing difficulties with implementation under FATCA partner local law.

With some exceptions, FFIs generally will be required to collect information and withholding beginning 7/1/14. Reporting of information generally will begin 3/31/15. There is little time for FFIs, including corporate trustee and fiduciary companies and related entities, to begin planning and putting into place procedures for FATCA compliance. Trusts, trustees, and asset managers will face unique difficulties in assessing and managing their FATCA implementation requirements, and will require a more bespoke solution to these problems than many other financial institutions.

FATCA AND NON-U.S. TRUST STRUCTURES

In order to determine its FATCA compliance obligations and the obliga-



tions of other FFIs to report and withhold on it, an entity in a non-U.S. trust structure must first determine its FATCA classification. To avoid unnecessary reporting and withholding, foreign trusts, private trust companies (PTCs), private investment companies (PICs), and corporate trustees must determine whether they are FFIs or NFFEs before FATCA implementation begins after 6/30/14.

Practically speaking, they should make this determination earlier and, if necessary, register online as FFIs with the IRS no later than 4/25/14, as this is the last day for which registration will guarantee inclusion on the first IRS FFI List by 6/2/14. The FFI will receive a global intermediary identification number (GIIN), required to demonstrate FATCA registration. Having a GIIN to provide to a withholding agent (e.g., bank or other financial institution) will help avoid withholding on payments to an FFI and ensure reporting reflects the

FATCA-compliant status of each entity.

As discussed below, foreign trusts, corporate trustees, PTCs, and PICs are all classified as "entities" for FATCA purposes. The dividing line between an FFI that has primarily investment income and an NFFE depends on whether the entity is professionally managed. Foreign trusts and PICs that have primarily investment income and are professionally managed will qualify as FFIs; foreign trusts and PICs that have primarily investment income but are not professionally managed will be classified as NFFEs.

FATCA Entity Classification

Before assessing the specific due diligence, reporting, withholding or other requirements applicable to a non-U.S. trust structure and the various entities comprising the structure, the entities must first be classified for FATCA purposes as either FFIs or NFFEs. A typical trust structure will require a determination of the application of FATCA at three different levels (see Exhibit 1):

- Level 1: the corporate or individual trustee and/or PTC;

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- Level 2: the trust; and
- Level 3: any underlying PICs or assets.

The location of the trust, trustee, PTC, and PICs, as applicable, as well as the location of any bank accounts, determines whether one or more IGAs are applicable. For example, a trust that is governed by the laws of England and Wales with a Swiss bank account will need to look to the U.S.-U.K. IGA⁵ for guidance in relation to its FATCA compliance requirements as to the trust (i.e., Level 2) and to the U.S.-Swiss IGA⁶ for guidance in relation to its FATCA compliance requirements as to the Swiss bank accounts (i.e., Level 3).

FATCA divides legal persons into two categories: individuals and entities. Entities are further divided into FFIs and NFFEs. Trusts, corporate trustees, PTCs, and PICs will be classified as FFIs if they have certain characteristics, as described below.

FFIs

An FFI is any non-U.S. entity that holds financial assets for the beneficial ownership of another person and falls within one of five following categories:

1. Depository institutions.
2. Custodial institutions.
3. Investment entities.
4. Insurance companies and their holding companies.
5. Holding companies or treasury centers that are part of a financial group.

The key classification factors of the five FFI categories enumerated in the Regulations are summarized in Exhibit 2.⁷

Entities in a non-U.S. trust structure with a corporate trustee, including trusts, are generally classified as investment entities and therefore as FFIs.

Under Reg. 1.1471-5(e)(4)(i), an entity is an investment entity if at least 50% of its gross income during the applicable measuring period (the shorter of the last three calendar years or the duration of the entity's existence) is attributable to conducting, as a business for or on behalf of cus-

EXHIBIT 2	
FFI Classification Factors	
Category of FFI	Key Classification Factor
Depository institution	Accepts deposits in the ordinary course of a banking or similar business.
Custodial institution	20% or more of the entity's gross income is attributable to holding financial assets.
Investment entity	Investment funds and investment managers primarily engaged in the business of investing, reinvesting, or trading in financial assets.
Specified insurance company	Insurance company or holding company of a group that includes an insurance company if the insurance company (or holding company) issues or is obligated to make payments on a cash value insurance or annuity contract.
Certain holding companies and treasury centers	Holding companies and treasury centers that are (1) part of an expanded affiliated group that includes a depository institution, custodial institution, insurance company, or investment entity, and (2) a holding company or treasury center formed in connection with or availed of by an investment fund.

tomers, one or more of the following activities:

- Trading in instruments, portfolio management, or otherwise investing, administering, or managing funds, money or financial assets on behalf of other persons (a "class A" investment entity),
- Investing, reinvesting, or trading in financial assets if the entity is managed by an FFI that is a depository institution, custodial institution, insurance company, or class A investment entity (a "class B" investment entity), or
- Functioning or holding itself out as a fund or other investment vehicle (a "class C" investment entity).

The IGAs provide for only one general type of investment entity, largely mirroring the "class A" in-

vestment entity found in the Regulations.

Application to trusts. The final Regulations provide examples illustrating that the IRS considers trusts which are professionally managed by a trustee or PTC, which is in turn an FFI, to be FFIs. Trusts that are not professionally managed by an FFI will not be FFIs but instead passive NFFEs.

Application to trustees. Most corporate trustees will be classified as investment entities under either the Regulations or an applicable IGA. Corporate trustees primarily manage the funds, money, or financial assets of the trusts comprising their mandates. To the extent a corporate trustee is itself managed by a company classified as an FFI, this also could serve as the basis for the trustee's classifi-

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¹ PL. 111-147, 3/18/10.

² See Donovan, Michaels, et al., "Final FATCA Regulations Ease Many Burdens," 118 JTAX 121 (March 2013).

³ A "U.S. person" includes a U.S. citizen, a U.S. resident, a domestic partnership, a domestic corporation, and a domestic trust. A "non-U.S. person" is an individual or entity that is not a U.S. person. See Section 7701(a)(30).

⁴ Cong. Rec. S10785 (daily ed. 10/27/09) (statement of Senator Baucus (D-Mont.), Chair, Senate Committee on Finance).

⁵ Bilateral Agreement between the U.S. and the U.K. to Implement FATCA, 9/12/12, available at www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last accessed 7/18/13) (the "U.K. IGA").

⁶ Bilateral Agreement between the U.S. and Switzerland to Implement FATCA, dated 2/14/13, available at www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last accessed 7/18/13) (the "Swiss IGA").

⁷ Regs. 1.1471-5(e)(1) through (6).

FATCA Glossary

FDAP	Fixed or determinable, annual or periodic income
FFI	Foreign financial institution
GIIN	Global intermediary identification number
IGA	Intergovernmental agreement
NFFE	Nonfinancial foreign entity
PIC	Private investment company
PFFI	Participating FFI
PTC	Private trust company

entity that holds assets for itself, and not on behalf of others. The IGAs adopt a substantially similar definition by reference to the Regulations.⁹

FFIEs are not required to register with the IRS or a FATCA partner authority, but certain payments made to "passive" NFFIEs may be classified as withholdable payments if the NFFIE does not certify that it has no substantial U.S. person owners or provide information about its U.S. person owners. These rules do not apply to "active" NFFIEs.

An entity is an active NFFIE if (1) less than 50% of its gross income from the preceding calendar year is passive income, or (2) less than 50% of the weighted average percentage of assets (tested quarterly) are assets that produce or are held for the production of passive income.¹⁰ Types of passive income for determining the test include dividends, interests, royalties and rents, annuities, and death benefits from life insurance contracts.¹¹

Active NFFIEs, along with certain other entity types, including qualifying publicly traded corporations, are classified as "excepted NFFIEs" not subject to the requirement that such entities identify and report any U.S. person beneficial owners.¹² If, on the other hand, the NFFIE is not an active NFFIE (i.e., a passive NFFIE), then 30% FATCA withholding will apply to all withholdable payments made to the NFFIE payee.¹³ A passive NFFIE can avoid the application of withholding if the NFFIE is the beneficial owner of the payment and the NFFIE identifies and reports its substantial U.S. owners.¹⁴ In the case of a trust, a "substantial U.S. owner" is any specified U.S. person treated as the owner of any portion of the trust under applicable grantor trust rules or that holds, di-

rectly or indirectly, more than 10% of the beneficial interests of the trust.¹⁵

Treatment of Trusts That Are FFIs

As mentioned above, the categorization of a trust and its related entities for FATCA purposes affects the reporting and withholding obligations of those entities under FATCA, as well as whether other FFIs will be required to report and withhold on those entities. This categorization involves two aspects:

1. Whether the entity has U.S. owners, and
2. The entity's FATCA entity classification.

This latter category involves some flexibility: FFIs may have more than one option for the type of FFI classification for which they can qualify, as long as they fulfill certain requirements.

Ownership of non-U.S. trusts. FATCA requires FFIs to report and withhold on certain financial accounts and financial entities owned by U.S. persons. While those reporting and withholding obligations will be discussed below, we first look at how FATCA applies to determine if a trust or other entities or accounts in a trust structure are treated as owned by U.S. persons.

For FATCA purposes, an "equity interest" in a trust is the equivalent of a "financial account."¹⁶ Pursuant to the Regulations, a person owning an "equity interest" in a trust includes any of the following:

1. A person who is the owner of all or any portion of a foreign trust under the grantor trust rules,¹⁷
2. Any beneficiary who is, directly or indirectly, entitled to more than 10% of the trust, and
3. A beneficiary who receives a discretionary distribution from the trust (if such person receives a distribution in the applicable calendar year).

Not all persons with an equity interest in a trust are necessarily deemed "accountholders" for FATCA purposes, however. For example, a person who, although a beneficiary of the trust, may receive only discretionary distri-

NFFIEs

entity that holds assets for itself, and not on behalf of others. The IGAs adopt a substantially similar definition by reference to the Regulations.⁹

FFIEs are not required to register with the IRS or a FATCA partner authority, but certain payments made to "passive" NFFIEs may be classified as withholdable payments if the NFFIE does not certify that it has no substantial U.S. person owners or provide information about its U.S. person owners. These rules do not apply to "active" NFFIEs.

An entity is an active NFFIE if (1) less than 50% of its gross income from the preceding calendar year is passive income, or (2) less than 50% of the weighted average percentage of assets (tested quarterly) are assets that produce or are held for the production of passive income.¹⁰ Types of passive income for determining the test include dividends, interests, royalties and rents, annuities, and death benefits from life insurance contracts.¹¹

Active NFFIEs, along with certain other entity types, including qualifying publicly traded corporations, are classified as "excepted NFFIEs" not subject to the requirement that such entities identify and report any U.S. person beneficial owners.¹² If, on the other hand, the NFFIE is not an active NFFIE (i.e., a passive NFFIE), then 30% FATCA withholding will apply to all withholdable payments made to the NFFIE payee.¹³ A passive NFFIE can avoid the application of withholding if the NFFIE is the beneficial owner of the payment and the NFFIE identifies and reports its substantial U.S. owners.¹⁴ In the case of a trust, a "substantial U.S. owner" is any specified U.S. person treated as the owner of any portion of the trust under applicable grantor trust rules or that holds, di-

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- ⁸ Reg. 1.1471-1(b)(74).
- ⁹ Model 1A IGA, Annex I, section VI.B(2).
- ¹⁰ Reg. 1.1472-1(c)(1)(iv).
- ¹¹ Reg. 1.1472-1(c)(1)(v)(A).
- ¹² Reg. 1.1472-1(c).
- ¹³ Reg. 1.1472-1(b)(1).
- ¹⁴ Regs. 1.1472-1(b)(1)(i) through (iii).
- ¹⁵ Reg. 1.1473-1(b)(1)(iii).
- ¹⁶ Regs. 1.1471-5(b)(3)(iii)(B), 1.1471-5(b)(1)(iii), and 1.1473-1(b)(3).

- ¹⁷ See Sections 671-679.
- ¹⁸ Reg. 1.1471-5(a)(2).
- ¹⁹ Reg. 1.1471-5(a)(3).
- ²⁰ Reg. 1.1471-5(f)(1).
- ²¹ Reg. 1.1471-5(f)(1)(i)(A).
- ²² Reg. 1.1471-5(f)(1)(i)(F).
- ²³ Reg. 1.1471-5(f)(1)(i)(F)(3).
- ²⁴ Reg. 1.1471-5(f)(1)(i)(F)(3).
- ²⁵ Reg. 1.1471-5(f)(2).

butions and does not receive any distributions in the applicable calendar year, and also is not considered an owner of any part of the trust under the grantor trust rules, would not be deemed to be an "account holder" of the trust.

A "U.S. account" is defined as any financial account maintained by an FFI that is held by one or more specified U.S. persons or U.S. foreign-owned entities.¹⁸ The person listed or identified as the holder of an account according to the FFI's records is the account holder,¹⁹ subject to certain exceptions, regardless of whether such person is a flow-through entity. If, however, the trust is a grantor trust or a simple trust, a trust grantor or beneficiary may be deemed an account holder. This will generally not be the case for complex trusts.

Categories of exempt or deemed-compliant FFIs. Where an entity in a trust structure is an FFI, and it has been determined that there is an account held by a U.S. person with respect to which the FFI would be required to report, the FFI still may be exempt from certain FATCA obligations under one of several categories of exemptions. The general categories of exempt or deemed-compliant FFIs include the following:

- *Deemed-compliant FFIs.* These non-reporting FFIs include three sub-categories: (1) registered deemed-compliant FFIs; (2) certified deemed-compliant FFIs; and (3) owner-documented FFIs.
- *Excluded entities.* Other categories of entities are exempted from the reporting and registration requirements of FATCA altogether.

Registered deemed-compliant FFIs. Registered deemed-compliant FFIs include certain categories of entities defined in the Regulations and any entity treated as registered deemed-compliant under an applicable IGA ("Model 1 FFI").²⁰ While these entities are deemed compliant with FATCA reporting and other requirements, they are still required to register with the IRS if governed by the Regulations or a Model 2 IGA. Registered deemed-compliant FFIs include qualifying local FFIs and sponsored investment entities.

Local FFIs. An FFI that is part of a non-U.S. trust structure may qualify as a local FFI exempt from the reporting requirements of FATCA, even if it has some U.S. accounts, if the accounts generally are held by residents of the jurisdiction in which the FFI is incorporated and does business. These are FFIs with a truly local pres-

ence and generally must meet a list of requirements to that effect.²¹

*Sponsored investment entities.*²² This is perhaps the most important category of registered deemed-compliant FFIs with respect to non-U.S. trust structures, as this exception permits a higher-level, or "sponsoring," FFI to fulfill the reporting obligations of lower-level, or "sponsored," FFIs. To qualify for this classification, a sponsored FFI (e.g., a trust or a subsidiary of a corporate trustee) must be an investment entity that is not a qualified intermediary, withholding partnership, or withholding trust.²³ The sponsoring entity (e.g., a fund manager, trustee, corporate director, or managing partner) must be authorized to manage the FFI and enter into contracts on its behalf, and must register both as an FFI and as a sponsoring entity, among other requirements.²⁴

Certified deemed-compliant FFIs. Certified deemed-compliant FFIs, in contrast to registered deemed-compliant FFIs, are able to certify their status as deemed-compliant, rather than being required to register pursuant to the Regulations or an applicable IGA.²⁵ These FFI types are not generally applicable to non-U.S. trust structures, however, as they include mainly the following:



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deemed-compliant FFI's, there are certain entities which, although technically defined as FFI's for FATCA purposes, have been excluded from FFI

a foreign trust or foreign PIC that is an FFI can avoid FATCA withholding either by becoming a PFFI or a deemed-compliant FFI. A corporate trustee or PTC, as an FFI, also must comply with the reporting and registration requirements of FATCA. As discussed above, a corporate trustee or PTC can undertake to fulfill the reporting obligations of a foreign trust or PIC on its behalf as a sponsoring entity.

A foreign trust or foreign PIC that is an NFFE can avoid withholding either by self-certifying that it has no substantial U.S. owners or by identifying any substantial U.S. owners that it does have.

Registration. Registration requirements generally are satisfied by (1) either entering into an FFI agreement (for an FFI operating under the Regulations or a Model 2 IGA) or following analogous domestic procedures (for a Model 1 FFI), and (2) registering online through the FATCA portal.²⁸ The FFI agreement has yet to be released and is anticipated in 2013. The substantive reporting requirements contained in the FFI agreement should match those already set forth in the Regulations.

Certain FATCA obligations begin 7/1/14 with respect to information collection, reporting, and withholding. An FFI, therefore, should be registered by this date, unless otherwise exempt from registration. Further, an FFI should register through the online portal no later than 4/25/14 to be included on the first IRS FFI List, due to be available online on 6/2/14. Failing to register on time could result in nonrecognition as a PFFI, thus risking withholding on payments to the FFI. The Registration Portal is due to open on 8/19/13.

Due diligence and reporting. Under the Regulations, a PFFI is required to report account and accountholder information with respect to U.S. accounts or accounts held by recalcitrant accountholders. The PFFI also must report payments to recalcitrant accountholders and nonparticipating FFI's. If a PFFI is unable to obtain a waiver (if required by foreign law) to

Trusts, trustees, and asset managers will face unique difficulties in assessing and managing their FATCA implementation requirements, and will require a more bespoke solution to these problems than many other financial institutions.

- Sponsored, closely held investment vehicles.
- Limited life debt investment entities.

Owner-documented FFI's. A trust or other entity underlying a corporate trustee or PTC may satisfy its FATCA reporting obligations and be classified as a deemed-compliant FFI by qualification as an owner-documented FFI. An FFI may be treated as an owner-documented FFI only with respect to payments received from and accounts held with a designated withholding agent. A designated withholding agent is a U.S. financial institution, participating FFI, or reporting Model 1 FFI that agrees to undertake the additional due diligence and reporting required to treat the FFI as an owner-documented FFI.

The requirements for classification as an owner-documented FFI include that the FFI is an FFI solely because it is an investment entity and that it is not owned by, or in an expanded affiliated group with, any FFI that is a depository institution, custodial institution, or specified insurance company. The FFI also must not maintain a financial account for any nonparticipating FFI.²⁶

Excluded entity types. In addition to those FFI's that are nonreporting on the basis of their qualification as

status.²⁷ These entity types are, however, limited in scope to the following, and would generally not affect a non-U.S. trust structure:

- Excepted nonfinancial group entities.
- Excepted nonfinancial start-up companies.
- Excepted nonfinancial entities in liquidation or bankruptcy.
- Excepted inter-affiliate FFI's.
- Certain tax-exempt foreign organizations described in Section 501(c).
- Certain nonprofit organizations.

FATCA COMPLIANCE

Once the FATCA classifications of a trust and its related entities are known, their corresponding FATCA compliance requirements can be determined. After outlining the general FATCA compliance requirements, we will examine the different methods potentially available to non-U.S. trust structures to comply with those obligations.

General Compliance

FFI's are subject to a 30% withholding tax on all withholdable payments they receive unless they become a participating FFI (PFFI) or otherwise are exempt from withholding. Thus,

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²⁶ Reg. 1.1471-5(f)(3)(ii).

²⁷ Reg. 1.1471-5(e)(5).

²⁸ Form 8957, to be used for registration, has been released in draft form by the IRS. Registration to obtain a GIIN is preferred via the online portal, however, and paper registration could result in delayed receipt of the GIIN, which is needed to demonstrate FATCA compliance.

²⁹ Reg. 1.1471-4(a)(3).

³⁰ The specific data required to be examined and due diligence procedures for preexisting and new individual and entity accounts are lengthy and are set forth in the Regulations and the Model IGAs. See Reg. 1.1471-3 (Identification of payee) and Reg. 1.1471-4(c) (FFI agreement—due diligence for the identification and documentation of accountholders and payees), Model 1A IGA, Annex I and Model 2 IGA, Annex I.

report an account, then the PFFI must close the account.²⁹

Before reporting, an FFI must determine which accounts are reportable. An FFI will need to follow the procedures and examine the information pursuant to the requirements of the Regulations or an applicable IGA to look for "U.S. indicia" that indicate a reportable account.³⁰ The IGAs modify the due diligence requirements somewhat according to the procedures found in Annex I of each Model IGA.

A finding of U.S. indicia associated with an account may be supported or refuted by appropriate documentary evidence, including an appropriate certificate of status, i.e., Form W-9 for U.S. persons or Form W-8BEN or other Form W-8 as applicable for non-U.S. persons. In the context of trust structures, which generally have relatively few "acountholders" compared to certain FFI types, it may be advisable to obtain a withholding certificate for all acountholders, whether a Form W-9 or Form W-8, in any event.

Once U.S. accounts are identified, these are subject to annual reporting by a PFFI. Reporting is done on Form 8966, the "FATCA Report." This form is to be filed electronically on March 31 following the end of the calendar year to which the form relates. The first scheduled annual reporting, therefore, is 3/31/15, with respect to accounts held in 2014. Reporting and

with the IRS and becomes a PFFI or (2) the FFI is deemed compliant, including by operation of an applicable IGA. Specific methods for complying with FATCA and preventing the application of withholding requirements, either on payments to a non-U.S. trust structure FFI, or on payments to beneficiaries, are addressed in each of the compliance options below.

Compliance Strategies

FFIs have several options to meet their FATCA compliance obligations. Depending on the particular circumstances of a corporate trustee and its affiliated and underlying entities, the trustee may choose to:

1. Have all the trusts or PICs carry out their obligations by becoming PFFIs,
2. Have each underlying entity pursue treatment as an owner-documented FFI (with the consent of the applicable designated withholding agent),
3. Become a sponsoring entity and conduct reporting on behalf of the underlying entities as sponsored FFIs,
4. Report on behalf of trusts as trustee-documented FFIs (where available), or
5. Employ a combination of compliance methods.

Participating FFIs. Having all underlying entities pursue PFFI status is not an attractive option for most corporate trustees that have many trusts

trust's compliance obligations separately. The corporate trustee or PTC classified as an FFI must separately register and report. Each PIC classified as an FFI also must separately register and report. This would create a significant compliance burden for the corporate trustee.

Owner-documented FFIs. Having each underlying entity pursue treatment as an owner-documented FFI offers advantages over treating each entity as a PFFI, but still has drawbacks. Generally, an owner-documented FFI will be required to provide each withholding agent or PFFI with which it holds an account with (1) a withholding certificate, (2) an annual owner reporting statement for all owners of the FFI (not just U.S. persons), and (3) documentation for each individual, specified U.S. person, owner-documented FFI, exempt beneficial owner, or NFFE that directly or indirectly holds an interest in the payee.

While each person with an equity interest must be reported to the withholding agent, the withholding agent would need to pass along information only with respect to U.S. person acountholders. This approach requires the consent of the designated withholding agent and may be impractical for more complicated structures. It may be feasible for specific structures, however, that do not have many underlying entities.

Although owner-documented FFI status represents one path to FATCA compliance for a trust or other underlying entity, this approach generally would seem less preferable than qualification as a sponsored entity (where sponsorship is feasible) or reporting as a trustee-documented trust. An owner-documented FFI still must provide all the documentation to the designated withholding agent and notify such agent of a change in circumstances.

Whether a corporate trustee elects to pursue a strategic implementation of sponsored-entity status or owner-documented FFI reporting may depend, therefore, on the feasibility of reporting at the level of the corporate

IRS considers trusts which are professionally managed by a trustee or PTC, which is in turn an FFI, to be FFIs. Trusts that are not professionally managed by an FFI will be passive NFFEs.

due diligence deadlines may be modified by an applicable IGA.

Withholding. As already discussed, there is a general requirement that a withholding agent withhold 30% on withholdable payments to an FFI. The 30% withholding does not apply if the FFI (1) enters into an FFI agreement

and PICs among their client mandates. Under this "default" option, each trust must independently enter into an FFI agreement, or comply with the requirements of an applicable Model 1 IGA, and register with the IRS to obtain a GIIN. Practically speaking, the trustee will be responsible for each

trustee. Where information cannot be provided in this manner, or where a trustee may wish to isolate liability with respect to the trust or other entity in question, reporting as an owner-documented FFI may be appropriate.

Sponsored FFIs. A sponsored FFI will be deemed compliant, provided that the sponsoring entity fulfills its reporting obligations. These will be substantially the same reporting obligations that a PFFI would have. In other words, the information reporting obligations of the sponsored FFI will be carried out by the sponsoring entity. In the context of a foreign trust or underlying PIC, this probably will entail reporting by the corporate trustee or an affiliated entity. This approach, although requiring registration of each underlying trust and PIC that is an FFI, has the obvious advantage of consolidating the reporting function at the level of the corporate trustee.

The sponsored FFI approach may represent a viable alternative to the owner-documented FFI approach. The sponsored FFI approach will permit a corporate trustee or PTC to aggregate the reporting function at its level with respect to each of the trusts it manages. While reporting still will have to be done with respect to U.S. accounts, this approach should streamline the process significantly by

removing the need for each trust to report as an FFI on its own.

Trustee-documented FFIs. As an alternative to the sponsored entity approach, a trust may be classified as a "trustee-documented trust" under an applicable Model 1 or Model 2 IGA. A trust is a trustee-documented trust if (1) established under the laws of a FATCA partner and (2) the trustee is a reporting U.S. financial institution, reporting Model 1 FFI, or PFFI, and reports all information required to be reported pursuant to the applicable IGA with respect to all U.S. accounts of the trust. Such a trust is treated as a nonreporting FATCA partner financial institution and is classified as a certified deemed-compliant FFI, so no registration of the trust is required.

This clearly is a preferred option, but is limited in application to trusts. Additionally this option is not available in the Regulations or in some IGAs. To the extent available, however, a trustee may wish to consider this approach to trust compliance.

Combined approach. In many cases, a combined approach may be preferable, using either the trustee-documented approach (when available) or sponsored-entity approach in general, but isolating certain problematic structures for compliance purposes by applying the PFFI or owner-documented approach to these structures only. This may be an effective method

for isolating risk to the trustee with respect to FATCA compliance for these structures, while generally easing the burden for reporting and compliance across its client mandates as a group.

CONCLUSION

For non-U.S. trusts and trust structures, complying with FATCA will not be simple. Trustees will need to examine each entity in each structure and first determine how these entities will be classified under FATCA. Then the trustee will need to determine the best method for each entity to comply with FATCA. There is no one-size-fits-all solution: the solution will depend on the particular circumstances of the structure and the trustee, including the specific clients, entities, and accounts involved, the jurisdiction, the circumstances and sophistication of the trustee, and so on. Ideally, the solutions employed will reduce the compliance burden for both trustees and clients, whether it is by having a large corporate trustee act as a sponsoring entity for multiple mandates, or a simple trust structure with a smaller trustee operating as an owner-documented FFI, or a combination of approaches. In all cases, non-U.S. trust structures will benefit from a carefully planned, bespoke solution that matches their particular circumstances. ●