Australian Securitisation Forum

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The Manager
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Dear Sir/Madam

Submission on the proposed Inter-Governmental Agreement regarding the Foreign Account Tax Compliance Act (FATCA)

The Australian Securitisation Forum (**ASF**)[1] welcomes the opportunity to make a submission on behalf of its members in respect of the advantages and disadvantages of an intergovernmental agreement (**IGA**) between Australia and the US (based on the published US Model IGA) as an alternative to individual agreements between Australian financial institutions and the US Internal Revenue Service under the US Foreign Account Tax Compliance Act (**FATCA**). We set out below the advantages and disadvantages of an IGA for Australian securitisation vehicles (**ASVs**).

Advantages of an IGA

The ASF strongly believes that an IGA would be advantageous for ASVs, for the reasons set out below.

Primary advantage for ASVs – Australian financial institutions can be specified to be "deemed compliant"

The Model IGA enables foreign financial institutions (**FFIs**) to be specified as "Deemed Compliant Financial Institutions" (**DCFI**), and consequently, as "Non-Reporting [FATCA Partner] Financial Institutions". This mechanism allows FATCA to be specifically tailored to Australian structures that are not able to benefit from the "deemed compliance" exemptions currently set out in the FATCA Proposed Treasury Regulations released on 8 February 2012 (**Regulations**).

[1] The ASF was formed in 1989 to promote the development of securitisation in Australia. It is the peak body representing participants in the Australian securitisation market including major banks, other Australian deposit-taking institutions, non-bank issuers, fixed income investors and service providers to the sector. Our mission is to promote and present the industry to government, regulators, the public and investors regarding the benefits of securitisation in Australia.

Specific Deemed Compliance Exemption for ASVs

We submit that ASVs should be specifically set out to be a DCFI in any IGA entered into between Australia and the U.S., for the following reasons:

1. Purpose of ASVs

The purpose of securitisation is to fund financial assets in an efficient manner. ASVs are established to hold specific investment assets (for example, residential mortgages) and to issue securities to investors who receive cash flows generated from such investment assets. ASVs are established as Australian vehicles governed by the Corporations Act. It is very unlikely that an ASV would have a fixed place of business outside of Australia. ASVs present a low risk of being used by U.S. persons to evade U.S. tax.

2. Local assets

The vast majority of securitisation in Australia involves Australian retail assets. Borrower eligibility criteria for underlying mortgages typically require the borrower to be an Australian resident. Consequently, the proportion of receipts (if any) that would constitute "withholdable payments" in respect of which FATCA withholding could be deducted is very small relative to all receipts of the ASVs.

3. Account holders are typically Australian financial institutions

The typical investors in ASVs (the noteholders) are financial institutions or entities that are likely to be considered exempt beneficial owners or deemed-compliant financial institutions should an IGA be entered into (such as superannuation funds).

This means that those who are investing will already be subject to reporting obligations under FATCA in respect of their financial accounts. Consequently, the regulatory burden imposed by FATCA on ASVs is out of proportion to the limited number of non-financial institution investors in such vehicles. However, the way in which ownership interests are structured (and, in many cases, cleared (see paragraph (d) below)) mean that it is practically very difficult, if not impossible, to determine the identity of the noteholders at any given time after the initial issue of notes.

The equity interests in ASVs are usually closely held by the sponsor (who may or may not be a financial institution) and Australian entities that are not financial institutions. It would be extremely unlikely for a U.S. person to hold equity interests in an ASV.

4. Notes held through a clearing system

Notes issued by ASVs are typically (but not always) cleared through Austraclear or a foreign clearing system. Entities with an ACN or ABN can be participants in Austraclear but individuals cannot participate in Austraclear. This means that ASVs may be able to treat the clearing system as the account holder for FATCA purposes of such notes, to the extent that such clearing system is a participating FFI.

While this may significantly reduce the extent of the due diligence obligations for an ASV and the number of accounts in respect of which an ASV would be required to report under FATCA, the reporting obligation in respect of the account holders will simply be pushed down the holding structure chain and will fall to operator of the relevant clearing system.

Consequently, the operator of the clearing system will face the same difficulties in determining the identity of the account holders as described in paragraph (b) (above) and is unlikely to be able to meet the FATCA due diligence reporting obligations in respect of such account holders.

The Regulations provide for an exemption from the definition of "financial account" for debt interests that are "regularly traded on an established securities market". However, Austraclear is unlikely to fall within the definition of an "established securities market"[2] and in any event, it is unlikely that the notes of an ASV would be considered to meet the "regularly traded"[3] test. This means that the noteholders will be holders of financial accounts, even though from a practical perspective it will be very difficult for ASVs (or the relevant clearing system) to identify and report on any US noteholders following issue of the notes.

5. ASVs have limited powers under constituent documentation

ASVs will generally not have the power to comply with FATCA obligations (whether under the FATCA legislation or an IGA) under the terms of their constituent documents. The vehicles are typically set up as special purpose trusts, whose trustees may not have powers beyond the pure trust purposes. Further, it may be difficult (and in practice, unworkable) to amend the provisions of such constituent documents and/or the terms of the notes issued by an ASV. Consequently, an ASV that is required to report either to the IRS or the ATO under an IGA may be in a position where it is unable to meet such obligations. Particularly once the foreign pass-thru rules take effect, this could have a significant impact on the Australian securitisation industry due to the deduction of FATCA withholding from the assets of non-"participating" ASVs.

6. Compliance burden will fall most heavily on smaller industry players, thus reducing competition

The compliance burden of FATCA significantly outweighs any benefit derived for the US in requiring ASVs to be compliant, for the reasons set out above. Unless ASVs are specified in the IGA as DCFIs, FATCA will reduce efficiency and increase costs for the Australian securitisation industry. This burden is even greater amongst smaller banks and non-banks who are involved in the Australian securitisation sector. These smaller entities already face high entry costs and any significant increase in their regulatory and administrative burden (as would occur if ASVs are not considered to be a DCFI) is likely to reduce their ability to compete in the Australian banking and securitisation sectors.

7. Local Client Base DCFI set out in UK IGA

The U.S. and the U.K. entered into an intergovernmental agreement dated 12 September 2012 (**UK IGA**), which sets out additional categories of DCFI (see Annex II of the UK IGA). One additional DCFI category applies to financial institutions with a

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[2] Regulation 1.1472-1(c)(1)(i)(C)

[3] "Regularly traded" under the Regulation 1.1471.1-5(b)(3)(iv) means that:

(a) 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 calendar year; and

(b) The aggregate number of such interests that were traded on such market or markets during the prior calendar year was at least ten percent of the average number of such interests outstanding during the prior calendar year.

particular local client base. This DCFI category expands the "Local FFI" DCFI category in the Regulations by removing:

the requirement for the FFI to be licensed or regulated in the relevant jurisdiction as a bank or similar organisation authorised to accept deposits in the ordinary course of its business, a securities broker or dealer, or a financial planner or investment adviser (instead, the FFI must be licensed and regulated under the laws of the United Kingdom); and

the restriction in the Regulations which states that the FFI must not qualify as an FFI solely because it is an entity described in section 1.1471-(5)(e)(1)(iii) (i.e. an investing FFI)[4].

In our view, an Australian IGA should incorporate this additional category of DCFI such that it applies to Australian financial institutions, as this is likely to be advantageous for Australian financial institutions generally. However, ASVs would be unlikely to be able to rely on this category of DCFI (even if they had a 98% Australian-resident client base) unless the criteria that that a financial institution must meet to fall within this category was amended to reflect the way in which ASVs are structured (for example, ASVs would not typically be licensed under Australian laws). If such criteria were appropriately tailored to the Australian securitisation industry, it might be possible for some ASVs to rely on this DCFI category.

8. Other advantages of an IGA for Australian financial institutions

At a more general level, the ASF considers that an IGA offers Australian financial institutions the following advantages when compared to the general FATCA provisions:

- An IGA may resolve many of the privacy law concerns in respect of disclosing information in respect of US financial accounts, assuming that the Australian government also passes appropriate legislation requiring Australian financial institutions to report such information to the Australian Tax Office.

- An IGA will remove the obligation imposed on participating FFIs to close accounts of their recalcitrant holders, which would have been legally difficult to do under Australian laws.

- An IGA will remove the obligation imposed on participating FFIs to withhold on "U.S. Source Withholdable Payments" made to non-participating FFIs or to withhold tax under section 1471 or 1472 of the U.S. Internal Revenue Code in respect of recalcitrant account holders. Such withholding creates difficulties for Australian financial institutions from both a legal and a systems perspective.

- Under an IGA, the parties will commit to work together to develop a "practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimizes burden". Foreign passthru withholding, in particular, would have significant repercussions for the Australian financial services industry.

[4] Section 1.1471-(5)(f)(1)(i)(A)(1) of the Regulations

Disadvantages of an IGA

The ASF does not consider that an IGA would be disadvantageous for ASVs.

For the reasons set out above, the ASF is strongly of the view that the Australian government should enter into an IGA with the US government, and that ASVs should be considered a DCFI under such IGA.

If you would like to discuss any of these issues further, please do not hesitate to contact Chris Dalton on 02 8243 3906*.*

Yours sincerely

Chris Dalton