



Impact of International Regulations on Trust Law and Practice

Withers LLP
11 October 2017

withersworldwide

Agenda

- Overview of recent regulatory activity (good and bad)
- Impact on trust structures
- Consequences for trustees
- Safeguards and solutions – what should trustees be doing?

Regulations, regulations, regulations (1)

- Global move towards transparency
 - FATCA
 - CRS – unprecedented exchange of information
 - UK register of beneficial ownership – publically available
 - UK Trusts Register
 - French national register of trusts (unconstitutional)
 - French national register of loans (unconstitutional)
- Accompanied by...

Regulations, regulations, regulations (2)

- Crackdown on tax evasion and non-compliance
 - UK Corporate Criminal Offence – Criminal Finances Act 2017
 - UK Requirement to Correct – Finance (No.2) Bill 2017
 - Enablers Legislation – Finance (No.2) Bill 2017
 - Disclosure facilities

Rights of the individual (1)

- Article 8 European Convention on Human Rights (ECHR)
 - Right to respect for private and family life
 - No interference by a public authority unless:
 - In accordance with the law
 - In pursuit of recognised legitimate aims (e.g. prevention of crime)
 - Necessary in a democratic society

Rights of the individual (2)

- EU data protection laws
 - Article 16 Treaty of the Functioning of the European Union (TFEU)
 - Data Protection Directive 95/46/EC
 - Data Protection Act 1998
 - General Data Protection Regulation (GDPR)
 - Post-Brexit

Rights of the individual (3)

- EU data protection laws cont...
 - If processing data about an individual, have to identify purpose(s) of such processing and has to be permissible under relevant law
 - Processing of information has to be proportionate, which includes amount of information being processed and who gets to see it, as well as how long it is kept
 - No fishing expeditions

Impact of regulatory activity on trusts

Trust information available to beneficiaries (1)

- BEFORE
- Position determined by a combination of:
 - Trust deed
 - Statute
 - Jersey Trust Law (Article 29)
 - Trusts (Guernsey Law) s.26
 - Common law
 - *Schmidt v Rosewood (2003)*

Trust information available to beneficiaries (2)

- AFTER
 - Safeguards in legislation of some offshore jurisdictions eroded (e.g. Cayman Confidential Disclosure Law 2016)
 - *Dawson-Damer v Taylor Wessing* – direct result of regulatory changes
 - Beneficiaries obtaining information via alternative sources (e.g. tax authorities)

Trust information available to tax authorities (1)

- BEFORE
 - General duty of confidentiality – although subject to limitations
 - Disclosure of information to foreign tax authorities a matter for the courts (and individuals have right to go to court to seek to prevent exchange)

Trust information available to tax authorities (2)

- AFTER
 - Under the CRS, automatic reporting in relation to
 - Settlor
 - Trustees
 - Protectors
 - Beneficiaries
 - No mechanism to prevent exchange
 - Courts will still have powers over enforcement

Trust information available to tax authorities (3)

- Will regulations aid taxpayers?
- Does the CRS breach the right to privacy?
 - Must be proportional
 - *Schrems v Data Protection Commissioner, Case C-362/14*
 - Legislation permitting public authorities access to electronic data on generalised basis is in breach of privacy and data protection laws

Trust information available to third parties (1)

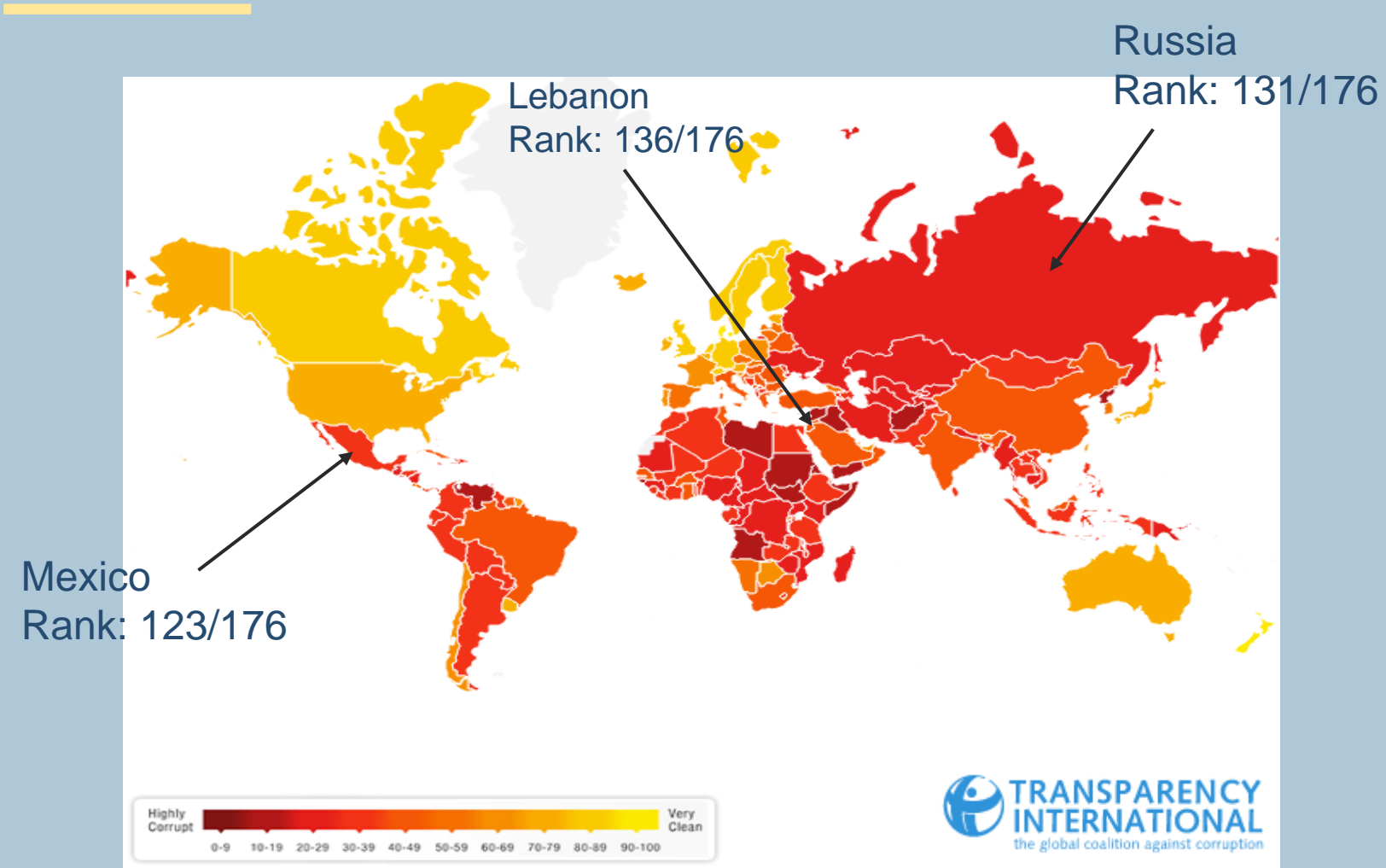
- Public registers
 - PSC registers – beneficial owners and company financial information
 - Ruled unlawful in France
- Government registers
 - Generally for use by certain government agencies (e.g. law enforcement / tax agencies)
 - Public / political pressure to make public
 - EU 5th Anti-Money Laundering Directive

What could go wrong?!



WannaCry ransomware

Who do we trust?



Consequences for trustees

- Relationship risk
- Tax risk
- Regulatory burden
- Increased cost of running structures

Safeguards and solutions (1)

- Communication is key
- Ensuring that ‘house is in order’
 - Trust documentation up to date and all transactions are documented
 - Review of tax position of trustees, beneficiaries and settlor
 - Putting in place appropriate risk assessment procedures
 - Continuing education

Safeguards and solutions (2)

- Legitimate planning to minimise reporting
 - Moving individuals
 - Moving structures



Trump Tax Proposals

Jay Rubinstein
11 October 2017

withersworldwide

Agenda

- Tax Reform Blueprint on the Table - General
- How a Tax Bill Becomes Law
- Specific Individual, Corporate and Transfer Tax Proposals
- Predictions and Conclusion



Donald J. Trump  @realDonaldTrump · 2 Oct 2016

I know our complex **tax** laws better than anyone who has ever run for president and am the only one who can fix them. [#failing@nytimes](#)

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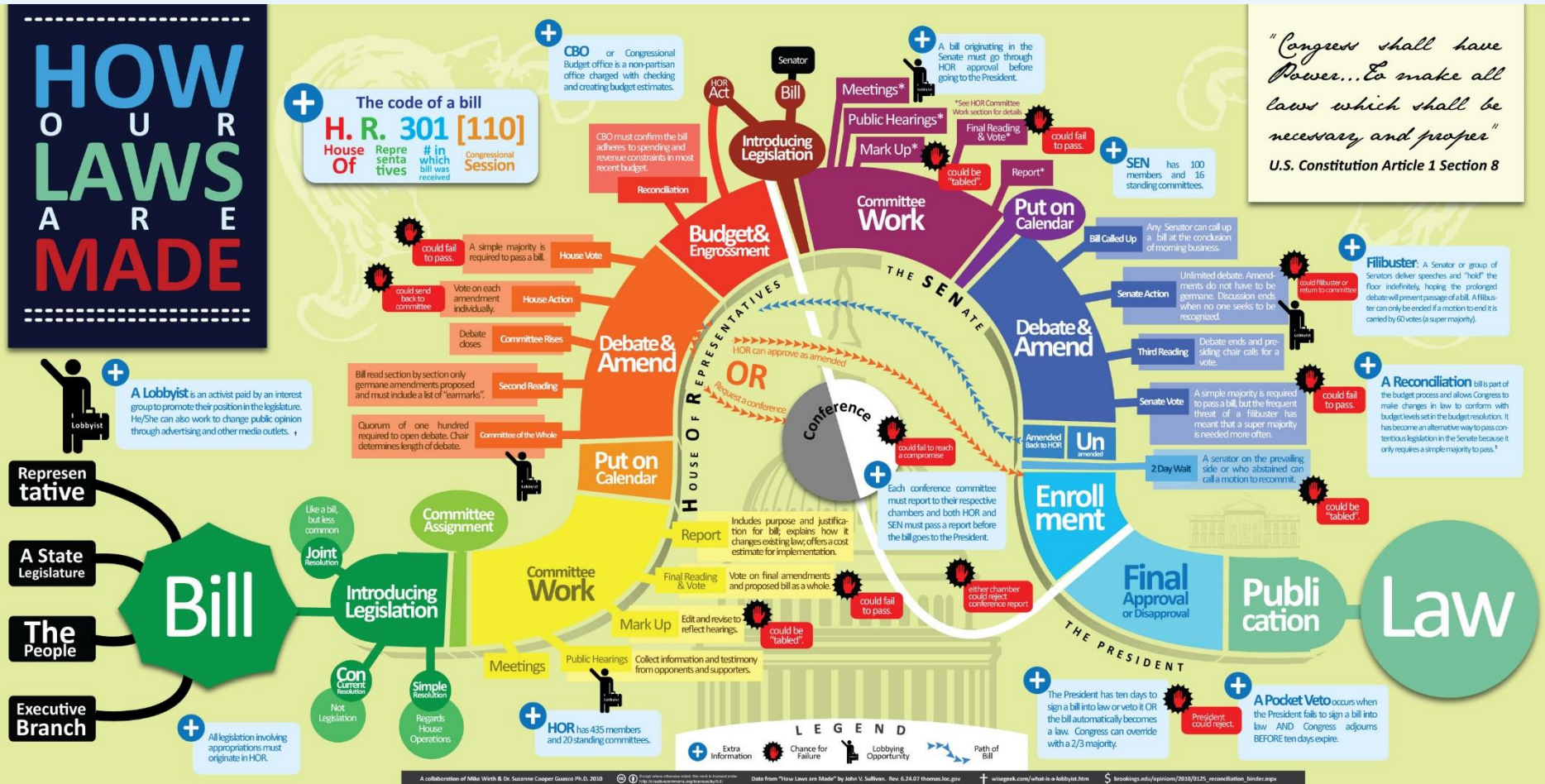
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Trump and Congressional Blueprints - General

- Donald Trump publicly announced his tax plans for America during his 2016 presidential election campaign; a further outline of his tax plans was announced by Treasury Secretary Mnuchin on April 26, 2017; and the White House released its budget proposal for Fiscal Year 2018 on May 23, 2017.
- Congressional Republicans, led by Speaker of the House of Representatives Paul Ryan, released their legislative framework for comprehensive tax reform on June 2016 – “A Better Way: Our Vision for a Confident America.”
- Big 6 - “Unified Framework For Fixing Our Broken Tax Code” released September 27, 2017 – provides directional guidance but delegates most drafting and decision making to House Ways & Means Committee and Senate Finance Committee

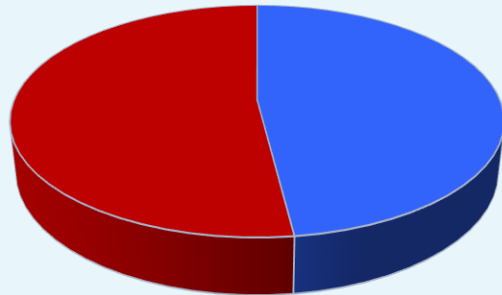
How will it happen? (Very complicated) Procedure for Enacting Law in America



Current Congressional Makeup

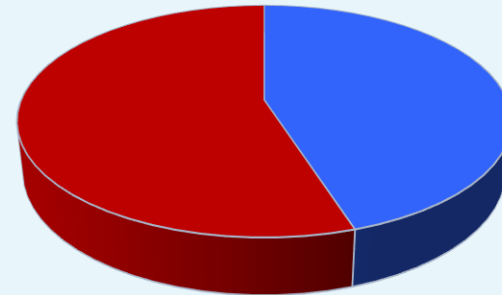
- 52 of 100 Senators are Republican
- 239 of 435 House of Representatives are Republican
- President Trump is a Republican

Senate



■ Democrat ■ Republican

House of Representatives



■ Democrat ■ Republican

*****Democratic “Wave” in 2018 Midterm Election May Substantially Alter Congressional Makeup and Impede Current Blueprint*****



Donald J. Trump  @realDonaldTrump · May 30

The U.S. Senate should switch to 51 votes, immediately, and get Healthcare and TAX CUTS approved, fast and easy. Dems would do it, no doubt!

 27K  19K  73K



Donald J. Trump  @realDonaldTrump · May 2

The reason for the plan negotiated between the Republicans and Democrats is that we need 60 votes in the Senate which are not there! We....

 12K  10K  44K



Donald J. Trump  @realDonaldTrump · May 2

either elect more Republican Senators in 2018 or change the rules now to 51%. Our country needs a good "shutdown" in September to fix mess!

 41K  17K  67K



How will it happen? (Simplified) Procedure for enacting Law in America

- Simple majority (218) needed in the House of Representatives
- Simple majority (51) needed in the Senate
- However –
 - Opposing Senators may **filibuster** – a tactic used to delay a measure from being brought to vote, and practically speaking often kills legislation. 60 votes are required to overcome a filibuster
 - If Democrats intend to filibuster, Republicans can enact tax legislation through **budget reconciliation**. Budget Reconciliation requires 51 votes and cannot be filibustered
 - **Limitation**: Tax legislation passed via budget reconciliation cannot increase the US budget deficit beyond a 10-year period. This means that phase-outs and other “sunset” provisions may need to be adopted. *See the Bush Tax Cuts of the early 2000s*
 - If Republicans manage to overcome Democratic filibuster, without resorting to budget reconciliation, legislation would be **permanent**

The Framework – Personal Income Tax Changes

- Top individual rate reduced to 35% from 39.6%
 - Additional top rate over 35% may be enacted – favored by House Ways & Means Committee members as a pay-for
- Significant expansion of standard deduction to \$24,000 joint filers and \$12,000 single filers
- Capital gains, qualified dividends remain taxed at 20%
- 3.8% additional tax on net investment income remains
- Elimination of individual AMT
- Elimination of itemized deductions but for home mortgage interest and charitable contributions

The Framework – Business Income Tax Changes

- Corporate tax rate reduced to 20%
- Elimination of corporate alternative minimum tax
- Pass-through entity tax rate reduced to 25%
 - Pass-through rate directs drafting committees to impose blockers to prevent conversion of personal compensation income to business income
- Immediate write-off for capital investments after September 27 in equipment and technology (but not structures) for minimum 5 year period
- Interest expense deductions for C corporations will be “partially” limited
 - Possible interaction with partial withdrawal and revision of Section 385 Regulations
- R&D and low income housing credits remain but other credits and deductions may disappear

The Framework – International Business Income Tax Changes

- Replacement of controlled foreign corporation worldwide system with 100% exemption for dividends paid back to US from at least 10% owned foreign subsidiaries
- Previously accumulated foreign earnings will be treated as repatriated with lower tax payable over several years
- Accumulated foreign investments in illiquid assets taxed at lower rate than rate for cash or cash equivalents; BEPs control on profits shifts to low tax countries through new minimum international tax

The Framework – Transfer Tax Changes



Donald J. Trump  @realDonaldTrump · 10 Nov 2011 

The **death tax** should be abolished -- the Government is simply taxing you twice.
It is also a job killer.

 105

 232

 34

The Framework – Transfer Tax Changes

- Elimination of estate (“death”) tax and generation-skipping transfer tax
- No mention of the fate of gift tax but likely to remain as income tax buffer
- Does not suggest capital gains tax at death in lieu of estate tax
- Does not mention elimination of step-up in basis to FMV at death
- Could we conclude no transfer or income tax liability attributable to death and all assets marked to market at time of death?

How soon?



Donald J. Trump  @realDonaldTrump · May 28 

The massive TAX CUTS/REFORM that I have submitted is moving along in the process very well, actually ahead of schedule. Big benefits to all!

 19K

 16K

 74K

Tax planning now?

Thank you

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- AML obligations for trusts
 - CRS duties for trusts
 - Italian “res non-dom” regime
-

Avv. Giorgio Vaselli, *Associate, Tax and WP*

Withers Studio Legale

Zurich, 11 October 2017



AML obligations for trusts

- EU Directive 2015/849
- Legislative Decree no. 90/2017 (in force from July 2017)
 - **New definition of B.O.** → including: settlor, trustee, protector, beneficiary or class of beneficiaries and any other individual who has (directly or indirectly) a power of control over the trust.
 - Introduction of a **trust dedicated section** in the Italian Companies Register
- **Implementing internal regulation expected within 12 months from July 2017**

AML obligations for trusts



- Caution
 - trustee required to identify, file and transmit to the Italian Companies Register updated information on B.O.s
 - B.O.s information might be disclosed upon specific request to some Italian Public Authorities (including Italian Tax Authorities) and selected persons

CRS duties

- Legal framework
 - Law no. 95/2015
 - Ministerial Decree 28 December 2015
 - Expected official interpretations from the Italian Tax Authorities

CRS duties

- Focus on trusts
 - Trusts could be identified as:
 1. **F.I.** → the trust shall comply with due diligence and reporting obligations with a specific analysis on controlling persons (or the trustee in case of «*trustee-documented trust*»)
 2. **Passive N.F.E.** → financial intermediaries (where the trust has its accounts) shall comply with due diligence and reporting obligations with a specific analysis on controlling persons;
 3. **Active N.F.E.** → financial intermediaries (where the trust has its accounts) shall comply with due diligence and reporting obligations.
- Similar rules apply also for FATCA obligation purposes

Italian res non-dom: summary

- Starting date: **1° January 2017**
- Addressees: **HWNIs** relocating to Italy (also Italian returnees)
- Annual fee (€ 100,000) on foreign incomes and gains
- (Eventual) preliminary ruling to be submitted to the local/domestic tax authorities
- Effects on reporting obligations, inheritance/gift taxes and property taxes: conditions for **more efficient wealth and succession planning**

Who can apply?

- Anyone interested in moving to Italy
- Subjective requirement: tax residence outside of Italy for the past 9 out of 10 years
- Even those who moved to Italy during 2016 (but prudentially ***FY 2016 is out of the scope of this regime***)
- Nationality is not a requirement: Italian returnees are admitted

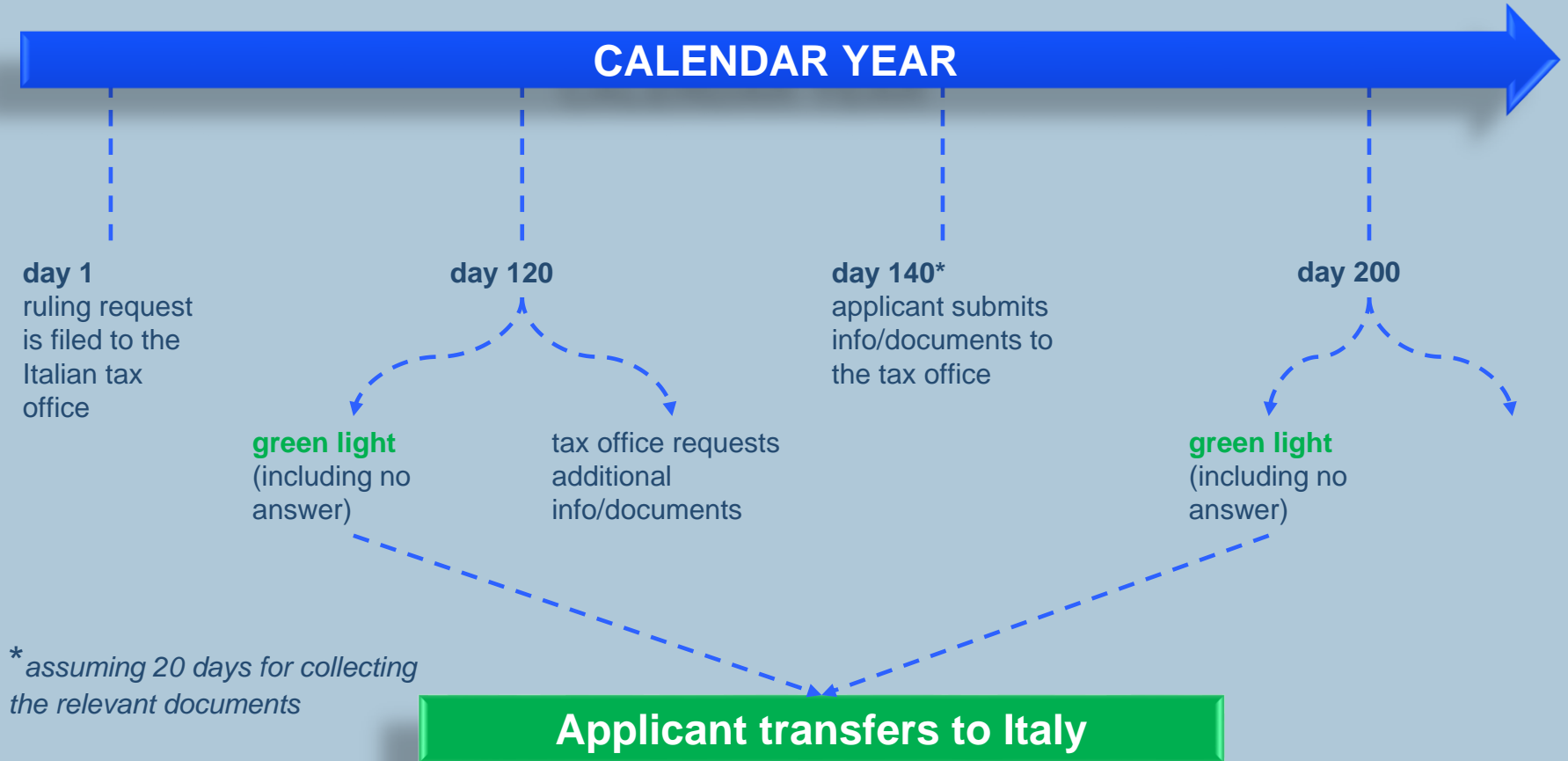
Res non-dom status: what is it?

- New territorial system of taxation:
 - incomes sourced in Italy are taxed as ordinary (i.e. under a progressive and proportional rate up to 43%; financial incomes may be subject to a flat 26% taxation)
 - incomes sourced abroad are subject to an annual flat substitutive tax equal to € 100,000
 - the € 100,000 annual fee is to be paid in a lump sum
- Anti-abuse provision: capital gains on shareholdings are excluded (for the first 5 years)
- Possible extension to family members:
 - Family members included: spouses, dependent minors, etc.
 - Civil partners are included
 - Additional cost of € 25,000 per member per year

How to apply

- The applicant shall opt for the non-dom status in the annual income tax return
- Information to be disclosed in the tax return:
 - **No** need to **disclose** assets held outside of Italy
 - Declaration of non-Italian residence for **9 out of the last 10 years**
- How to prove non-Italian residence: **checklist**
 - General details of the applicant: i.e. citizenship and last place of tax residence
 - Personal, economic and cultural/social links with Italy
 - Note: same details for family members who are to be included
- Preliminary ruling to the Italian Revenue Agency (**suggested** and in principle **safer approach**)
 - Faculty of the applicant
 - Rationale: test out the application without unexpected obstacles
 - Possibility to submit the ruling as non resident
 - Procedure: 120 days (+60 days under certain conditions), otherwise automatic green light

How to apply: suggested approach



Terms

- Applicability for non-dom status: within the terms for the 2018 tax return (i.e. September 2018) → ***FY 2017: FIRST FY UNDER THIS NEW REGIME***
- Duration of the regime: **up to 15 years**
 - Non-dom status renews automatically year by year
 - Possible to give up the regime, but **notification** to the tax authorities
 - **No exit taxation** for non-dom leavers
- Causes of termination of the regime:
 - Voluntary revocation in the tax return
 - Non-dom transferring residence abroad
 - Failure to pay the full annual charge
- Once revoked, no more non-dom eligibility
- The causes of termination do not preclude the family members from keeping their status as res non-dom for their remaining years
 - They simply should submit an autonomous application



Other benefits



Gains from the sale of real property held for more than five years are **not** taxable.



Gains from the sale of artworks are not taxable



Still a tax haven for inheritance and gift taxes

Q&A

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Thank you
