

Allens

Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000 Australia

T +61 2 9230 4000
F +61 2 9230 5333
www.allens.com.au

GPO Box 50
Sydney NSW 2001 Australia
DX 105 Sydney

ABN 47 702 595 758



9 May 2014

General Manager
Tax System Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/Madam

Giving effect to the FATCA IGA

Thank you for the opportunity to make a submission to The Treasury in relation to the exposure draft of "Tax and Superannuation Laws Amendment (2014 Measures No.#) Bill 2014: FATCA". The exposure draft contains proposed Division 396 of Schedule 1 to the *Taxation Administration Act 1953* (Cth).

Our submission is directed at ensuring that the drafting of Division 396 is compatible with the drafting of Australian Privacy Principle 5 contained in Schedule 1 to the *Privacy Act 1988* (Cth) (extracted in Appendix 1 to this submission).

Specifically, APP 5.2(c) (dealing with notification to individual customers of collection of personal information) includes in the matters that the individual should be notified: of

"if the collection of the personal information is required or authorised by or under an Australian law or a court/tribunal order — the fact that the collection is so required or authorised (including the name of the Australian law, or details of the court/tribunal order, that requires or authorises the collection);"

The draft Explanatory Memorandum to proposed Division 396 of Schedule 1 to the Taxation Administration Act 1953 states at paragraph 1.1:

Schedule # to this Bill amends Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) **to require Australian financial institutions to collect information** about their customers that are likely to be taxpayers in the United States of America (US) and to provide that information to the Commissioner of Taxation (Commissioner) who will, in turn, provide that information to the US Internal Revenue Service (IRS).

However, the actual exposure draft of proposed Division 396 does not explicitly **require** Australian financial institutions to **collect** FATCA relevant information about their customers. Therefore, it is unclear whether, in seeking to comply with APP 5.2(c), it would be correct for a financial institution to notify its customers that the collection of the personal information was required or authorised by Division 396.

On the one hand, it could be argued that if Division 396 requires Australian financial institutions to provide FATCA relevant information about their customers to the Commissioner of Taxation, then it is implicit that such institutions are required, or at least authorised, by Division 396 to collect that information from their customers.

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On the other hand, any potential doubt in this respect could be avoided by making some minor amendments to the draft legislation. Our suggested amendments to achieve this are shown in Appendix 2 to this submission.

If you would like to discuss this submission with us, please contact Thomas McAuliffe on the number below.

Yours faithfully

Gavin Smith
Partner
Allens
Gavin.Smith@allens.com.au
T +61 2 9230 4891

Thomas McAuliffe
Senior Associate
Allens
Thomas.McAuliffe@allens.com.au
T +61 2 9230 4251

Appendix 1**Australian Privacy Principle 5 — notification of the collection of personal information**

- 5.1 At or before the time or, if that is not practicable, as soon as practicable after, an APP entity collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances:
- a. to notify the individual of such matters referred to in subclause 5.2 as are reasonable in the circumstances; or
 - b. to otherwise ensure that the individual is aware of any such matters.
- 5.2 The matters for the purposes of subclause 5.1 are as follows:
- a. the identity and contact details of the APP entity;
 - b. if:
 - i. the APP entity collects the personal information from someone other than the individual; or
 - ii. the individual may not be aware that the APP entity has collected the personal information; the fact that the entity so collects, or has collected, the information and the circumstances of that collection;
 - c. if the collection of the personal information is required or authorised by or under an Australian law or a court/tribunal order — the fact that the collection is so required or authorised (including the name of the Australian law, or details of the court/tribunal order, that requires or authorises the collection);
 - d. the purposes for which the APP entity collects the personal information;
 - e. the main consequences (if any) for the individual if all or some of the personal information is not collected by the APP entity;
 - f. any other APP entity, body or person, or the types of any other APP entities, bodies or persons, to which the APP entity usually discloses personal information of the kind collected by the entity;
 - g. that the APP privacy policy of the APP entity contains information about how the individual may access the personal information about the individual that is held by the entity and seek the correction of such information;
 - h. that the APP privacy policy of the APP entity contains information about how the individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
 - i. whether the APP entity is likely to disclose the personal information to overseas recipients;
 - i. if the APP entity is likely to disclose the personal information to overseas recipients — the countries in which such recipients are likely to be located if it is practicable to specify those countries in the notification or to otherwise make the individual aware of them.

Appendix 2

1 **Division 396—FATCA**

2 **Guide to Division 396**

3 **396-1 What this Division is about**

4 This Subdivision gives effect to the FATCA Agreement between
 5 the Government of Australia and the Government of the United
 6 States of America.

7 Reporting Australian Financial Institutions must give the
 8 Commissioner certain information about U.S. Reportable
 9 Accounts. For the 2015 and 2016 calendar years, they must also
 10 give the Commissioner information about payments made to
 11 Nonparticipating Financial Institutions.

12 This Subdivision also creates record-keeping and due diligence
 13 obligations in relation to the requirements to give the
 14 Commissioner information.

15 **Table of sections**

16 396-5 Statements about U.S. Reportable Accounts
 17 396-10 Statements about payments to Nonparticipating Financial Institutions
 18 396-15 Meaning of the *FATCA Agreement*
 19 396-20 Due diligence procedures
 20 396-25 Record keeping

21 **396-5 Statements about U.S. Reportable Accounts**

22 (1) Subsection (2) applies if:

- 23 (a) an entity is a Reporting Australian Financial Institution
 24 (within the meaning of the *FATCA Agreement) at any time
 25 in a calendar year; and
 26 (b) the entity maintains a U.S. Reportable Account (within the
 27 meaning of the FATCA Agreement) at any time in the year.

28 (2) The entity must ~~give the Commissioner a statement that contains~~ collect
 29 the information in respect of that U.S. Reportable Account that the
 30 Australian Government is required to obtain in order for it to fulfil
 31 its obligations under the *FATCA Agreement in respect of that
 32 U.S. Reportable Account.

Land give the Commissioner a statement
 that
 3 contains
 that
 information.

- 1 (3) A statement under subsection (2) must be in the *approved form.
- 2 (4) More than one statement under subsection (2) may be included in
3 the same document.
- 4 (5) The statement must be given to the Commissioner no later than the
5 first 31 July after the end of the year.
- 6 Note: Section 388-55 allows the Commissioner to defer the time for giving
7 an approved form.

8 **396-10 Statements about payments to Nonparticipating Financial** 9 **Institutions**

- 10 (1) Subsection (2) applies if:
- 11 (a) an entity is a Reporting Australian Financial Institution
12 (within the meaning of the *FATCA Agreement) at any time
13 in a calendar year; and
- 14 (b) the calendar year is the 2015 or 2016 year; and
- 15 (c) the entity makes a payment to a Nonparticipating Financial
16 Institution (within the meaning of the FATCA Agreement) at
17 any time in the year.
- 18 (2) The entity must ~~give the Commissioner a statement that contains~~ collect
19 the information in respect of that payment that the Australian
20 Government is required to obtain in order for it to fulfil its
21 obligations under the *FATCA Agreement in respect of that
22 payment.
↳ and give the Commissioner a statement that
23 (3) A statement under subsection (2) must be in the *approved form. contains
24 (4) More than one statement under subsection (2) may be included in that
25 the same document. information.
- 26 (5) The statement must be given to the Commissioner no later than the
27 first 31 July after the end of the year.
- 28 Note: Section 388-55 allows the Commissioner to defer the time for giving
29 an approved form.

30 **396-15 Meaning of the FATCA Agreement**

- 31 The *FATCA Agreement* is the Agreement between the
32 Government of Australia and the Government of the United States
33 of America to Improve International Tax Compliance and to
34 Implement FATCA, done at [TBA] on [TBA].