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Foreign Account Tax Compliance Act and Common Reporting Standard

January 2019

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Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS)

The Foreign Account Tax Compliance Act (FATCA) was passed in 2010 to help prevent tax evasion by US citizens and taxpayers with offshore financial accounts. This was both an attempt to ferret out individuals with accounts set up in prior years and identify assets currently earning income outside the US. This came together with other Internal Revenue Service (IRS) initiatives targeting offshore banks and US taxpayers who were trying to hide assets.



Although many countries complained about the administrative requirements and invasion of privacy, they liked the idea of obtaining information about tax cheats and decided that maybe it wasn't such a bad idea. Hence, the Organization for Economic Co-operation and Development (OECD) instituted the Common Reporting Standard (CRS). These rules became effective for 2016 information for certain early adopters (e.g., the UK). All organizations subject to FATCA will also have to comply with CRS.

Introduction to FATCA/CRS

The US legislation introduced a general requirement on US withholding agents to withhold tax on certain payments to Foreign Financial Institutions (FFIs) that do not agree to report certain information to the IRS regarding US accounts, and on certain payments to non-financial foreign entities (NFFEs) that do not provide information on their substantial US owners. Withholdable payments include US source income on securities and any gross proceeds from the sale of securities that generate US source income.

The CRS rules involve legislation that is needed in each of over 100 participating jurisdictions, based upon the guidelines issued by the OECD. These have been implemented during 2017 and 2018 in the

various countries. The CRS sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by the financial institutions. The Standard consists of the following four key parts:

1. A model Competent Authority Agreement (CAA) (providing the international legal framework for the automatic exchange of CRS information)
2. The Common Reporting Standard
3. The Commentaries on the CAA and the CRS
4. The CRS XML Schema User Guide

There are similarities between FATCA and CRS. They both require:

- Implementation of due diligence procedures
- Documentation of account holders
- Reporting

There are also certain differences. Classifications under CRS are different. Certain entities not classified as FFIs under FATCA will be classified as Financial Institutions (FIs) under CRS. Also, many of the exceptions and de minimis exclusions allowed under FATCA are not available under CRS. See chart on next page.



FATCA vs CRS comparison chart

	CRS	FATCA	NOTES
Governing Authority	Over 100 Separate Jurisdictions	US: IRS	Will need to monitor each jurisdiction.
Account Scope	1. Individual and Entity accounts held by tax residents of any CRS jurisdiction. 2. Passive NFEs with Controlling persons resident in any CRS jurisdiction.	1. US Individuals. 2. US Entities. 3. Passive NFEs held by Substantial US Owners.	CRS will probably involve more reportable accounts than under FATCA.
Thresholds	No thresholds (except for pre-existing accounts).	\$50,000 for individuals; \$250,000 for pre-existing accounts.	May want to consider having no thresholds for either type of reporting to avoid culling process.
Documentation Requirements	New Self-Certification Forms will be needed. (Must address multiple tax residences, CRS legal entity classification.)	Form W-9/ W-8 Series may be used.	CRS can not use the US tax forms. Under CRS, all entities will ultimately have a Controlling Person(s).
Registration	None.	IRS Portal: GIIN, Agreement (non-IGA and Model 2 IGA countries) and Certifications.	For CRS, no special registration but reporting under local rules to local authorities.
Withholding	No Withholding Required under CRS.	30% withholding on Non-compliant Payees and Intermediaries.	Audits and potential penalties by CRS jurisdictions to be enacted.



As of January 1, 2019, there is no longer any "Timeline to Implementation". Generally, as of that date, both the FATCA and CRS requirements are fully in force.

Who is Targeted?

FATCA and CRS is applicable to individual taxpayers holding offshore investments that exceed reporting thresholds and also has far reaching consequences for financial institutions including banks, insurance companies, pension funds, mutual funds, investment managers, private equity funds and broker dealers, collectively identified as foreign financial institutions (FFIs) under FATCA and financial institutions (FIs) under CRS. It also effectively sweeps into its net such entities as foreign trusts and family offices that are resident outside the country of the beneficiaries or families.

Individuals

FATCA: US individual taxpayers must report their foreign financial bank accounts and assets on forms filed with the IRS and US Treasury Department. This includes the FBAR bank account form that has been required for several years, and now Form 8938 that was required starting in 2011.

CRS: This varies by country since it is a jurisdiction by jurisdiction decision on what must be reported by individuals. While there may not be any new form of reporting, the decision will be what to do about accounts that have not been reported in the past.

Entities

FATCA: FFIs must report on US account holders' financial accounts and income to the IRS. In some situations they must also withhold taxes (30%) on certain types of payments. They are being forced to do this because of the potential 30% withholding that will result on any US source payment they receive if they are not FATCA compliant. Even if they have neither US account holders nor investments in the US that produce US source payments, they will be forced to comply because they will be dealing with other FFIs that are compliant and will require them to be compliant or else they will withhold on payments and/or report their non-compliance to the IRS.

CRS: FIs must report on any CRS account holders' information to their local jurisdiction, which will then provide this to all the other (over 100) jurisdictions that have account holders with the FI. Some places, like the UK, have portals where both FATCA and CRS data is reported to the local authorities.

Foreign Financial Institutions (FFI/FI)

An FFI/FI is defined as any foreign entity which:

1. Accepts deposits in the ordinary course of a banking or similar business (depository institution);
2. As a substantial portion of its business, holds financial assets for the benefit of one or more persons (custodial institution); or
3. Is an investment entity.

This last category is the most wide-ranging in that it may encompass trusts, family offices and investment advisors because it involves any entity primarily engaged in the conduct of a business for customers dealing with financial assets or an entity whose gross income is primarily attributable to investment or trading in financial assets and the entity is managed by another entity that is an FFI. There has only been a limited carve out exception for small trusts where there is no professional management involved.

Withholding will not be required under FATCA if an FFI enters into an agreement with the IRS. CRS does not have any withholding requirement, only reporting. Participating FFIs will be required to identify their US accounts and comply with verification and due diligence procedures prescribed by FATCA regulations. US accounts are defined as any financial accounts held by a US individual taxpayer or certain US owned foreign entities. CRS FIs must follow the KYC/AML requirement, which are basically the same. There is no de minimis account under CRS, unlike FATCA.

FFI/FFIs are required to report certain information on an annual basis with respect to each account held by an individual resident in the US or a CRS jurisdiction. They must also comply with the request for additional information from the US or CRS authorities where an account holder refuses to provide ownership information. The information that must be reported includes:



- Name, address, and taxpayer identification number (TIN) of each account holder who is an individual
- Account number
- Account balance or value
- Gross receipts and gross withdrawals or payments from the account during each calendar year

Under FATCA, if foreign law prevents the FFI from reporting the required information absent a waiver from the account holder, and the account holder fails to provide a waiver within a reasonable period of time, the FFI is required to close the account. FATCA effectively enlists FFIs and many foreign governments in the US government's attempt to combat tax evasion by US taxpayers, whether resident in the US or not. FFIs in IGA countries do not have to close the accounts, but must report certain information on the nonparticipating account holders. There are no similar requirements under CRS (unless required under the local jurisdiction implementing the legislation).

Non-Financial Foreign Entities (NFFE/NFE)

Any foreign entity that is not an FFI/FI is considered to be an NFFE/NFE. Under CRS, certain entities can avoid the FI classification if they meet the specific criteria of an Active NFE.

FATCA requires a withholding agent to withhold 30% of any withholdable payment to an NFFE unless:

1. The beneficial owner of the account provides proper certification (Form W-8BEN or W-8BEN-E) that there are no substantial US owners of the entity or the tax information on the US owner;
2. The withholding agent does not know or have any reason to know that the information provided is incorrect; and,
3. The withholding agent reports the information to the IRS.

As mentioned above, there is no withholding requirement for IGA FFI and FIs under CRS.

Family Offices and Trusts

Many family offices and foreign trusts will be considered FFIs because they fall under the Investment Entity (described in Reg. Sec. 1.1471-5(e)(4)). This is because most of this type of entity's gross income is from investments, which makes it fall into the category of an FFI. There are certain exceptions to the FFI classification for trusts that are not professionally managed (or claim they are not in a business with customers). Even if the FFI classification can be avoided, most trusts will probably be a passive NFFE. This avoids registration with the IRS, but the NFFE will need to disclose any substantial US owners and controlling US persons (beneficiaries) of the NFFE when completing a Form W-8BEN-E.

Under CRS, Passive NFEs will have to disclose any "Controlling Persons". Interestingly, FIs in non-participating jurisdictions – such as the US – are classified as Passive NFEs and must report Controlling Persons.

Non-Financial US Multinational Companies

FATCA even impacts US multinational companies with foreign subsidiaries. A determination for each foreign entity will be required because they, too, will need to document their FATCA status. The focus of FATCA is not on withholding; this is only the penalty provision to force reporting. But foreign nonfinancial businesses will need to focus on payee documentation and payment reporting to avoid the withholding penalty regime. This also highlights the withholding requirements US multinationals have always had related to payments to foreign payees where withholding under Chapter 3 and reduced treaty withholding rates have always been an issue.

While there are exemptions from being classified as an FFI related to holding companies and treasury centers for nonfinancial companies, they will need to review (and document) this exemption in case it is ever challenged by the IRS or an unrelated US withholding agent (e.g. US banks). There are also issues related to foreign joint ventures where they do not control the foreign legal entity.



The Direct Reporting NFFE is different from other NFFEs. It must register with the IRS and obtain a Global Intermediary Identification Number (GIIN – discussed below). The benefit of this may be that it avoids additional documentation requests from US withholding agents about an entity's FATCA status due to the agent having a GIIN number, which provides additional assurance that it is not required to withhold under the FATCA rules.

Inter-Governmental Agreements

In many cases, foreign law would prevent an FFI from reporting directly to the IRS the information required by FATCA. To overcome these legal impediments (and probably to relieve the IRS of some of the administrative burden of enforcing FATCA), the US Treasury Department has collaborated with foreign governments to develop two alternative Model Intergovernmental Agreements (IGA) that facilitate the effective and efficient implementation of FATCA in a manner that removes domestic legal impediments to compliance.

The Model 1 IGA requires FFIs to report to the authorities in their jurisdiction, rather than directly to the IRS. The partner jurisdiction then exchanges this information with the IRS on an automatic basis.

The Model 2 IGA directs the FFI to register with the IRS and report specified information about US accounts directly to the IRS in a manner consistent with the general regulations, with certain modifications. If there is a problem disclosing this information under domestic law, the FFIs are required to obtain consent from the US account holders to disclose this information. There were 113 countries listed on the IRS website as having IGAs with the US as of October 2018. See <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

There are a similar number of jurisdictions that have signed on for CRS. See <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/#d.en.345489>

Registration and Implementation

FATCA requires that FFIs register with the IRS. They are able to do so through a secure online web portal at www.irs.gov/fatca. Upon approval, they will receive a GIIN from the IRS. FFIs that are under a Model 1 IGA will also have to sign an agreement to follow the requirements of the FFI Agreement. All of this should have been completed by now for FFIs already in existence.

To register as an FFI, an entity must register on the IRS web portal and declare its Responsible Officer (RO). The RO will be the person who must certify compliance with the FFI requirements on an ongoing basis. An RO must be an officer of the FFI. An entity can also designate a Person of Contact (POC), which can be useful in assisting the RO in complying. The POC does not have to be an officer or employee of the FFI. In practice, we have seen the POC be a third party service provider.

While under the CRS rules, if there is no RO, there generally is a requirement that the FI have a contact person whom the local authorities can contact for questions.

General Rules of Withholding

An FFI will be subject to FATCA withholding of 30% on any US source withholdable payment made unless the withholding agent has established that the payment is exempt (e.g., the FFI is properly registered with the IRS or is an exempt organization). A withholding agent may treat a payee as a deemed compliant FFI if the withholding agent has a withholding certification that identifies the payee as a certified deemed compliant FFI. FFIs in IGA countries do not have to withhold.



There are no withholding requirements under CRS. However, every FFI must remember that there can be withholding required under provisions other than FATCA or CRS on cross border payments. There can be both local withholding rates and lowered treaty rates that FFI/FIs need to consider.

Due Diligence Requirements for Entity Accounts

An FFI/FI must determine who the account holder is or if an account is held by a recalcitrant account holder or a non-participating FFI by applying the required procedures to establish the status of each payee. This is required regardless of whether the participating FFI/FI makes a payment to the account.

For foreign trusts or family offices that are determined to be FFI/FI (as Investment Entities) this can be an interesting exercise when trust terms allow for discretion as to whom may be a beneficiary. This will require a careful reading of trust terms and documents, as well as a review of prior year distributions.

Account Reporting

Generally, participating FFI/FIs are required to report the following:

- Name, address and TIN of each account holder
- Account number
- Account balance or value of the account
- Payments during the calendar year

Annual reports are to be completed and either sent to the IRS (for FATCA reporting by FFIs in non-IGA countries and Model 2 IGAs) or to the local country tax authorities (for FATCA reporting by Model 1 FFIs and FI reporting CRS information). There are normally reporting portals for FATCA and CRS account reporting. This information will then be shared with the appropriate jurisdiction in the following year.

Compliance Program

The FATCA RO must establish a compliance program that includes policies, procedures and processes sufficient for the FFI to satisfy the requirements of the FFI Agreement. The first certification period begins on the effective date of the FFI Agreement and ends at the close of the third full calendar year following that date.

Each subsequent certification period covers three calendar years. This means many FFIs were required to certify compliance for the period ending December 31, 2017 and should have reported this through the IRS web portal during 2018. Also, for Model 2 FFIs and non-IGA FFIs that have an agreement with the IRS, these must be renewed periodically through the portal.

As with other reporting requirements, the compliance program for Model 1 FFIs is not dictated by the FFI Agreement and will be determined based upon local rules in the country of the FFI.

For CRS FIs, there is no specific or uniform certification requirement and the procedures on certification or renewal are left up to each jurisdiction.

What We Offer

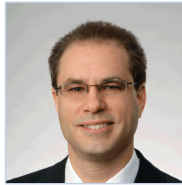
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Moore Stephens member firms in the US, UK and other IGA countries provide an integrated, deep knowledge of FATCA and CRS for a number of industries, as well as a thorough understanding of how it impacts family offices and trust situations.

We can assist you in your analysis of the impact of the two reporting regimes on your particular situation, aide in registering and establishing policies and procedures, and assist with your ongoing compliance requirements. For more information, please contact one of the team.

Contact information

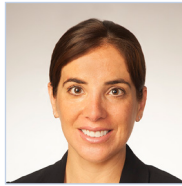
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