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# *Hong Kong: First ever tax information exchange agreement signed with the United States*

*May 1, 2014*

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## *In brief*

Hong Kong and the US signed a tax information exchange agreement (TIEA) on March 25, 2014. The agreement is the first of its kind signed by Hong Kong and allows the free exchange of tax information upon request between Hong Kong and the US. The HK-US TIEA will provide the necessary legal basis for Hong Kong to provide, upon request by the US, certain information that needs to be reported by financial institutions in Hong Kong to the US under the Foreign Account Tax Compliance Act (FATCA), which will be effective from July 1, 2014. In addition to the TIEA, Hong Kong is in discussions with the US to enter into an intergovernmental agreement (IGA) to help financial institutions in Hong Kong comply with FATCA.

The HK-US TIEA substantially follows the OECD Model TIEA with a few modifications. There is no material difference between the HK-US TIEA and the comprehensive double tax agreements (CDTAs) that Hong Kong has entered into so far in terms of the scope of information exchange and safeguards on confidentiality and privacy rights. As the pressure for greater tax transparency continues to grow and automatic exchange of information (EoI) increasingly becomes an international standard, it is expected that the EoI regime in Hong Kong will continue to evolve. US individuals with accounts/investments in Hong Kong should stay tuned for developments in this area and be prepared to assess the possible impact of the changing EoI landscape on them.

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## *In detail*

Hong Kong and the US signed a TIEA on March 25, 2014. The agreement is the first of its kind signed by Hong Kong after it changed its policy on EoI and amended its legislation to allow for signing of a TIEA in July last year ([see previously released Hong Kong Tax News Flash](#)). One immediate impact of the HK-US TIEA is the facilitation of FATCA

implementation in Hong Kong, as noted in the following statement in the press release issued by the HKSAR government on March 25, 2014:

*“The TIEA with the US provides the necessary basis for Hong Kong to provide for EoI upon requests made in relation to the information reported by financial*

*institutions in Hong Kong to the US under the US Foreign Account Tax Compliance Act (FATCA) ..... Subject to the completion of the ongoing discussions, Hong Kong intends to enter into an intergovernmental agreement with the US to lay down the arrangements which help*

*facilitate compliance by the financial institutions in Hong Kong. As a complementary measure, the signing of a TIEA with the US will allow the US tax authorities to file a request to the IRD for EoI under specified conditions.”*

In summary, the HK-US TIEA would enable Hong Kong to provide certain information as may be contemplated under a future HK-US IGA, upon requests made by the US tax authorities.

### **Key features of the HK-US TIEA**

The key features of the HK-US TIEA include the following:

- The information exchange must be on a request basis satisfying the conditions in the TIEA (i.e., the TIEA does not provide for automatic information exchange).
- The ‘foreseeably relevant’ test is used to assess the validity of an EoI request made by the Applicant Party (i.e., the contracting state requesting the information). The Applicant Party will be required to provide certain specified information in its EoI request to demonstrate a prima facie case for the foreseeable relevance of the information requested.
- There is no ‘domestic tax interest’ requirement, which means the Requested Party (i.e., the contracting state receiving an EoI request) will need to provide the information requested even though it does not need such information for its own domestic tax purposes.
- ‘Group request’ is allowed, which means the Applicant Party can ask for information on a group of taxpayers, without naming them

individually, as long as the request is not a ‘fishing expedition’.

- The scope of information that needs to be exchanged includes information held by the competent authority of the Requested Party or information that is in the possession or control of persons within the area of the Requested Party’s jurisdiction.
- In the case of Hong Kong, the types of tax covered under the TIEA are limited to income tax (i.e., profits tax, salaries tax, and property tax). On the other hand, in the case of the US, the types of tax covered are federal income taxes, federal employment taxes, federal estate and gift taxes, and federal excise taxes.
- There are certain specified circumstances under which the Requested Party may decline an EoI request, including (1) where the Applicant Party has not exhausted all the means in its own jurisdiction to obtain the information, (2) where supply of the information would disclose a trade secret, (3) where the information is subject to legal professional privilege, or (4) where the disclosure of the information is contrary to the public policy.
- In terms of confidentiality, the information exchanged can only be disclosed to those concerned with tax assessment, collection and appeals and can only be used for such purposes. Disclosure of the information to any third party or jurisdiction is not allowed.

### **Modifications made in the HK-US TIEA**

In the revised Departmental Interpretation and Practice Notes No.

47 – Exchange of Information ([revised DIPN 47](#)) issued by the Inland Revenue Department (IRD) in January 2014, the IRD indicated that Hong Kong will follow the OECD Model TIEA with some modifications to suit Hong Kong. The HK-US TIEA substantially follows the OECD Model TIEA with the following major modifications:

- The HK-US TIEA does not include the article on ‘Tax Examination Abroad’ that is included in the OECD Model TIEA. This means the HK-US TIEA does not provide for the representatives of the US competent authority to enter into Hong Kong to interview individuals, examine records, or be present at a tax examination in Hong Kong.
- Customs duties are specifically excluded from the term ‘tax’.
- The OECD Model TIEA precludes disclosure of the information exchanged to a third party unless express written consent is given by the Requested Party. The HK-US TIEA simply states that the information exchanged may not be disclosed to any third party without the ‘express written consent’ exception. This may be seen as a more rigid stance on not allowing disclosure of the information exchanged to a third party.
- A standard response time of 90 days is specified in the OECD Model TIEA but the same is not included in the HK-US TIEA.

### **EoI provisions of TIEA vs CDTA**

There is no material difference in terms of (1) the scope of information exchange and (2) safeguards on confidentiality and protection of

taxpayers' privacy rights between a TIEA and the EoI article of a CDTA. As mentioned in Revised DIPN 47, the measures to protect confidentiality and privacy rights set out in IRD (Disclosure of Information) Rules, such as the notification and review system under which taxpayers are provided with the rights to be informed about the information exchange and to request amendment of the information to be exchanged, etc., will be applied equally to both TIEAs and CDTAs.

The major difference between TIEA and CDTA EoI provisions is that a TIEA tends to set out in more detail issues relating to the practical implementation of information exchange. For example, the HK-US TIEA sets out information that the Applicant Party has to provide in its

EoI requests and contains provisions that address which party should bear the costs incurred in exchanging information.

### ***The takeaway***

The signing of the HK-US TIEA marks a new era of information exchange in Hong Kong. While the initial effect of the HK-US TIEA relates to the implementation of FATCA in Hong Kong, one should not lose sight of the fact that the TIEA also allows for the exchange of tax information between the two governments for other reasons where appropriate.

US individuals with financial accounts/investments in Hong Kong should review their circumstances to determine what disclosure on their individual income tax returns is

required and to assess the possible impact of the evolving EoI regime on them. The US Internal Revenue Service (IRS) has put in place the Offshore Voluntary Disclosure Program to assist taxpayers to come forward and declare their unreported income on overseas accounts, while providing a clear and fixed penalty regime.

With the increased transparency of tax information between the two jurisdictions, coupled with the increase in compliance requirements for US individuals (e.g., FinCEN Form 114 – Report of Foreign Bank and Financial Account, Form 8938 – Statement of Foreign Financial Assets), US individuals should evaluate their own circumstances carefully in order to be compliant in their US tax affairs.

### ***Let's talk***

For a deeper discussion of how this issue might affect your business, please contact your IAS engagement team or one of the following professionals:

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