[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED]

7 June 2011

Hon. Douglas H Shulman
Commissioner
Internal Revenue Service
CC: PAL LPD: PR (NOT-121556-10)
Room 5203
PO Box 7604, Ben Franklin Station
WASHINGTON, DC 20044

Dear Commissioner Shulman,

RE: Foreign Account Tax Compliance Act (FATCA)

We welcome the opportunity to provide comment on Guidance Notice 2011-34 and FATCA more broadly, in advance of the Draft Regulations.

Australia and New Zealand Banking Group Limited **(ANZ)** is one of the five largest listed companies in Australia and a major international banking and financial services group. ANZ is one of the 25 largest listed banks globally by market capitalization n1 .

The Australian Bankers' Association **(ABA)** is also providing a Submission in response to Guidance Notice 2011-34. That Submission covers operations of ABA members, including ANZ, in Australia and New Zealand. We endorse and support that Submission. In addition, we wish to provide some specific information on the impact of FATCA for ANZ operations in the broader Asia-Pacific region.

ANZ operates in 32 markets globally with representation in Australia, New Zealand, Asia Pacific, Europe, America and the Middle East. The ANZ Group consists of more than 180 Australian legal entities, and over 60 international legal entities. The Group has more than 48,000 employees in those 32 markets, with over 8 million customers worldwide.

ANZ has, in particular, significant operations in the Asia Pacific region. This includes representation in 14 markets across Asia and 12 markets across the Pacific, where we provide a full range of banking products and services to ANZ's retail, business, corporate and institutional clients.

Whilst ANZ operates in 32 countries, the number of US customers across the ANZ group is not large. However, the operational and technology costs of complying with FATCA will be very significant. While these costs will be dependent on the final regulations, it is likely they will be significantly disproportionate to both the number of customers who are US persons and the revenue gain to the US Treasury from potential tax evaders. Whilst ANZ fully supports efforts to reduce tax evasion, we also

seek efficient and practical regulations. We are also concerned with FATCA's interaction with local laws, as well as timeframes to comply and resultant operational impediments.

As a responsible bank we are committed to meeting our taxation and compliance obligations. However, the FATCA provisions, as drafted, would place a heavy administrative burden on ANZ and banks globally. As such, our submission focuses on some of the key challenges we see with the implementation of FATCA. We have also provided some feedback on how the legislation could be implemented in a practical manner, lessening the burden and improving the efficiency with which the regulations are applied.

Potential legal challenges in complying with FATCA

Operating in a number of countries requires our business to work across numerous jurisdictions and meet a number of different regulatory requirements imposed by local regulators. This means our businesses must satisfy a number of local requirements, including AML-KYC obligations, bank secrecy laws, privacy laws, various other regulations, and duties of banker-client confidentiality.

We have undertaken a review of how those various statutory and operational obligations sit with the proposed FATCA requirements. It appears that FATCA will generate a number of potential conflicts of law issues. Some examples of conflict of law issues in key jurisdictions are set out in the following country examples. In each of those jurisdictions, disclosure of customer information to the US Department of Treasury and Internal Revenue Service (**IRS**) is prohibited by local banking and privacy laws, in the absence of express written agreement or consent from the customer (in some cases, even customer consent is not sufficient). Some jurisdictions also have limitations on sending personal data offshore. These laws are supported by civil and criminal liability against the banks and any individuals involved in the commission of the breach.

Whilst implementation of a customer consent process may address those concerns, customers cannot be legally compelled in any of those jurisdictions to provide such consent. Where consent is not obtained, banks may also be precluded from unilaterally closing the account in those jurisdictions. Financial institutions will ultimately need to work with the local government authorities and regulators in those countries once the final FATCA regulations are issued, to determine whether possible solutions can be implemented to address these potential conflicts.

(a) **Taiwan:** for individuals who refuse to consent, unilateral closure of their accounts is restricted under Taiwan law. Under the Consumer Protection Law, a customer may claim against a bank for termination of the relevant contract or damages. A customer may also complain to the Consumer Protection Foundation, and request the Foundation to bring a class action against the bank for "unequal" treatment.

(b) **Indonesia:** a bank will breach a customer's

ownership rights under Indonesian law should it undertake a unilateral closure of a customer's account. Similar to laws in China and India, there are significant restrictions in Indonesia around a bank's ability to send customer data offshore. This would include the data required to meet FATCA obligations.

(c) **Vietnam:** banks only have limited rights to close an account of a customer, relevantly when the account owner breaches his or her agreement with the bank. Whilst it is possible to amend account terms and conditions for new customers to recognise a bank's right to close a customer's account if it finds the account Is actually a US reportable account (and consent to disclosure has not been provided), it is unclear whether the bank would have the ability to do this for existing customers.

(d) **Singapore and Hong Kong:** whilst unilateral closure of a customer's account is permitted, such closure must be on reasonable notice, and otherwise be on the terms and conditions of that customer's account. The terms and conditions would need to be amended to permit the right to close a customer's account if the bank finds the account is a US reportable account, and consent to disclose has not been provided. This may not be able to be implemented for existing customers.

(e) **China:** unless it is expressly agreed in the customer's bank account opening agreement, a bank could not close a customer's account if it finds the account is a US reportable account and consent to disclosure has not been provided. Concerns again arise as to whether this can be implemented for existing customers. The Peoples Bank of China recently issued a ruling prohibiting retail customers in China being able to consent to have their bank information sent offshore.

(f) **Korea:** written consent for disclosure of financial transaction information will need to identify the proposed transferee, the scope of information to be disclosed, the date of consent, and the period

for which the consent is valid. For personal information, the consent must also identify the person within the IRS in charge of management of the information, the purpose for which the information will be used, the items of information transferred, the date, time and method of transfer, and the period for the possession and use of the information. This will require banks to implement a process to refresh consents on an ongoing basis, adding additional cost and complexity.

(g) **Japan:** the action of dosing of an account, or a refusal to provide a banking service, on the basis of failure to provide consent to disclose could be considered offensive to the public order and morals under the Civil Code of Japan, and therefore may be prohibited.

(h) **India:** new data privacy regulations recently introduced in India impose further conditions on the form of consent. The regulations limit the exporting of sensitive personal data (such as financial information) to countries whose data privacy laws match those in India. Further consultation would be required with Indian authorities to understand if they consider USA data protection laws equivalent to those prescribed in India, failing which banks in India would be unable to comply with the proposed FATCA requirements (even if customer consent was obtained).

In addition, terminating or denying to provide banking services on the grounds of nationality (in this case, on the grounds of their US status) could be construed as a breach of various local anti-discrimination laws. Further consultation with relevant anti-discrimination authorities in those countries would be required to understand if this view would be taken in these circumstances.

FATCA requires foreign financial institutions to withhold on payments to recalcitrant account holders. From our review of the jurisdictions in which ANZ operates, the imposition of such withholding to enforce US tax obligations will not be permitted under local laws in the absence of clear and specific consent from customers to do so (there may also be no legislative mechanism under the local laws to allow withholding for a foreign country). Customers could therefore take legal action against a bank to recover any amounts so withheld resulting in civil and conceivably criminal liability, as well as the cost of litigation and reputational issues.

The combined impact of these key conflicts of law challenges will potentially put banks with global operations in a position where they face either financial sanctions in the US for violating their FATCA

FFI agreement (by complying with local laws), or legal sanctions in the local jurisdiction for complying with their FATCA FFI agreement. It must be recognised that banks, such as ANZ, have a limited ability to affect how local laws and regulations are implemented and interpreted by the relevant government and regulatory authorities.

Potential solutions to legal impediments

We support the proposal of the ABA Submission to recognise the use of double tax treaties between governments. In countries without Double Tax Agreements with the USA, we suggest Taxation Information Exchange Agreements (TIEA) might offer an alternative method to overcome the conflicts of law concerns. Such agreements and treaties enable the exchange of information between the IRS and the local tax authority in conformity with local laws. This will address conflicts of law concerns in some jurisdictions.

Furthermore, we propose that information disclosure and withholding consent processes apply only to new customers, or when a new account or relationship is entered into with an existing customer. This will assist in avoiding conflicts of law in jurisdictions where new account opening terms need to be introduced (e.g. to address the bank's ability to close accounts where there is a failure to provide consent should the account become a reportable US account).

Potential solutions to key business challenges in complying with FATCA

The breadth and scope of FATCA will necessitate significant changes to banking systems and processes. The Notices in their current form create an excessive financial burden for a customer base that is overwhelmingly composed of non-US persons and persons who have no US connection. Compounding this, the changes introduced in *Notice 2011-34* include several subtle variations rather than a one size fits all approach. For each subtle variation, an added complexity and its associated burden is introduced. This results in more complex manual processes, more costly technology solutions and a higher risk that banking staff required to implement the FATCA requirements will simply not be able to understand what is needed. The challenge will not just be faced in the initial implementation, but also on an ongoing basis, given the significant staff training requirements to support the implementation of FATCA.

Pre-existing Individual Accounts

Limiting the application of FATCA to new customers will greatly reduce the complexity, administrative burden and associated compliance costs for participating banks. In doing so, FATCA would be less cumbersome to implement and would provide a more realistic opportunity for banks to adhere to mandated timelines.

If an analysis of pre-existing customer accounts is required, we believe that customer searching should be entirely electronic. It should also exclude the need to undertake broader searching of associated customer connections, such as families and entities.

Entity tracing of pre-existing accounts to establish beneficial ownership is also a significant problem. There is an onerous level of manual activity needed to undertake a multi-level tracing requirement for the entire customer base. Trapping this in systems to enable electronic access, searching and reporting capabilities will be a costly exercise, as this is a major deviation from the current anti-money laundering and know-your-customer (AML-KYC) approach (i.e. beneficial ownership is currently only addressed at initial customer 'on-boarding').

Furthermore, if an analysis of pre-existing entities is required we suggest the current ratio determining 'U.S. substantial ownership' be amended, The Notices currently specify that the collection and verification of customer information for private or unlisted companies with indicia of 'U.S. substantial ownership' be 10%, This could be amended to 25% to align with AML-KYC requirements. This would significantly reduce overhead expenditure in complying. We consider this to be mutually beneficial as it allows the IRS to focus on 'key customers/entitles' and greatly simplifies the application of FATCA for banks.

We consider that the optimum approach is to focus on the potentially high risk areas of a FFI's business. We support an approach focussing solely on the Private Banking business (i.e. accounts managed by a 'Relationship Banking Manager') or large accounts with a de minimis threshold set at a realistic target, say **USD500,000.** Removing all pre-existing individual requirements outside of the Private Bank verification and concentrating effort on the single account de minimis threshold, would benefit both complying banks (i.e. reduced scope, time to implement and cost) and the IRS (i.e. focussing on the customers the IRS are most interested in).

Following an initial electronic search (prefaced on the scope above) we would expect to undertake a reasonable due diligence process on customers returning a positive test for defined US indicia.

We seek clarification on the audit and 'diligent review' requirements and processes. In particular:

(i) the extent to which a relationship manager is required to undertake a review and trace the associated party relationships of clients;

(ii) the meaning of 'existing computerised information' and whether the use of the term suggests that aggregation of customer accounts must only be undertaken if existing systems allow.

We note that enforcing any form of aggregation will add significant complexity and cost to any potential technology solution.

We consider that FATCA should encourage compliance through the promotion of efficient, fully automated electronic search capabilities. This will limit the manual requirements placed on FFI's to the high-risk elements of the FFI's business. Furthermore, all searches and reporting requirements should

be accepted on an account-by-account basis without aggregation steps, including aggregation within individual systems.

Phased implementation approach

Financial institutions generally require at least 18 months to develop and test systems changes of the breadth and complexity required by FATCA. The finalisation of regulations is important to define business requirements from which organisations must design, build, test and implement solutions. We are concerned there may not be sufficient time to develop and implement systems and processes required to become compliant by the 1 January 2013 commencement date.

We suggest the adoption of a phased-in approach. This could include capturing new indicia data for new accounts and then concentrating on the risk areas. For example, accounts managed by private banking departments and single large accounts with balances of USD500,000 or more. We consider a phased-in approach is warranted given the delays in issuing draft and final regulations.

This approach would enable FFI's to commence technology effort towards capturing the new data requirements, whilst providing a grace period to commence work activity on high net worth individuals.

The proposed phased implementation recognises that large banking organisations with complex information technology systems will require significant lead-times to design, develop and implement changes to meet FATCA requirements. We propose that FFI's be allowed a phased-in period of 18 months after the effective date of the proposed Regulations and any associated administrative guidance issued by the IRS.

Deemed compliant status

Although the latest Notice already allows for local members of a participating FFI Group to achieve a deemed complaint status with an agreement with the IRS, the local entity still needs to confirm the following;

1) No operations outside the country of organisation;

2) Does not solicit account holders outside the country;

3) Implements certain pre-existing account and customer identification procedures; and

4) If specified types of accounts are found, it will either enter an FFI Agreement, transfer the accounts to a participating FFI, or close those accounts.

This has the potential to introduce practical problems for FFI's. It still requires 'deemed compliant' FFI's to implement new on-boarding processes and pre-existing customer identification procedures.

In certain jurisdictions an 'opt out' step should be allowed for low risk jurisdictions/entities. This would include entities that do not have any US customers, US interests or US connections, or who are offering products that would be considered to be in a lower risk group.

Furthermore, we propose that if one member of an 'expanded affiliated group' cannot satisfy FATCA obligations by virtue of a conflict of law in their local jurisdiction, then it would not have the effect of making that member, or the 'expanded affiliated group', non-compliant. We propose the following key amendments to the design of the FATCA regulations to assist with a practical implementation across multiple jurisdictions and entities:

- Allow for a single registration for each participating FFI, whilst providing an 'opt out' arrangement for individual entities which are considered low risk.

- On the data privacy concern arising from a conflict of law in certain jurisdictions, we suggest that an exclusion approach be applied, ensuring FFI's are not to be penalised if they are not able to comply with FATCA requirements in these jurisdictions.

Passthru payment methodology

Section II of the Notice prescribes a seemingly straight-forward mechanical approach (a "percentage of assets" test) that is intended to enable a participating FFI to satisfy its obligations under *section 1471(b)(1)(D)* to withhold on so-called "passthru payments" made to recalcitrant account holders and non-participating FFI's. We recommend that the wide application of this method be abandoned and not included in the forthcoming proposed regulations.

We consider the proposed method reflects a questionable interpretation of the underlying provision of FATCA, It would be extraordinarily difficult, if not impossible for many participating FFI's to administer. The deeming nature of the passthru percentage methodology itself, absent an ability to demonstrate that the payment Is linked to (i.e. "attributable to") a withholdable payment, may raise questions under applicable local law, In particular, this applies to the legal ability of a participating FFI to withhold on interest, or other payments made to account holders classified as recalcitrant, or to non-participating FFI's.

The proposed passthru percentage test effectively creates a wholly artificial concept of passthru payment. The method is so broad it ignores the requirement of the statutory provision, that a payment be "attributable to" a withholdable payment. The proposal thereby leads to a withholding event, notwithstanding there being no demonstrable relationship between the payment and an underlying US withholdable payment.

In our view, this statutory requirement cannot be ignored. Rather, it should be interpreted to require that there be some identifiable link between the payment and funds transferred to the participating FFI from the United States (i.e. a withholdable payment). Moreover, the manner in which other features of the proposed percentage of assets test would be applied underscores the artificial nature of the results it would produce.

If a percentage of assets test, or other method, is to be applied as a solution to the complexity of passthru payments, we recommend the IRS work with the financial industry to devise a simple, practical methodology.

Conclusion

Thank you for considering our views. A delegation from the Australian Banking Association (ABA) will visit Washington D.C on the 23 and 24 of June and will include representatives from ANZ. We look forward to discussing this further with you. We remain pleased to work with overseas authorities, and with the Australian and US Governments to develop a more practical solution to the problem of tax evasion.

Yours sincerely,

Alex Thursby
Chief Executive Officer, Asia
Pacific, Europe & America
Australia and New Zealand Banking
Group Limited
Docklands, VIC

FOOTNOTES:

n1

GICS and FTSE sector scheme data, January 2011.