

The Empire Strikes Back: US FATCA legislation with extra- territorial effect and what it means for you

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Agenda

- *What is FATCA?*
- *Who and what are impacted?*
- *Strategic decision making and current status*
- *Where to next?*
- *Questions?*

What is FATCA?

The Foreign Account Tax Compliance (FATCA) provisions of the Hiring Incentives to Restore Employment (HIRE) Act of 18 March 2010

- *Intent is to:*
 - *improve tax compliance for offshore financial accounts owned by certain U.S. Persons*
 - *Require increased information reporting*
- *Imposes 30% withholding, on a staggered basis, on U.S. source income/proceeds from 1 January 2014 unless:*
 - *Foreign financial institutions (FFIs) enter into agreements with the U.S. Treasury or are otherwise deemed compliant with FATCA*
 - *Non-financial foreign entities (NFFE) report or certify their ownership*

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What is FATCA? (Cont'd)

The Proposed Treasury Regulations

- *Were released on 8 February 2012 and further refine the requirements to meet compliance, deal with non compliant parties (withholding), reporting, certification and timelines related thereto*
- *Comments/submissions on the Proposed Regulations were due to be submitted to the IRS by 30 April 2012*
- *Subsequently much lobbying has taken place*
- *Release of “Final Regulations”?*
 - *Planned for North American “Summer” 2012 release; then suggested will come out in October 2012; could even be later!*

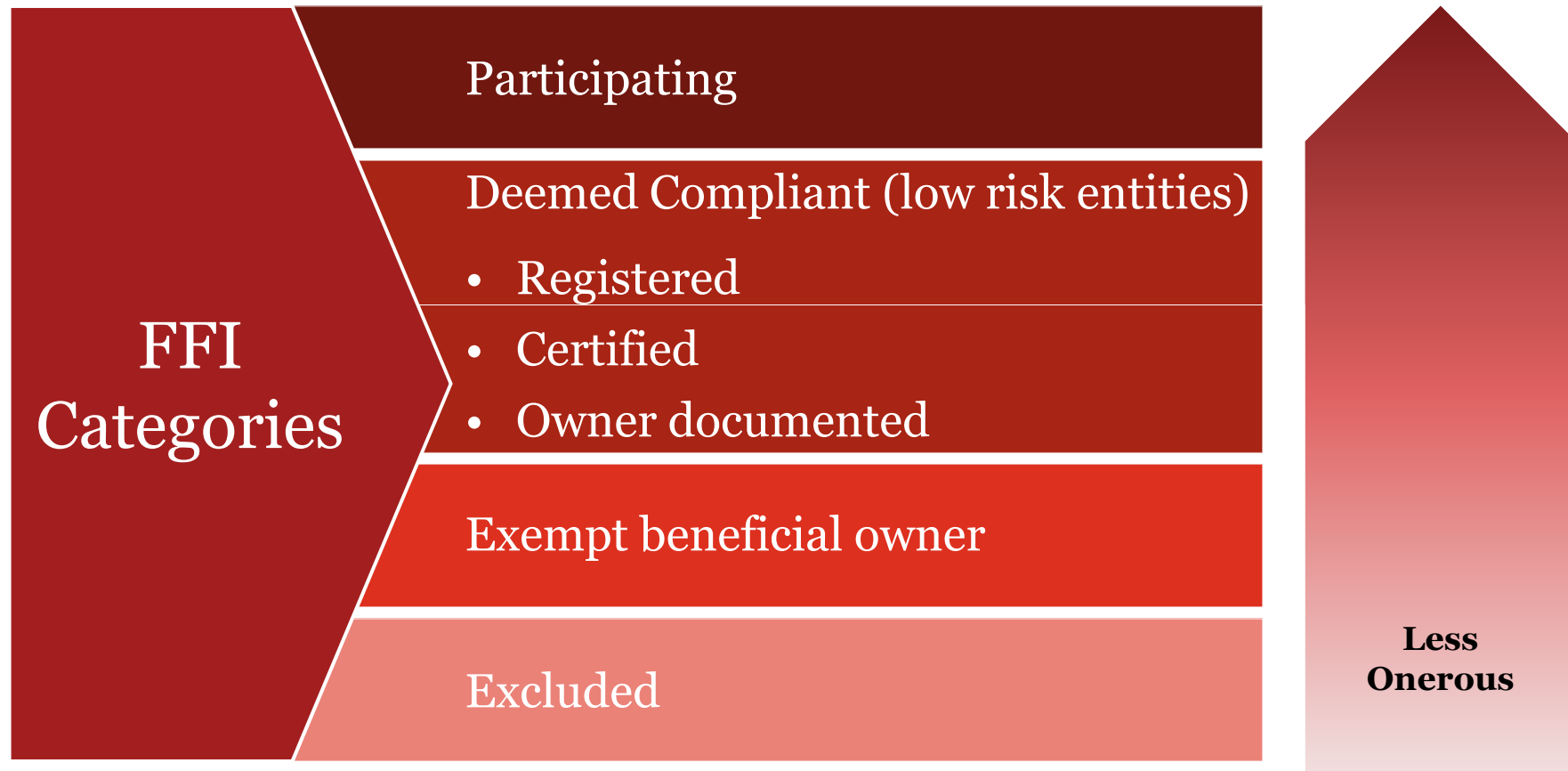
What is FATCA? (Cont'd)

- FATCA withholding and reporting provides US Internal Revenue Service (IRS) with additional tools in the fight against financial crime (tax evasion) using extra-territorial reach
- FFIs (if compliant) cannot be used to shield U.S. taxpayers' identity from the IRS. Qualified Intermediary (QI) legislation was not effective in this.
- FATCA :
 - seeks to overcome the tax haven impediment to accessing data
 - requires FFIs to perform a more exhaustive search for U.S. Persons, and Non Financial Foreign Entities (“NFFE”) to disclose substantial U.S. Owners
 - With respect to its extra-territorial application, it is cleverly written and other countries are now waiting to see if it works well for the US. They might want to enact something similar eg UK, Germany, others – keen; China??

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Who and What are impacted ?(Cont'd)

Different categories of FFIs have varying compliance obligations



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Who and what are impacted? (Cont'd)

- Banks, hedge funds, private equity funds, broker-dealers, clearing organisations, trust companies and insurance companies
- Currently, unless the Proposed ie draft, Regulations are amended or arrangements made within Intergovernmental Agreements (IGA), most Australian and many other countries' superannuation/pension funds will be caught, and
- Leveragability of anti-money laundering (AML) client/customer onboarding, documentation and monitoring requirements will be minimal (except for AML regimes identical to US)

FATCA has:

- *Extensive practical implications for financial institutions (FIs) eg in data gathering, reporting and withholding*
- *Unintended consequences eg re superannuation funds and AML*
- *Extra-territorial application: you have obligations as FFIs and US FIs*

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Who and what are impacted? (Cont'd)

- FFIs must appoint a responsible officer who has to provide certification of compliance, including that
 - To the best of the responsible officer's knowledge, **from 6 August 2011** until the date of certification, no formal or informal practices or procedures were in place to assist account holders in the avoidance of FATCA, and
- Within **one year** of the effective date of the FFI agreement, the responsible officer is required to certify to the IRS that the participating FFI has completed the review of all high value accounts, and
- Within **two years** of the effective date of the FFI agreement, the responsible officer is required to certify to the IRS that the participating FFI has completed the review of all other accounts.
- Conducted periodic reviews of the FFI's compliance with due diligence, withholding and reporting obligations under the FFI agreement
- Other statements may be required of Responsible Officer over time
- Independent verification of compliance not currently a requirement

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Strategic decision making and current status

Intergovernmental Agreements (IGA)

- IRS is currently considering intergovernmental partnerships/IGAs to:
 - Avoid legal impediments to compliance (privacy/discrimination)
 - Simplify practical implementation (specify exclusions, leveragability)
 - Reduce FFI costs (eg reporting through ATO or equivalent)
- IGA would allow FFIs in so-called “FATCA partner countries” to take a different path to compliance and have a more level playing field
- Could eliminate passthru withholding for eligible FFIs
- France, Germany, Spain, Italy, UK, Switzerland and Japan have to date issued statements of their intention with respect to such
- Australia, New Zealand in talks with US. No formal statements issued as yet but discussions proceeding

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Strategic decision making and current status (Cont'd)

Strategic decisions

- *Whether or not to be compliant: international business and relationship implications. The “pariah factor”*
- *To deal or not to deal with non compliant FFIs, NFFEs, 3rd party providers and customers. If so, how to manage the withholding implications of dealing with recalcitrants?*
- *To retain US persons as customers/clients?*
- *To continue to invest in US source assets? (Note 1)*

Current Status

- *Major financial institutions (US FIs and FFIs) have FATCA projects*
- *Most of these have completed gap analyses, developed and commenced implementing Road Maps to FATCA readiness*
- *Others are either less advanced, or even still in one or more stages of denial – disbelief, anger, anguish, resignation or combinations thereof*

Note 1: If IGAs come in force some of these may not apply as obligations will become enshrined in local regulations.

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Where to next?

- *If one does not do all that is required one may be treated as “recalcitrant” and others may not want to do business with you. Alternatively, others will withhold 30% of moneys coming to or through you. Thus, most financial institutions see a need to comply, including address how they are impacted:*

Determine if one:

- *is a FFI (many categories) or NFFE*
- *has US persons as customers, and*
- *has US source income*
- *Determine the various legal entities, products, systems and 3rd party relationships that exist and how they will be defined/dealt with/impacted*
- *Appoint a Responsible Officer*
- *Develop and implement a Road Map to meet the staggered implementation timeline s for FFIs (provided overleaf)*

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FATCA Timeline – For FFIs (for Agreements Effective 1 July 2013)

	2012	2013	2014	2015	2016	2017
FFI Governance		<ul style="list-style-type: none"> Jan 1 2013 – FFI can enter into FFI Agreement online (Note 1) Jul 1 2013 – IRS encourages FFIs to sign up by July 1 2013 to ensure readiness by Jan 1 2014 	<ul style="list-style-type: none"> Jul 1 2014 – Certify completion of review of pre-existing high value individual accounts (Note 2) 	<ul style="list-style-type: none"> Jul 1 2015 – Certify completion of account identification procedures and documentation requirements for all other pre-existing individual accounts 	<ul style="list-style-type: none"> Jan 1 2016 – Two-year transition period ends for "Limited FFIs" and "Limited Branches" 	
Due diligence for pre-existing accounts			<ul style="list-style-type: none"> Jul 1 2014 – Complete due diligence for any pre-existing account holder that is a prima facie FFI Jul 1 2014 – Complete due diligence for high value accounts 	<ul style="list-style-type: none"> Jul 1 2015 – Complete due diligence for all other pre-existing accounts 		
Due diligence for new accounts		<ul style="list-style-type: none"> Jul 1 2013 – New account opening procedures must be in place to identify US accounts (Note 3) 				
Withholding	<ul style="list-style-type: none"> Jan 1 2013 – Cut-off date for grandfathered obligations 		<ul style="list-style-type: none"> Jan 1 2014 – FATCA withholding begins on US source FDAP income 	<ul style="list-style-type: none"> Jan 1 2015 – FATCA withholding begins on gross proceeds 		<ul style="list-style-type: none"> Jan 1 2017 – FATCA withholding expected to begin for foreign passthrough payments
Reporting			<ul style="list-style-type: none"> Sep 30 2014 – Begin limited reporting for US accounts and aggregate reporting for recalcitrant accounts (calendar year 2013) with respect to accounts identified as of June 30 2014 (Note 4) 	<ul style="list-style-type: none"> Mar 15 2015 – Begin Form 1042 FATCA reporting Mar 15 2015 – Begin Form 1042-S FATCA reporting (calendar year 2014) for US source FDAP income 	<ul style="list-style-type: none"> Mar 15 2016 – Form 1042-S reporting (calendar year 2015) now includes gross proceeds; as well as foreign reportable amounts paid to NPFIs Mar 31 2016 – Reporting on US accounts (calendar year 2015) required to include income associated with the US account 	<ul style="list-style-type: none"> Mar 15 2017 – Form 1042-S reporting (calendar year 2016) expected to include foreign passthrough payments Mar 31 2017 – Reporting for US accounts (calendar year 2016) required to include proceeds paid to US accounts

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(1) IRS may make the online FFI registration system available before Jan 1 2013

(2) As part of the first certification, FFI must certify that it did not have any procedures in place from August 6, 2011 that would assist account holders in the avoidance of FATCA 6 August 2012

PwC (3) New accounts are generally permitted a 90-day grace period before being treated as recalcitrant

(4) Limited reporting includes name, address, TIN, account number, and account balance of each specified US person who is an account holder. For account holders that are NFFEs that are US owned foreign entities, report name, address and TIN (if any) of such entity and each substantial US owner of such entity

Where to next?(Cont'd)

One size does not fit all and initial work should focus not on solutions but on:

- Mobilisation activities, e.g. establish PMO, seek funding (if not in place)
- Conduct impact/gap analysis e.g. legal entities, products, systems impacted (if not already undertaken)
- Identification of number of customers affected (ascertain the quantum)
- Develop a Road Map to address new requirements, processes, documentation and systems changes, with related policies and procedures
- Making the strategic decisions on whether or not to be compliant, and with whom to continue relationships
- Join with appropriate industry bodies and others to keep up to date on potential exclusions eg superannuation
- Consider appropriate contributions to a country's effort to obtain IGA – country exclusions likely to be easier through IGAs (refer to sample Model Agreements already released)

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Questions?

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