

# Still no clearer on FATCA

**It is increasingly likely that there will be little substantive change to the US Foreign Account Tax Compliance Act (FATCA). New guidance was issued by the US tax authorities in April, but this did little to provide the overall clarity the industry needs. The legislation, in effect, seeks to turn the global financial industry into a US tax inspection agency, giving institutions three broad choices: help the Internal Revenue Service (IRS) with their tax collection duties; have no US citizens as clients and be able to prove it or have no US investments. Failure to do so will lead to a 30% tax on all US-sourced investment revenue, including the sale of capital.**



Paul Chambers

Photo: Steve Eastwood

Much more than a tax issue, FATCA will affect the whole value chain and requires the construction of completely new and extended information and reporting systems. An estimate of the cost by the European Banking Federation put the bill at about 100 million euros for a typical large cross-border bank. Implementation is due for the start of 2013 but so far there is little clarity as to what is required and April's IRS Guidance-Notice 2011-34 shed little light.

## FATCA is here to stay

According to Paul Chambers, partner with the tax consultancy Atoz, this notice sought "to exclude certain funds and pension schemes from the legislation; but frankly they have tried, but haven't done a very good job." The point is that Congress did not want there to be much wriggle room. "There may be the occasional SIF which will be excluded if you can prove that it is family held but FATCA is here to stay," insists Chambers. Having one or other fund out of scope will make no difference to the need to build a new system. It appears that officials at the IRS and the Treasury are trying to make it work the best they can, but there is little they can do.

Some in the industry are unhappy about perceived soft-peddling by the EU authorities. ABBL Chairman Ernst Wilhelm Contzen told the association's AGM on 27th April that the EU "finally started to become active on the issue" only after intense lobbying. However, given the popularity of being seen to clamp down on tax avoidance, there would appear to be little chance of US politicians making the necessary changes.

## Could it come to Europe?

Chambers noted that only moves by large investors to downgrade their US holdings could give the rest of the world some leverage. There has been speculation that with returns low in the US market this legislation could tip investors over the edge, leading them to pull out. But is this possi-

ble? "It is still a big market and it is probably wishful thinking," Chambers said. "In the short term, there is probably not a risk of withdrawals, but the US market is not particularly attractive at the moment and this is not adding to it."

Adding to the concerns are that other jurisdictions such as Germany "are taking a close look" at how this plays out. The EU Savings Directive (EUSD) has been a non-event, so could policy makers try to develop an EU FATCA?

## Expect last minute decisions

Some had hoped for greater clarity on the concept of 'deemed compliance' which would see the IRS grant de facto immunity from FATCA implementation in some specific cases. Chambers is sceptical, though, as taking this route would require faith in civil servants taking the right decision. Also, the conditions remain as vague as the rest.

There is little for the IT guys to get their teeth into when it comes to building a parallel system to existing EUSD or know-your-customer tools. So some are considering whether they should go down the route of excluding US citizens and green card holders. "A lot of banks are reluctant to open accounts for them because they can't be bothered with the administration," Chambers commented.

Industry consultation is on-going, with more guidance expected for the autumn, but the likelihood is that the IRS and US Treasury will largely be making many of the decisions close to or after the 1st January 2013 deadline. The industry has little choice but to wait and see. Chambers did offer a small crumb of consolation for Luxembourg: "everyone has to do this if they play in the US market, so there is probably no competitive advantage to any jurisdiction over another."

Text: Stephen Evans