



GLOBAL INVESTIGATIONS & COMPLIANCE

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COMBATTING OFFSHORE TAX EVASION FROM THE FINANCIAL INSTITUTION'S PERSPECTIVE

HOW ASPECTS OF FATCA COMPLIANCE PROGRAMS CAN BE LEVERAGED TO MEET THE REQUIREMENTS OF THE COMMON REPORTING STANDARDS

I. INTRODUCTION

Over the past few years, financial institutions ("FIs") around the globe have continued their efforts to become fully compliant with the Foreign Account Tax Compliance Act ("FATCA").¹ These institutions are striving to achieve compliance by building an internal FATCA compliance framework, conducting necessary due diligence on their account holders, and updating their internal monitoring programs to comply with FATCA. In short order, FIs will need to expand their FATCA compliance programs even further to meet the additional anti-tax evasion requirements being adopted by the international community, most notably, the Common Reporting Standards ("CRS") and due diligence standards developed by the Organization for Economic Cooperation and Development ("OECD").

FATCA was enacted in the U.S. to combat offshore tax evasion by enabling the U.S. tax authority, the Internal Revenue Service ("IRS"), to better enforce compliance and recoup potentially unreported tax revenues from accounts maintained outside the United States. The U.S. is, however, not alone in its efforts; the passage of FATCA has emboldened others such as the OECD.

The FATCA Model 1 intergovernmental agreement ("IGA") is very similar to the CRS and due diligence standards developed by the OECD, working with the G20 and the EU.² In fact, as the OECD has stated, the chief differences between FATCA and

1/ FATCA is found within Chapter 4 of Subtitle A of the Internal Revenue Code, and is further clarified by the Final Chapter 4 Treasury Regulations (found in the Federal Register at 78 FR 5874).

2/ See, Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard (OECD Feb. 23, 2013), <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf>.

3/ Standard for Automatic Exchange of Financial Account Information in Tax Matters, p. 10 (OECD Oct. 29, 2014), <http://www.gfintegrity.org/wp-content/uploads/2014/07/OECD-Full-AutoExchangeStandard-July2014.pdf>

the CRS are primarily “driven by the multilateral nature of the CRS system.”³ These differences are acknowledged and further expanded upon in the OECD’s recently released Implementation Handbook (“The Handbook”).⁴ The Handbook was designed to primarily assist governments, but is also useful to FIs, in implementing the global exchange standards while also leveraging any work completed in furtherance of a FATCA compliance program.

account holder populations.

II. FATCA ACCORDING TO THE MODEL 1 INTERGOVERNMENTAL AGREEMENT

FATCA is a law designed to combat offshore tax evasion by requiring foreign (i.e., non-U.S.) FIs, commonly referred to as “FFIs,” to identify and report upon their U.S. account holder populations. FATCA revolves around information reporting, which is based on the FFI’s due diligence results, but how that information is reported depends upon whether the FFI is located in a jurisdiction that has a FATCA IGA in place, and, if a FATCA IGA exists, the type of FATCA IGA in effect.⁵

A FATCA Model 1 IGA is an agreement between the U.S. and a non-U.S. jurisdiction—referred to as a “partner jurisdiction”—that allows for the proper administration and implementation of FATCA by making the FATCA IGA part of local law in the partner jurisdiction.⁶ An FFI located in a FATCA Model 1 IGA jurisdiction (hereinafter, “Model 1 FFI”) reports upon its U.S. account holder population directly to its own local government, which in turn provides that information to the IRS.⁷ To comply with a FATCA Model 1 IGA, an FFI must have due diligence processes and procedures in place to identify its U.S.

4/ Standard for Automatic Exchange of Financial Account Information in Tax Matters: Implementation Handbook (OECD Aug. 7 2015), <http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>.

5/ This paper will only cover FATCA compliance pursuant to the requirements of a FATCA Model 1 Intergovernmental Agreement, and will not cover FATCA compliance pursuant to a FATCA Model 2 Intergovernmental Agreement or the FATCA Final Regulations.

6/ A FATCA Model 2 Intergovernmental Agreement, which is not the focus of this paper, allows an FFI in a Model 2 IGA partner jurisdiction to report upon its U.S. account holders directly to the IRS by way of a signed contract (referred to as an “FFI Agreement”).

7/ FATCA Model 1 IGAs come in two varieties, the reciprocal FATCA Model 1A version and the non-reciprocal FATCA Model 1B version.

8/ See, OECD Automatic Exchange of Information, <http://www.oecd.org/tax/exchange-of-tax-information/automaticexchange.htm>.

9/ Id.

10/ The full Standard for Automatic Exchange of Financial Account Information in Tax Matters was released on July 21, 2014, Id.

11/ The complete list of signatory nations to the CRS, along with their intended first information exchange date, may be found at, <http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf>.

12/ Supra note 2 at §I.A.1. (p. 18).

13/ Id.

III. OECD

International political interests began seriously focusing on the advantages of automatic exchange of taxpayer information in 2012.⁸ The G20 endorsed the automatic exchange of information (“AEOI”) as the new standard,⁹ eventually giving life to what is now the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters.¹⁰ Similar to a FATCA Model 1 IGA, the CRS provides a model for its signatory nations, referred to as “Reportable Jurisdictions,” to follow.¹¹ In general, the CRS requires each FI located within a Reportable Jurisdiction, or Reporting FI (“RFI”), to report the name, address, jurisdiction(s) of residence, taxpayer identification number, or TIN, and date and place of birth of each Reportable Person who is an account holder to each Reportable Jurisdiction in which indicium of residence is identified.¹² In addition to this identifying information, the account number (or its functional equivalent), name and identifying number of the RFI, as well as the account value, must also be reported.¹³

IV. EXAMPLES OF POTENTIAL UPDATES TO THE FI’S FATCA COMPLIANCE PROGRAM

With the recent adoption of the OECD, it would be wise for Model 1 FFIs to be mindful of the CRS and to plan for the appropriate procedures to account for both FATCA and the CRS, especially given the number of overlapping nations that have adopted both regimes.¹⁴ Fortunately, there are many similarities between the two regimes, so many facets of the FI’s current FATCA compliance program can likely be leveraged to meet the requirements of the CRS.¹⁵

A. Due Diligence and Client Identification Updates

Both reporting frameworks require FIs to request a self-certification from its account holders as part of the onboarding process, but the CRS requires slightly more information than FATCA. For example, in order for a Model 1 FFI that has a preexisting FATCA-compliant program to also be CRS-compliant, it must collect place of birth and date of birth information and all tax residency statuses for the account holder or individuals associated with the account. This information may already be obtained as part of the client onboarding process, but ensuring the information can ultimately be reported, which may include storing the information electronically, is key. If the FI does not currently collect this information it will have to on a go-forward basis.

^{14/} See, Appendix A, Jurisdictions That Have IGAs (in Full-Effect or in Substance) and are Signatories to the CRS, for the full list of countries that have adopted both frameworks.

^{15/} See, Appendix B, Comparison of Key Points Relating to FATCA and CRS, which outlines certain topics and the way each is addressed according to the Model 1 FATCA IGA and the CRS.

Also, there is no de minimis value-threshold exemption for individual account holders. In order for an FI to be CRS-compliant it must review and classify all of its customers to determine if they have tax-residence in a Reportable Jurisdiction. For that same FI to be considered a FATCA-compliant Model 1 FFI, it must review accounts for indicia of U.S. taxpayer status, but may exclude individual accounts valued below \$50,000 from review. Accordingly, for a FATCA-compliant Model 1 FFI to be CRS-compliant it will have to review a much greater number of accounts and its volume of reporting will increase.

B. Reporting

The next issue arises in the varying reporting obligations under FATCA and the CRS, namely what information must be reported and what jurisdictions must the information be reported to. Under a FATCA Model 1 IGA, an FI would need to have processes and procedures in place to properly identify U.S. indicia and report upon its U.S. account holder population. Under the CRS, on the other hand, the FI must treat the account holder as a tax resident of every jurisdiction for which indicia of tax residence exists. Thus, for a Model 1 FFI to also be CRS-compliant it must amend its reporting processes and procedures to identify an account holder's residence status and report that information ultimately to all Reportable Jurisdictions for which the account holder is a tax-resident while accounting for the difference in attributes of the account holder that must be reported.

C. Definitional Differences

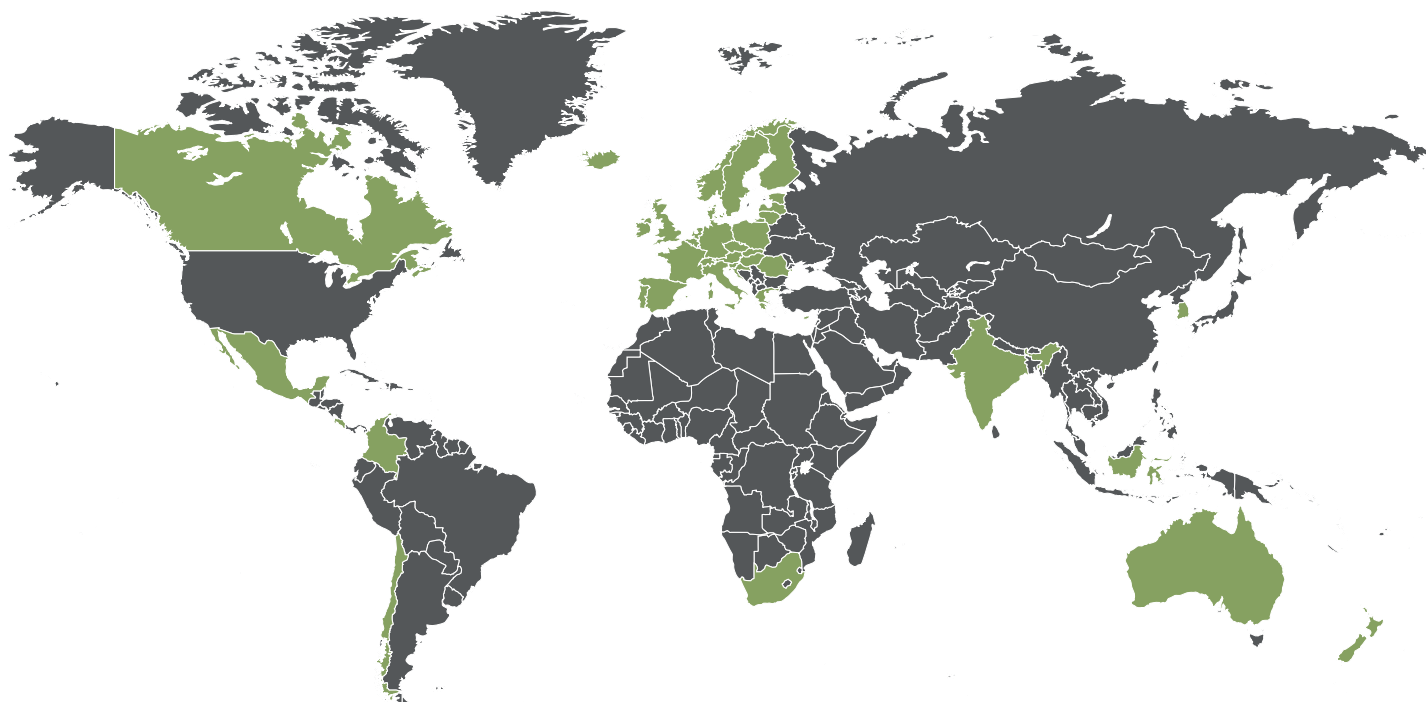
There are subtle differences in the way terms are defined between the FATCA Model 1 IGA and the CRS that could cause some conflicting reporting and due diligence issues. For example, unlike the CRS, the FATCA Model 1 IGA treats FIs with a local client base as deemed-compliant FFIs, exempting them from FATCA's reporting obligations.¹⁶ Because no corresponding exemption exists in the CRS,¹⁷ the same non-reporting FI in a FATCA Model 1 IGA jurisdiction would be considered a reporting FI under the CRS.

Other exemptions may also arise with a fully executed FATCA IGA after accounting for the partner jurisdiction's negotiated positions. For instance, based upon the negotiated position(s) of the partner jurisdiction, certain financial products can be excluded from due diligence and reporting under a FATCA IGA, but may not be excluded under the CRS. It is, therefore, important to keep apprised of the various exemptions in the jurisdictions in which the FI operates to be both FATCA and CRS-compliant.

¹⁶/ Model 1 IGA, Annex II, §III.A. (p. 5) <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Annex-II-to-Model-1-Agreement-11-30-14.pdf>.

¹⁷/ Supra note 2 at §VIII.B. (p. 31).

Appendix B: Jurisdictions That Have IGAs (in Full-Effect or in Substance) and are Signatories to the CRS



JURISDICTIONS				
Anguilla	Curacao	Iceland	Mauritius	Slovenia
Australia	Cyprus	India	Mexico	South Africa
Austria	Czech Republic	Indonesia	Montserrat	South Korea
Belgium	Denmark	Ireland	Netherlands	Spain
Bermuda	Estonia	Isle of Man	New Zealand	Sweden
British Virgin Islands	Finland	Italy	Norway	Switzerland
Canada	France	Jersey	Poland	Turks and Caicos Islands
Cayman Islands	Germany	Latvia	Portugal	United Kingdom
Chile	Gibraltar	Liechtenstein	Romania	
Colombia	Greece	Lithuania	San Marino	
Costa Rica	Guernsey	Luxembourg	Seychelles	
Croatia	Hungary	Malta	Slovak Republic	

A complete list of nations that have IGAs (in Full-Effect or in Substance) with the US, along with their date of signing, may be found at, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>. The complete list of signatory nations to the CRS, along with their intended first information exchange date, may be found at, <http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf>.

Appendix B: Comparison of Key Points Relating to FATCA and CRS

Below is a table comparing and contrasting certain key points of the FATCA Model 1 IGA to the Model Agreement under the CRS.¹⁸

CATEGORY	TOPIC	FATCA MODEL 1 IGA	MODEL COMPETENT AUTHORITY AGREEMENT AND CRS
Due Diligence for New Accounts	Required to Request Self-Certification for New Accounts	Yes	Yes¹⁹
	Value Threshold for Self-Certifications	Greater than \$50,000	No de minimis threshold exemptions for new or pre-existing accounts.
Due Diligence for New and Pre-Existing Accounts	Accounts of Non-Compliant Account Holders (i.e., Recalcitrant Accounts) Must Be Withheld Upon or Closed	No²⁰	No
	Change in Circumstance Monitoring	Yes²¹	Yes²²
Due Diligence for Pre-Existing Accounts	Applicable De Minimis Thresholds For Account Review	Greater than \$50,000 for Individual Accounts	No de facto de minimis threshold exemptions for Individual Accounts ²³
		Greater than \$250,000 for Entity Accounts	Greater than \$250,000 for Entity Accounts ²⁴
	Effect of Finding Indicia of Residence and/or Citizenship	If indicia of U.S. citizenship or residence are discovered, then the FI must treat the account holder as a U.S. taxpayer assuming no rebuttal information is identified.	If indicia of tax-residence of a Reportable Jurisdiction(s) is discovered, then the RFI must treat the account holder as a tax-resident of every single Reportable Jurisdiction for which indicia exists assuming no rebuttal information is identified. ²⁵

^{18/} The Handbook further expands upon this comparison and highlights more subtle nuanced differences between a FATCA Model 1 IGA and CRS. Supra note 4.

^{19/} Supra note 2 at §IV.A. (p. 24).

^{20/} Model 1A IGA, Article 4, §2 (p. 13), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf>

^{21/} Model 1 IGA, Annex I, §II.E.5. (p. 8), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Annex-I-to-Model-1-Agreement-11-30-14.pdf>.

^{22/} Supra note 2 at §III.C.9. (p. 23).

^{23/} It is important to note an RFI may be exempted from performing an electronic records search for Reportable Jurisdiction(s) indicia for individual accounts valued below \$1,000,000 (referred to as "Lower Value Accounts") only if a residence address is on file. Id. at §III.B. (p. 20).

^{24/} Under the CRS, pre-existing entity accounts that fall below a \$250,000 threshold are not required to be reviewed, identified, or reported by the RFI. Id. at §V.A. (p. 24).

^{25/} Supra note 2 at §II.B.4. (p. 20-21).

CATEGORY	TOPIC	FATCA MODEL 1 IGA	MODEL COMPETENT AUTHORITY AGREEMENT AND CRS
Due Diligence for Pre-Existing Accounts	Indicia for Pre-Existing Account Review	<p>Indicia to determine U.S. person status:</p> <ul style="list-style-type: none"> • Identification of the Account Holder as a U.S. citizen or resident; • Unambiguous indication of a U.S. place of birth; • Current U.S. mailing or residence address (including a U.S. P.O. box); • Current U.S. telephone number • Standing instructions to transfer funds to an account maintained in the United States • Currently effective power of attorney or signatory authority granted to a person with a U.S. address • An “in-care-of” or “hold mail” address that is the sole address Financial Institution has on file for the Account Holder. 	<p>Indicia to Determine Tax Residence:²⁶</p> <ul style="list-style-type: none"> • Identification of the account holder as a resident of a reportable jurisdiction; • Current mailing or residence address (including a P.O. box) in a reportable jurisdiction; • One or more telephone numbers in a reportable jurisdiction and no telephone number in the jurisdiction of the reporting financial institution • Standing instructions to transfer funds to an account maintained in a reportable jurisdiction • Currently effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction • A “hold mail” instruction or “in-care-of” address in a reportable jurisdiction if the reporting financial institution does not have any other address on file for the account holder
	Identification of Passive Non-Financial Entity Accounts and its Controlling Persons	<p>FFI must determine whether the account holder is a passive non-financial foreign entity (“NFFE”) with one or more controlling persons, then determine whether the controlling person(s) is a citizen or resident of the U.S. (and therefore a U.S. Reportable Account).²⁷</p>	<p>RFIs must determine whether the account holder is a passive non-financial entity (“NFE”) with one or more controlling persons, then determine whether the controlling person(s) is a resident of a Reportable Jurisdiction (and therefore a Reportable Account).²⁸</p>

26/ Supra note 2 at §III.B.2. (p. 20).

27/ Supra note 21 at §IV.D.4 (p. 11); §IV.B. (p. 13).

28/ Supra note 2 at §V.D.2. (p. 25); §VI.A.2 (p. 26).

CATEGORY	TOPIC	FATCA MODEL 1 IGA	MODEL COMPETENT AUTHORITY AGREEMENT AND CRS
Due Diligence for New Accounts	Relationship Manager Knowledge Inquiry	For accounts valued above \$1,000,000 the FFI must inquire to see if the Relationship Manager has actual knowledge that the account holder is a U.S. person. ²⁹	For accounts valued above \$1,000,000 the RFI must inquire to see if the Relationship Manager has actual knowledge that the account holder is a tax-resident of a Reportable Jurisdiction. ³⁰
Reporting	Multiple Country Reporting Possibly Required	No	Yes ³¹
	Information to be Reported by 2016 or a Later Agreed Upon Date	<ul style="list-style-type: none"> • Name • Address • U.S. TIN (individuals and entities) • Account number (or functional equivalent) • Account balance or value • Additional income or payment information depending on the type of account³² 	<ul style="list-style-type: none"> • Name • Address • Jurisdiction of Residence • TIN (individuals and entities) • Date of birth • Place of birth • Account number (or functional equivalent) • Name and identifying number of the FI • Account balance • Additional income or payment information depending on the type of account³³

V. CONCLUSION

The passage of FATCA by the U.S., followed by the signing of the OECD's Standard for Automatic Exchange of Information by more than 60 nations, demonstrates a concerted global effort to combat tax evasion and recoup much needed tax revenues. This becomes even more apparent since the U.S. has begun to automatically exchange financial account information with certain foreign tax administrations pursuant to FATCA IGAs that are in place, which the IRS announced on October 2, 2015 by way of

²⁹/ Supra note 21 at §II.D.4. (p. 6).

³⁰/ Supra note 2 at §III.C.4. (p. 22).

³¹/ Id. at §III.B.4. (p. 20-21).

³²/ Supra note 20, Article 2, §2 (p. 9). Additionally, the IRS recently released Notice 2015-66, which amends FATCA to extend the start date of withholding on gross proceeds and foreign pass-thru payments by adjusting the definition of the term withholdable payment, among other things. This is intended to reduce the burden on withholding agents.

³³/ Supra note 2 at §I.A.1. (p. 18).