

There has been an abundance of press coverage on the subject of FATCA and numerous practitioners have offered helpful insights into the technicalities and operation of the new reporting rules. FATCA marked a pivotal start to some very serious moves on global tax transparency that are continuing apace. We now have the CRS (Common Reporting Standard) coming hazily into view and this subject of global tax transparency seems to be impressing on my day-to-day life given the global reach of my firm. I have had considerable experience of the technical detail of FATCA working closely with my US colleagues; I have seen the ripple effect of the rules in Asia and the Middle East; and I have been advising on implementation here in the UK. And now we are asked for guidance on the CRS. All in the name of transparency, which whilst of course a worthwhile exercise, is a very costly exercise for businesses and one which for many is still as clear as mud.

FATCA

For those who wonder idly what on earth FATCA is you are lucky enough to live in a tax/ compliance vacuum but I shall recap very briefly.

The Foreign Account Tax Compliance Act was enacted on 18 March 2010, as part of the US Hiring Incentives to Restore Employment Act and is designed to prevent tax evasion by US persons through the use of accounts held with foreign financial institutions.

The UK and many other countries around the world have introduced domestic legislation to lend validity to the otherwise unilateral move by the US to keep track of its citizens living elsewhere.

What do you need to do about FATCA?

Well quite a few things if you look after funds or financial assets on behalf of others – or indeed you somehow tentatively carry out such a function and thus get caught by the reporting regime. Failure to comply with your requirements could leave you exposed to a 30% withholding tax on US source income.

You will need to ascertain whether you are a reporting or non reporting “financial institution” or an active or passive “non-financial foreign entity” (NFFE) within the meaning of the legislation. There are various categories of non-reporting financial institutions which if none apply it can be assumed you are reporting and must therefore register before the end of the year with the US Internal Revenue Service and obtain a “global intermediary identification number.” A reporting financial institution will then need to examine owners and account holders with a view to discovering “US indicia.” If an entity is not a financial institution then it will be an NFFE which if it mainly holds passive investments will usually need to report owners which display US indicia.

The method of reporting any persons with US connections will be via HMRC for onward transmission to the US IRS. On 29 August HMRC published 181 pages of updated guidance on how this procedure is going to work using a Government Gateway FATCA portal and submission schema. The subject of FATCA and trusts remains a dubious area and not one to delve into in this note.

CRS

So we have all got to grips with our obligations under FATCA or least we are trying to. Then along comes the OECD and the “minimum standard for information to be exchanged” and the CRS- or the global FATCA. Of course the FATCA obligations are live and even as an early adopter here in the UK we have until 31 December 2015 to capture the required CRS information with a view to first reporting in 2017. However as we have seen with FATCA this is by no means an easy process and one which will take considerable man power and time to ensure compliance.

311 pages of the CRS were published at the end of July setting out the financial account information to be exchanged, the financial institutions that need to report, the different types of account and taxpayers covered, as well as due diligence procedures to be followed. Entities with primarily passive investments will be treated as transparent and reporting will be on the controlling individuals.

The CRS smacks of FATCA. But it isn't FATCA. The OECD has published a model Competent Authority Agreement (CAA) to implement the CRS legally. This is instead of the Intergovernmental Agreements that have been signed to implement FATCA. A CAA will still need to be underpinned by domestic legislation which should tread carefully around the matter of data protection. There is no threat of withholding for non-compliance with the CRS- it is simply a risk to your reputation.

I Still Can't See Clearly

We now have two entirely separate regimes for information reporting. Businesses will need to be familiar with the nuances of both and comply with their extensive obligations under both. There will be rafts and rafts of information that will need to be reported to HMRC and exchanged with other countries. Let's see how that goes. I think that the obligations under the European Union Savings Directive continue just to add to the considerable burden on businesses.

*Transparency is not about restoring trust in institutions.
Transparency is the politics of managing mistrust.*

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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