

# BACO

# CRS and FATCA Updates

L. Ryan Pinder  
Graham Thompson

# The Standard for Automatic Exchange and the Common Reporting Standard

- ▶ The Standard for Automatic Exchange of Financial Account Information in Tax Matters (the “Standard”) was developed by the OECD and approved by the Council of the OECD on July 15, 2014. The Standard is intended to provide a framework for co-operation between tax administrations.
  - ▶ The rules and method of exchange of information pursuant to the Standard is set forth in the Common Reporting Standard (the “CRS”) released by the OECD.
- 

# Implementation of the Standard

- ▶ A country can choose its legal basis for implementation of the Standard and requirements under the CRS. The OECD has made it clear in the CRS itself that a country can form the legal basis of its obligations under the Standard either through:
  - bilateral agreements (similar to FATCA IGAs), or
  - multilateral agreements, and specifically The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the “Convention”).

# Importance of How a Country Implements

- ▶ **Multilateral Convention – broader than CRS**
  - The Convention covers a wide range of taxes including income, capital gains, net wealth, social security, inheritance taxes, gift taxes, property taxes and other taxes.
  - **spontaneous exchange of information** where, a Party to the Convention becomes aware of information which could foreseeably have tax implications for another Party; including “savings of tax [that] may result from artificial transfers of profits within groups of enterprises.”

# Importance of How a Country Implements – contd.

- ▶ **Multilateral Convention – broader than CRS**
  - **simultaneous tax examinations in their own territories** of the tax affairs of persons where there is a common interest between two or more Parties.
  - For tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the Convention shall have a retroactive effect going back to the tax period when the offense took place (Article 28 (7)). Article 30(1)(f) of the Convention allows a State Party to formulate a reservation that limits the earlier periods to a maximum of three years preceding the year when the Convention has entered into force in respect of the said Party.

# Importance of How a Country Implements – contd.

## ▶ Bilateral Approach

- Similar in process to FATCA IGAs
- Based on The Standard under the rules of the CRS
  - Not the additional requirements of The Convention
- Provisions in the CRS that allows certain negotiated variances – i.e. application to trust beneficiaries
- Preserves importance of prescribed requirement of confidentiality
- Allows for greater preservation of a national interests

# Confidentiality Requirement

- ▶ Before entering into an agreement to exchange information automatically with another jurisdiction, it is essential that the receiving jurisdiction has the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received
  - Objective Standard
  - The OECD released a Guide on Confidentiality, which sets out best practices related to confidentiality and provides practical guidance on how to ensure an adequate level of protection
  - Some countries difficult to achieve

# Use of Information Requirement

- ▶ Information received as part of automatic exchange is used only for the purposes specified in the instrument.
  - ▶ The Information must be used for tax purposes and not for any unrelated matter
    - How do you police
    - Objective determination
    - Shouldn't be only in law
- 

# FATCA versus The CRS

## ▶ FATCA

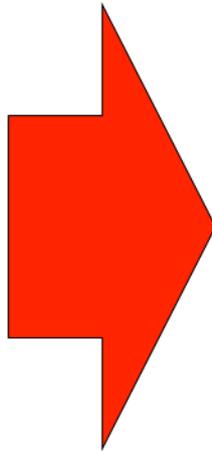
- US automatic exchange initiative
- Based on taxable income for US taxpayers with foreign financial accounts
- Exclusively on bilateral inter-country arrangements

## ▶ CRS

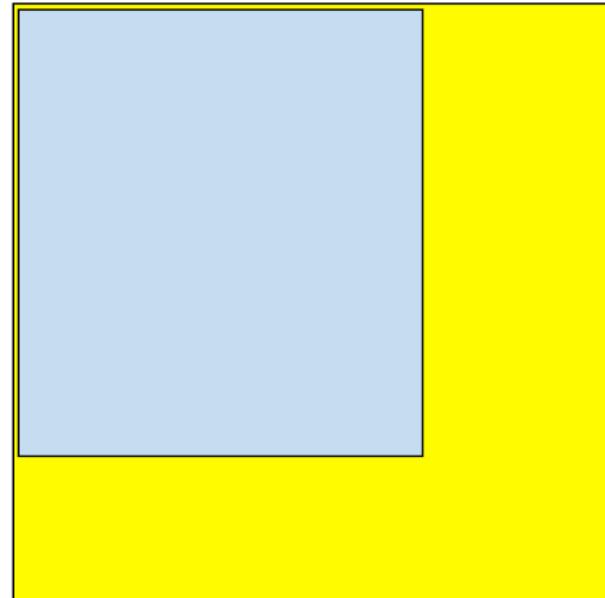
- Global automatic exchange initiative
- Encouraged to be a multi-lateral approach with countries from different legal systems, tax systems, political systems
- Treats structures in certain ways illogically

# FATCA a subset of CRS

FATCA



CRS



# FATCA – Entity Classification

- ▶ FFI includes any non-US entity which falls within any, or more than one, of the below categories:
  - Custodial Institution
  - Depository Institution
  - Investment Entity
  - Specified Insurance Company
- ▶ The Investment Entity classification is most likely for your clients

# Investment Entity

▶ An Investment Entity is any entity that conducts as a business (or is managed by any entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:



- 1) Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- 2) Individual and collective portfolio management; or
- 3) Otherwise investing, administering, or managing funds or money on behalf of other persons.

# Investment Entity

- ▶ Entities are classified as an Investment Entity when they are managed by a FFI.
  - Managed either because of a discretionary investment management agreement in place, or because FFI acts a Corporate Director or Foundation Council etc.
  - Discussion as to what level of management causes the entity to be an Investment Entity
    - Interpretation is that corporate directorship / trustee / governance role is enough

# Sponsoring an Investment Entity

- ▶ There are three prescribed requirements:
  - A Sponsoring Entity must be authorized to act on behalf of the Sponsored Investment Entity;
  - The Sponsoring Entity must register with the IRS as a Sponsoring Entity
  - The Sponsoring entity must also undertake all of the required compliance
  
- ▶ Common query – What constitutes “authorization to act” – Is a specific written authorization letter required?
  - Corporate Directors / Foundation Council / Trustee
  - Reference new W-8BEN-E

# Trustee Documented Trust

- ▶ A trustee-documented trust is a trust established under the laws of such jurisdiction (The Bahamas) to the extent the trustee of that trust is a Reportable US Financial Institution, Reporting Model 1 FFI or Participating FFY and reports all information required to be reported
- ▶ Query – which GIIN is to be used when Trustee has FFI GIIN and Sponsor GIIN
  - The trustee should be the sponsoring entity in the case of reporting as a trustee documented trust.
  - The FATCA FAQ issued by the US Treasury provide that the Trustee in such instances should use the sponsoring GIIN as opposed to the GIIN applied for itself as a FFI.
    - Line 9a / 26 W8-BEN-E

# CRS Self Certification

- ▶ Applicable to New Accounts
  - Not pre-existing accounts
    - Database procedure of review – if can't review then may resort to self-certification
- ▶ For a self-certification to be valid, however, it generally must contain the Account Holder's (i) name, (ii) address, (iii) jurisdiction(s) of residence for tax purposes, and (iv) tax identifying number for each Reportable Jurisdiction.
- ▶ If a Financial Institution knows or has reason to know that a self-certification is incorrect, it is expected that in the course of the account opening procedures the Reporting Financial Institution would obtain either *(i)* a valid self-certification, or *(ii)* a reasonable explanation and documentation (as appropriate) supporting the reasonableness of the self-certification (and retain a copy or a notation of such explanation and documentation).

# CRS Self Certification

- ▶ Entity / Individual / Controlling Person Forms
  - Note with respect to Entity self certification in Non-Participating Jurisdictions – also requires controlling persons self certification
  - BO Arbitrage???? – USA
- ▶ Goal is to get to tax residence for reporting
- ▶ Note controlling person for trusts – see page 6 of controlling person self certification

# CRS and Trusts

- ▶ CRS – practical difficulty in application to Trusts
  - in the case of a trust that is a Financial Institution, an “Equity Interest” is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust.
  - A Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.

# CRS and Trusts contd.

- ▶ CRS – practical difficulty in application to Trusts
  - In the case of a trust, the term “Controlling Persons” means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust. The settlor(s), the trustee(s), the protector(s) (if any), and the beneficiary(ies) or class(es) of beneficiaries, must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercises control over the trust.
    - Illogical application to Trusts

# Trust Entity Classification

- ▶ The following are the same for all types of AEOI (FATCA, CRS)
  - All trusts are deemed to be entities
  - Trusts are either investment entities – a type of Financial Institution (FI) or Non-Financial Entities (NFEs)
  - What sort of entity a trust is depends upon what assets are in the trust and who manages the trust
  - If the Trust holds largely financial assets and the trustee is a corporate trustee, the trust is likely to be a FI for AEOI purposes

# The US Position on CRS

- ▶ The United States has no current plans to implement the CRS but will instead continue to use FATCA
  - "The United States has indicated that it will be undertaking automatic information exchanges pursuant to FATCA from 2015 and has entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange."
    - OECD

# Reporting Arbitrage

- ▶ Because reporting, especially for trusts and funds, are different under FATCA and The CRS this has created a regime of reporting arbitrage.
  - How long will the international community allow the arbitrage to exist?
  - What are the structuring implications for US entities when designated as a non-participating jurisdiction?



**L. Ryan Pinder**  
**Partner**  
**Graham Thompson**  
**Nassau, The Bahamas**  
**[lrp@gtclaw.com](mailto:lrp@gtclaw.com)**  
**(242) 322-4130**