

Tax & Investment in the US

Third quarter 2014

Key tax developments for global companies operating in the US

Affordable Care Act isn't just for US companies

Highlights

What tax issues are potentially affecting companies investing in the USA today?

- *Affordable Care Act isn't just for US companies*
- *'First sale' strategy may reduce US customs duties*
- *Doing business in the US—A guide to the key tax issues*

The *Patient Protection and Affordable Care Act*, or the Affordable Care Act (ACA), imposes new requirements and related penalties for both individuals and employers regarding health insurance coverage. The ACA was signed into law on March 23, 2010, with phased effective dates for its many provisions. Some of the most significant provisions affecting individuals became effective on January 1, 2014, while the most important employer-related provisions have been deferred an additional year to 2015. The law has implications for foreign individuals on assignment to the US and for foreign companies doing business in the United States.

Some of the ACA requirements and penalties that could apply to globally mobile employees and their employers are highlighted below. Although not all requirements are yet fully in effect, US inbound companies must take some proactive steps *now* to prepare.

What is the Affordable Care Act?

Although the ACA has been an all-consuming concern for US companies, it may be cruising below the radar of many US inbound companies on the assumption that it doesn't apply to them. That could be a costly assumption.

Under the ACA, employers face significant penalties (sometimes called the 'pay or play' provisions or the 'employer mandate') if they fail to offer healthcare coverage to their full-time employees or if the coverage offered is not affordable. And the rules don't just apply to US companies, they apply to businesses employing US citizens and residents as well as foreign nationals working in the United States.

Here's what you need to consider

The ACA generally requires individuals to maintain health coverage (called 'minimum essential coverage' or MEC). If not, they face a tax penalty payable on filing their individual US federal income tax return. Under the ACA, insured coverage, governmental coverage such as Medicare, and certain employer-provided coverage are considered MEC. This requirement is referred to as the 'individual mandate'.

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Who must meet the individual mandate?

Foreign nationals working in the US

The individual mandate applies to US citizens and permanent residents. It does not apply to nonresident aliens.

However, many foreign nationals on assignment in the US do become residents for tax purposes, and therefore, will be subject to the MEC requirement unless another exemption applies.

US citizens living abroad

Generally, US citizens living abroad are subject to the MEC requirement. However, a US citizen who has a tax home outside the US and is a bona fide resident of a foreign country or countries during an uninterrupted period that includes an entire tax year or who is present in a foreign country for at least 330 full days during a period of 12 consecutive months will be deemed to satisfy this requirement.

ACA requirements and penalties for employers

Under ACA beginning in 2015, an ‘applicable large employer’ is subject to penalties if it fails to offer 95% of its full-time employees (and their dependents other than spouses) the opportunity to enroll in MEC under an eligible employer-sponsored plan (the 95% test).

Meaning of ‘applicable large employer’

An applicable large employer is one that employed at least 50 full-time and full-time equivalent employees during the preceding calendar year. This requirement has been delayed one year for employers with fewer than 100 full-time employees, so employers with between 50 and 99 full-time

employees will first be subject to the employer mandate in 2016.

Determination of full-time employees

A full-time employee is one who works on average at least 30 hours a week in a month. IRS guidance includes optional administrative safe-harbors for identifying full-time employees.

Employer mandate or pay or play penalties

Penalties apply if the employer fails to offer coverage to its full-time employees and their dependents, defined as children up to age 26, but not spouses.

The annual penalty imposed on an applicable large employer that fails to offer coverage to at least 95% of its full-time employees is \$2,000 times the number of full-time employees (less 30, allocated across the controlled group), assessed monthly for any month in which coverage is not offered as required.

Reporting requirements

Applicable large employers are required to report to the IRS information about the health coverage they have offered employees as well as monthly information concerning each employee's coverage for themselves and their dependents, and to furnish related statements to employees. This reporting requirement will be effective with respect to coverage provided in 2015 with reporting first due early in 2016; compliance for 2014 is voluntary.

For more information, read PwC's Tax Insights, *Affordable Care Act isn't just for US companies*.

‘First sale’ strategy may reduce US customs duties

For foreign-based multinational corporations (MNCs) doing business in the United States, the amount of customs duties paid on goods entering the US often is not a top-level consideration. However, many of those companies might be leaving money on the table by paying more in customs duties than is necessary. Ninety percent of assessed US customs duties are based on value, so a reduction in the value of the imported products will lead to a reduction in the duty paid. A concept known as ‘first sale’ can help foreign MNCs achieve considerable reductions in the US customs duties they pay.

There are two strong reasons why the first sale concept should be of particular interest to foreign MNCs:

1. First, many foreign MNCs doing business in the United States already use a multitiered structure, which is a pre-requisite for first sale implementation. That is, in many cases, there will be no need for foreign MNCs to create a foreign middleman structure with sufficient substance to meet the stringent requirements imposed by US Customs and Border Protection to qualify for the benefits of first sale because such a structure already exists.
2. Second, because many foreign MNCs already have the required structure in place—including arm's-length pricing that can satisfy Customs' stringent requirements for

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documentation — implementation of first sale often is not as onerous as they may assume based on the substantial benefit that might be available combined with a lack of familiarity with US customs rules.

What is first sale?

‘First sale for export’ (often referred to as FSFE) appraisal is, as a general proposition, a short-form designation for customs appraisal on the basis of a sale in a multitiered sale chain at an earlier stage than the last sale before importation. First sale is a Customs-approved valuation method that may be used in multitiered distribution systems (for example, foreign manufacturer, foreign middleman, and importer), under which duties are assessed on the manufacturer-to-middleman transaction price instead of the middleman-to-importer transaction price. In essence, in an approved first sale transaction, Customs permits the exclusion of the middleman’s markup when valuing the imported merchandise.

Benefits of first sale

Non-US MNCs, like all well-run businesses, are looking to optimize their commercial structures, and naturally, they take tax into consideration in achieving that. Many of those companies, however, are largely unaware of strategies that will allow them to use their existing, substantive middleman structures to simultaneously reduce customs duties. Consequently, they often wind up with less-than-optimal tiered sales arrangements and pay higher customs duties.

An increased understanding of the first sale concept, however, would help MNCs identify opportunities

to decrease their US customs duties by reducing the valuation of imported goods. The potential US customs duty savings from first sale valuation are equal to the gross profit achieved by the middleman multiplied by the duty rate applicable to the imported merchandise.

Who could benefit?

First sale strategies could be especially valuable to MNCs that do the following:

- undertake manufacturing operations through a separate legal entity
- operate within an existing middleman structure that would meet the stringent requirements to qualify for first sale
- import heavily into the US and
- pay high duties on those imports.

Companies in the textile, footwear, apparel, chemical, and plastics industries may benefit significantly because they typically have high duty costs.

Explore further details in PwC’s article, [*‘First sale’ strategy may reduce US customs duties.*](#)

Doing business in the US—A guide to the key tax issues

All would agree that the United States has a complex tax system that significantly affects business decisions and business operations. Or more precisely, after taking into account federal, state, and local levels of taxation, the United States has many complex tax systems.

This complexity creates significant challenges for companies doing business in the United States: navigating the law and administrative processes, managing risk related to tax issues, and avoiding pitfalls that can trip up even the most sophisticated without constant and thorough vigilance. Businesses need to allocate significant resources to compliance and governance focused on tax matters. And, of course, the environment in which business operates today makes understanding and addressing these challenges an even more important endeavor for finance and non-finance executives alike.

At the same time, there are opportunities for companies seeking to conduct business in the United States. With an understanding of the incentives built into the applicable tax policies and the potential to achieve enhanced after-tax results from business operations through understanding the effect of US tax rules, businesses can improve their delivery in this important metric of performance.

The individual circumstances and objectives of foreign businesses either currently doing or looking to do business in the United States can vary greatly. Each business will have a particular set of perspectives in regard to its operations in the United States as compared to US-based businesses.

It is often frustrating, but always rewarding, to navigate through the confusion and complexity and identify the key insights that will enhance business performance and effectively manage risk.

PwC’s *Doing Business in the United States* guide is intended to leverage our extensive experience in regard to US operations of

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global businesses to provide a broad understanding of the basic tax implications of business operations in the United States, as well as to offer helpful observations, into the tax consequences for non-US companies.

However, as a guide, it can only be a starting point. PwC has a global network of multidisciplinary tax professionals who have deep, practical experience in assisting businesses investing into the United States. We stand ready to help in any way we can.

The guide reviews:

- **Federal tax issues**
 - Taxes on corporate income
 - US trade or business
 - Effectively connected income
 - Branch income
 - Permanent establishment
 - Group taxation
 - Thin capitalization
 - Controlled foreign companies
 - S corporations
 - Determining income
 - Corporate deductions
 - Credits and incentives
 - Administrative issues
- **State and local tax issues**
 - Activities that could subject a foreign entity to state tax
 - Dividing up taxable income among the states: multistate apportionment
 - Tax filings include more than just the in-state entity: combined, water's edge, worldwide filing methodologies, and tax havens

- Adjustments to federal taxable income
- Treatment of foreign-source income
- States with transfer pricing adjustment power
- Indirect tax considerations
- Local taxation
- Credits and incentives: state and local

- **US tax treaties**

- **Transfer pricing**

- **Individual tax issues**

- Personal income tax rates
- Alternative minimum tax
- State and local income taxes
- Residence
- Income determination
- Foreign tax relief and tax treaties
- Other tax credits and incentives
- Tax administration

- **Health care**

- **Financing US operations**

- Debt vs. equity
- Cash pooling

- **Setting up a US tax department**

*[Read the full text](#) of our *Doing business in the United States*.*

Let's talk

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