

US Foreign Account Tax Compliance Act Intergovernmental Agreement

Frequently Asked Questions

(Version Updated on 7 October 2015)

This document aims to provide background information regarding the intergovernmental agreement (“IGA”) signed between Hong Kong and the US for implementation of the US Foreign Account Tax Compliance Act (“FATCA”). This document is not and should not be regarded as tax advice for financial institutions and their clients. If in doubt, individual institutions or clients should seek professional advice from their own tax or legal advisers.

Q 1: What is FATCA? Does this US tax legislation have any implication for Hong Kong?

A 1: FATCA was enacted by the US in March 2010 aiming to combat tax evasion by US taxpayers. In brief, under FATCA, foreign financial institutions (“FFIs”) are required to sign agreements with the US Internal Revenue Service (“IRS”) to identify and disclose detail regarding their US account holders. These financial institutions will be required to withhold tax for relevant US account-holders who do not give consent to such disclosures, or to close such accounts.

An FFI which does not sign or is not otherwise exempt will face a punitive 30% withholding tax on all “withholdable payments” derived from US sources, initially including dividends, interest and certain derivative payments. In addition, starting from 2017, gross proceeds such as sales proceeds and returns of principal derived from stocks and debt obligations generating US source dividends or interest will be treated as “withholdable payments”.

Q 2: What is an IGA under FATCA?

A 2: The US Treasury announced in June 2012 its intention to sign IGAs under FATCA with other jurisdictions, in order to simplify due diligence and disclosure requirements, reduce or eliminate conflicts with local legislation, and eliminate certain withholding requirements.

The US has developed two Model IGAs to simplify the implementation of FATCA. Model I establishes a framework of reporting account information on US persons by financial institutions to the relevant domestic authority which in turn provides the information to the US IRS. As at 30 September 2015, 68 jurisdictions including Australia, Canada, France, Germany and the United Kingdom have signed Model I IGA with the US.

Having regard to our tax legislation, Hong Kong has opted for a Model II IGA with the US. Austria, Bermuda, Chile, Japan, Moldova and Switzerland have signed Model II IGAs with the US. Model II establishes a framework of enabling relevant financial institutions in Hong Kong to seek consent for disclosure from US clients, and to report relevant tax information of such clients to the US IRS. This model of IGA will be supplemented by the operation of a tax information exchange agreement.

Q 3: Why does Hong Kong sign an IGA with the US ?

A 3: The purpose of FATCA is to combat tax evasion by US taxpayers using offshore financial accounts. The compliance requirements of FATCA have caused serious concerns in the financial markets. Moreover, FFIs that do not comply with FATCA will be subject to a 30% withholding tax on certain types of US-sourced payments. The IGA with the US provides additional exemptions and simplified reporting and due diligence procedures to minimise the compliance burden of financial institutions in Hong Kong.

Q 4: What are the obligations when a financial institution in Hong Kong enters into a FFI agreement with the US IRS?

A 4: According to the FFI Agreement published by the US IRS, financial institutions in Hong Kong shall, pursuant to the IGA signed between Hong Kong and the US, –

- (a) use established due diligence (i.e. “know-your-customer”) procedures under the prevailing anti-money laundering legislation to identify US accounts and clients;
- (b) obtain a consent of relevant US clients (including individuals and entities) for reporting their relevant account balances, gross amounts of relevant interest incomes, dividend incomes and withdrawals, and identification details (e.g. name, address, the US federal taxpayer identifying numbers, known as “TIN”) to the US IRS annually (in respect of the year-end information of previous year) starting from 2015; and
- (c) report “aggregate information” of account balances, payment amounts and number of non-consenting US accounts to the US IRS. Based on such aggregate information, the US IRS may lodge to our Inland Revenue Department, where necessary, requests for exchange of information (“EoI”) on a group basis pursuant to the EoI framework provided for under the tax information exchange agreement signed between Hong Kong and the US in March 2014.

Please refer to the relevant US IRS webpage for details:

<http://www.irs.gov/Businesses/Corporations/Information-for-Foreign-Financial-Institutions>

Q 5: Are all financial institutions in Hong Kong obliged to comply with FATCA even though some of them may not have any US client?

A 5: All financial institutions meeting the criteria of FFIs under FATCA such as banks, investment entities, insurance companies and custodial institutions, unless otherwise exempt, must register with the US IRS and comply with the terms of FFI agreement. Otherwise they will be subject to a 30% withholding tax on relevant US-sourced payments to them.

Q 6: If a financial institution, having regard to relevant circumstances, believes that it is more suitable from the business perspective to apply a FATCA definition in the relevant US Treasury Regulations in lieu of the corresponding definition in the IGA signed between Hong Kong and the US, can the institution choose to apply the definition in the US Treasury Regulations in accordance with paragraph 6, Article 3 of the IGA?

A 6: Yes, the institution can apply the most suitable definition in accordance with the said provision in the IGA.

Q 7: What kind of client information do financial institutions in Hong Kong have to provide to US IRS in order to comply with FATCA?

A 7: With the consent of their US clients, financial institutions in Hong Kong have to report to the US IRS their US clients' identification details (e.g. name, address, the US federal taxpayer identifying numbers, known as "TIN", and the prescribed type of entity if the client is an entity), the relevant account balances, gross amounts of relevant interest incomes, dividend incomes and withdrawals. If their US clients refuse to give any consent to report their account information, financial institution concerned should report "aggregate information" of account balances, payment amounts and number of non-consenting US accounts to the US IRS. Based on such aggregate information, the US IRS may lodge to our Inland Revenue Department, where necessary, requests for EoI on a group basis pursuant to the EoI framework provided for under the tax information exchange agreement signed between Hong Kong and the US in March 2014.

Q 8: FATAC requires financial institutions in Hong Kong to report their US client information to the US IRS. How should financial institutions protect the privacy of Hong Kong residents?

A 8: Financial institutions in Hong Kong would only provide the relevant account information of their US clients to the US IRS with their clients' prescribed consent. The majority of Hong Kong residents are not US taxpayers. Their personal data is not subject to reporting under FATCA.

In any circumstances, financial institutions in Hong Kong cannot provide their clients' information to any unauthorized third party without their clients' prescribed consent.

Q 9: How does the IGA between Hong Kong and the US help minimise the compliance burden of FATCA ?

A 9: According to the IGA signed between Hong Kong and the US -

- (a) financial institutions in Hong Kong complying with the respective FFI Agreements will not be subject to a 30% withholding tax in respect of relevant US-sourced payments by institutions in the US or other FFIs owing to their own FATCA obligations. This will certainly help safeguard the interest of all depositors, insurance policy holders, investors and other clients of Hong Kong financial institutions in Hong Kong;
- (b) the US IRS will waive the requirements under the relevant US Internal Revenue Code for financial institutions in Hong Kong to withhold tax on payments to recalcitrant accounts (i.e. accounts of which the holders do not consent to FATCA reporting and disclosure to the US IRS) or close those recalcitrant accounts;
- (c) for group institutions with worldwide operations, their Hong Kong operations shall continue to be treated as FATCA-compliant despite any non-compliance of a related entity operated in a jurisdiction that prevents its compliance with FATCA;
- (d) financial institutions in Hong Kong may rely on a set of streamlined due diligence procedures as stated in Annex I to the IGA to screen and identify US indicia in order to locate US accounts and clients for reporting purposes. This will minimise compliance burdens of financial institutions in Hong Kong and inconvenience for other account holders who are not the targets of FATCA; and
- (e) A wide range of entities, financial institutions and products including, among others, mandatory provident fund schemes, other retirement products that fall within the specified criteria, institutions

with a predominately local clientele, shall be exempt under Annex II to the IGA in view of the low risks of themselves being used by US taxpayers for tax evasion.

Please refer to the Annexes I and II of the IGA between Hong Kong and the US at our website for details of the standard streamlined due diligence procedures and exemption arrangements:

<http://www.fstb.gov.hk/fsb/topical/doc/HK-USIGA.pdf>

Q 10: Would a Hong Kong financial institution be affected if their related entity abroad does not comply with FATCA?

A 10: The FATCA compliant status of a Hong Kong financial institution would not be affected despite any non-compliance of a related entity operated in a jurisdiction that prevents its compliance with FATCA. However, a financial institution in Hong Kong would be treated as non-compliant if its related entity operated in other jurisdiction does not comply with FATCA for other reasons.

Q 11: Are all financial institutions in Hong Kong required to register with the US IRS?

A 11: Unless the financial institutions are exempt from registration under the IGA, such as exempt beneficial owners and certified deemed-compliant foreign financial institutions, all other financial institutions treated as FFIs under the IGA have to register with the US IRS at the specified US IRS website. A Global Intermediary Identification Number (“GIIN”) will be assigned by the US IRS to a financial institution completing the registration process for identification. The US IRS has provided a list of all participating FFIs at a specified date at its website and will update the list regularly.

Please refer to the relevant US IRS website for registration details:

<http://www.irs.gov/Businesses/Corporations/FATCA-Foreign-Financial-Institution-Registration-Tool>

Q 12: Is there any financial institution or product in Hong Kong exempt from compliance with FATCA owing to the IGA? If so, are their due diligence and reporting obligations under FATCA waived entirely?

A 12: Annex II of the IGA between Hong Kong and the US contains a list of exemptions for entities, financial institutions and financial products which otherwise may fall within FATCA reporting and withholding rules. Some exemptions are waiving a wide range of compliance obligations. Some are partial exemptions requiring the institutions concerned to register with the US IRS for reduced compliance requirements.

Please refer to the Annex II of the IGA signed between Hong Kong and the US posted at our website:

<http://www.fstb.gov.hk/fsb/topical/doc/HK-USIGA.pdf>

The following entities, institutions and financial products would be exempt from a wide range of or certain compliance obligations under Annex II of the IGA –

- (I) Exemptions as “exempt beneficial owners”
 - (a) HKSAR Government and all statutory bodies;
 - (b) all Mandatory Provident Fund (“MPF”) schemes;
 - (c) certain retirement products that fall within the specified criteria;
 - (d) the Grant Schools Provident Fund and the Subsidized Schools Provident Fund; and
 - (e) international organisations based in Hong Kong.
- (II) Partial exemptions as “registered deemed-compliant FFIs” or “certified deemed-compliant FFIs”
 - (a) financial institutions licensed and regulated under the laws of the HKSAR with no fixed place of business outside of Hong

Kong and the Mainland, and with a client base comprising predominantly residents of Hong Kong or the Mainland (by applying a threshold of 98% of financial accounts by value);

- (b) prescribed credit unions, as well as certain depository institutions (e.g deposit-taking companies) with an asset value of less than US\$175 million on their own balance sheet;
- (c) certain credit card issuers that impose restrictions on clients keeping a debit (deposit) balance on the accounts;
- (d) certain regulated collective investment schemes; and
- (e) investment advisers and investment managers.

(III) Exemptions of financial products from being “financial accounts”

- (a) certain term life insurance contracts which have no contract value that any person can access without terminating the contracts; and
- (b) certain employee incentive share schemes, such as share option schemes, share award schemes, employee share purchase schemes, share appreciation rights schemes, usually established by listed corporations.

Q 13: My company operates an occupational retirement scheme under the Occupational Retirement Schemes Ordinance (“ORSO”). Would the company’s occupational retirement scheme be exempt from registration and reporting obligation under the IGA?

A 13: Apart from MPF schemes, certain retirement funds are exempt from registration and reporting obligation under Annex II of the IGA. These retirement products include all ORSO schemes that are registered with the Mandatory Provident Fund Schemes Authority (“MPFA”) in accordance with the ORSO (i.e. the ORSO registered schemes) and satisfy certain specified criteria.

The specified criteria, in essence, include-

- An ORSO registered scheme that does not have a single beneficiary with a right to more than five percent of the scheme's assets; or
- An ORSO registered scheme with a limited size that satisfies the following criteria:
 - (a) the scheme has fewer than 50 participants;
 - (b) the scheme is sponsored by one or more employers that are not investment entities or passive non-financial entity under FATCA;
 - (c) the employee and employer contributions to the fund are limited by reference to earned income and compensation of the employees; and
 - (d) participants that are not residents of the HKSAR are not entitled to more than 20 percent of the fund's assets.

Please refer to the relevant section of Annex of the IGA at our website for details.

<http://www.fstb.gov.hk/fsb/topical/doc/HK-USIGA.pdf>

All other ORSO schemes that could not satisfy the said criteria including "ORSO exempted schemes", i.e. ORSO schemes which are granted exemption certificates by MPFA, would not be exempt from FATCA registration and reporting. (For information regarding registration with the relevant authority of the US, please see Q.11)

Q 14: My financial institution has recently asked me to complete a Form W-8 published by the US Internal Revenue Service to certify that I am not a US person for compliance with US FATCA. As a Hong Kong resident and not a US person, why should I need to provide my information and make any tax reporting to the US authority?

A 14 Pursuant to the intergovernmental agreement between Hong Kong, China and the US for cooperation to facilitate the implementation of FATCA (“IGA”), financial institutions in Hong Kong, including banks, securities brokers, specified insurance companies, etc., unless otherwise exempt or excepted under Annex II of the IGA, must enter into a foreign financial institution agreement (“FFI agreement”) with the US Internal Revenue Service (“IRS”) and comply with the terms of the FFI agreement accordingly.

Under the term of its FFI agreement with US IRS, a financial institution in Hong Kong is obliged to carry out, amongst other thing, the due diligence procedures as prescribed in Annex I to the IGA or the relevant US Treasury Regulation to identify financial accounts held by US persons and report US account information with the account holders’ consent to IRS annually. Copy of FFI agreement can be found at US IRS’ website at:

<http://www.irs.gov/pub/irs-drop/rp-14-38.pdf>

According to the due diligence procedures set out in Section II, Annex I to the IGA for preexisting individual accounts ⁽¹⁾, a Hong Kong financial institution is obliged to, in certain circumstances (for example, when an electronic search of account holder information indicates a US place of birth under Section II(B)(4)(a) of Annex I) to obtain a self-certification (which may be on an US IRS Form W-8 ⁽²⁾ or other similar agreed form) and other documentary evidence, as the case may be, from the account holder establishing the account holder’s non-US status. Both the IGA and the FFI agreement do not require financial institutions to submit self-certification provided by their non-US clients to the US Authority.

Form W-8BEN is a form published by the US IRS. According to the

relevant instruction published by the US IRS, non-US persons are subject to US tax on certain income they receive from US sources including interest, dividends, rents, premiums, annuities, etc, which is generally collected by withholding. Beneficial owners to such income are required to complete and submit a Form W-8 (and Form W-8BEN for non-US individuals) to establish that they are non-US persons as well as to claim tax concession available to certain type of non-US persons. For further details, please refer to Form W-8BEN and the relevant instructions published by the US IRS at:

<http://www.irs.gov/pub/irs-pdf/fw8ben.pdf>

and

<http://www.irs.gov/pub/irs-pdf/iw8ben.pdf>
<http://www.irs.gov/pub/irs-pdf/iw8.pdf>

Financial institutions in Hong Kong are expected to leverage their anti-money laundering and know-your-client procedures to fulfil, amongst other, their responsibilities under FATCA to relief their clients' burden. Neither the relevant US law nor the IGA makes any specified requirement on self-certification, although a Form W-8 collected for its purpose is recognized by the US IRS as an appropriate form/documentation. If such certification is needed, financial institutions in Hong Kong and their account holders are free to use any mutually acceptable form/document for the purpose as indicated in the IGA.

You may wish to consult your financial institution and seek professional advice on your need to complete a self-certification and a Form W-8 having regard to information and documents collected by and the financial assets held with your financial institution.

Financial institutions in Hong Kong are supervised and overseen by the relevant financial regulators in accordance with the applicable law. If you are not satisfied with the conduct of business by your financial institution, you may wish to contact the financial regulator concerned, in the case of -

- (a) a bank or an authorized institution under the Banking Ordinance: the Hong Kong Monetary Authority at hkma@hkma.gov.hk,
- (b) a licensed cooperation, for example, a securities dealer or an asset manager, licensed under the Securities and Futures Ordinance: the Securities and Futures Commission at enquiry@sfc.hk,
- (c) an authorized insurer or its authorized representatives: the Office of the Commissioner of Insurance at iainail@oci.gov.hk.

Notes:

- (1) There are other different sets of due diligence procedures prescribed in Annex I to the IGA for identification of new individual accounts (section III), preexisting entity accounts (section IV) and new entity account (section V).
- (2) The US IRS publishes a series of Form W-8 for different types of foreign/non-US entities, including Form W-8BEN for non-US individuals.

Q 15: How can Hong Kong residents and financial institution verify whether a Hong Kong or foreign financial institution has complied with FATCA to avoid unnecessary withholding on their US-sourced payments?

A 15: Unless the financial institutions are exempt from registration under the IGA, such as exempt beneficial owners and certified deemed-compliant foreign financial institutions, all other financial institutions treated as FFIs under the IGA have to register with the US IRS at the specified US IRS website. A GIIN will be assigned by the US IRS to a financial institution after completing the registration process for identification. The US IRS has provided a list of all participating FFIs at a specified date and tools for searching and identifying participating FFIs and their GIINs from the list at its website. The US IRS will update the list regularly.

Please refer to the relevant US IRS webpage for details:

<http://www.irs.gov/Businesses/Corporations/FATCA-Foreign-Financial-Institution-List-Search-and-Download-Tool>

According to the list published by the US IRS, more than 2,800 financial institutions in Hong Kong have already registered with the US IRS.

Depositors, investors and financial institutions in Hong Kong can enquire their related financial institutions regarding their compliance with FATCA. They can also verify the participation status of the related financial institutions at the relevant US IRS website.

Q 16: What is the progress of the US in signing IGAs with other jurisdictions?

A 16: As at 30 September 2015, 75 jurisdictions have signed IGAs with the US including 68 on Model I and 7 on Model II such as Hong Kong. Jurisdictions that had reached agreements in substance with the US on the terms of IGAs could be treated as having IGAs in effect providing that the jurisdictions consent to having their status of agreement disclosed. 37 jurisdictions are treated as having IGAs in effect with the US.

Please refer to the relevant US Treasury webpage for details:

<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>

Q.17 Hong Kong has announced its support for the new global standard on automatic exchange of information (“AEOI”) for the purpose of enhancing tax transparency and combating cross-border tax evasion. Does it mean that Hong Kong will shift to adopt Model I IGA?

A.17 We have no plan to switch to a Model I IGA before the legal framework for AEOI is available. Although Hong Kong will implement AEOI in future, we still need to discuss in detail with the US the types of tax information to be exchanged and the manner in which the information to be exchanged on an automatic basis before negotiating a Model I IGA with the US. We need to further consult our financial institutions on the technical details should there be any change.

**Financial Services and the Treasury Bureau
7 October 2015**