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FStaxworld
Your September snapshot

In this month's FS*taxworld*, we explore the purpose and content of the recently-released CRS Implementation Handbook.

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The View from Deloitte

Dear Reader,

On 7 August 2015, the Organisation for Economic Co-operation and Development (OECD) released the CRS Implementation Handbook (hereafter, the "Handbook"). As stated in its preface, the Handbook purports to assist government officials in the implementation of the OECD Common Reporting Standard (CRS). Accordingly, the Handbook provides a practical guide to the steps necessary to craft CRS as a set of domestic regulations and thus provides an overview of the legislative, technical and operational issues along with a more detailed discussion of the key definitions and procedures, via the following structure:

• Part I: An Overview of the Steps to implement the Standard

• Part II: Overview of the OECD Commentary and due diligence rules

- Chapter 1: Reporting Financial Institutions (Reporting FIs)
- Chapter 2: Financial Accounts
- Chapter 3: Financial Accounts which are Reportable Accounts
- Chapter 4: Due diligence procedures
- Chapter 5: The information that gets reported and exchanged
- Chapter 6: Treatment of trusts

• Part III: The Standard compared with FATCA Model 1 Intergovernmental Agreement (IGA)

• Annex I: CRS-related Frequently Asked Questions

Much of the material from the core sections of the Handbook is lifted directly from the OECD Commentary with scant further elaboration and is thus of limited interest to those already well-versed in the current technical state of the CRS rules. More valuably, however, the Handbook also provides new measures (notably on the treatment of trusts) and material updates on previously-introduced concepts. These sections complement existing understanding and provide insights into potential CRS market standards that may be adopted. In whole or in part, by jurisdictions without the wherewithal or inclination to tailor rules to their own financial industry needs.

Part I

In addition to the specifications on the use of primary legislation, secondary legislation and guidance for governments preparing the local laws to govern CRS implementation in their jurisdiction, Part I of the Handbook sets out a series optional provisions for jurisdictions to consider. These options relate to topics reserved in the OECD Commentary for local deliberation and are grouped into three general categories:

- Reporting Requirements (referring to Section I to CRS);
- Due Diligence (referring to Section II-VII of CRS); and
- Definitions (referring to Section VIII of CRS).

In addition, Part I outlines additional details provided in the OECD Commentary that may need to be factored into the legislative decision-making process, including:

- Substantive additional details (e.g. the treatment of joint account holders, the scope of the application of the Controlling Person concept to a trust, etc.);
- "Wider" versus "staggered" approaches to implementing due diligence compliance obligations;
- Transitional challenges resulting from phased adoption of CRS and the outline of a possible "white list" approach;
- Provisions to name jurisdiction-specific low risk institutions and accounts;
- Key differences to FATCA to be considered when implementing CRS; and
- Obligations for jurisdictions to ensure effective implementation.

Several of the above items, notably the "white list" approach and availability of both "wider" and "staggered" approaches in key financial center jurisdictions, will be crucial developments for both global financial groups and Swiss financial institutions with significant cross-border activity.

Part II

As noted above, Part I tends to repeat concepts and compliance rules already set forth in the OECD Commentary. However, chapter 6 introduces detailed instructions on the rules governing trusts under CRS, both from the perspective of a trustee administering trusts and other similar fiduciary structures and from the perspective of a bank or other financial institution where trusts hold Financial Accounts (as defined under CRS). This chapter provides the depth of specific industry guidance that the trust industry lacked under FATCA and many IGAs. In so doing, however, it expands certain obligations beyond the demands of FATCA and the expectations under CRS.

For example, the Handbook states that trustees will always exercise ultimate effective control over a trust and thus qualify *per se* as Financial Account Holders of every trust they administer under CRS. While the language may seem intuitively applicable upon first impression, customary norms and canons of statutory construction had convinced most experts that trustees did not qualify under this term.

The Handbook also expressly requires trusts to look through any entity Account Holder for the natural Controlling Person of that entity. This requirement applies irrespective of the CRS status of the entity Account Holders and thus is materially more demanding than the similar requirement imposed on banks, which is limited to looking through entity Account Holders treated as passive NFEs.

Couple the two requirements together and trusts must report the Controlling Persons of the trust company that administers them. In the case of a trust company that is part of a larger financial group, a senior managing official of the trust company will be nominated, which should lead to non-reporting as he or she is likely to be treated as a domestic Account Holder of each trust administered by that trust company. However, smaller, privately-held trust companies will need to treat the shareholders of the trust company as Controlling Persons, which may result in significant additional reporting.

Other provisions in chapter 6 likewise tend to expand the obligations imposed on trusts under

CRS from the requirements mooted in the OECD Commentary. Presumably, financial centers with a prominent trust and fiduciary industry will specify less onerous obligations for their own trustees, but these rules may nonetheless encumber trusts administered out of atypical trust jurisdictions that adopt the Handbook provisions unreformed.

Part III

On the grounds that the OECD drafters expressly modelled CRS on the Model 1 IGAs, the Handbook confirms the similarities, while also highlighting areas where FIs cannot simply assume that their FATCA compliance activities are directly translatable to CRS. Accordingly, Part III contrasts the compliance obligations for an FI under CRS with those for a Model 1 FI under a FATCA Model 1 IGA, in the following fashion:

- Providing differences in wording between CRS and FATCA Model 1 IGAs;
- Explaining such differences;
- Recognizing where such differences can be overcome; and
- Identifying when jurisdictions can rely on the approach defined under CRS for FATCA purposes as well.

Annex I

The Annex of the Handbook includes a series of FAQs received by the OECD during the preparatory phases of the drafting of the Handbook (which evolved over several unpublished versions). The OECD had previously published many of these FAQs, but Annex I added a few more. Topics of particular interest amongst the FAQs include:

- Scope of obligations of an FI to establish the tax residency of Account Holders;
- The validation of TINs obtained from Account Holders;
- The relationship manager inquiry;
- Determination of the correct rule set for analysis of the CRS status of entities;
- Indirect investment in real estate;
- The possible statuses of a Central Bank, International Organization or Governmental Entity; and
- Reporting of domestic Controlling Persons.

Closing thoughts

Superficially, the Handbook appears to incorporate the OECD CRS Standard and Commentary in full and thus seemingly qualifies as the most comprehensive document released to date by the OECD for CRS implementation. It is not intended to substitute for the OECD CRS Standard and Commentary though. Until and unless implemented into applicable local law, the Handbook lacks any legal force and relies on persuasiveness and potential for its authority. As a result, any apparent inconsistencies between the Handbook and, say, the OECD Commentary, should be resolved in favor of the OECD Commentary. For any dissatisfied with its provisions, however, the comfort provided by such a secondary status may grow cold. The drafters designed the Handbook as a template for wholesale adoption by local authorities and the likelihood remains that many local authorities will do so. Any financial institutions or industry groups that object to content in the Handbook are urged to liaise with their local authorities in an effort to ensure that any such undesirable material is not enacted into their local implementing law.

Regards,
Paul Millen
Robin King

OECD CRS for Non-Financial Groups

The OECD Common Reporting Standard (CRS) is a FATCA-style regime developed by the Organisation for Economic Co-operation and Development (OECD) that will widen the scope of reporting and provide a standard for the automatic exchange of financial account information with respect to off-shore holdings. As with FATCA, the compliance obligations fall predominantly, but not entirely, on financial businesses. As a result of the introduction of CRS into Swiss law beginning in January 2017, Swiss non-financial groups can expect additional requests for information from their banks in Switzerland and across the more than 90 other countries that confirmed their intention to adopt this scheme as of 1 January 2016 for the 58 early adopters and one or more years later for the remaining jurisdictions.
Similar to the FATCA regime, Account Holders of FIs in the 90 countries currently adopting CRS should be prepared to certify not only their FATCA status but also their CRS status to avoid the practical consequences of non-compliance. Whereas failure to certify FATCA status may lead to 30% FATCA withholding on certain payments, a non-compliance with CRS may have as a consequence the denial of banking services with FIs or limited (or denied) access to funding.
The classification of entities under CRS is based on definitions developed under the FATCA Model 1 IGA. As such, a group that has already performed its FATCA entity classification exercise should use that analysis as a basis for preparing its CRS entity classification. While there will be local variations and differences in the classifications we would expect the information needed to perform the analysis to be broadly consistent whether preparing an analysis under FATCA or CRS rules. For those who have not yet completed their FATCA entity classification analysis for the group, we would recommend performing it as soon as possible in order to be prepared to respond to both FATCA and CRS requests on a timely basis.

For more information, please contact Brandi Caruso or Sarah Drye.

First Response to the Federal Council's Proposal for Implementation of the Swiss AEOI Act

At the end of August, the Swiss National Council's Committee for Economic Affairs and Taxation (CEAT-N) published its proposals to the National Council. The vast majority of the draft articles passed the CEAT-N as proposed by the Federal Council in the 5 June 2015 dispatch. Nevertheless, some notable changes were submitted for further discussion and decision:

- The Federal Tax Administration shall not be entitled to question representatives of a Financial Institution (cancelation of article 28 para 2(c)), but may still request written and oral information (article 28 para 2(b) - unchanged);
- The anti-abuse provisions in article 31 with regard to conduit structures shall be canceled in its entirety (article 31). The application of the current draft article could in practice lead to difficulties in definition. Nevertheless, cancellation of the article may trigger a push-back from the OECD/Global Forum as local anti-abuse provisions to prevent circumvention of the Common Reporting Standard (CRS) are required according to the OECD Commentary (Section IX) and the Handbook (Part I);
- Negligence with regard to reporting duties should not be treated as penal offense (cancelation of article 33 para 2); and
- With regard to potential partner countries, the Federal Council is required to analyze the applicable data privacy regulations and possibilities of taxpayers to regularize their past (new article 38a) before the proposal to enter into an AEOI-agreement is submitted to the Federal Assembly.

A minority (7 out of 25 members) expressed further concerns regarding the signing of the Multilateral Competent Authority Agreement (MCAA) and the Swiss AEOI Act. The minority proposed to neither approve nor reject the draft articles, but rather abstain from comment altogether. If comments are to be submitted, however, in addition to the Committee's proposals, their primary criticisms of the AEOI Act include the following:

- The Swiss tax authorities should be allowed to use information received from partner jurisdictions regarding Swiss taxpayers only in case of reasonable suspicion of serious tax evasion or tax fraud, which limits de facto the reciprocity of AEOI (article 20);
- The "unjustifiable" criminal penalties regarding incorrect self-certifications (CHF 10,000) should be limited to case of willful behavior (and, thus, exclude negligence) (article 36); and
- The activation of the MCAA with respect to any partner jurisdiction should be subject to a facultative referendum to strengthen democracy rather than being approved by the Swiss parliament with a simple resolution (*"einfacher Bundesbeschluss")* (cancelation of article 39).

As currently planned, the National Council will discuss the Committee's proposals and decide in its autumn session.

For more information, please contact Markus Weber or Robin King.

Report from the FATCA Frontlines: SIF Issues MoU regarding More Favorable IGA Terms

On 31 July 2015, the U.S. Treasury released a notification concerning more favorable terms afforded to another Partner Jurisdiction under a Model 2 IGA, as sent to Switzerland on 27

March 2015. The more favorable terms in the notification are based on the Bermuda-U.S. IGA from 19 December 2013. The publication can be found on the U.S. Treasury website. Based on the notification, the *Staatssekretariat für internationale Finanzfragen* (SIF) issued a Memorandum of Understanding (MoU), dated 28 July 2015. The MoU highlights two of the clauses included in the notification from the U.S. Treasury and clarifies that Swiss Financial Institutions that already applied the related procedures described in the Swiss-U.S. IGA can continue to rely on those provisions and report U.S. persons identified on that basis. Based on discussions with people familiar with the topic, it seems that the SIF determined that only these two clauses of the more favorable terms required further clarification and were therefore included in the MoU. Further, all clauses included by the U.S. Treasury in the notification seems to be applicable in Switzerland and an amended IGA is expected to be published. The MoU can be found on the SIF webpage.

For more information, please contact Markus Weber or Sarah Rathgeb.

Financial Institutions Facing Challenges during CRS Implementation

The implementation of CRS is beginning to take concrete shape. The sheer number of parallel developments increases the challenges for Financial Institutions. Our latest article in the September 2015 issue of the Expert Focus magazine (available here in German) provides an overview on the latest developments in Switzerland and internationally. In particular, we analyze (i) potential "triangulation" issues in relation to accounts held by professionally managed Investment Entities in Non-Participating Jurisdiction developments, (ii) the various implementation options for Financial Institutions, and (iii) other amendments to the Swiss draft AEOI Act.

For more information or a pdf copy of our article, please contact Markus Weber or Robin King.

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