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FStaxworld
Your April snapshot

In this month's FSt*axworld*, we address the treatment of the U.S. for purposes of OECD CRS.

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The View from Deloitte

Dear Reader,

Since the U.S. declaration that it would not commit itself to the implementation of the OECD Common Reporting Standard (CRS), the question of the treatment of the U.S. hovered over the application of CRS. The recent emergence of certain white lists sharpened the debate, as a few jurisdictions included the U.S. on their white lists of Participating Jurisdictions.

The appearance of any jurisdiction on the white list of another jurisdiction confers significant benefit to any Professionally Managed Investment Entity (PMIE) type Financial Institutions (FIs) resident in the former jurisdiction, but holding financial assets offshore in the latter. Namely, such white list treatment permits Reporting FIs

to respect the FI categorization of the PMIE because it is treated as resident in a Participating Jurisdiction from the perspective of the jurisdiction of the Reporting FI. Under a white list approach, such respect would apply even though the PMIE will itself not incur any of the compliance obligations that a PMIE in a jurisdiction implementing CRS would incur and thus its account holders will not be subject to reporting. Alternatively, the Reporting FI would regard the PMIE as resident in a non-Participating Jurisdiction, treat it therefore as a “deemed” Passive NFE and accordingly subject it to look-through treatment, requiring disclosure (and potential reporting) of the Controlling Persons of the PMIE.

In the absence of a white list approach, only PMIEs resident in jurisdictions with which the jurisdiction of the Reporting FI has a CRS agreement in place could qualify for Participating Jurisdiction status. In view of the gradual progress of such agreements, the OECD CRS Handbook, published last September, endorses the use of a transitional white list, covering either all jurisdictions committed to CRS implementation or all signatories to the Multilateral Competent Authority Agreement (MCAA). The U.S. satisfies neither criterion.

The U.S. contends, however, that it is already subject to enhanced global reporting requirements as part of its obligations under the many reciprocal Model 1 IGAs it signed under FATCA and therefore should be afforded treatment as a Participating Jurisdiction. Whether the lean reporting obligations specified for the U.S. in the Model 1 IGA amounts to participation in the global tax transparency regime imagined by CRS is debatable, but evidently most jurisdictions remain unconvinced.

So far, most jurisdictions publishing a CRS white list adhered to the recommendation set forth in the OECD CRS Handbook, limiting the listed jurisdictions to those with a demonstrable commitment to CRS itself. However, not every jurisdiction rejected the U.S. claim outright. Both the British Virgin Islands (BVI) and Liechtenstein, for example, released preliminary drafts of white lists for their respective jurisdictions, naming the U.S. However, soon after the release of such preliminary white lists, both these jurisdictions reversed their position for unspecified reasons, removing the U.S. from subsequent drafts of their white lists. More recently, Luxembourg released a white list including the U.S. Whether Luxembourg can resist whatever persuasive pressures convinced BVI and Liechtenstein to abandon their preliminary stances is as yet unknown.

The balance is delicate. If a jurisdiction can name and maintain a white list including the U.S., its neighbours are likely to adopt the same approach or risk competitive disadvantage for U.S. investments. However, if U.S. PMIEs suffer scant regulatory discomfort from non-compliance with a global system, the advantage for the U.S. as a jurisdiction from which to manage assets held overseas will be amplified in contrast to the jurisdictions implementing CRS. Therefore, each jurisdiction faces a classic tragedy of the commons dilemma: It is in the interest of each jurisdiction to include the U.S. on its own white list, but to ensure that the other jurisdictions implementing CRS exclude it from theirs. So far the unified front remains mostly intact, but the allure of dollar investments may, nonetheless, crack it.

Regards,

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