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The Swiss role in FATCA

Peter Cotorceanu and Quan Nguyen consider which FATCA rules apply to Swiss trust companies and their trusts.

The very first question any non-US entity must answer as it prepares for the US *Foreign Account Tax Compliance Act* (FATCA) to take effect on 1 July 2014 is: which FATCA rules must it follow? Get the answer wrong, and the entity's entire FATCA compliance plan is at risk.

Switzerland has a FATCA intergovernmental agreement (IGA) that will generally govern a Swiss trust company for the purposes of determining if it is a foreign financial institution (FFI), and its obligations under FATCA with respect to any financial accounts that it maintains. However, the Swiss IGA does not govern any offshore 'branch' or 'head office' of a Swiss trust company. As for a Swiss trust company's trusts, the Swiss IGA will not cover any of them. Not one. Rather, a Swiss trust company's trusts will be governed either by another country's IGA or the US Treasury Regulations, depending on the particular facts.

Coverage of the Swiss IGA

The model IGAs provide two alternatives for an IGA's coverage. Countries may choose to cover FFIs 'organised under the laws of' the IGA country or FFIs 'resident in' the IGA country. 'Resident in', for this purpose, refers to tax residency. Switzerland chose the first alternative, so the Swiss IGA governs FFIs 'organised under the laws of Switzerland'. This language captures any FFI trust company that is a Swiss entity, such as a Swiss AG.

However, the Swiss IGA also covers branches and head offices of FFIs not organised under the laws of Switzerland if the branch or head office is located in Switzerland. Moreover, the Swiss IGA does *not* cover any branch or head office of an FFI organised under the laws of Switzerland that is located outside Switzerland. The terms 'branch' and 'head office' are not defined in the Swiss IGA, so the definitions of such terms under Swiss tax law will determine whether a non-Swiss company has a 'branch' or 'head office' located in Switzerland.

What does all this mean in practical terms? Let us take trust companies and trusts in turn.

Trust companies

If a Swiss trust company serves as trustee of all of its trusts and has no people or operations on the ground in other jurisdictions – i.e. no offshore branches or head offices – the Swiss IGA will govern that trust company. However, if the Swiss trust company has operations physically present in another country, such as people on the ground running its trusts, those operations might constitute a 'branch' of the Swiss trust company located in that country; if so, the branch would not be governed by the Swiss IGA. Which FATCA regime would govern the offshore branch will depend on whether that jurisdiction has an IGA. If it does, the branch will typically be included by the IGA's express language, just as branches are covered by the language in the Swiss IGA. If the other jurisdiction does not have an IGA, the branch will be covered by the US Treasury Regulations.

What if the Swiss trust company has a separately incorporated subsidiary in the offshore jurisdiction

that acts as trustee? Again, the answer will depend on whether that jurisdiction has an IGA and, if so, what entities the IGA covers. Take, for example, a Swiss trust company with a Jersey trust company subsidiary. Jersey has an IGA. Jersey has chosen the 'resident in' test as the touchstone of its coverage. For FATCA purposes, a company is 'resident in' Jersey if it is incorporated in Jersey or managed and controlled in Jersey. Since the subsidiary is incorporated in Jersey, it is a Jersey financial institution covered by the Jersey IGA, even if it is managed and controlled in Switzerland.

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However, Jersey's IGA, like Switzerland's, excludes offshore branches. Thus, if the Swiss operations of the Jersey trust company constitute a Swiss branch or head office, the Swiss IGA will govern that Swiss branch or head office. In this case, both the Jersey and Swiss FATCA reporting regimes would potentially apply to the Jersey trust company. Thankfully, though, the draft Crown Dependencies FATCA guidance notes, which cover Jersey, Guernsey and the Isle of Man, permit a Jersey trust company to forego FATCA reporting where it knows that the required reporting is being done by another FFI. Thus, if the Swiss branch or head office reports all of the information required under the Jersey IGA, duplicate reporting can be avoided.

Assume the Swiss trust company has a separate subsidiary in the BVI. As of the time of writing, the BVI does not have an IGA. The BVI is, however, on the US Treasury Department's list of countries that have reached agreement in substance on an IGA (specifically, a Model 1 IGA) and that are therefore treated as having an IGA in effect.¹ Based on US Internal Revenue Service *Announcement 2014-17*, until an actual IGA is signed, FFIs that are resident in or organised under the laws of such countries will be treated as having in effect the relevant model IGA provisions. The model IGA language, just like the text of the Swiss and Jersey IGAs, excludes branches located outside the IGA jurisdiction. This yields the same result as with the Jersey trust company: the Swiss-based operations (if considered a branch or head office) will be governed by the Swiss IGA, and the BVI subsidiary will be governed by the Model 1 IGA. When the BVI IGA comes into force, whether the BVI subsidiary will be governed by that country-specific IGA will depend on the actual language of the IGA.

Now, take a subsidiary trust company incorporated in a country that does not have an actual IGA and that is not on the US Treasury Department's list of countries that are treated as having an IGA in effect. Again, the same principles apply: Swiss-based operations (if considered a branch or head office) will be governed by the Swiss IGA, and, since the other jurisdiction does not have an IGA, the subsidiary would be governed by the US Treasury Regulations.

Trusts

A trust is an entity for FATCA purposes, but ordinary trusts, as opposed to investment trusts, should not have branches or head offices. And, of course, there is no such thing as a trust organised under the laws of Switzerland. Therefore, as previously mentioned, the Swiss IGA does not govern any trusts.

If the Swiss IGA does not cover trusts administered by Swiss trust companies, which FATCA rules do? It depends. Take, for example, a Jersey law trust administered by a Swiss trust company. As we have already seen, the Jersey IGA governs financial institutions 'resident in' Jersey. A trust is 'resident in' Jersey if any of the trustees is 'resident in' Jersey. A trust company is 'resident in' Jersey only if it is incorporated in Jersey or managed and controlled in Jersey. A Swiss trust company does not meet this test, so the trust is not governed by the Jersey IGA, even though it is a Jersey law trust. Since neither the Swiss IGA nor the Jersey IGA governs this trust, and no other IGA applies, the trust is governed by the US Treasury Regulations. Counter-intuitive, is it not?

Would the result be different if the trust were a Cayman Islands trust, rather than a Jersey trust? Like the Swiss IGA, but unlike its Jersey counterpart, the Caymans IGA governs financial institutions 'organised under' local law. Thus, under the Caymans IGA as written, a trust governed by Cayman Islands law would be governed by the Caymans IGA, regardless of where the trustee is organised or resident. However, under the draft Caymans IGA guidance notes, issued on 12 May 2014, the Caymans IGA applies only where the trustee is a corporation incorporated, registered, or licensed in the Cayman Islands. Unless the final guidance notes change this, a trust governed by Caymans law with a Swiss trust company as trustee will not be governed by the Caymans IGA unless the Swiss trust company is registered or licensed in the Caymans. The Caymans IGA would also govern the trust if the Swiss trust company used a Cayman Islands subsidiary trust company as trustee.

What about a BVI trust with a Swiss trustee? As already mentioned, until the BVI's country-specific IGA enters into force, FFIs (including FFI trusts) that are resident in or organised under the laws of the BVI will be governed by the relevant model IGA provisions. When the actual BVI IGA comes into force, its language will determine whether it governs the trust. Since the BVI, like many traditional offshore jurisdictions, does not have a concept of tax residency, the BVI IGA will probably apply to FFIs 'organised under the laws of' the BVI. In that case, the BVI IGA would govern the trust.

Finally, what about a trust established under the laws of a jurisdiction that has no IGA and is not treated as having an IGA on the US Treasury's website, where that trust is administered solely by a Swiss trust company? Such trusts are governed by US Treasury Regulations exclusively.

Conclusion

As you can see, simply determining which set of FATCA rules applies to a given trust company or trust can be complicated. The same is true with respect to any fiduciary structure, including foundations, standalone companies (PICs), and trusts' underlying companies. It is, therefore, essential that any Swiss trust company – indeed any trust company globally – carefully determines the correct set of rules to apply to any entity, including itself, when it attempts to implement FATCA. This is an absolute

prerequisite for getting FATCA right.

• [1](http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx) The list is available at www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx

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