

AUSTRALIAN LISTED INVESTMENT COMPANIES ASSOCIATION

C/- LEVEL 20
101 COLLINS STREET
MELBOURNE VIC 3000
AUSTRALIA

TEL (613) 9654 0499
FAX (613) 9654 3499

ALICA FATCA Submission

CC:PA:LPD:PR (REG-121647-10)
Room 5205,
Internal Revenue Service
PO Box 7604
Ben Franklin Station, Washington, D.C. 20044.

By email: www.regulations.gov

30 April 2012

Submission

**Foreign Account Tax Compliance Act (FATCA)
Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities**

Dear Sir/Madam

The Australian Listed Investment Company Association (ALICA) is pleased to provide comments in response to proposed regulations under chapter 4 of Subtitle A (sections 1471 through 1474) of the Internal Revenue Code of 1986 (Code) regarding information reporting by foreign financial institutions (FFIs) with respect to U.S. accounts and withholding on certain payments to FFIs and other foreign entities, released by the Internal Revenue Service (IRS) and The Treasury Department (Treasury) on 8 February 2012 (the proposed regulations).

We recognise the concerns of the US Government which have led to the introduction of the Foreign Account Tax Compliance Act (FATCA) regime and do not dispute the power of the US Government to take action in relation to the collection of certain tax information in respect of US Persons.

However we raise in this submission our significant concerns with the potential application of FATCA and proposed regulations to ALICA member companies as listed Australian corporate collective investment vehicles and the resulting adverse impact on the member companies and their shareholder investors.

We are particularly concerned about obligations that may be imposed on ALICA member companies as part of entering into an FFI agreement in order to become a participating FFI (PFFI), recognising that Australian corporate legislation does not allow a company to take unilateral action to cancel shares which would be necessary in order to "close" the account.

We submit that the financial account exception for equity interests that are regularly traded on an established securities market should be extended to shareholders in Australian Listed Investment Company (LIC) entities by applying a widely held test that is met by being listed on an approved securities exchange. This extension is necessary to rectify certain restrictions with the current drafting in respect of the requirements to be considered 'regularly traded', as discussed below.

We further submit that the financial account concept and related exceptions should be extended to entities. That is, a non-financial foreign entity (NFFE) that is undocumented should only be deemed to be a non-participating FFI (NPFFI) if it holds a financial account in an FFI. The financial account exclusion as modified above should apply to such NPFFIs.

Alternatively a specific exclusion should be introduced for ALICA member companies and other LICs (as defined by Australian Taxation legislation) from application of the FATCA rules.

About ALICA

ALICA is an organisation that represents Australian resident listed public companies that have their shares quoted on the Australian Securities Exchange ("ASX"). Its members are also Australian resident listed public companies for Australian taxation purposes. They have large and diverse shareholder bases, primarily domestic and retail.

Shareholders invest with ALICA member companies as an efficient and cost effective way of investing primarily in the Australian stock market. Generally they have an objective to provide shareholders with attractive investment returns through access to a growing stream of fully franked dividends and growth of capital invested. They tend to have an investment

philosophy which is built on taking a medium to longer term view of value which means that the aim is to buy and hold individual stocks for the long term based on certain selection criteria.

A LIC is broadly a corporate collective investment vehicle structure to which the investing public is invited to subscribe by buying shares (either in the primary or in the secondary market). LICs are defined under the Australian income tax law and are subject to corporate regulation in much the same way as other companies.

LICs can be attractive for certain Australian resident investors due to the franking credits for company tax paid attached to dividends distributed by LICs from an Australian income tax perspective. It also allows certain investors from an Australian income tax perspective to access the benefit of a capital gains tax (CGT) discount where the dividend received includes a 'LIC capital gain' component in respect of assets owned for at least 12 months.

For a company to qualify as a LIC, at least 90 per cent of the market value of its CGT assets must consist of 'permitted investments' and it cannot own more than 10 per cent of another company or trust except where it is another LIC.

LICs have 'a closed end' structure where the number of shares on issue is fixed and set by their Boards from time to time. As a result, they generally do not issue new shares or cancel them as investors enter and leave the investment vehicle.

Application of FATCA to Australian LICs

Our analysis of FATCA and the proposed regulations is that the requirements for application of the provisions will prima facie be met in respect of Australian LICs as being FFIs, each being an entity that 'is engaged... primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests, or commodities'.

On our analysis, the LICs will not meet the requirements for deemed compliant FFI status to be exempt from FATCA withholding under any of the proposed regulations. Similarly, they would not meet the proposed requirements to be excluded as an exempt beneficial owner.

We understand ALICA member companies would therefore be required to enter into an FFI agreement to become a PFFI in order to avoid being regarded as an NPFFI and potentially being withheld on in respect of any withholdable payments or pass through payments.

As outlined above, the ALICA member companies are (taxable) listed public companies. We would therefore expect concessional application of the FATCA rules in line with other listed public companies potentially subject to withholding under FATCA.

That is, we would expect that our shareholders' interests would be excluded from the definition of a financial account as an equity interest that is regularly traded on an established securities market (§1.1471-5(b)(1)(iv)).

The proposed regulations provide that for this purpose, debt or equity interests are considered regularly traded on an established securities market if trades in such interests are effected, other than in de minimis quantities, on such market or markets on at least 60 days during the prior year, and the aggregate number of such interests that are traded on such market or markets during the prior year is at least ten percent of the average number of such interests outstanding during the prior year (paragraph §1.1471-5(b)(3)(iv)).

ALICA member companies will not typically meet this turnover requirement. This is a function to at least some extent of the medium to long term nature investment strategy for the company's investments corresponding with a continuing pool of mainly medium to long term investors in the LICs, resulting in low turnover volumes in our shares.

We submit that it is appropriate for the proposed exclusion for such shareholders in listed company FFIs to be extended to interests in ALICA members and other LICs.

Recommendation 1

In our view, the limitation of the currently proposed exemption to companies only where they meet a trading volume "regularly traded" test is not appropriate for our member companies and their shareholder investors. We can see that there might be some concern if the listed status of a company could be used in some cases to disguise an otherwise closely held entity and to inappropriately exclude them from the reach of the FATCA rules. However in the ALICA member companies' case **they are genuinely widely held listed entities** with the largest, for instance, having approximately 95,000 shareholders and a market capitalisation of approximately A\$4.5 billion.

We submit that the financial account exclusion should be extended to include a widely held test that is not based on further trading volume conditions. ALICA member companies and other LICs should meet such a widely held test by being listed on an approved stock or securities exchange.

Paragraph §1.1471-5(b)(3)(iv) could be amended to add:

“(C) or the interests are widely held or are shares in a company which are listed for quotation in the official list of a recognised stock or securities exchange”

with reference to an appropriate list of recognised foreign country stock and securities exchanges which would include the Australian Securities Exchange - for example the Australia-US double tax treaty contains a list of ‘recognised stock exchanges’ in Article 16 paragraph (6)

and a widely held test based upon having more than 300 members where the entity is not otherwise closely held, for example requiring that 10 or fewer persons must not beneficially own interests of 50% or more in the entity.

Recommendation 2

We note the financial account concept and related exclusion applies only to individual shareholders. FATCA obligations would still remain for entities that are shareholders in ALICA member companies and therefore collection and reporting requirements and withholding on pass-thru payments in respect of NPFIs would still apply.

The separate treatment of individual and non-individual shareholders in LICs is inappropriate. The same issues arise in respect of all shareholders notwithstanding the legal owner of the shares. The financial account concept should therefore be extended to entities including NPFIs. That is, a NFFE that is undocumented should only be deemed to be a NPIFI if it holds a financial account in a FFI. The financial account exclusion as modified above should apply to such NPFIs.

It follows that without adjustment to the proposed regulations, all entity shareholders in ALICA member companies that are otherwise not specifically excluded (for example as a participating or deemed compliant FFI, exempt non-financial foreign entity or exempt beneficial owner) would be subject to the rules and might be withheld upon.

We outline below the potential adverse consequences to ALICA members from the application of FATCA.

Impact of FATCA on ALICA companies and other Australian LICs

Application of FATCA to ALICA members will result in many potential adverse consequences to our companies and their investors.

It raises many general concerns including for example in respect of:

- significant additional administration burdens and associated costs
- potential for significant adverse changes to our relationships with investee entities and costs if a FFI agreement cannot be entered into
- difficulties in implementation of a FFI agreement including collection of the required information and corresponding investor education, if a FFI agreement can be entered into
- ongoing difficulties in complying with a FFI agreement, if one could be entered into, including collection of the required information
- initial and ongoing costs in respect of documentation, reporting and potential withholding obligations in complying with the rules
- impact on our shareholding base and consequential commercial impacts including in respect of our share price in response to potential and actual withholding on investor payments

We note in this regard that we do not currently have other Australian obligations to collect detailed information in respect of our investors which might meet the FATCA requirements. For example LICs are not required to comply with Australia’s anti-money laundering reporting rules, rather the broker that executes that trade is required to comply with the anti-money laundering rules.

Certain requirements of FFI agreements are also potentially in conflict with Australia’s domestic laws including for example discrimination legislation and privacy laws.

However in particular we are concerned by the FFI agreement requirement in respect of recalcitrant account holders which requires the PFI to take action in certain circumstances to close each such account within a reasonable period of time.

The nature of the investors in Australian LICs is that of a shareholder in a company. The Australian Corporations Act 2001 which governs companies and its shareholders does not allow a company to take unilateral action to cancel shares which would be necessary in order to “close” the account.

LICs will therefore not be able to comply with the terms of an FFI agreement in respect of such recalcitrant account holders. We would therefore not be able to enter such an agreement and would be exposed to the full force of FATCA and its withholding consequences as a NPFFI.

Alternative call for exclusion generally for Australian LICs

Alternatively, we submit that a further exemption from FATCA should be introduced for companies which are listed for quotation on a stock or securities exchange. Such an exclusion would address the issues of ALICA members and other Australian LICs.

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We would be pleased to discuss our submission with you in further detail should that assist.

In the interim please do not hesitate to contact us with any queries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'AJ Hancock', written in a cursive style.

AJ Hancock
For the Australian Listed Investment Company Association