

The U.S. Foreign Account Tax Compliance Act

The Foreign Account Tax Compliance Act (“FATCA”) was enacted by the United States in 2010 and went into effect on July 1, 2014. This memorandum discusses how FATCA applies to Belize trusts and how Belize trusts can avoid the 30% FATCA withholding tax.

FATCA Terminology

FATCA divides all non-U.S. entities into two categories: “foreign financial institutions” (“FFIs”) and “non-financial foreign entities” (“NFFEs”). An NFFE is any non-U.S. entity that is not an FFI. The term “FFI” includes non-U.S. banks, non-U.S. brokers, certain non-U.S. insurance companies, and a much broader category of non-U.S. entities called “investment entities,” which is any non-U.S. entity described in any of the following three categories:

- The entity (i) derives more than 50% of its income from investing in securities and (ii) is managed by another entity as part of the manager’s business (such as a trustee);
- The entity makes more than 50% of its income from engaging in certain activities (e.g., trading, investing, administering, or managing assets) on behalf of customers; or
- The entity is a collective investment vehicle, mutual fund, private equity fund, etc.

The 30% FATCA Withholding Tax

The purpose of FATCA is to use the threat of a withholding tax to motivate non-U.S. entities to provide information about their U.S. owners and accountholders (or to certify that they have no U.S. owners or accountholders). So, an FFI or NFFE that does not take the necessary action to avoid withholding (as described below) will suffer a 30% withholding tax on certain types of U.S.-sourced income. This withholding tax is refundable only in certain limited cases; in particular, any amount withheld from an FFI that has not taken steps to avoid the withholding is not refundable.

Currently, only U.S.-sourced interest and dividends (and similar types of passive income) are subject to the 30% FATCA withholding tax. Starting January 1, 2017, the 30% FATCA withholding tax will also apply to the gross proceeds from the sale of securities—not the gain, but the full gross proceeds. Finally, once the U.S. passes implementing regulations, the 30% FATCA withholding tax will also apply to certain payments by entities attributable to their receipt of the foregoing types of payments.

FATCA Treatment of Belize Trusts

A trust is not an entity for Belize legal purposes—it is merely a contractual arrangement among the settlor(s), trustee(s), protector(s), and beneficiary(ies). However, consistent with its treatment for other U.S. tax reporting purposes, a trust is treated as an entity for FATCA purposes. If a Belize trust’s income is predominantly from securities, it will be an “investment entity” under the first category described above, and will therefore be an FFI. However, if the trust’s income is not predominantly from securities, then the trust will be an NFFE.

The treatment described above is still the case even if no settlor, trustee, protector, or beneficiary of the Belize trust is a U.S. person. FATCA is a concern for all Belize trusts that make U.S. investments, even if there are no U.S. persons involved at the trust level. Additionally, where a Belize trust makes all investments through a subsidiary entity (such as an LLC or IBC), the subsidiary entity should be disregarded for FATCA purposes (so that the FATCA compliance of the structure is determined at the trust level).

How Belize Trusts can Avoid the 30% FATCA Withholding Tax

The procedure for a Belize trust to avoid the 30% FATCA withholding tax depends on whether it is an NFFE or an FFI.

Belize Trusts that are NFFEs

A Belize trust that is an NFFE can avoid FATCA withholding simply by certifying that its income is predominantly from an active business or, if its income is predominantly from passive sources, either (a) providing information about its U.S. owners who own more than 10% (“substantial U.S. owners”) or (b) certifying that it has no substantial U.S. owners. A Belize trust that is an NFFE makes these certifications and provides this information on IRS Form W-8BEN-E, which it must provide to non-U.S. financial institutions and U.S. withholding agents.

Belize Trusts that are FFIs

A Belize trust that is an FFI and that takes no action whatsoever would be a “non-participating FFI” and would be subject to the 30% FATCA withholding tax, which would be non-refundable. Therefore, a Belize trust that is an FFI should take action to achieve a FATCA-compliant status before it receives any withholdable payments. A Belize trust that is an FFI has three options to become FATCA compliant.

Option 1: Become a Participating FFI

First, the trust could become a “participating FFI” (which is the same status achieved by a FATCA compliant non-U.S. bank or broker). To become a participating FFI, the trust would need to comply with the complex FATCA regulations, which are written more with banks and brokers in mind and therefore do not always apply in a logical fashion to trusts. Thus, for example, becoming a participating FFI would involve the trust registering with the IRS as a participating FFI through the IRS’s own proprietary online registration system, entering into an FFI agreement with the IRS, appointing a person to act as the “responsible officer” of the trust for FATCA matters, adopting a FATCA compliance policy, responding to any information requests from the IRS, and filing annual FATCA reports with the IRS. Any deviation from the complex FATCA regulations would risk the cancellation of the FFI agreement, which would cause the trust to once again be subject to the 30% FATCA withholding tax.

Option 2: Become an “Owner-Documented FFI”

Next, the trust could become an “owner-documented FFI.” To be an owner-documented FFI, a financial institution in which the trust has an account would have to agree to treat the trust as an owner-documented FFI. The advantage of this option over the first option is that the trust is not required to handle all of the FATCA matters described above on its own—all of these matters are taken care of by the financial institution in which the trust has an account.

The disadvantage of this option is that the trust can only be treated as an owner-documented FFI with respect to one financial institution in which it holds an account. Therefore, if the trust has more than one account (for example, a bank account and a brokerage account), the trust would only be able to be treated as an owner-documented FFI with respect to one account (and would therefore be subject to the 30% FATCA withholding tax with respect to the other account(s)). Additionally, the trust would be limited in its selection of banks and brokers to only those that are willing to treat the trust as an owner-documented FFI and many banks and brokers do not offer this service.

Option 3: Become a “Sponsored Entity”

Finally, the trust could request that its trustee act as the trust’s “sponsoring entity,” which allows the trust to be FATCA compliant as a “sponsored entity.” The trustee would register with the IRS as a sponsoring entity and would do all the work necessary to register each sponsored trust with the IRS and file any required annual FATCA reports with the IRS. The trust would then be able to provide the proper withholding forms to all of the financial institutions in which it holds accounts so that it can avoid the 30% FATCA withholding tax. The trust would **not** be required to enter into an FFI agreement with the IRS, appoint a FATCA responsible officer, or adopt a FATCA compliance policy.

Conclusion

Each Belize trust should determine whether it is treated as an NFFE or an FFI (by determining whether its income is likely to be predominantly from securities or from other sources). If a Belize trust is treated as an FFI, it should select and execute a FATCA compliance strategy before it receives a withholdable payment (so that it is not subject to the nonrefundable 30% FATCA withholding tax).

Of the three options for FATCA compliance, Option 3 (trustee sponsorship) combines the best of both of the other options while avoiding their drawbacks. Like Option 1 (participating FFI), the trust would be FATCA compliant with respect to all of its accounts and would be able to freely change banks or brokers without worrying about losing its FATCA-compliant status. Also, like Option 2 (owner-documented FFI), the trust would achieve FATCA compliance without having to comply with all of the FATCA rules that are written more for banks or brokers—the trustee would handle all FATCA compliance matters.



No 5 Cork Street
P. O. Box 1708
Belize City
BELIZE

Tel: +501 223 6910

Fax: +501 223 6623

Email: orion@bt.net

Website: www.orionbc.com

FATCA Sponsor Service

To allow the Belize trusts for which we act as trustee to achieve FATCA compliance in the most efficient and effective way possible, we offer a FATCA sponsor service to such trusts that are treated as FFIs. Our FATCA sponsor service provides a complete FATCA solution—we perform all work necessary so that your Belize trust avoids the nonrefundable 30% FATCA withholding tax. This work includes: (i) registration of your Belize trust as a sponsored entity, (ii) completion and transmission of FATCA reporting forms to withholding agents so that the trust avoids FATCA withholding, and (iii) completion and transmission of any required annual FATCA reporting.

We would be happy to discuss with you further how we can achieve FATCA compliance for your Belize trust through our FATCA sponsor service.