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Tax Compliance

Global Transparency Effort Likely to Open Flood of Taxpayer Information in 2016

The global push to combat tax evasion is expected to generate a flood of information this year, with treatment of the data a challenge for governments around the world and a question for taxpayers.

Both reporting of overseas U.S. accounts under the Foreign Account Tax Compliance Act and a year of Swiss bank investigations are adding to the pile of information held by U.S. tax authorities. Officials say a major priority is to keep the data secure, yet at the same time use it to track down wrongdoing.

As those efforts move ahead, the role that financial institutions are expected to play in getting that information is likely to be tough.

FATCA, CRS May Lead to Confusion. Some jurisdictions are still working to adopt FATCA, which calls for foreign banks to tell the Internal Revenue Service about accounts held by U.S. taxpayers, while in others the transfer of information is in full swing.

Alongside this effort, the Organization for Economic Cooperation and Development's common reporting standard (CRS) is taking effect for some countries for the first time this year—an action that calls for complex multilateral reporting that could lead to major difficulties for both banks and governments.

The differences between the two regimes, including the threshold for reporting, are likely to create problems for banks, while many countries faced with implementing both FATCA and CRS are struggling with the need for guidance in short order, practitioners said.

Difficulties Predicted. “There is going to be a lot of confusion,” John Staples, EY LLP’s global markets leader for information reporting and withholding, told Bloomberg BNA. “It’s very, very hard for large globalized institutions to keep track of all that information.”

The differences between FATCA and CRS, including the threshold for reporting, are likely to create problems for banks, while many countries implementing the two regimes are struggling with the need for guidance in short order.

FATCA and CRS both carry big hurdles for financial institutions and big questions for taxpayers. Dozens of jurisdictions have signed intergovernmental agreements under FATCA that allow foreign banks to turn over account information to their own governments, which then would share the information with the IRS.

Koskinen: Data Under Scrutiny. While the exchange of information with the U.S. has already begun for a few countries, others have yet to enact legislation that would allow governments to do it.

However, IRS Commissioner John Koskinen said in late December that the data garnered so far was already under close scrutiny.

“We’re getting and sharing a lot of information, and you’d be surprised at how much information we’re giving back,” Koskinen said at a tax conference sponsored by George Washington University and the IRS. “We’re looking to see what would give us indications of areas we ought to pursue.”

Sharing Has Started. The IRS hasn’t yet shared names of the countries where reciprocal exchange of information is taking place, but confirmed in early October that the trade was happening. Both Australia and Canada said they have been exchanging data with the IRS on U.S.-held accounts, but the U.S. has indicated there likely will be more.

That said, according to Koskinen, the agency isn't doing this without input from the private sector on what would be the most useful data, and concern about security. "Our goal is only collecting the data that is helpful, and using it appropriately," he said. "We are committed to the safety of the information."

Practitioners said that while the trading of data at the government level is underway, financial institutions aren't thrilled about the role they will need to play in the coming year to provide that information—particularly with CRS compliance looming.

For FATCA, "there's a pretty large number of jurisdictions that don't have guidance," and that is leading to difficulties, said Michael Plowgian, a principal in the International Tax Group of KPMG LLP's Washington National Tax Practice.

With many IGAs still to be signed and many still being implemented, "it's hard to do something globally when you're still trying to get a handle on some of these," PricewaterhouseCoopers LLP's Neil Higgins said.

Political Will Not Enough for FATCA. "There's a difference between a political will and a situation where the tax authority and the government have the resources to implement the political will," said Higgins, a specialist on automatic exchange of information for PwC's U.K. operational tax services team.

Higgins said a key issue is identifying when banks are required to get residency self-certifications from account holders or potential account holders.

Denise Hintzke, global FATCA tax leader at Deloitte Tax LLP, told Bloomberg BNA there is "still a tremendous amount of confusion about the interplay between the regs and the IGAs."

CRS: Biggest Challenge. Without exception, all the practitioners interviewed on the topic said CRS—and its interplay with FATCA—will create the biggest problems for banks in 2016.

"CRS is much more complicated than FATCA," Hintzke said. While FATCA has a threshold of \$50,000 in an account before the reporting is required, the common reporting standard doesn't have any minimum threshold and calls for banks to report accounts to multiple jurisdictions rather than just the U.S. It also comes with a different time frame and requires a wider scope of information to be shared than FATCA does.

With dozens of countries agreeing to start the process of implementing CRS starting Jan. 1, 2016, both governments and financial institutions are faced with huge challenges, practitioners said. Although no actual reporting is set to begin until Jan. 1, 2017, banks in the "early adopter" jurisdictions—where guidance is very scarce—still carry a heavy burden, they said.

Need for Guidance. "There's no question that it will be a difficult process," Plowgian said, with fewer than 10 jurisdictions providing guidance so far and legislation needed in many countries.

While early adopters have been looking carefully at the handbook provided by the OECD in July, "the OECD can't make a law," Plowgian said. "The OECD has been doing as much as it can, but until there is legislation, it's going to be hard to implement."

Practitioners said one of the most crucial issues is the process for taxpayers to self-certify their tax residency

when they open accounts—a process overseen by banks.

Calling this an "urgent issue," Plowgian said the process under CRS is "not exactly the same as it is under FATCA. Institutions will have to redesign their forms and train a bunch of people how to validate the certification."

No CRS in U.S. Another challenge is that the U.S. can't adopt CRS at all without legislation. U.S. officials have said this country won't be able to adopt the standard for years, and there is a question about whether adopter countries will view the U.S. as participating—a question to which the U.K. has already answered no.

Going forward, U.S. multinationals will be faced with CRS reporting in jurisdictions that have adopted the standard, even if the U.S. itself isn't viewed as participating. U.S. taxpayers could also be required to report investments in countries participating in CRS. Questions surround the treatment of trusts in this situation.

Certainty Sought for Trusts. "I do think trusts raise a lot of issues," John Harrington, a partner at Dentons, told Bloomberg BNA. "Is it a separate entity or is it an investment? If it's managed by an individual, who then uses a financial adviser, at what point does that cross over to be managed by a financial institution?"

Both Higgins and Harrington said more guidance is needed for trusts under CRS.

"A bit more policy design around trusts would have been very helpful," Higgins said. "Under both FATCA and CRS, a trust could be treated as a financial institution even if the U.S. has not yet agreed to participate in CRS."

He said "CRS failed to learn from FATCA and missed the opportunity to provide clarity. Certain areas for trusts may have benefited from more tailored rules."

Swiss-Bank Investigations. As more and more information from FATCA flows into the U.S., the Department of Justice also is collecting reams of data from its ongoing investigations of Swiss banks—activity that will continue in 2016 as the government determines the fate of the largest financial institutions thought to be helping U.S. taxpayers hide money from the IRS.

The program, which allows Swiss banks to avoid prosecution by paying a hefty fine and handing over data on U.S.-held accounts, is yielding "a treasure trove of information," a top DOJ official said in late 2015.

The U.S. is getting not only names of account holders, but information surrounding their conduct and more, Caroline Ciralo, acting assistant attorney general of the DOJ Tax Division, said at a tax conference sponsored by the American Institute of CPAs. In cases where banks didn't sign waivers agreeing to release the names of account holders, they are handing over "everything but," Ciralo said, and the U.S. is making treaty requests to get those names.

Follow-Up Underway. While the U.S. reached agreements with most banks under investigation in 2015, "there are some pretty big banks out there that have yet to do their deal," said Scott Michel, a member of Caplin & Drysdale.

In addition, between FATCA, the Swiss program and the government's sharply increasing efforts to track down U.S. taxpayers concealing assets overseas, "The tax system must have a huge amount of data—material

information and leads that are useful in pursuing all types of information around the world,” Michel said.

He and other practitioners said the DOJ is already using information from the Swiss bank program to do more work on additional cases.

“We’ve definitely seen follow-up,” Michel said. “On the bank side, a number of banks have been approached with very specific questions on very specific cases.”

Pursuing Individual Taxpayers. “The DOJ has gotten a flood of information,” said Bryan Skarlatos, a partner with Kostelanetz & Fink LLP. “It’s already using the information to pursue individual taxpayers.”

He told Bloomberg BNA, “We are seeing the decline of bank secrecy and the rise of transparency. There is more cooperation between countries. Cross-border enforcement is really where the future lies.”

According to Alan Granwell, of counsel at Sharp Partners P.A., all of these trends are having a significant impact on international tax planning around the world.

“It’s dramatic when you consider where we were, where we are and where we’re going,” he said.

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