



FATCA: Commencement date delay announced

By Anthony Quinn

On 24 October 2012, the Inland Revenue Service (IRS) released Announcement 2012-42¹ *Timelines for Due Diligence and Other Requirements Under FATCA*, which delays certain deadlines under the Foreign Account Tax Compliance Act (FATCA).

In essence, the announcement provides new timelines for Foreign Financial Institutions (FFIs) and United States Financial Institutions (USFIs) to complete due diligence and certain other requirements. In addition, the announcement provides guidance in respect to whether certain instruments meet the “grandfathered obligation” definition.

Furthermore, the announcement outlines extended timelines relating to withholding on certain gross proceeds, which may not be

FFIs and USFIs now have until 1 January 2014 to comply with FATCA due diligence requirements, which represents a six-month extension

applicable to FFIs, that operate in jurisdictions that have already or are planning to enter into an Intergovernment Agreement (IGA) with the US.

The announcement of an extension to key implementation deadlines was certainly welcomed by various business and industry groups, who had previously lobbied the IRS for more time and greater alignment between the deadlines for FFIs and USFIs.

FFIs and USFIs now have until 1 January 2014 to comply with FATCA due diligence requirements, which represents a six-month extension from the previous deadline of 1 July 2013, where there was no IGA in existence.

In this article, we will cover the following:

- summary of new implementation time-frames

- customer due diligence
- pre-existing account remediation
- withholding guidance in respect to gross proceeds
- information reporting
- grandfathering obligations as they relate to certain instruments
- open issues not covered in the announcement
- other matters.

Summary of new implementation timeframes

Announcement 2012-42 outlines various extensions to the FATCA implementation timelines. Firstly, withholding agents, including Participating FFIs (PFFIs) and Registered deemed-compliant FFIs (RDCFFIs), will be required to implement new account opening procedures by 1 January 2014 instead of 1 January 2013 (USFIs) or 1 July 2013 (PFFIs). The effect of this extension is that implementation timeframes are now aligned for both USFIs and FFIs.

Secondly, as a consequence of the commencement date for FATCA being 1 January 2014, this means that withholding agents and FFIs must assess any pre-existing account holders as at 31 December 2013 (previously 31 December 2012). The dates by which withholding agents and financial institutions must complete and review documentation remains

Withholding agents and FFIs must assess any pre-existing account holders as at 31 December 2013 (previously 31 December 2012).

12 months for high-value account holders (i.e. 31 December 2014) and 24 months for low-value account holders (i.e. 31 December 2015) from the new commencement date.

It is worth noting that FFI agreements entered into prior to 1 January 2014 will become effective from 1 January 2014; however, for FFIs that have not registered by the commencement date, the FFI agreement will be effective on the date it was signed, meaning that the 12- and 24-month periods will apply from the later date of registration.

Finally, the announcement provides further guidance in respect to withholding. This will apply from 1 January 2017 on any sale or disposition of assets that generate US-sourced FDAP² income.

The table below was issued with Announcement 2012-42 and has been re-created to outline the changes to customer due diligence and pre-existing account remediation depending on the FATCA status of the financial institution (i.e. PFFI, RDCFFI or prima facie FFIs).

Customer due diligence

As outlined above, USFIs, PFFIs and RDCFFIs are required to implement FATCA-compliant account opening procedures for individual and entity accounts by either 1 January 2014 or by the effective date that PFFIs enter the FFI agreement or RDCFFI register with the IRS.

Pre-existing account remediation

The announcement defined the term “pre-existing obligation”, which has different meanings depending on whether the withholding agent is a USFI, a PFFI or a RDCFFI, as follows:

- For USFIs, a pre-existing obligation means any obligation that exists prior to 1 January 2014.
- For PFFIs, a pre-existing obligation means any obligation that exists prior to

TABLE 1: SUMMARY OF FATCA OBLIGATIONS AND COMMENCEMENT DATES

	New Individual and Entity Accounts (Implementation of new account opening procedures)	Preexisting Accounts of Prima Facie FFIs (Date by which due diligence must be completed for all accounts)	Preexisting Accounts of Entities other than Prima Facie FFIs	Preexisting High Value Accounts of Individuals	Preexisting Accounts of Individuals other than High Value Accounts
Withholding Agents other than Participating FFIs and Deemed-Compliant FFIs	1 Jan 2014	By 30 June 2014	By 31 Dec 2015	N/A	N/A
Withholding Agents that are Participating FFIs	By the later of 1 January 2014, or effective date of FFI Agreement	By the later of 30 June 2014, or 6 months after the effective date of the FFI Agreement	By the later of 31 December 2015, or two years after the effective date of the FFI Agreement	By the later of 31 December 2014, or one year after the effective date of the FFI Agreement	By the later of 31 December 2015, or two years after the effective date of the FFI Agreement
Withholding Agents that are Registered Deemed-Compliant FFIs	By the later of 1 January 2014, or date of registration	N/A	N/A	N/A	N/A

Source: IRS 2012, Announcement 2012-42

TABLE 2: CURRENT STATE OF IGA DISCUSSIONS BY COUNTRY



Countries that have signed the IGA	Countries expected to sign by 31 December 2012	Countries actively engaged in discussions – some of which are expected to be signed by the end of 2012	Other countries exploring IGA discussions – no anticipated date
United Kingdom Denmark Mexico Switzerland	France Germany Italy Spain Japan Canada Finland Guernsey Ireland Isle of Man Jersey Netherlands Norway	Argentina Australia Belgium Cayman Islands Cyprus Estonia Hungary Israel Korea Liechtenstein Malaysia Malta New Zealand Slovak Republic Singapore Sweden	Bermuda Brazil British Virgin Islands Chile Czech Republic Gibraltar India Lebanon Luxembourg Romania Russia Seychelles Saint Maarten Slovenia South Africa

Source: IRS 2012, Announcement 2012-42

the later of 1 January 2014 or the effective date of the FFI agreement.

- For RDCFFIs, a pre-existing obligation means any obligation that exists prior to the later of 1 January 2014 or the registration date.

As a result, both PFFIs and USFIs will be able to treat accounts opened prior to 1 January 2014 as pre-existing obligations. FFIs that are subject to a relevant IGA may also treat accounts opened prior to 1 January 2014 as pre-existing obligations unless they register with the IRS after that date.

The IRS has made it clear that although the time period for completing the identification and documentation of pre-existing

accounts may not have expired, the expectation is that once an account has been documented as a US account or as belonging to a non-participating FFI (NPPFI), withholding and reporting as appropriate must begin from that point.

This subtle point on timing may impact when PFFIs actually start the pre-existing account remediation searches, within the required timeframes.

Withholding guidance in respect to gross proceeds

Under the proposed regulations, withholding agents were previously obligated to withhold tax on payments of gross proceeds from the sale of certain property that produces, or

could produce US-sourced FDAP income made on or after 1 January 2015.

Announcement 2012-42 further delays the requirement to perform withholding on gross proceeds by two years and only requires withholding on payments of such gross proceeds from a sale of US FDAP-earning property occurring after 31 December 2016.

This delay is likely to have resulted from two key issues raised with the IRS. The first relates to industry calls for global discussions via the Organisation for Economic Co-operation and Development (OECD) to establish common standards for withholding and reporting. The second is likely to be the result of a desire to see the large number of IGAs being entered into globally come to fruition.

Information reporting

The announcement provides guidance on the date from which a PFFI becomes obligated to comply with the applicable information reporting for the 2013 and 2014 calendar years, most notably that information reports must be filed by 31 March 2015³.

Under the proposed regulations, information reporting with respect to the 2013

This subtle point on timing may impact when PFFIs actually start the pre-existing account remediation searches, within the required timeframes.



calendar year was previously required to be reported by 30 September 2014, so the announcement represents a six-month extension on previous guidance.

It is unclear how the IRS would compel an FFI to conduct information reporting with respect to the 2013 calendar year, as this period will generally precede the effective date of the FFI agreement.

Grandfathering obligations as they relate to certain instruments

The scope of grandfathered obligations was expanded to include the following three additional categories:

- an obligation that produces or could produce a foreign passthrough payment but not a withholdable payment⁴
- an instrument that gives rise to a withholdable payment solely because it is treated as giving rise to a dividend equivalent⁵
- any obligation to make a payment with respect to, or to repay, collateral posted to secure obligations under a notional principal contract that is a grandfathered obligation.

Open issues not addressed in the announcement

The announcement did not provide clarity on a number of issues including the date from which an FFI must enter into an FFI agreement in order to avoid FATCA withholding tax associated with certain payments made on or after 1 January 2014. This could create issues for FFIs, who may still need to enter into the FFI agreement by 30 June 2013 in order to avoid FATCA withholding tax on any new accounts opened on or after 1 January 2014.

Other matters

On 7 November 2012, the Australian Treasurer Wayne Swan announced⁶ that Australia had entered formal discussions with the US regarding an IGA, which was a welcome relief as it significantly reduces the uncertainty, particularly in respect to imposing a penalty withholding tax.

A day later, the US Treasury Department announced⁷ that it is in discussions with over 50 countries and is confident that a significant number will be signed by the end of 2012, with more to follow in 2013. The table above shows the current state of IGA discussions by country, although it is expected that Australia will not be one of the countries to sign the IGA this year, despite drafting for "Annex II"

(the section of the IGA where countries can propose certain carve-outs) being underway.

So what can you expect next?

As a result of this announcement, it is anticipated that the final FATCA regulations are unlikely to be issued until late December 2012, which will be a nice Christmas present for those in the industry tasked with digesting and responding to FATCA. Happy holidays! ■

Anthony Quinn is an independent management consultant with more than 17 years experience as a program and project manager, responsible for running large-scale transformation change programs for many investment and retail banks in Australia, Europe the UK and the US.

Anthony held the position of Program Manager for the Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Program for the Banking and Financial Services Group within Macquarie Bank.

Anthony now works as a FATCA program manager for an investment bank and has recently launched www.financialcrimesconsulting.com

REFERENCES:

1. IRS 2012, Announcement 2012-42, <http://www.irs.gov/pub/irs-drop/A-12-42.pdf>
 2. US FDAP income means Fixed, Determinable, Annual, Periodical income and contains certain instruments listed at [http://www.irs.gov/Individuals/International-Taxpayers/Fixed-Determinable-Annual-Periodical-\(FDAP\)-Income](http://www.irs.gov/Individuals/International-Taxpayers/Fixed-Determinable-Annual-Periodical-(FDAP)-Income)

3. The proposed FATCA regulations already required information reporting for the 2014 calendar year to be reported by 31 March 2015.

4. The testing date for the grandfather rule will be the date that is six months after the term "foreign passthrough payment" is defined in final regulations.

5. Pursuant to s 871(m), 7. Applies to instruments that are outstanding six months after such instrument is first treated as giving rise to a dividend equivalent.

6. <http://www.treasurer.gov.au/wmsDisplayDocs.aspx?doc=pressreleases/2012/110.htm&PageID=003&min=wms&Year=&DocType=0>

7. <http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx>