

# FATCA

## THE SAGA CONTINUES

By Anthony Quinn



Over the past few months, there has been a flurry of FATCA activity – including more than 110 submissions to the US Treasury Department from concerned industry groups, financial institutions, individuals and other lobby groups. This culminated in a one-day public hearing held in Washington DC on 15 May.

The IRS has also released further guidance on the FATCA registration process and issued drafts of the new W-8 BEN forms in addition to inter-government agreement (IGAs) announcements between the US and Japan and Switzerland.

In this article, we will discuss the key FATCA developments including:

- The public hearing;
- Inter-government agreements;
- The FATCA registration process; and
- Tax forms W-8 BEN and W-8 BEN-E.

### Public hearing

On 15 May, 21 representatives – including John Brogden from the Financial Services Council (FSC) and Tony Burke from the Australian Bankers Association (ABA) – attended the public hearing in Washington to plead the case for their members.

Unsurprisingly – given each lobbyist had just 10 minutes to present – observers commented that interaction between the speakers and panel members was limited.

However, outside the public hearing it was reportedly a different story, with very positive feedback coming from the many side-meetings that occurred before and after the public hearing. In fact, the FSC and ABA have since appointed US-based lobbyists with serious connections on Capitol Hill to ensure the positions of their members continue to be represented long after the public hearing.

Encouragingly, US Treasury indicated its openness to further submissions, which the FSC and ABA responded to by submitting lobbying papers reiterating the key points from the 30 April submissions (Australian superannuation carve-out, AML reliance and IGAs, in addition to timing and transition).

In late July, the FSC made a trip to Washington to meet with US Treasury, the IRS, the Australian Embassy and other policy-makers; and provided insight on their return. The key points are that the final regulations could be expected around October, which is expected to include some softening of the proposed regulations in respect of pre-existing account remediation, AML reliance and the superannuation fund carve-out. We will have to wait and see.

### Inter-government agreements (IGAs)

On 22 June, the US Treasury announced that Switzerland and Japan were the latest countries to enter into FATCA partner agreements (joining the UK, France, Germany, Spain and Italy; which made announcements in February when the proposed regulations were issued<sup>1</sup>).

The original IGAs with the five European countries contemplated a framework whereby participating foreign financial institutions (PFFIs) report FATCA-required information to their own governments – and then the gov-

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ernments exchanged the information with the US on an automatic basis, effectively exempting PFFIs in those countries from dealing with the IRS at all.

However, the IGA announcements with Switzerland and Japan contemplate an alternative model framework, whereby PFFIs will be allowed to pass only a limited subset of client details to the IRS. The rest of the FATCA-required information will only be available to the IRS via a direct request to the Swiss or Japanese governments.

So, what will the terms of any agreement with Australia look like? While discussions have started with industry groups and Treasury in Australia, it is clear our government is a bit slow off the blocks. Over the coming weeks and months we can expect the dialogue to increase, with the FSC, ABA and ASFA planning on formalising a joint paper outlining what their members would like included in an Australian IGA.

### Details of FATCA registration process<sup>2</sup>

On 12 June, the IRS released further details on the registration process using the

eagerly anticipated online system that will be used by foreign financial institutions (FFIs) to register as participating FFIs or as Registered Deemed-Compliant FFIs.

PFFIs must soon start considering the FATCA governance structure, as the registration process requires a FATCA Responsible Officer (RO) to be appointed (who will typically be the person signing the FFI agreement). The FATCA RO is required to certify their authority to act on behalf of the FFI – and must themselves be identified – either by entering their Social Security Number (SSN) or International Tax Identification Number (ITIN). In the absence of these, a short paper form and supporting identification documentation must be submitted in order to receive the FATCA Individual Identification Number (FIIN).

The FATCA RO is permitted to select up to five points of contact (POCs) to assist in completing all aspects of the registration process except signing the FFI agreement. The IRS has recognised FFIs may require external support in the initial registration and ongoing maintenance, and have permitted PFFIs to

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appoint up to four external POCs (for example third-party local or US-based individuals or service providers) with at least one POC being in-house.

In addition to POCs, FFIs are permitted to nominate an Authorised Third Party (ATP) who can have power of attorney for the FFI, thereby allowing the FATCA RO to delegate full FATCA registration duties (including signing) to either another in-house individual or to certain US-licensed tax professionals subject to US regulatory jurisdiction. This concession is likely to lead to a cottage industry of US licensed tax professionals offering 'FATCA certification and registration' services to FFIs keen to outsource this administrative headache.

The IRS has commented it will closely monitor the account creation and FATCA registration process which, given ongoing comments from industry, may be subject to change.

### New IRS tax forms W-8 BEN<sup>3</sup> and W-8BEN-E<sup>4</sup>

Earlier in May, the IRS issued draft versions of the W-8 forms, which are being split

into two separate forms (W-8BEN for individuals and W-8BEN-E for entities). However, disappointingly the instructions were not released at the same time, leaving plenty of unanswered questions.

Further guidance is expected over the coming months in respect to these and other tax forms which are to be updated by the IRS – so watch this space.

### Summary

Following the public hearings in mid-May, it was encouraging to hear feedback from attendees that the US Treasury was open to further dialogue before the FATCA regulations are finalised. The subsequent visit by the FSC appears to have been positive, with the lobbying efforts starting to have effect in influencing the shape and form of the final regulations.

With over 100 submissions made in response to the proposed regulations, 21 transcripts from the public hearing, subsequent submissions by industry groups, follow-up visits and IGAs being agreed, it's clear the IRS has its work cut out – and not surprising that the target deadline of northern summer 2012 (August) is reportedly being extended to 'fall' (October).

With less than six months to go until the commencement date of FATCA for US financial institutions – and less than 12 months for PFFIs – we are in for a nervous wait to see what concessions are made when the final regulations land, and whether the timeframes are achievable given the final scope or whether these are extended given the delay in issuing.

### So what can you expect?

Over the next couple of months we can expect further announcements from the IRS. The first is likely to be the Model FFI Agreement (expected imminently) as well as further announcements formally communicating the new expected timeframe for final regulations. ■

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<sup>1</sup> In April, U.S. Treasury announced that discussions had also started with Ireland.

<sup>2</sup> <http://www.irs.gov/businesses/small/international/article/0,,id=258313,00.html>

<sup>3</sup> <http://www.irs.gov/pub/irs-utl/formw8benindividualexecirculation2.pdf>

<sup>4</sup> <http://www.irs.gov/pub/irs-utl/formw8benentityexecirculation2.pdf>