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The US Foreign Accounts Tax Compliance Act (FATCA) and interaction with G20 initiatives: a quick guide

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Introduction

The *Foreign Account Tax Compliance Act* (FATCA) is an American law developed to reduce offshore tax evasion and regain federal tax revenues from American account holders at foreign (non-American) financial institutions internationally. It therefore has implications for Australia and its financial institutions.

The impetus for the Act was a [2009 court case in which Swiss Bank UBS](#) was found to have assisted American nationals to evade paying American taxes. As a result, UBS agreed to pay the United States (US) government US\$780 million in fines, restitution and provide the names of suspected tax cheats.

According to [the United States Department of Justice](#), the use of offshore bank accounts to avoid paying American taxes costs the US Treasury, in total, at least US\$100 billion annually.

The wide-reaching FATCA was passed in the 111th Congress as part of the 2010 [Hiring Incentives to Restore Employment Act](#) (*Hire Act*), becoming law in March 2010.

FATCA [requires](#):

- individuals to report their financial accounts held outside of the United States, and
- foreign (that is, non-US) financial institutions to report to the Internal Revenue Service (IRS) about their American clients.

To enforce the FATCA, it has become necessary for the US government to sign agreements with foreign governments allowing the trade of individuals' financial data; [this is outlined below](#).

FATCA's large scope and international presence has led to fears about the expanding reach of the US Treasury and IRS. The Australian Government is seeking to address concerns regarding the infringement of individuals' data privacy rights and Australian taxation sovereignty prior to signing an Intergovernmental Agreement with the United States.

References to the legislation

- MA Dizdarevic, '[The FATCA provisions of the Hire Act: boldly going where no withholding has gone before](#)', *Fordham Law Review*, 79(6), 2011, pp. 2967–2994.
- S Nauheim and N Cousin, '[The evolving FATCA guidance](#)', *Tax Management International Journal*, 42(4), 2013, pp. 183–204.

- PriceWaterhouseCoopers (PWC), [Foreign Account Tax Compliance Act \(FATCA\). Treasury regulations §1.1471-1.1474 incorporating technical correction released September 10, 2013](#), PWC, 2013.

Governmental websites

- US Department of the Treasury, [‘Foreign Account Tax Compliance Act \(FATCA\)’](#), Treasury website, last updated 29 November 2013.
- Internal Revenue Service, [‘Foreign Account Tax Compliance Act’](#), IRS website, last updated 8 December 2013.

Background information

- C Alkan, [‘Something to declare’](#), The Association of Chartered Certified Accountants website, May 2012.
- Deloitte, [‘Foreign Account Tax Compliance Act \(FATCA\): relevance and impact’](#), Deloitte website.
- House of Lords Select Committee on Economic Affairs, [‘Tackling corporate tax avoidance in a global economy: is a new approach needed?’](#), HL 48, first report of session 2013–14, Parliament of the United Kingdom, 23 July 2013.
- PriceWaterhouseCoopers, [FATCA FAQs: frequently asked question on the Foreign Account Tax Compliance Act](#), PWC, July 2011.

Intergovernmental agreements between the US and other jurisdictions

The US IRS found it necessary to [enter into intergovernmental agreements \(IGAs\) with other nations](#). This is because, in many cases, the laws of other nations prevent a foreign financial institution from reporting to the IRS the information required by the FATCA statutory provisions and regulations.

To overcome this, the US Treasury collaborated with foreign governments to develop two alternative model IGAs, [Model 1 IGA and Model 2 IGA](#):

- Model 1 IGA requires signatories to report all FATCA-related information to their respective governmental agencies, who then report this information to the IRS. The majority of signatories to Model 1 also have reciprocal agreements with the US; thus the IRS will provide relevant information to the signatory country regarding the taxation of the signatory nation’s citizens in the US
- Model 2 requires signatories to directly report to the IRS. There is no reciprocal agreement in this model. Currently, Japan and Switzerland are the two signatories to Model 2 IGAs.

As of 29 November 2013, the US has entered into [10 Model 1 IGAs and 2 Model 2 IGAs](#); the Model 1 IGAs are with the Cayman Islands, Costa Rica, Denmark, France, Germany, Ireland, Mexico, Norway, Spain and the United Kingdom, and Model 2 IGAs with Japan and Switzerland.

Further reading:

- Deloitte, [‘Positive developments for FATCA compliance’](#), *Financial Services Risk and Regulatory Review*, December 2012/February 2013, pp. 7–9.
- Deloitte, [‘FATCA: US and non-US sector impact overviews’](#), Deloitte website.
- PriceWaterhouseCoopers, [‘IRS releases draft “FFI agreement” under FATCA and related guidance: long awaited piece of the puzzle contains surprising twists’](#), PWC website, November 2013.
- RJ Holst, J Lee-Lim and W Lu, [‘Intergovernmental agreements under FATCA: comparing the two models’](#) Latham & Watkins, *White Paper*, February 2013.

FATCA: Australia's IGA negotiations with the US

Formal discussions for an IGA between the US and Australia [commenced following a meeting](#) between Treasurer Wayne Swan and US Treasury Secretary Tim Geithner on 7 November 2012. Former Treasurer Swan explained:

A key objective of the intergovernmental agreement is to facilitate Australian compliance with FATCA in a way that reduces its overall burden on Australian business...[It] would also improve existing reciprocal tax information-sharing arrangements between the Australian Taxation Office (ATO) and the United States Internal Revenue Service. This will help ensure Australian tax laws are effectively enforced so Australian businesses and individuals who pay the correct amount of tax are not disadvantaged by those who seek to evade their tax obligations.

The [Australian Government involvement with FATCA](#) seeks to facilitate Australian compliance to reduce the Act's overall burden on Australian business. It is in Australia's interest to observe FATCA rules and sharing tax information will result in Australia getting a greater share of income from multinational enterprises (MNEs).

Negotiations have been [continued by the Coalition government](#).

Further reading:

- A Clements and C Hillier, '[How will FATCA impact you? A superannuation fund perspective](#)', *Australian Superannuation Law Bulletin*, November 2012, pp. 79–81.
- Deloitte, '[Final FATCA regulations issued – where to from here for Australian banks?](#)', *Banking on Tax*, iss. 9, March 2013.
- W Jarvis-Blees, '[Financial sector welcomes Australian government's FATCA dialogue](#)', Thomson Reuters website, 8 November 2012.

The following websites have been established to document negotiations:

- Australian Government, '[Intergovernmental Agreement to Implement FATCA](#)', *The Treasury*, 28 August 2012.

Compliance with Australian privacy law

The FATCA has been the subject of July 2011 [discussions by the Australian Government's Privacy Advisory Committee](#). The Office of the Australian Information Commissioner's chief concern is ensuring the Act's compliance with Australian privacy law; as such, it was recommended that the issue be raised with the Department of the Treasury.

[Ernst & Young](#) and [Clayton Utz](#) have both raised concern as FATCA ratification may conflict with domestic and Commonwealth privacy and confidentiality laws.

FATCA and the G20

International tax avoidance was a [key issue discussed at the G8 Summit in Ireland](#). The resultant [Lough Erne Declaration](#) states that member states will 'share tax information, seek to uncover shell company ownership structures and ensure that multinational companies don't shift profits offshore to tax havens.'

Following on from the [2013 G20 Summit, increasing tax transparency is expected to be hotly discussed](#) when Australia hosts the [G20 Summit in 2014](#).

G20 countries have [called for a coordinated effort to halt international tax evasion by sharing bank and tax records by 2015](#).

International tax avoidance: Australia and the EU

As part of the [Delegation of the European Union to Australia, European Commissioner for Taxation, Customs, Statistics, Audit and Anti-Fraud, Algirdas Šemeta](#) conducted a taxation industry roundtable in December 2013 with Communications Minister Malcolm Turnbull and the CEO of Australian Customs and Border Protection Service Michael Pezzullo.

Šemeta [stated](#)

The impact that tax policies also have on wider economic and social objectives is immense. So in the context of our deeper economic governance and co-ordination, the EU is working towards tax reforms that promote growth, competitiveness and fairness.

FATCA requirements: postponed

As of December 2013, [the US Treasury and IRS agreed to postpone the due diligence and withholding requirements of foreign jurisdictions](#) from 1 January 2014 to 1 July 2014. This delay will allow foreign jurisdictions to remove the conflict between FATCA and data-protection laws, which exist in many countries.

Further reading:

- I Grinberg, '[Beyond FATCA: an evolutionary moment for the international tax system](#)', *Georgetown University Law Center*, Working draft, 27 January 2012.
- I Grinberg, '[The battle over taxing offshore accounts](#)', *UCLA Law Review*, 60(2), December 2012, pp. 306–383.
- A S Lederman and B Hirsh, '[The American Assault on Tax Havens—Status Report](#)', *The International Lawyer*, 44(4), Winter 2010, pp. 1141–1155.
- B Pulle, '[Tax avoidance by multinational enterprises—Australian Government initiatives to avoid erosion of corporate tax base](#)', Briefing book, Parliamentary Library, Canberra, 2013, pp. 52–53.

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