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FATCA: IRS announce extension to implementation dates

FATCA deadlines keep being moved, Anthony Quinn, updates us on what is happening with the implementation of the crucial legislation.

Foreign Account Tax Compliance Act (FATCA) requires financial institutions to use enhanced due diligence procedures to identify US persons who have invested in either non-US financial accounts or non-US entities. The intent behind FATCA is to keep US taxpayers from hiding income and assets overseas.

Most FATCA provisions were expected to take effect in the middle of 2013, but delays still persist.

In July, just three days prior to the first deadline under the legislation, the Inland Revenue Service extended most implementation dates for FATCA compliance for at least six-months.

The US Treasury Department issued a statement on the same day announcing that "due to overwhelming interest from countries around the world, a six-month extension to the start of the FATCA withholding and account due diligence requirements will be provided to allow more time to complete agreements with foreign jurisdictions".

Despite the IRS claims of 'overwhelming interest', the number of inter government agreements (IGAs) signed to date is just nine, a far cry from the seventeen that the IRS predicted would be signed by Christmas 2012.

The IRS have reported that they are in negotiations with over 80 jurisdictions to sign IGAs – so what then is the hold up?

Firstly, FATCA compliance is a complex beast and most Governments and FFIs are beginning to realize that without an IGA, which essentially overcomes many conflict of law issues , then complying with (and enforcing) the 544 page FATCA regulations, which is the far more complex alternative to an IGA, would be almost impossible.

By their own admission the US Treasury Department stated *"in many cases, foreign law would prevent FFIs from complying with FATCA"*. So for FATCA to work, there needs to be an IGA and in most countries, enabling legislation to recognize the IGA as taking precedence over existing law.

Secondly, the IRS has changed tack on the approach to negotiating IGAs. Initially, Annex II, the section of the IGA dedicated to country specific nuances with respect to products and exempt institutions was being negotiated on a country-by-country basis. The IRS in an attempt to speed up the process will no longer follow this approach, instead using the already signed IGAs as the standard and negotiations outside this will be by exception only.

The IRS has also just introduced a most favoured nation clause allowing earlier IGA signatories to rely on more favourable exemptions, if granted to subsequent countries in IGAs signed in future.

Thirdly, opponents of FATCA have been highlighting that the US Treasury Department, does not have the legal authority to promise reciprocity to the world's governments, without obtaining approval from both the US Senate and the US Congress first.

In a recent article, James Jatras a former US Diplomat and Senator that has started the lobbying group *repealFATCA* stated:

"Another fact that is not well known is that these IGAs are not treaties nor authorized by FATCA, they have the force of law for non-US, not for the US. This is the part of the 'scam' that Treasury is trying to pull, and foreign governments don't appear to have caught on. In fact, I have first-hand knowledge of at least one government that specifically indicated to treasury that they would consider an IGA only if it took the form of a treaty protocol, with Senate approval, so they could be sure it would bind the US as well – Treasury flatly refused".

Finally, another reason for the delay appears to the movement to evolve FATCA into an international automated tax information exchange standard, which is gaining momentum with the