

## ***US publishes first FATCA competent authority arrangements***

October 6, 2015

### ***In brief***

The US competent authority (CA) announced on September 24, 2015 that it had signed competent authority arrangements (CAAs) with the governments of Australia and the United Kingdom (UK) pursuant to its intergovernmental agreements (IGAs) with these countries to implement the Foreign Account Tax Compliance Act (FATCA). Although the CAAs cover administrative matters regarding the mechanisms and procedures associated with the automatic exchange of information (AEOI), they also provide significant details on the enforcement and remediation of financial institutions that are noncompliant with the IGAs.

**Observation:** *The release of the CAAs comes at the end of the first FATCA reporting period and marks another milestone in the AEOI between jurisdictions. With the start of the Common Reporting Standard (CRS) for certain 'Early Adopter' countries set to begin on January 1, 2016, it is expected that a number of jurisdictions will enter into similar CAAs to enable the exchange of information under FATCA and CRS.*

### ***In detail***

As part of its efforts to enforce the provisions of FATCA, the US Department of the Treasury (Treasury) has entered into a series of IGAs with the CAs of over seventy nations (collectively 'Partner Countries') and is in the process of negotiating more than 35 additional IGAs. These IGAs streamline the application of FATCA's due diligence, withholding, and reporting requirements for foreign financial institutions (FFIs) located in these Partner Countries, and provide the legal basis

(together with locally crafted rules, regulations, or other authorities) for FFIs to comply with FATCA's reporting requirements without running afoul of applicable Partner Country data privacy and/or bank secrecy rules.

These IGAs generally provide that the relevant CAs will enter into agreements or arrangements with the US CA to:

- Establish the procedures for the AEOI called for by the IGAs, including information on reportable accounts and data regarding payments made to nonparticipating FFIs; and

- Prescribe rules and procedures to implement the collaboration, compliance, and enforcement provisions of the IGAs.

The CAAs expand upon key provisions of the Australian and UK IGAs by providing procedures for the exchange of information required by the IGAs. Some of the key points addressed in the CAAs include:

1. The CAAs confirm that the CAs intend to exchange information within nine months after the end of a calendar year (i.e., by the end of September).

Additional detail is provided on the format of information exchanges, the time when these exchanges will be considered made, and the process for CA-to-CA feedback and consultation to ensure data quality and usability.

**Observation:** *The CAA does not require US financial institutions to report FATCA/IGA-related information (e.g., account balances) to the Internal Revenue Service (IRS) or any other taxing authority. For such reporting to be required, the US would need to enact legislation and adopt Treasury regulations requiring such reporting.*

2. The CAAs recognize that a financial institution's noncompliance with its obligations pursuant to an IGA may be administrative or minor in nature, or may constitute significant noncompliance. Additional detail is provided on actions/omissions that constitute either administrative or minor errors or significant noncompliance.
  - The US CA may find significant noncompliance based on a failure by or on behalf of a reporting financial institution (RFI) to report information on US reportable accounts or on payments made in 2015 or 2016 to nonparticipating financial institutions (NPFIs).

- The US CA may determine that a RFI is in significant noncompliance if the RFI:
  - Does not comply with its obligations to withhold on US source withholdable payments made to NPFIs;
  - Fails to provide to any intermediate payor of a US source withholdable payment the information required for withholding and reporting on any such payment to a NPFI; and
  - Does not meet its IGA-related obligations with respect to related entities and branches that are NPFIs (generally, limited FFIs and limited branches).
- Administrative and other minor errors include incorrect or incomplete reporting of information or other errors that result in infringements of an IGA. Where a RFI notifies a CA that it has made errors in its reporting to the CA, that CA should amend its reporting which has been exchanged with the other CA. For example, if a UK RFI notifies the HM Revenue & Customs (HMRC) of errors in its reporting to the HMRC, the HMRC should correct any reports it has made to the IRS.
- Failures of a RFI to correct administrative or other minor errors may, in the CA's discretion, lead to a determination of significant noncompliance. It is expected that such a determination would not occur until at least 120 days after notice has been provided.

The receiving CA is required to notify the providing CA of noncompliance. The notification procedures differ depending on whether the receiving CA seeks to address administrative or other minor errors or areas of significant noncompliance.

3. The CAAs provide that, where a receiving CA notifies the providing CA of administrative or other minor errors, the providing CA will apply its own domestic law (including applicable penalties) to obtain the information or correct infringements of the IGA and exchange such information with the receiving CA. The UK CA has indicated that failure to prevent tax evasion could be viewed as a corporate criminal offense.
4. Notice 2014-33 provided that the IRS would view calendar years 2014 and 2015 as a transition period for FATCA enforcement and administration. In addition, the Notice provided that this transition period will apply with respect to certain related due diligence and withholding provisions that were revised in coordinating Treasury regulations issued on February 20, 2014. This relief means that the IRS will take into account the extent to which withholding agents, FFIs, and other entities are making a good faith effort to comply with FATCA and the modifications to existing information reporting and withholding obligations until calendar year 2016. The CAAs adopt this approach and verify that the CAs also intend to apply a good faith standard when measuring levels of compliance (by other CAs as well as FFIs) during the transition period.

### ***The takeaway***

While the CAAs largely pertain to government-to-government matters and compliance with the corresponding IGAs, the additional detail is helpful for financial institutions and other parties attempting to comply with the myriad of rules introduced by Treasury regulations, IGAs, Partner Country guidance notes, and other legislation. Financial institutions will need to continue to monitor the signing of these CAAs as it could impact what and when information is reported under the separate governmental agreements.

### ***Let's talk***

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