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PROPOSAL FOR THE EU TO IMPOSE A WITHHOLDING TAX ON EU SOURCE PAYMENTS TO US FINANCIAL INSTITUTIONS UNLESS THEY UNDERTAKE THEIR FATCA RECIPROCAL PROMISES

TREASURY PROMISED TO RECIPROCATE EQUIVALENT LEVELS OF EXCHANGE TO THE FATCA INFORMATION IT COLLECTS.

CONGRESS REJECTED TREASURY'S REQUEST FOR FATCA RECIPROCITY BECAUSE 1) IT WOULD BE AN EXPENSIVE AND COUNTER PRODUCTIVE DOMESTIC MANDATE, 2) DAMAGE INWARD INVESTMENTS, AND 3) REGULATION WOULD NOT BRING A PENNY INTO THE US TREASURY.

A WITHHOLDING TAX FOR NON-COMPLIANCE SHOULD IMPOSED BY THE EU ON EU SOURCE PAYMENTS TO USA FINANCIAL INSTITUTIONS UNLESS THEY AGREE TO RECIPROCATE EXCHANGE OF INFORMATION AS PROMISED IN THE FATCA IGAS.

The United States '***indicates***' it will undertake automatic information exchanges pursuant to FATCA from 2015 - intergovernmental agreements model 1A. The United States '***acknowledges***' the need to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions The United States includes 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.

However no reciprocal information will be forthcoming from USA except on depository interest for individuals. This is a bigger failure than the EU Savings Tax Directive.

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7. USA FI encourage undeclared money into US Financial Institutions even offering non-interest deposits to avoid the extremely limited reciprocity.

8. Proposal that the EU impose a withholding tax on EU Source Payments to US Financial Institutions unless US FI exchange info as per the existing FATCA IGAs with EU Member States.

Summary

The US initiative to flush out tax evading US persons by introducing FATCA led to the subsequent cloning by the OECD to implement the Common Reporting Standard. Ironically this has established the USA as the safest place for EU tax evaders to hide their financial assets.

Treasury and IRS are committed to reciprocate the exchange of information equivalent to what is collected under FATCA. However the Congress (both the House of Representatives and the Senate) has to yet enact legislation to enable information to be exchanged.

Treasury tried to get approval from the House of Representatives to collect and exchange information with FATCA partner. However the Ways and Means Committee and Finance Comittee .led by Repr. Posey, rejected the proposal stating it is difficult to conceive of any circumstance that would justify imposing such an expensive and counterproductive domestic mandate, it would discourage investment into USA and such regulations would not bring one penny into the U.S. Treasury.

The no FATCA reciprocal reporting in sight, US Financial Institutions are aggressively attracting the world's untaxed assets which will not be reported under the Common Reporting Standard.

Treasury has proposed that Financial Institutions identity beneficial owners of legal entity customers in case future exchange of information is implemented. However this is useless as it exempts all pre-existing entities and all trusts, which is how tax evaders hold accounts in the USA.

It is proposed that the EU follow the USA strategy of imposing a withholding tax on US source payments unless EU Financial Institutions implement FATCA. The only way to oblige the USA to enact legislation to implement the promised FATCA reciprocal reporting is for the EU to impose a withholding tax on EU source payment made to a US Financial Institution unless that US Financial Institution automatically exchanges information pursuant to the FATCA reciprocal agreement.

1. USA makes political commitment and advocates support for FATCA reciprocal reporting

Whilst negotiating the FATCA IGAs, Treasury enticed participating jurisdictions by promising the United States would reciprocate equivalent levels of information reported under FATCA.

"The United States ***acknowledges*** the need to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. The United States includes 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. The reciprocal FATCA agreements cited *"Whereas, the United States of America collects information regarding certain accounts maintained by U.S. Financial Institutions held by residents of [e.g. Spain] and is committed to exchanging such information with the [e.g. Kingdom of Spain] and pursuing equivalent levels of exchange..."*

2. OECD did not invite USA to join CRS because FATCA reciprocity is equivalent to CRS

The OECD did not invite the USA to be a CRS participant because the OECD accepted that FATCA reciprocal exchange of information was equivalent to the CRS.

3. USA Congress vetoed Treasury's request to reciprocate information

The term "United States" in the FATCA IGAs was in fact "Treasury", which is merely an executive branch of the US Government, which can only execute and enforce the law. Only Congress can enact legislation to exchange information.

Furthermore, FATCA IGAs are not Congress approved treaties. They are an executive treaty passed by the US President without Congress approval. The next President could overturn features of the FATCA IGAs that were not in the Congress approved Statute, mostly FATCA reciprocal reporting.

Congress refuses to enact legislation to reciprocate information as per the FATCA IGA agreements. Treasury should never have made promises of FATCA reciprocity without first obtaining Congress authority.

Congress rejects Treasury request to automatically exchange information

In March 2013, Treasury submitted a proposal to Congress to provide Treasury with authority to collect information with respect to non-resident alien individuals, non-U.S. person entities, and U.S. entities held in substantial part by non-U.S. owners, regarding account balances and payment made to these account. The House of Representatives committee meeting rejected this proposal before it could be put to the House floor for voting, citing:

- ☒ Difficult to conceive of any circumstance that would justify imposing such an expensive and counterproductive domestic mandate
- ☒ Discourage investment into USA
- ☒ Regulations would not bring one penny into the U.S. Treasury

4. Only information permitted to be reciprocated by the US is depository interest paid to non-resident alien individuals

Current legislation restricted the USA exchange information to depository interest for non-resident alien individuals if the USA has in effect an income tax or other convention or bilateral agreement relating to the exchange of information. IRS views that FATCA IGAs are a "convention" as it is not an income tax agreement or bilateral agreement. Even then the convention should be ratified by Congress.

IRS publication **Revenue Procedure 2014–64** provides an updated list of jurisdictions with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of information for purposes of the bank deposit interest reporting requirements, as well as jurisdictions with which the IRS and Treasury have determined the automatic exchange of such information is appropriate.

COUNTRIES OF RESIDENCE WITH RESPECT TO WHICH THE REPORTING REQUIREMENT APPLIES										
Antigua & Barbuda	Bermuda	Costa Rica	Egypt	Guernsey	Ireland	Korea (South)	Mexico	Panama	Slovenia	Trinidad & Tobago
Aruba	Brazil	Croatia	Estonia	Guyana	Isle of Man	Latvia	Monaco	Peru	South Africa	Tunisia
Australia	BVI	Curacao	Finland	Honduras	Israel	Liechtenstein	Morocco	Philippines	Spain	Turkey
Austria	Bulgaria	Cyprus	France	Hong Kong	Italy	Lithuania	Netherlands	Poland	Sri Lanka	Ukraine
Azerbaijan	Canada	Czech	Germany	Hungary	Jamaica	Luxembourg	Netherlands island territories	Portugal	St. Maarten (Dutch part)	UK
Bangladesh	Cayman	Denmark	Gibraltar	Iceland	Japan	Malta	New Zealand	Romania	Sweden	Venezuela
Barbados	China	Dominica	Greece	India	Jersey	Marshall Islands	Norway	Russia	Switzerland	EU MS
Belgium	Colombia	Dominican	Grenada	Indonesia	Kazakhstan	Mauritius	Pakistan	Slovak	Thailand	

Information restricted to depository interest paid to non-resident individuals

Legislation, require the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013, providing that in the case of interest aggregating $10 or more paid to a nonresident alien individual, the payor is required to make an information return for the calendar year in which the interest is paid.

Interest that is reportable is interest that relates to a deposit maintained at an office within the United States and that is paid to a resident of a country that is identified, in an applicable revenue procedure as a country with which the United States has in effect :

- an income tax, or
- other convention,
- or bilateral agreement

relating to the exchange of tax information under which the competent authority is the Secretary of the Treasury or his delegate.

This is extremely limited information as depository interest does not include interest from bonds, funds, derivatives, etc. In addition, any depository interest paid to an account owned by an entity will not be reportable.

5. FINCEN proposes US Financial Institutions identify individual beneficial owners behind legal entity customers

Financial Crimes Enforcement Network ("FinCEN"), a subsidiary of Treasury, published an advanced notice of rulemaking. This requires Financial Institutions to identify the individual beneficial owners behind legal entity customers. Facilitating reporting and investigations in support of tax compliance, and advancing national commitments made to foreign counterparts in connection with the provisions commonly known as the Foreign Account. Although this is not yet law. The proposed rule is full of loopholes that this rule will not yield any useful information. For example: exempting all existing entities established up to one year after issuance of final rule, excludes insurers and exemption of trusts.

a) loophole 1 : Exempt pre-existing and new customers

FinCEN also sought comment on whether and how a beneficial ownership requirement should apply to customers of Financial Institutions where such relationships have been established prior to the implementation date of this rule. Financial Institutions noted that a requirement to ''look back'' to obtain beneficial ownership information from existing customers would be a **substantial burden**. FinCEN proposes that the beneficial ownership requirement will apply only with respect to legal entity customers that open new accounts going forward from the date of implementation. Thus, the definition of ''legal entity customer'' is limited to legal entities that open a new account after the implementation date.

b) Loophole 2: Exempt Trusts

Several comments described potential challenges in applying a beneficial ownership requirement to a customer that is a trust. There are many types of trusts. While a small proportion may fall within the scope of the proposed definition of legal entity customer (e.g., statutory trusts), most will not. Unlike the legal entity customers that are subject to the proposed beneficial ownership requirement (corporations, limited liability companies, etc.), a trust is generally a contractual arrangement between the person who provides the funds and specifies the trust terms (i.e., the settlor or grantor) and the person with control over the funds (i.e., the trustee) for the benefit of those who benefit from the trust (i.e., the beneficiaries). This arrangement does not generally require the approval by or other action of a state to become effective. FinCEN notes that in order to engage in the business of acting as a fiduciary it is necessary for a trust company to be federally- or state chartered.

As the comments noted, identifying a 'beneficial owner among the parties to such an arrangement for AML purposes, based on the proposed definition of beneficial owner, would not be practical. **At this point, FinCEN is choosing not to impose this requirement** on trusts.

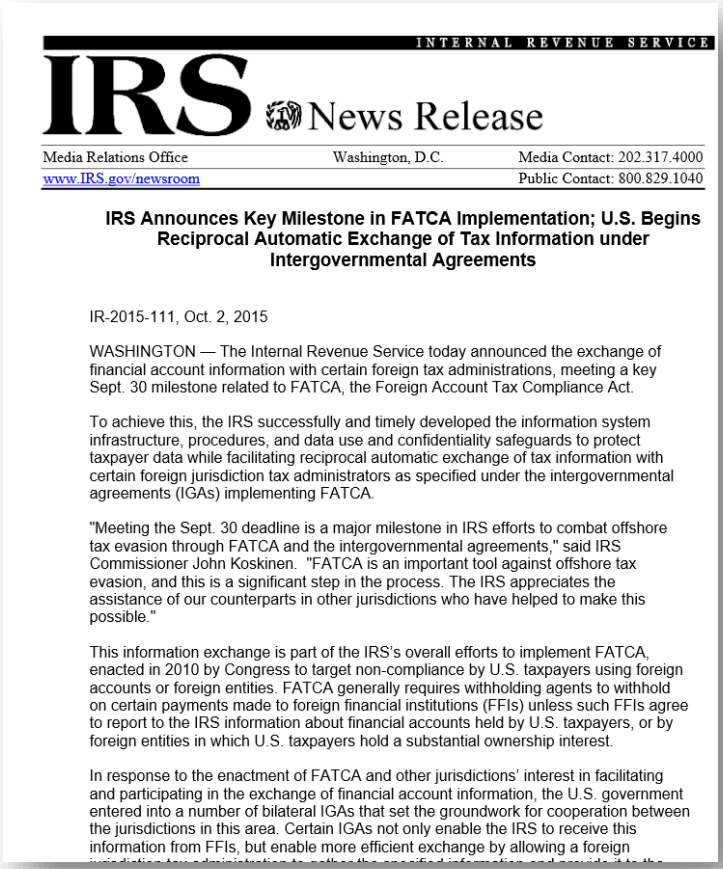
c) Loophole 3: Effective Date of the Rule

FinCEN seeks comment on whether the proposed effective date **of one year from the date of the issuance of the final rule** is sufficient to enable Financial Institutions to work any necessary changes into their systems or procedures in tandem with other cyclical updates, and thereby enable Financial Institutions to reduce implementation costs.

6. IRS misleading publicity of FATCA reciprocal information

www.irs.gov/pub/irs-news/IR-15-111.pdf

IRS Announces Key Milestone in FATCA Implementation; U.S. Begins Reciprocal Automatic Exchange of Tax Information Under Intergovernmental Agreements



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IRS Announces Key Milestone in FATCA Implementation; U.S. Begins Reciprocal Automatic Exchange of Tax Information under Intergovernmental Agreements

IR-2015-111, Oct. 2, 2015

WASHINGTON — The Internal Revenue Service today announced the exchange of financial account information with certain foreign tax administrations, meeting a key Sept. 30 milestone related to FATCA, the Foreign Account Tax Compliance Act.

To achieve this, the IRS successfully and timely developed the information system infrastructure, procedures, and data use and confidentiality safeguards to protect taxpayer data while facilitating reciprocal automatic exchange of tax information with certain foreign jurisdiction tax administrators as specified under the intergovernmental agreements (IGAs) implementing FATCA.

"Meeting the Sept. 30 deadline is a major milestone in IRS efforts to combat offshore tax evasion through FATCA and the intergovernmental agreements," said IRS Commissioner John Koskinen. "FATCA is an important tool against offshore tax evasion, and this is a significant step in the process. The IRS appreciates the assistance of our counterparts in other jurisdictions who have helped to make this possible."

This information exchange is part of the IRS's overall efforts to implement FATCA, enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts or foreign entities. FATCA generally requires withholding agents to withhold on certain payments made to foreign financial institutions (FFIs) unless such FFIs agree to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

In response to the enactment of FATCA and other jurisdictions' interest in facilitating and participating in the exchange of financial account information, the U.S. government entered into a number of bilateral IGAs that set the groundwork for cooperation between the jurisdictions in this area. Certain IGAs not only enable the IRS to receive this information from FFIs, but enable more efficient exchange by allowing a foreign

However the IRS announcement completely omits to mention that reciprocal reporting is limited to depository interest paid to individuals.

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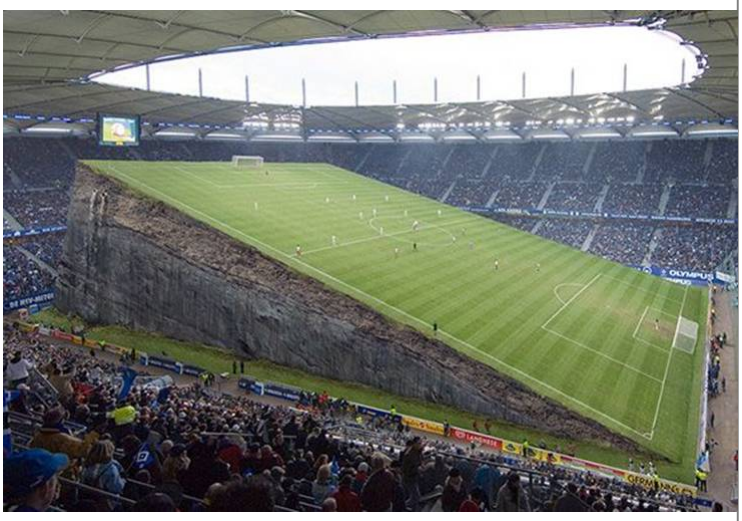
In response to the enactment of FATCA and other jurisdictions' interest in facilitating and participating in the exchange of financial account information, the U.S. government entered into a number of bilateral IGAs that set the groundwork for cooperation between the jurisdictions in this area. Certain IGAs not only enable the IRS to receive this information from FFIs, but enable more efficient exchange by allowing a foreign jurisdiction tax administration to gather the specified information and provide it to the IRS. Some IGAs also require the IRS to reciprocally exchange certain information about accounts maintained by residents of foreign jurisdictions in U.S. Financial Institutions with their jurisdictions tax

authorities. Under these reciprocal IGAs, the first exchange had to take place by September 30, giving the IRS a deadline to put in place a process to facilitate this data exchange.

The information now available provides the United States and partner jurisdictions an improved means of verifying the tax compliance of taxpayers using offshore banking and investment facilities, and improves detection of those who may attempt to evade reporting the existence of offshore accounts and the income attributable to those accounts. The IRS will only engage in reciprocal exchange with foreign jurisdictions that, among other requirements, meet the IRS's stringent safeguard, privacy, and technical standards. Before exchanging with a particular Jurisdiction, the United States conducted detailed reviews of that jurisdiction's laws and infrastructure concerning the use and protection of taxpayer data, cyber- security capabilities, as well as security practices and procedures. "This ground breaking effort has fundamentally altered our relationship with tax authorities around the world, giving us all a much stronger hand infighting illegal tax avoidance and **levelling the playing field**," Koskinen said.



The level playing field according to USA

7. USA Financial Institutions encourage undeclared money into US Financial Institutions even offering non-interest deposits to avoid the extremely limited reciprocity

Undeclared money around world fleeing to USA

Hundreds of billions untaxed financial assets are fleeing to US to escape the Common Reporting Standard.. This is ironic considering the US threatens a 30% withholding tax on any non US Financial Institution who does not agree to report to the IRS regarding accounts held by US persons.

Exacerbating this situation, US banks are offering non-interest bearing accounts to foreign account holders to assist clients evade the miniscule reporting of depository interest.

8. Proposal that the EU impose a withholding tax on EU Source Payments to US Financial Institutions unless US FI exchange info as per the existing FATCA IGAs with EU Member States

The EU Commission is advocating the OECD peer review the US due to its non-reciprocal reporting. This is a weak, slow process. The US threatened to impose a 30% withholding on any US source payments to any foreign Financial Institutions unless they agreed to report on US persons as per FATCA. It is therefore appropriate that the EU follow the same strategy of withholding tax on EU source payments to US Financial Institutions unless the US Financial Institutions agree to exchange information as promised in the reciprocal FATCA IGAs. No new agreement needed as this is already in FATCA IGAs.

US Financial Institutions may complain they do not have the authority to exchange information. However when US threatened to impose withholding on EU Financial Institutions, the EU institutions or authorities did not have the legislation to permit exchange information. Special legislation was needed to be implemented. So the US can equally get Congress to approve the exchange of information.

- exact same conditions of FATCA
- no pre-existing exemptions

Recommended withholding rate of 35%

- A 35% rate is suggested because it is the rate the EU Savings Tax for withholding in lieu of reporting
- Although the US non-compliance withholding is 30%, taxes are higher in the EU.

Dated this, the 18th day of October, 2015

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END OF PROPOSAL