AUSTRALIAN BANKERS' ASSOCIATION INC.

Paul Stacey
Tax & Security Manager

AUSTRALIAN BANKERS' ASSOCIATION INC.
Level 3, 56 Pitt Street, Sydney NSW 2000
p. +61 (0)2 8298 0416 **f.** +61 (0)2 8298 0402

www.bankers.asn.au

12 May 2014

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

Email: fatca_iga@treasury.gov.au

Dear Sir or Madam,

Tax and Superannuation Laws Amendment (2014 Measures No#) Bill 2014: FATCA and accompanying Explanatory Memorandum

The Australian Bankers' Association appreciates the opportunity to provide its comments on "Tax and Superannuation Laws Amendment (2014 Measures No#) Bill 2014: FATCA and accompanying Explanatory Memorandum".

The Australian Bankers' Association (**ABA**) is the peak national body representing banks that are authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia. The ABA's membership of 24 banks comprises the four major banks, former regional banks that now operate nationally, foreign banks that are represented and carry on banking business in Australia as Australian banks and a mutual bank.

The purpose of this letter is to comment on the draft FATCA enabling legislation together with the accompanying Explanatory Memorandum pertaining to the Australian IGA (**IGA**).

We also attach a marked up copy of the draft enabling legislation (Appendix A) and Explanatory Memorandum (Appendix B) that indicates how the text of relevant parts of each document may read should our comments be accepted.

Proposed draft enabling legislation

Proposes section reference	Comment
396-5	As many Financial Institutions (**FI**) are making changes to customer on-boarding systems globally, there is a need to ensure that such changes include the ability to collect global tax residency details in anticipation of the OECD's Common Reporting Standard (CRS) rules. It is suggested that Treasury allows the collection of tax residency, residency and citizenship in order to give an option to institutions wanting to "future proof" such systems changes to deal with the pending requirements of the OECD CRS. The UK and other jurisdictions have adopted a similar approach. For your consideration, we have included wording at the end of Appendix A from the Singapore IGA enabling legislation that illustrates how wording to give effect to such "future proofing" may look like.

Proposes section reference	Comment
396-10	The Regulations contain information about the reporting requirements for Article 1(b). The Regulations specify that only payments that are withholdable payments without a U.S. source in respect of financial accounts maintained with the financial institutions need to be reported. Alternatively, financial institutions are provided a choice to report on all withholdable payments regardless of source if this is more convenient. We are of the view that the enabling legislation should accommodate both these options.
396-20	In our view the current drafting is ambiguous and needs to be clearer to ensure there is an explicit statement to apply the due diligence from Annex I of the IGA (which would include the ability to perform account holder identification by either obtaining a self-certification or through documentary evidence under the Regulations). This is necessary to address issues under privacy law, as organisations are only permitted to collect information that is relevant to their functions or activities.

Draft Explanatory Memorandum

For ease of reference we have numbered the paragraphs in the Explanatory Memorandum (refer Appendix B). The paragraph references in the table follow the inserted paragraph references in Appendix B.

Inserted paragraph reference	Comment
1.8	At this stage the reference to brokers should be limited to brokers with custodial and nominee arrangements only as generally "trading accounts" are out of scope.
1.9	Our comments in respect of proposed s396-5 of the enabling legislation applies equally to this paragraph - refer to our comments above.
1.14(3)	Although this issue has previously been raised, we note that the draft enabling legislation does not deal with entities that solely provide services to superannuation entities that are Exempt Beneficial Owners. There are many entities in Australia that act solely as the trustee or custodian of a superannuation fund. These entities fall under the definition of an investment or custodial entity in the IGA, but the only services provided are to the exempt superannuation funds. We urge Treasury to provide for these entities to be treated as non-reporting Australian Financial Institutions that are deemed compliant so that there is no requirement to register or report in respect of them.
1.19	Because there is no mention of Direct Reporting NFFEs or Sponsored Direct Reporting NFFEs in the Australian IGA, we suggest that this paragraph be amended to include a reference to these types of entities.
1.21	To avoid confusion and double reporting, industry requests that the enabling legislation should specify a definition of Collective Investment Vehicle that is relevant for Australian schemes and which entities within the schemes are responsible for reporting and which accounts within the scheme are reportable. Confirmation is sought that Australian entities can apply any entity/product exemption noted in the final regulations, including those pertaining to inter-affiliate FFIs. Many FI groups in Australia have a large number of intermediate holding and other companies

Inserted paragraph reference	Comment
	within their group structure. While these entities do not offer FATCA financial accounts their treatment as a financial institution under the IGA is unclear. Industry would urge Treasury to follow the Regulations and the UK guidance as to how such entities should be treated in Australia, to avoid registration of many entities that will only ever file nil reports.
1.28	Annex I of the IGA, section IIA, IIB, IVA and VA provides that a Reporting FI may elect not to apply certain thresholds to both the identification, due diligence and reporting of certain Reportable Accounts where the implement rules provide for such election. Treasury is urged to provide for such election in the implementing rules.
1.49	This paragraph should include a reference to the 18 month non-compliance period prior to a Partner Jurisdiction FI being classified as non-complying and therefore Non-Participating (refer Article 5(2)(a) and (b) of the IGA).

Yours sincerely,

Paul Stacey

Inserts for

Tax and Superannuation Laws Amendment (2014 Measures No. #) Bill 2014: FATCA

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
1. Schedule #	The day this Act receives the Royal Assent.	
2.		
3.		

Schedule #—FATCA

Income Tax Assessment Act 1997

1 Subsection 995-1(1)

Insert:

FATCA Agreement has the meaning given by section 396-15 in Schedule 1 to the *Taxation Administration Act 1953*.

Taxation Administration Act 1953

2 After Division 394

Insert:

Division 396—FATCA

Guide to Division 396

396-1 What this Division is about

> This Subdivision gives effect to the FATCA Agreement between the Government of Australia and the Government of the United States of America.
>
> Reporting Australian Financial Institutions must give the Commissioner certain information about U.S. Reportable Accounts. For the 2015 and 2016 calendar years, they must also give the Commissioner information about payments made to Nonparticipating Financial Institutions who maintain financial accounts with the Reporting Australian Financial Institution.
>
> This Subdivision also creates record-keeping and due diligence obligations in relation to the requirements to give the Commissioner information.

Table of sections

396-5 Statements about U.S. Reportable Accounts

(1) Subsection (2) applies if:

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

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

(3) A statement under subsection (2) must be in the *approved form.

(4) More than one statement under subsection (2) may be included in the same document.

(5) The statement must be given to the Commissioner no later than the first 31 July after the end of the previous calendar year.

Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.

396-10 Statements about payments to Nonparticipating Financial Institutions

(1) Subsection (2) applies if:

(a) an entity is a Reporting Australian Financial Institution (within the meaning of the *FATCA Agreement) at any time in a calendar year; and

(b) the calendar year is the 2015 or 2016 year; and

(c) the entity makes a payment to a Nonparticipating Financial Institution (within the meaning of the FATCA Agreement) at any time in the year.

(2) The entity must give the Commissioner a statement that contains the information in respect of that payment that the Australian Government is required to obtain in order for it to fulfil its obligations under the *FATCA Agreement in respect of that payment.

(3) A statement under subsection (2) must be in the *approved form.

(4) More than one statement under subsection (2) may be included in the same document.

(5) The statement must be given to the Commissioner no later than the first 31 July after the end of the year.

Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.

396-15 Meaning of the *FATCA Agreement*

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

Note: The text of the Agreement is set out in Australian Treaty Series *[TBA]*. In 2014, the text of a Convention in the Australian Treaty

Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

396-20 Due diligence procedures

In determining whether an entity is obliged to give the Commissioner a statement under subsection 396-5(2) or 396-10(2), the entity must apply the Due Diligence procedures set out in the *FATCA Agreement to identify US Reportable accounts and accounts maintained by Nonparticipating Financial Institutions.

An entity may also enhance the due diligence procedures under the FATCA Agreement to give the Commissioner the statements under subsection 396-5(2) or 396-10(2).

*Note: Those due diligence procedures are specified in Annex I to the FATCA Agreement, subject to the application of Article 7 of that Agreement (consistency in the application of FATCA to partner jurisdictions).

396-25 Record keeping

(1) If an entity is obliged to give the Commissioner a statement under subsection 396-5(2) or 396-10(2), the entity must keep written records that:

(a) correctly record the procedures by which the entity determines the information that is required to be contained in the statement; and

(b) are in English, or readily accessible and easily convertible into English.

(2) The entity must retain the records until the expiration of 5 years after the entity gives the Commissioner the statement under subsection 396-5(2) or 396-10(2).

Note: Section 288-25 imposes an administrative penalty if an entity does not keep and retain records as required by this section.

3 Application

(1) Subject to subitem (2), the amendments made by this Schedule apply in relation to a U.S. Reportable Account that is maintained by a Reporting Australian Financial Institution on or after 1 July 2014.

(2) The following provisions apply in relation to a payment that is made by a Reporting Australian Financial Institution on or after 1 July 2014:

(a) section 396-10 in Schedule 1 to the *Taxation Administration Act 1953* (as inserted by this Schedule);

(b) any other provision inserted in that Schedule by this Schedule, to the extent that the provision relates to the section mentioned in paragraph (a).

A suggestion on how Singapore has "future proofed" FATCA:

INTERNATIONAL AGREEMENTS TO IMPROVE TAX COMPLIANCE

Interpretation of this Part

105I. In this Part —

"international tax compliance agreement" means an agreement or arrangement that is declared by the Minister, by an order under section 105K, as an international tax compliance agreement;

"person" has the meaning given to that word in section 2(1) and includes a partnership.

Purpose of this Part

105J. The purpose of this Part is to implement Singapore's obligations under an international tax compliance agreement.

[19/2013]

International tax compliance agreements

105K.

—(1) The Minister may by order declare any of the following as an international tax compliance agreement for the purposes of this Part:

(*a*)

the agreement reached between the Government and the Government of the United States of America to facilitate compliance by financial institutions and other persons in Singapore with the Foreign Account Tax Compliance Act of the United States of America (FATCA);

(*b*)

any agreement modifying or supplementing that agreement;

(*c*)

any other agreement or arrangement between the Government and the government of another country which makes provision corresponding, or substantially similar, to that made by an agreement referred to in paragraph (*a*) or (*b*).

(2) An order under subsection (1) may only take effect on or after the date on which the agreement or arrangement enters into force for Singapore.

Provision of information to Comptroller

105L.

—(1) A person falling within any description of persons prescribed by regulations made under section 105P (referred to in this section as a prescribed person) shall, at such times and frequency and in such form and manner as may be prescribed by those regulations, provide the Comptroller with information of a description prescribed by those regulations.

(2) A prescribed person is not excused from providing the information by reason only that the person is under a duty of secrecy, whether imposed by written law, rule of law, any contract or any rule of professional conduct, in respect of that information.

[19/2013]

(3) A prescribed person who in good faith complies with subsection (1) shall not be treated as being in breach of any duty of secrecy referred to in subsection (2).

[19/2013]

(4) No civil or criminal action for a breach of any such duty, other than a criminal action for an offence under section 105M(3), shall lie against the prescribed person —

(*a*)

for producing any document or providing any information if he had done so in good faith in compliance with subsection (1); or

(*b*)

for doing or omitting to do any act if he had done or omitted to do the act in good faith and as a result of complying with subsection (1).

[19/2013]

(5) Notwithstanding subsection (2), subsection (1) does not apply to any information subject to legal privilege.

[19/2013]

Offences

105M.

—(1) Any person who, without reasonable excuse, fails or neglects to comply with section 105L(1) shall be guilty of an offence and shall be liable on conviction —

(*a*) to a fine not exceeding $1,000 and in default of payment to imprisonment for a term not exceeding 6 months; and

(*b*) in the case of a continuing offence, to a further fine not exceeding $50 for every day or part thereof during which the offence continues after conviction.

[19/2013]

(2) The Comptroller may compound any offence under subsection (1).

[19/2013]

(3) Any person who, in purported compliance with section 105L(1), produces to the Comptroller any document which contains any information, or provides to the Comptroller any information, known to the person to be false or misleading in a material particular —

(*a*) without indicating to the Comptroller that the information is false or misleading and the part that is false or misleading; and

(*b*) without providing correct information to the Comptroller if the person is in possession of, or can reasonably acquire, the correct information,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

[19/2013]

Power of Comptroller to obtain information

105N. —(1) Sections 65 to 65D shall have effect for the purpose of enabling the Comptroller to obtain any information for the purpose of complying with any provision of an international tax compliance agreement or enabling Singapore to carry out its obligations under any provision of such agreement, and section 65E shall also have effect in relation to a notice issued under section 65B for this purpose.

[19/2013]

(2) For the purpose of subsection (1) —

(*a*) the reference in section 65 to the purpose of obtaining full information in respect of any person's income shall be read as a reference to the purpose referred to in subsection (1);

(*b*) a reference in section 65B to the purposes of this Act shall be read as the purpose referred to in subsection (1);

(*c*) references in section 65B to proceedings for an offence under this Act, proceedings for the recovery of tax or penalty and proceedings by way of an appeal against an assessment shall be read as a reference to proceedings for an offence under this Part; and

(*d*) the Comptroller may authorise an officer of the Monetary Authority of Singapore under section 4(1) to perform a duty of the Comptroller under section 65, 65A or 65B.

[19/2013]

Information may be used for administration of Act

105O. For the avoidance of doubt, any information provided or obtained under section 105L or 105N may be used for any purpose connected with the administration of this Act, including the investigation or a prosecution for an offence alleged or suspected to have been committed under this Act.

[19/2013]

Regulations to implement international tax compliance agreements

105P. —(1) The Minister may make regulations for, or in connection with, giving effect to or enabling effect to be given to an international tax compliance agreement.

[19/2013]

(2) Without prejudice to the generality of subsection (1), regulations under subsection (1) may —

(*a*) prescribe anything which may be prescribed under this Part;

(*b*) for the purpose of section 105L, prescribe different descriptions of information, forms and manners of provision of the information, and times and frequencies for the provision of the information, in relation to different international tax compliance agreements, different persons or under different circumstances;

(*c*) impose registration, due diligence procedures and other obligations required or permitted to be imposed under an international tax compliance agreement on any person to whom the agreement applies; and

(*d*) contain incidental, transitional or savings provisions.

[19/2013]

(3) Regulations under subsection (1) may give force of law to any provision of an international tax compliance agreement, whether with or without any modification.

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
FATCA	Foreign Account Tax Compliance Act
Intergovernmental Agreement	*Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA*
IRS	Internal Revenue Service
TAA 1953	*Taxation Administration Act 1953*
US	United States of America
USD	US Dollars

General outline and financial impact

FATCA

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

These amendments give effect to the Australian Government's commitments as set out in the *Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA*.

Date of effect: 1 July 2014

Proposal announced: On 6 November 2013, the Government announced its intention to work towards signing and enacting a treaty-status intergovernmental agreement with the United States of America to enable the financial sector to comply with Foreign Account Tax Compliance Act (FATCA) reporting rules (Treasurer's Media Release No. 17 of 6 November 2013).

This followed an earlier announcement on 7 November 2012 by the then Treasurer that Australia had commenced formal discussions with the United States of America for an intergovernmental agreement (Treasurer's Media Release No. 110 of 7 November 2012).

Financial impact: Nil

Chapter 1
FATCA

Outline of chapter

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).

1.2 These amendments give effect to the Australian Government's commitments as set out in the *Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA* (the Intergovernmental Agreement).

Context of amendments

The Foreign Account Tax Compliance Act

1.3 The Foreign Account Tax Compliance Act (FATCA) is a unilateral anti-tax evasion regime enacted by the US Congress as part of the US *Hiring Incentives to Restore Employment Act 2010*. FATCA is aimed at detecting US taxpayers who use accounts with offshore financial institutions to conceal income and assets from the IRS. The relevant provisions are contained in the US Internal Revenue Code 1986 and are supplemented by extensive US Treasury FATCA regulations that were issued on 17 January 2013 (and have been subject to subsequent amendment).

1.4 The substantive FATCA requirements for financial institutions generally start on 1 July 2014.

1.5 From that date, FATCA will require all foreign (that is, non-US) financial institutions, including custodial institutions, depository institutions, investment entities, certain holding companies and certain treasury centres, and specified insurance companies, to conclude individual agreements with the IRS under which they will periodically report certain information about their account holders who are US citizens or US resident individuals (or individuals who fail to rebut a presumption of being a US citizen or US resident individual) or are specified entities established in the US or controlled by US persons.

1.6 In order to comply with their reporting obligations, financial institutions will need to follow specific due diligence procedures in identifying all relevant accounts.

- The level of due diligence required depends on whether the account is held by an individual or an entity and whether or not the account was opened prior to 1 July 2014.

- For example, the due diligence requirements generally do not apply to accounts held by individuals unless the aggregated account balances exceeds USD 50 000.

1.7 Financial institutions that do not comply with FATCA will be subject to a 30 per cent US withholding tax on their US source income.

1.8 A broad range of Australian financial institutions, including banks, some building societies and credit unions, specified life insurance companies, private equity funds, managed funds, exchange traded funds and some only brokers with custodial arrangementsbrokers will be subject to FATCA. As most major Australian financial institutions operate or otherwise invest in the US, the US withholding tax creates a strong commercial incentive for these entities to comply with FATCA.

1.9 This means that those Australian financial institutions that intend to comply with FATCA would need to commence relevant due diligence procedures from 1 July 2014 in anticipation of reporting to the IRS. However, Australian privacy laws would have generally prevented compliance with these US-based obligations under the US Treasury final regulations and some Australian State and Territory anti-discrimination laws could also prevent the interrogation of customer accounts based on US citizenship.

1.10 In recognition of the fact that many countries' domestic laws would otherwise prevent foreign financial institutions from fully complying with FATCA under the US Treasury Regulations, the US has developed an intergovernmental agreement approach to manage these legal impediments, simplify practical implementation, and reduce compliance costs for relevant financial institutions. The US has signed a number of intergovernmental agreements with a range of jurisdictions including Bermuda, Canada, the Cayman Islands, Chile, Costa Rica, Denmark, France, Germany, Guernsey, Hungary, Ireland, the Isle of Man, Italy, Japan, Jersey, Malta, Mauritius, Mexico, the Netherlands, Norway, Spain, Switzerland and the United Kingdom of Great Britain. A complete list of countries with intergovernmental agreements with the US is available on the US Department of the Treasury's website.

Summary of new law

1.11 These amendments insert a new Division, 'Division 396 — FATCA', into 'Part 5-25 — Record-keeping and other obligations of taxpayers' in Schedule 1 to the TAA 1953.

1.12 To ensure consistency with the Intergovernmental Agreement, these amendments adopt meanings and concepts used in that agreement.

- This means the substantive amendments apply to 'Reporting Australian Financial Institutions' that maintain at least one 'U.S. Reportable Account' in a calendar year.
- In addition, transitional obligations apply to 'Reporting Australian Financial Institutions' that make payments to 'Nonparticipating Financial Institutions' in 2015 and 2016.

Comparison of key features of new law and current law

New law	***Current law***
Reporting Australian Financial Institutions that maintain U.S. Reportable Accounts will need to follow specific due diligence procedures and provide information about those accounts as specified in the Intergovernmental Agreement to the Commissioner.	No equivalent.
Reporting Australian Financial Institutions that make certain payments to Nonparticipating Financial Institutions maintaining financial accounts in 2015 and 2016 will need to follow specific due diligence procedures and provide information about those payments as specified in the Intergovernmental Agreement to the Commissioner.	No equivalent.
Reporting Australian Financial Institutions that report information to the Commissioner will need to keep records for five years that explain the procedures used for determining the information reported.	No equivalent.

Detailed explanation of new law

The Australian Intergovernmental Agreement with the US

1.13 Broadly, the Intergovernmental Agreement establishes a framework for reporting by Australian and US financial institutions of some financial account information to their respective tax authorities (being the ATO and the IRS respectively). Article 25 (*Exchange of Information*) of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income* (which has the force of law under subsection 5(1) of the *International Tax Agreements Act 1953*) requires the tax authorities to automatically exchange that information.

1.14 The Intergovernmental Agreement consists of four parts.

- (1) The Agreement which:
  - defines specific concepts used in the Agreement — per Article 1;
  - requires Australia to obtain information about 'Reportable Accounts' — per Article 2;
  - sets out the process for exchanging information with the US — per Article 3;
  - specifies how 'Reporting Australian Financial Institutions' will be treated under FATCA — per Article 4;
  - provides for compliance and enforcement mechanisms — per Article 5;
  - articulates a mutual commitment between Australia and the US to enhance the effectiveness of information exchange and transparency — per Article 6;
  - grants Australia the benefit of more favourable terms under Article 4 or Annex I provided by the US to other jurisdictions — per Article 7;
  - allows for consultation and amendment of the agreement and specifies the terms of the agreement — per Articles 8 and 10; and
  - incorporates Annex I and Annex II as integral parts of the agreement — per Article 9.
- (2) Annex I requires Reporting Australian Financial Institutions to apply specific due diligence procedures in identifying 'U.S. Reportable Accounts' and accounts held by 'Nonparticipating Financial Institutions'.
- (3) Annex II deems specific Australian 'Entities' and specific 'Account Types'to be complying with or exempt from FATCA

or specific Australian accounts to be excluded from the definition of 'Financial Accounts' for the purposes of FATCA.

- (4) The Memorandum of Understanding to the Agreement.

1.15 Paragraph 4 of Article 5 of the Intergovernmental Agreement requires Australia to implement measures, as necessary, to prevent financial institutions from adopting practices designed to circumvent the relevant reporting obligations. Although the Australian Government does not propose to introduce a specific anti-avoidance rule at this stage, it has given an undertaking to the US that it will do so if it becomes apparent that Reporting Australian Financial Institutions are adopting practices designed to circumvent their reporting obligations.

1.16 It is important to note that a Reporting Australian Financial Institution that complies with all of its reporting obligations under these amendments will still need to comply with additional obligations directly imposed by the IRS to avoid becoming subject to a 30 per cent US withholding tax on its US source income. These additional obligations are contained in subparagraphs (1)(c), (d) and (e) of Article 4 of the Intergovernmental Agreement.

1.17 How each Reporting Australian Financial Institution chooses to comply with these additional obligations will be a matter for that institution and the IRS. Although the ATO has a role in acting as an intermediary between Reporting Australian Financial Institutions and the IRS, the formal obligations on the ATO under Article 5 of the Intergovernmental Agreement are limited to applying Australia's domestic taxation laws, where applicable, to resolve any non-compliance. Accordingly, these obligations will only apply in situations where the non-compliance has led to a contravention of Australia's domestic taxation laws.

The reporting obligation — U.S. Reportable Accounts

1.18 Reporting Australian Financial Institutions that maintain one or more U.S. Reportable Accounts at any time during a calendar year will need to give a statement to the Commissioner in relation to each of those accounts. This statement must contain all of the necessary information about that account that would allow the Australian Government to fulfil its obligations under the Intergovernmental Agreement. ***[Schedule #, item 2, subsections 396-5(1) and (2) of Schedule 1 to the TAA 1953]***

1.19 As noted in paragraph 1.12 the concepts of Reporting Australian Financial Institutions and U.S. Reportable Accounts are defined in Article 1 of the Intergovernmental Agreement. However, generally speaking:

- banks, some building societies and credit unions, specified life insurance companies, private equity funds, managed funds, exchange traded funds, custodial institutions and some brokers with custodial arrangements will typically be Reporting Australian Financial Institutions; and

- U.S. Reportable Accounts will typically include cheque and transaction accounts, savings accounts, term deposits, debt interests and equity interests, custodial accounts/ arrangements and annuity contracts).

Superannuation entities, including pooled superannuation trusts, and CAC government entities will generally not be Reporting Australian Financial Institutions — per Annex II of the Intergovernmental Agreement.

1.20 However, paragraph 7 of Article 4 of the Intergovernmental Agreement allows Australia to permit Australian Financial Institutions to use a definition in the relevant US Treasury regulations in lieu of a corresponding definition in the Intergovernmental Agreement where the application of such a definition would not frustrate the purposes of the Agreement.

1.21 In complying with this reporting obligation, an Australian Financial Institution may elect to use any alternative definition in the relevant US Treasury regulations, provided the use of that definition does not frustrate the purposes of the Intergovernmental Agreement. Such a definition would be within the meaning of the Intergovernmental Agreement. An entity must have made any relevant elections by the time it gives the statement to the Commissioner and the way the entity has prepared its statement provides sufficient evidence of any elections it may have made. That said, an entity that provides a statement to the Commissioner has an obligation to keep necessary records about the procedures it has used to determine the information given to the Commissioner (including any elections made) — further information about this obligation is contained in paragraphs 1.43-1.49.

1.22 Article 2 of the Intergovernmental Agreement sets out Australia's obligations in relation to the collection of information about U.S. Reportable Accounts. This includes collecting the following information, for example, in relation to each U.S. Reportable Account:

- the name, address and US Tax Identification Number of each Specified US Person that is an Account Holder (or each Specified US Person that is a Controlling Person, as well as the name, address and US Tax Identification Number of the controlled Non-US Entity);

- the account number or equivalent;

- the name and identifying number of the Reporting Australian Financial Institution;

- the account balance or value at the end of the calendar year or other appropriate reporting period (or, if the account was closed during the year, immediately before its closure);

- the total amount of income generated by the account (such as interest, dividends) and paid into the account (or with respect to the account) — but only with respect to 2015 and subsequent years; and

- in some cases, the total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year — but only with respect to 2016 and subsequent years.

1.23 The statement to the Commissioner must be given in the 'approved form'. The concept of approved forms is used in Australia's domestic taxation laws to provide the Commissioner with administrative flexibility to specify the precise form of information required and the manner of providing it. ***[Schedule #, item 2, subsections 396-5(3) and (4) of Schedule 1 to the TAA 1953]***

1.24 Section 388-50 of Schedule 1 to the TAA 1953 provides the legislative basis for the use of approved forms. Of note, subsection 388-50(2) allows the Commissioner to combine more than one statement in the one approved form and paragraph 388-50(1)(c) allows the Commissioner to require any necessary additional information.

1.25 Each statement is due to the Commissioner by 31 July of the following year to which the information relates.

- However, section 388-55 of Schedule 1 to the TAA 1953 allows the Commissioner to defer the time that entities must lodge a statement in the approved form.

- This means Reporting Australian Financial Institutions may lodge these statements by a later date where that has been approved by the Commissioner.

[Schedule #, item 2, subsection 396-5(5) of Schedule 1 to the TAA 1953]

1.26 The ATO has published a range of information and guidance about how the Commissioner administers the approved form provisions. In particular, practice statement PS LA 2005/19 provides information about the processes for approving an approved form and practice statement PS LA 2011/15 provides information about general lodgement obligations and the process for seeking to defer these obligations.

The requirement to follow specific due diligence procedures

1.27 In effect, complying with this reporting obligation will require all Reporting Australian Financial Institutions that maintain Financial Accounts (within the meaning of the Intergovernmental Agreement) to determine if they maintain any U.S. Reportable Accounts. This requires applying the due diligence procedures specified in the Intergovernmental Agreement to determine the information to be reported. ***[Schedule #, item 2, section 396-20 of Schedule 1 to the TAA 1953]***

1.28 Annex I to the Intergovernmental Agreement specifies these due diligence procedures. However, Clause C of Section I of Annex I allows Australia to permit Reporting Australian Financial Institutions to elect to apply the due diligence procedures specified in the US Treasury regulations as an alternative to the procedures described in Annex I to determine whether an account is a U.S. Reportable Account or not.

1.29 In complying with the due diligence obligations, a Reporting Australian Financial Institutions may elect to use any alternative procedures described in the US Treasury regulations in part or in full.

Consequences of not complying

1.30 Australia's domestic taxation laws contain a range of sanctions for entities that do not comply with their reporting obligations. Specifically:

- Division 284 of Schedule 1 to the TAA 1953 sets out the penalties that apply to entities that make false or misleading statements about tax-related matters; and
- Division 286 of Schedule 1 to the TAA 1953 sets out the penalties that apply to entities that fail to lodge statements on tax-related matters in time.

1.31 This means, for example, that:

- a Reporting Australian Financial Institution that makes a false or misleading statement because of an intentional disregard of Australia's domestic taxation laws may be liable to an administrative penalty of 60 penalty units — per table item 3A of subsection 284-90(1) of Schedule 1 to the TAA 1953;
- a Reporting Australian Financial Institution that makes a false or misleading statement through recklessness to the operation of Australia's domestic taxation laws may be liable to an administrative penalty of 40 penalty units — per table item 3B of subsection 284-90(1); or
- a Reporting Australian Financial Institution that makes a false or misleading statement because of a failure to take reasonable care to comply with Australia's domestic taxation laws may be liable to a penalty of 20 penalty units — per table item 3C of subsection 284-90(1).

1.32 Similarly, a Reporting Australian Financial Institution that fails to provide a statement on time or in the approved form may be liable under subsection 286-80(2) of Schedule 1 to the TAA 1953 to a base administrative penalty of one penalty unit for each period of up to 28 days from when the document was due, up to a maximum of five penalty units (subsections 286-80(3) and (4) of Schedule 1 to the TAA 1953 increase these penalty amounts for some entities). This could include a Reporting Australia Financial Institution that fails to identify any U.S. Reportable Accounts that it maintains and lodge a statement with the Commissioner.

1.33 Section 4AA of the *Crimes Act 1914* provides the value of a penalty unit. The current value is $170.

1.34 Division 298 of Schedule 1 to the TAA 1953 contains a range of machinery provisions relating to this penalty framework. This includes section 298-20 which allows the Commissioner to remit all, or part, of an administrative penalty and section 298-30 which allows entities to object to the Commissioner's penalty assessment.

1.35 The ATO has also published a wide range of information and guidance about the operation of this penalty regime. Relevant practice statements include PS LA 2012/4 which relates to false and misleading statements and PS LA 2011/19 which relates to failing to lodge.

1.36 It is important to note that a Reporting Australian Financial Institution that fails to comply with this reporting obligation may also be deemed by the IRS to be a Nonparticipating Financial Institution under subparagraph 2(b) of Article 5 of the Intergovernmental Agreement notwithstanding any compliance action undertaken by the ATO using Australia's domestic taxation laws.

The reporting obligation — payments to Nonparticipating Financial Institutions

1.37 As noted in paragraph 1.12, Reporting Australian Financial Institutions that make payments to Nonparticipating Financial Institutions in 2015 and 2016 will also need to provide information about this to the Commissioner.

1.38 Specifically, Reporting Australian Financial Institutions that make certain payments to Nonparticipating Financial Institutions holding financial accounts with the Reporting Australian Financial Institution in 2015 and 2016 will need to give a statement to the Commissioner in relation to each of these paymentsthe aggregate amount of these payments to financial accounts. Each statement must contain all of the necessary information about those payments that would allow the Australian Government to fulfil its obligations under the Intergovernmental Agreement. ***[Schedule #, item 2, subsections 396-10(1) and (2) of Schedule 1 to the TAA 1953]***

1.39 This statement is due to the Commissioner by 31 July of the year following the year to which the information relates and must be given in the approved form. Paragraphs 1.23-1.25 provide further information about the consequences of not providing these statements in the approved form. ***[Schedule #, item 2, subsections 396-10(3), (4) and (5) of Schedule 1 to the TAA 1953]***

1.40 Reporting Australian Financial Institutions that provide such a statement will need to apply the due diligence procedures specified in the Intergovernmental Agreement in determining the information to be contained in that statement. ***[Schedule #, item 2, section 396-20 of Schedule 1 to the TAA 1953]***

1.41 In complying with these due diligence obligations, a Reporting Australian Financial Institutions may elect to use any alternative procedures described in the US Treasury regulations as specified in the Intergovernmental Agreement under Clause C of Section I of Annex I.

1.42 A Reporting Australian Financial Institution that does not comply with this obligation may be liable to specific sanctions under Australia's domestic taxation laws and may also be deemed by the IRS to be a Nonparticipating Financial Institution. Paragraphs 1.30 to 1.36 provide further details about these different sanctions.

The requirement to keep records of relevant procedures

1.43 Similar to Australia's income tax regime and the lodgement of income tax returns, the reporting obligations on Reporting Australian Financial Institutions will operate on a self-assessment basis. This means that whilst the Commissioner may initially accept an entity's statement at face value, the Commissioner may subsequently seek to verify the accuracy of that statement, particularly if there are potential compliance risks.

1.44 Accordingly, reporting entities will need to keep adequate records about the procedures they used in preparing the relevant statement to ensure the Commissioner can properly assess whether they have, in fact, complied with their reporting obligations. This record-keeping obligation is similar to other record keeping provisions in Australia's domestic taxation laws.

1.45 Specifically, a Reporting Australian Financial Institution that provides a statement to the Commissioner needs to keep records for five years (from the date of providing that statement to the Commissioner) that:

- correctly record the procedures by which it determined what information to include in the statement; and
- are in English, or are readily accessible and easily convertible into English.

[Schedule #, item 2, section 396-25 of Schedule 1 to the TAA 1953]

1.46 This record-keeping obligation particularly applies in relation to the due diligence procedures followed by the Reporting Australian Financial Institution in identifying relevant accounts or payments as well as any elections made by the institution in relation to terms used in the Intergovernmental Agreement. However, entities need not create specific records just to comply with this obligation. Internal guidelines or similar documents about the procedures relevant staff should follow, for example, may be sufficient, particularly if there is also evidence that staff do, in fact, routinely follow these guidelines.

Consequences of not complying

1.47 Section 288-25 of Schedule 1 to the TAA 1953 provides that an entity that fails to keep or retain records as required by the taxation laws is liable to an administrative penalty of 20 penalty units.

1.48 The ATO has published a practice statement, PS LA 2005/2, which provides further information about these record keeping obligations.

1.49 In addition, a Reporting Australian Financial Institution that fails to keep adequate records may be exposed to the possibility of being deemed by the IRS to be a Nonparticipating Financial Institution.

Consequential amendments

1.50 These amendments refer to the Intergovernmental Agreement as the 'FATCA Agreement'. ***[Schedule #, item 2, section 396-15 of Schedule 1 to the TAA 1953]***

1.51 In addition, these amendments amend the definitions in section 995-1 of the *Income Tax Assessment Act 1997* to incorporate a reference to the FATCA Agreement. ***[Schedule #, item 1, subsection 995-1(1) of the Income Tax Assessment Act 1997]***

1.52 These amendments also insert relevant guide material for Division 396. ***[Schedule #, item 2, section 396-1 of Schedule 1 to the TAA 1953]***

Application and transitional provisions

1.53 These amendments commence on Royal Assent.

1.54 These amendments apply in relation to:

- all U.S. Reportable Accounts maintained by Reporting Australian Financial Institutions on or after 1 July 2014 ***[Schedule #, item 3, paragraph (1)]***; and
- any payments made in 2015 or 2016 by Reporting Australian Financial Institutions to Nonparticipating Financial Institutions ***[Schedule #, item 3, paragraph (2)]*.**