FATCA: round up

Anthony Quinn provides an update on developments in the FATCA implementation.

There have been a number of interesting developments with regards to the Foreign Account Tax Compliance Act (FATCA). FATCA, for the uninitiated, is a US law designed to increase reporting to the US Inland Revenue Service (IRS) of US taxpayers who hold financial accounts with Foreign Financial Institutions (FFIs).

Inland Revenue Service (IRS) and US Treasury announcements

On 19 August 2013, the IRS announced the opening of the new online system for financial institutions that need to register with the IRS for FATCA.

In the press release, the IRS stated, "Financial institutions are encouraged to become familiar with the system, create their online accounts and begin submitting their information. Starting in January 2014, financial institutions will be expected to finalise their registration information by logging into their accounts, making any necessary changes and submitting the information as final."

Once registrations are finalised and approved in 2014, registering financial institutions will receive a notice of registration acceptance and will be issued with a global intermediary identification number (GIIN).

Statistics on the number of FFI registrations made so far are currently unknown, but given the IRS announced an extension for registration to be completed by April 2014, to be included in the first published list in the June 2014, it is likely that many financial institutions would not have started this at this point.

In September, the US Treasury issued a technical corrections notice to address drafting, cross-referencing and definitional issues, as well as, applying some additions, deletions or modifications to regulatory language arising from the release of the final FATCA regulations on 28 January 2013.

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It is also been suggested that, towards the end of this year, the US Treasury will release coordination regulations, which will have the effect of aligning the main chapters (3, 4 and 61) of the Internal Revenue Code.

Update on intergovernmental agreements (IGAs)

At the time of writing, the number of Bilateral IGAs signed with the US remains at just nine, here listed in order of signing: United Kingdom, Denmark, Mexico, Ireland, Switzerland, Norway, Spain, Germany and Japan), but there are many more expected over the coming months.

IGA's are important because they overcome many conflict-of-law issues. Without an IGA, complying with FATCA regulations becomes almost impossible.

Interesting times in Switzerland

In late August, the Swiss Government agreed to a deal with the US Government to assist in resolving past issues and tax disputes between the two countries. This may halt Washington's planned legal action against banks in Switzerland which have long been suspected of facilitating tax evasion by American taxpayers, reported to be in the region of tens of billions of undeclared dollars.

The deal offers Swiss banks the opportunity to handover account information of US account holders and pay an 'appropriate' fine – assessed at 20-50% of the value of undeclared accounts, depending on the time when they were opened. Banks that opened accounts prior to 2009, when the US imposed a $780m fine on UBS, the world's largest private bank, will face lower penalties, but fines will be more severe for banks offering Americans accounts after that.

There are, however, an unspecified number of banks already under investigation by US authorities, for whom this deal will not apply.

A week later, in early September, members of the House of Representatives voted in favour of introducing enabling legislation in Switzerland that will require Swiss banks to report the holdings of their current and future American clients to US tax authorities. In doing so, they have opted for the Model 2 IGA, favoured by Japan, where client data will only be exchanged once US authorities have requested administrative assistance.

Critics of the FATCA agreements made by the Swiss Government indicated that this could be a devastating blow for Switzerland's financial industry. Many have warned that bigger penalties could be around the corner, if European tax authorities decide to follow suit and impose similar penalties.

However, in the end, the divisive bill was approved 112 votes to 51 (with 21 abstentions). This result indicates that many MPs seem to have come to the conclusion that failure by Switzerland to sign up to FATCA would put Swiss banks at a huge disadvantage, as they would effectively be excluded from the US capital markets.

Update on developments in Australia

In early September, the Financial Services Council (FSC) and Financial Planners Association (FPA), delivered on their commitment to revise existing AML identification forms and issue guidance to product issuers and financial planners to comply with FATCA customer due diligence.

The draft AML ID forms and guidance were presented to the FSC/FPA board and received provisional approval, subject to prospective changes resulting from an Australian IGA or enabling legislation. The date of when these will be introduced is currently under discussion.

Another noteworthy development in August was that a joint submission by the FSC and the Australian Bankers Association (ABA) was sent to Australian Treasury advising them of "certain issues the industry is aware of in applying the Model 1 IGA requirements and some of the more complex and unique entity types that exist in the Australian context".

The letter titled, 'Identification of entities under FATCA model 1 IGA requirements', goes on to cover "potential issues that the industry has identified and also explores options that would allow for a consistent approach to identification of these entities for the ATO, industry and customers."

Implementation considerations

The announcement (Notice 2013-43) by the IRS, to delay the commencement date of FATCA to 1 July 2014, presents Australian Financial Institutions (FIs) with a particular challenge since this coincides with financial year-end, undoubtedly the busiest period of the whole year and a time when many financial institutions have self-imposed 'change freezes', preventing code releases during this period.

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Reporting FIs will be faced with the following choices, each with downsides that must be considered, which are summarised below:

- Go early – which has potential legal risk associated with introducing customer identification changes prior to having enabling legislation in Australia to support FATCA KYC collection (assuming this remains unsigned before FATCA commencement).
- Go on-time – which has significant delivery and operational risks associated with trying to co-ordinate and deploy changes to systems, procedures, collateral and controls during the busiest time of year.
- Go late – which has significant compliance and reputational risks, particularly where the IRS have provided extensions and could include remediation of accounts opened after 1 July 2014 and whenever year-end 'change freeze' periods have ended.

After weighing up the above options and consulting with advisory boards, my sense is that many Reporting FIs will come to the conclusion that introducing FATCA changes prior to 1 July 2014, is the safest approach, but this in itself could introduce other risks, depending on how early FIs decide to implement.

For example, if Australian Reporting FIs align customer identification changes to comply with the Privacy Amendment (Enhancing Privacy Protection) Act 2012, which comes into effect in March 2014 (a sensible working assumption) and then either the Australian IGA is signed after this point (and requires changes to customer ID forms or guidance), or the IRS announce a further delay, then this could force Reporting FIs to re-visit recently-deployed FATCA solutions. This all means one thing for certain – increased compliance costs.

Final thoughts

The complexities for FATCA delivery teams seem to increase daily, with developments such as the IRS refining guidance in technical corrections documents, emerging domestic guidance issued by industry bodies with country specific nuances and ongoing lobbying of domestic tax authorities in countries that have yet to sign IGAs. Not to mention domestic regulatory compliance programs needing to be considered simultaneously.

In Australia, there is also a number of competing regulatory compliance programs, such as the Financial Claims Scheme, Future of Financial Advice, Code of Banking Practice and Privacy Reforms. Combined, they will be stretching financial institutions further and making prioritisation of resources a challenge, as organisations juggle resources to deliver on these major programs simultaneously. •••

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