

Global IRW Newsbrief

Information reporting and withholding (IRW)

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Summary of IRS hearing on proposed FATCA regulations

Executive Summary

The provisions of Foreign Account Tax Compliance Act (FATCA) were enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act on March 18, 2010 (P.L. 111-147). On February 8, 2012, the U.S. Department of Treasury (Treasury) and Internal Revenue Service (IRS) released long awaited proposed regulations providing much needed guidance on how to comply with FATCA. For background information, see [Global IRW Newsbrief: The new proposed FATCA regulations: Overview](#).

Treasury and IRS held a public hearing in Washington, DC on May 15, 2012 to permit those affected by the proposed regulations to express their concerns and to provide Treasury and IRS an opportunity to question the commentators. There were 22 commentators representing many segments of the U.S. and non-U.S. financial services industry as well as commentators representing multinational corporations who presented their concerns with the requirements described in the regulations. Each participant was allotted 10 minutes to summarize their previously submitted written comments. Treasury and IRS did not ask any questions nor make any comments except for comments related to the logistics of the hearing.

A summary of the testimony can be found below, however an unofficial transcript of the four hour hearing prepared by Tax Analysts can be found at [Unofficial Transcript Available of IRS Hearing on FATCA Implementation](#). It is expected that the IRS will release the official transcript in six to eight weeks. The final regulations and any future guidance released by the Treasury and IRS will reveal whether any of the comments made during the hearing are adopted.

Background

FATCA was the U.S. government's legislative response to a concern that certain U.S. persons were using foreign accounts to hide income offshore. It created a new tax information reporting and withholding regime under the Internal Revenue Code that is intended to prevent and detect offshore tax evasion.

The proposed regulations provide that the requirements of FATCA will be phased in over a number of years beginning on January 1, 2013, with some provisions effective January 1, 2017 or later.

Recap of the Testimony

The main purpose of the hearings was to provide interested parties an opportunity to voice their concerns directly with Treasury and the IRS and suggest alternative methods for achieving the objectives of FATCA. Treasury and IRS typically consider all relevant comments; however, Treasury and IRS are not required to adopt any of the suggestions.

The majority of the witnesses' testimony was focused on several key areas under FATCA:

- Documentation burdens;
- Modification of dates and deadlines;
- Conflicts between requirements and local laws; and
- Additional guidance needed.

Documentation burdens

Consistent with the comment letters received, a number of commentators noted that FATCA's customer documentation requirements far exceed the due diligence requirements imposed under local 'know-your-customer' (KYC) and anti-money laundering (AML) rules. They noted it is burdensome for a foreign financial institution (FFI) to have to review information provided for a new individual account in accordance with local AML/KYC rules, and if that review reveals U.S. indicia, then they have to undertake additional steps to comply with FATCA. Further, a witness suggested that the requirement that FFIs periodically 'refresh' documentary evidence used to identify an account holder is a substantial and costly undertaking and may be inconsistent with local AML/KYC rules.

Modification of dates and deadlines

Many commentators requested that Treasury and IRS delay the effective date of FATCA's provisions. The primary rational provided for a delay is that industry needs additional time to modify or develop technology required to comply. Additionally, the commentators indicated that the proposed release date for the final regulations, currently planned to be later in the summer, does not give industry enough time to understand and implement the requirements. Many of the commentators at the hearing, indicated it will be difficult for affected institutions to meet the July 1, 2013 compliance deadline for FFIs, as it takes at least 18 months to finalize systems changes and, given FATCA's complexity, more time is likely to be required.

Another commentator suggested it will be difficult to commence full implementation until all relevant guidance has been issued, including final regulations or the

intergovernmental agreements. Participants also suggested that the deadlines related to FFIs and U.S. financial institutions (USFIs) should be uniform. Currently, U.S. financial institutions are required to comply by January 1, 2013, and FFIs need to generally comply by July 1, 2013.

Conflicts with local laws

Participants addressed potential conflicts between FATCA's requirements and local laws, which will make compliance difficult. For example, a participating FFI's cannot be forced to violate local law to comply. Several witnesses from outside the U.S. indicated that tax information exchange agreements will be necessary for FFIs in their jurisdictions to be compliant.

Additional guidance needed

Witnesses voiced concerns that the IRS's guidance to date has not focused enough on fund investors, intermediaries, and asset managers, noting that the considerable issues exist with having each intermediary in a chain of investments or ownership become FATCA compliant. Faced with the risk of withholding, if any party in the chain of ownership is not FATCA compliant, an advisor may counsel an investor to simply purchase a non U.S. fund.

Further, witnesses noted that the definition of FFI, especially with respect to entities engaged in a banking (or similar) business, is overly broad, and may result in an inappropriate classification. These commentators requested that the IRS provide additional clarification on the level of activity needed for an entity to be considered an FFI.

PwC observations: A significant amount of guidance under FATCA is expected to be issued in the near future. At this juncture, we expect that Treasury and the IRS will issue final regulations, new withholding certificates (e.g., Form W-8), new reporting forms (e.g., Form 1042-S), and a draft FFI agreement. In addition, inter-governmental agreements may be available shortly. As this guidance is issued, PwC will issue Newsbriefs and Alerts as appropriate.

FATCA comments letters

A selective list of FATCA comment letters submitted by interested parties from around the world can be found on PwC's [Comment Letters page](#). The list is sortable by organization, date and topic. Please note that the comment letters are posted here with author consent and as they were sent; PwC has not changed the content of the letters. Posting the comment letters does not imply endorsement or agreement with the contents on the part of PwC. Postings of selected comment letters will continue as they are received and processed.

For more information, please contact:

Dominick Dell'Imperio (646) 471-2386 dominick.dellimperio@us.pwc.com

Jon Lakritz (646) 471-2259 jon.w.lakritz@us.pwc.com

Robert Limerick (646) 471-7012 robert.limerick@us.pwc.com

Iris Goldman (646) 471-3992 iris.goldman@us.pwc.com

Candace Ewell (202) 312-7694 candace.b.ewell@us.pwc.com

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