Sydney

Level 15, 255 Pitt Street
Sydney NSW 2000 Australia
GPO Box 3698
Sydney NSW 2001
www.challenger.com.au

Telephone 02 9994 7000
Facsimile 02 9994 7777

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

Dear Sir/Madam

Re: Giving effect to the Australian Government's obligations under the FATCA intergovernmental agreement with the United States of America

Challenger Limited welcomes the opportunity to comment on the Exposure Draft of the Tax and Superannuation Laws Amendment (2014 Measures No. #) Bill 2014: FATCA (**Exposure Draft**), which is designed to give effect to the Australian Government's obligations under the FATCA intergovernmental agreement (**IGA**) with the United States of America. Challenger wishes to raise the following two items in respect of the Exposure Draft and IGA.

1. Uncertainty whether the Exposure Draft adequately enlivens certain options under the IGA

A number of the provisions of the IGA permit Australia to allow Reporting Australian Financial Institutions (**RAFIs**) to utilise alternative rules when carrying out due diligence on accounts. For example:

- Annex I.I.C enables Australia to permit RAFIs to use procedures described under the relevant US Treasury Regulations;
- Annex I.II.A, Annex I.III.A, Annex I.IV.A, and Annex I.V.A enable Australia's implementing rules (presumably the Exposure Draft) to permit RAFIs to elect to apply the due diligence requirements across de minimis accounts (eg for individuals, pre-existing accounts not exceeding $50,000 or for cash value insurance contracts and annuity contracts, not exceeding $250,000); and
- Annex I.VI.F enables Australia to permit RAFIs to rely on due diligence procedures performed by third parties.

We respectfully submit that it is not clear whether the Exposure Draft, as it is currently drafted, adequately permits RAFIs to use the US Treasury Regulations, make elections with regards to de minimis accounts, or rely on due diligence carried out by third parties. We would therefore welcome additional provisions in the Exposure Draft to ensure that these options are open to RAFIs.

2. Uncertainty regarding the default treatment of non-responsive Account Holders with respect to new accounts

With respect to pre-existing accounts, the IGA contemplates the scenario of an unresponsive Account Holder. For example, with respect to a pre-existing Individual Account, a RAFI is required to search for US indicia (Annex I.II.B.1), and upon finding any US indicia treat the account as a US Reportable Account (Annex I.II.B.3), with the option of attempting to obtain from the Account Holder certain information (such as a self-certification indicating they are not a US citizen or resident for tax purposes) that allows the RAFI to treat the account as not being a US Reportable Account (Annex I.II.B.4). Thus with an unresponsive Account Holder on a pre-existing account, the default position on finding US indicia is to treat them as a US Reportable Account. The position is similar for pre-existing non-individual accounts.

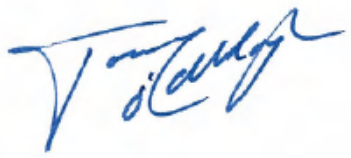
With respect to a new account, however, there does not appear to be a default treatment of a non-responsive Account Holder for a new account. For example, for a new Individual Account, Annex I.III.B requires that the RAFI "upon account opening … must obtain a self-certification", which then enables it to determine whether it is or is not a US Reportable Account. Annex I.III.B.3 deals with a "change of circumstances" with respect to a new Individual Account, and only in that paragraph is a default treatment of a non-responsive Account Holder dealt with, in which if a RAFI is "unable to obtain a valid self-certification, [it] must treat the account as a US Reportable Account". The position is similar for new non-individual accounts.

There is a view that the "must obtain" requirement should be interpreted as a best or reasonable endeavours requirement, with those of that view taking the approach of treating any non-responsive Account Holders as being US Reportable Accounts by default. Whilst we agree this is the correct approach with respect to pre-existing accounts and new accounts with a change of circumstances, this does not appear to be correct with respect to new accounts on account opening.

We note that in the discussion with Treasury on 29 April 2014, that the proposed solution the ASX is looking to adopt with respect to mFunds, and later other products within scope of FATCA such as ETFs and listed securities, relies upon a "Day 2" contact by an issuer of a product to the investor seeking to obtain the FATCA self-certification. Where a new Account Holder does not respond to this request, it would be difficult on the present text of the Exposure Draft and IGA for the RAFI to have met the requirement that they "must obtain a self-certification" given the expected poor response rate to mail-out requests.

Accordingly, we seek clarification from Treasury as to how the "must obtain" requirement is to be interpreted with regards to new accounts.

Sincerely,



Tom O'Callaghan
Head of Compliance, Boutiques and Investments