

Asia-Pacific Risk & Compliance News

Foreign Account Tax Compliance Act (FATCA): Australian Treasury investigates a Memorandum of Understanding (MoU) with the IRS

With deadlines for compliance with FATCA fast approaching, and with unanswered questions as to how FFIs (Foreign Financial Institutions) will be able to balance obligations under FATCA with their obligations under the Australian National Privacy Principles, the Australian Treasury have undertaken to investigate the feasibility of implementing a Memorandum of Understanding (MoU) with the U.S. Internal Revenue Service (IRS).

The Basics: What is FATCA?

FATCA is a piece of US Federal legislation that, in effect, has wide reaching international impact. Its main objective is to minimise, if not eliminate, the ability for US taxpaying individuals or corporations to 'hide' funds in foreign jurisdictions for the purpose of minimising or avoiding the payment of tax.

Why is an MoU required?

As the FATCA laws currently stand, an Australian FFI would be required to report annually to the IRS on the following:

- names;
- addresses;
- Tax File Numbers (TFN's); and
- account balances (among other requirements) of any accounts that are held by individuals or companies that have a US indicia (indicia includes US citizenship or green card, US birthplace, US residential and/or postal address, Power of Attorney (POA) in the US, etc).

Further to this, FFIs would be required to withhold, on behalf of the IRS, 30% of all transactions that are conducted by suspected US held or controlled accounts that are deemed to be 'delinquent' (i.e. have not been cooperative in proving, or disproving, the US indicia indicated).

Based on this reporting structure, it is possible, if not likely, that nearly all FFIs would, in some way, breach local privacy laws unless specific permission has been sought from each and every single one of these account holders to send their information to the US. Even then, it is still unclear whether an FFI would be fully compliant.

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What will happen if an MoU is implemented?

If the MoU is agreed to by the US and Australian Treasury, FFIs will only be required to report the required US account indicia information to an Australian regulatory body instead of the IRS. Further, an FFI will have no requirement to withhold funds on behalf of the IRS for delinquent accounts.

These measures within the MoU will make it much simpler for Australian FFIs to comply with FATCA and privacy obligations.

What will happen if an MoU is NOT implemented?

Although unlikely, if an MoU is not implemented before the commencement of FATCA reporting obligations, Australian FFIs will face a difficult choice, namely:

- 1) ceasing business with any customers or accounts that have US indicia – this has already started occurring with some European banks;
- 2) comply with the FATCA requirements and run the risk of being prosecuted for breaches of our Privacy Laws; or,
- 3) not comply with FATCA requirements and run the risk of having 30% of all transactions conducted in USD being withheld by the IRS.

If you would like to contribute to the ‘Intergovernmental Agreement to Implement FATCA’ (the MoU), click here for electronic submission via the treasury website:

<http://www.treasury.gov.au/ConsultationsandReviews/Submissions/Submission-Form?parent={D5BCF744-EC92-4F62-87F7-6C841E9E443A}>

Visit www.lexisnexis.com.au/riskandcompliance for more information on how we can assist with your compliance requirements.