International Wealth Tax Advisors
Cross Border Tax Planning Firm

# How FATCA and CRS Have Changed The World As We Knew It

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# Introduction

The word of the day, no the century is *Transparency*. The days of *Secrecy* are long over. Since the enactment of FATCA the world as we once knew it no longer exists. Switzerland is no longer the jurisdiction of choice but rather the U.S. and maybe one or two others are where the world appears to be stock piling their assets and investments. What does this mean to you and your clients? Listen as our panel of experienced advisors analyze the complexity of FATCA and CRS and the compliance effects it has placed on the global financial markets, institutions and individual investors.

***Transparency is the word of the century.***

***The Days of secrecy are no longer.***

# What is FATCA and CRS

## FATCA

### What is FATCA

- FATCA requires non-U.S. financial institutions (Foreign Financial Institutions, “FFI”) to report financial account information on U.S. account holders or pay a 30% penalty for non-compliance.
- Though agreed to with Model 1 jurisdictions, the U.S. is not currently providing reciprocal information to such jurisdictions.
- The U.S. is not currently considering CRS participation.

## Common Reporting Standard

### What is CRS?

- Reporting Financial Institutions (“RFI”) in participating jurisdictions perform due diligence to identify “financial accounts” that “reportable persons” hold an “equity or debt Interest” in and, if held by a passive non-financial entity (“NFE”), the “controlling persons” of the NFE who are reportable persons.
- RFIs report information collected to the competent authority of the participating jurisdiction in which they are resident
- Participating jurisdiction exchanges relevant information collected with CRS “partner jurisdictions” where the reportable persons are tax resident.
- Exchange is automatic, annual and in bulk.
- “reportable person”: An individual or entity that is tax resident in a partner jurisdiction
- Most participating jurisdictions likely to treat the U.S. as a “non-participating jurisdiction” & entities resident in U.S. as passive NFEs.

# Differences Between FATCA and CRS

## FATCA
### Primary Differences from CRS

1) Objective: Control
2) Bilateral regime
3) Imposes withholding penalty
4) Report accounts of individual U.S. persons (citizens and residents)
5) Some reciprocity of information with Model 1A jurisdictions
6) More exemptions from reporting, “sponsored entities” and other “deemed-compliant”
7) Central registration process with the IRS
8) PTC has the option to be treated as an FFI
9) “Investment Entity”, “managed by” may be broader than CRS
10) Cash is a financial asset
11) “Look-through” allowed to determine classification as FFI or NFFE
12) Trust protector not deemed to be a account holder (beneficial owner)

## Common Reporting Standard
### Primary Differences from FATCA

1) Objective: Transparency
2) Predominantly a multilateral regime
3) No withholding tax payable
4) Report accounts of individual tax residents regardless of citizenship
5) AEOI between partner jurisdictions
6) Fewer exemptions from reporting, e.g. no “sponsored entities“; charities not excluded. However, under both CRS & FATCA “trustee documented trusts” are non-reporting entities.
7) No central registration process- NB. No GIIN.
8) PTC may not be able to qualify as FI (investment entity)
9) “Investment Entity”: private client entity generally needs to satisfy “managed by” & “financial assets” test .
10) Cash might not be classified as a financial asset
11) “Look-through” not allowed to determine classification as FI or NFE
12) Trust Protector is a reportable person, regardless of whether the trust is an investment entity or a passive NFE

# FATCA and CRS Focus

## FATCA

### Primary Objective

- The tax revenue aspect of FATCA is widely stated as the primary purpose. In fact, it was not intended to close the tax loss gap. FATCA is not raising any significant tax revenue annually. In fact, except for the extraordinary penalties assessed, little additional tax has been collected.
- Senator Levin stated that FATCA was intended to "force foreign financial institutions to disclose their U.S. account holders or pay a steep penalty for nondisclosure. Hence, it appears that the primary purpose of FATCA was for the U.S. government to obtain otherwise private financial information and control of the global financial industry.
- Unlike a conventional withholding tax which actually intends to collect revenue, FATCA is designed to force foreign financial institutions to disclose private financial information to unilaterally submit to IRS and U.S. government control.

## Common Reporting Standard

### Primary Objective

- OECD's primary objective: Create a system of automatic exchange of tax information ("AEOI") to combat tax evasion and increase tax transparency globally.
- Based on FATCA…. But wider scope: FATCA requires reporting regarding U.S. taxpayers . CRS requires "reporting financial institutions" ("RFIs") to report regarding taxpayers resident in "partner jurisdictions- Currently, 100+ CRS "participating jurisdictions"!

# Statute, Agreements & Treaties

## FATCA

- FATCA
- **Inter-Governmental Agreements (IGAs)**
  - Difference is who reports to who and reciprocity
  - Model 1 IGAs
    - Government to government
  - Model 1A IGAs
    - Reciprocity
  - Model 2 IGAs
    - FFI report to IRS directly
- Enabling statute & regulations in reporting jurisdictions

## Common Reporting Standard

- CRS Competent Authority Agreements (CAAs)
  - **Multi-Lateral CAA**
    - Annex E
      - Must specify participating jurisdictions that it agrees to report to (i.e. “partner jurisdictions”)
      - sets conditions to be met for automatic exchange of information to take place
  - **Bi-lateral CAA**
  - **Non-reciprocal CAA (multi-lateral or bilateral)**
- Enabling statutes & regulations
- Convention on Mutual Administrative Assistance in Tax Matters / TIEAs / DTAs / DACS 2 in EU

# Key Elements of FACTA and CRS

## FATCA

### Definitions

- Foreign Financial Institution (FFI)
  - Traditional financial institutions
  - Investment entity
  - Insurance company (cash value / annuity)
  - Other financial business
    - Makes loans or provides credit
    - Purchases, sells, discounts or negotiates A/R, etc.
    - Provides institutional fiduciary services
    - Finances foreign exchange transactions
    - Leases assets
- NFFE
  - Passive
  - Active
- Deemed- Compliant entities
  - Sponsored entities
  - Other "deemed-compliant" entities; low value accounts, sponsored entities, owner-document, trustee documented trusts

## Common Reporting Standard

### Definitions

- Analogous to FATCA with some minor variations, e.g.:
  - Investment Entity
  - Non Financial Entity ("NFE")
    - Passive
    - Active
  - Reportable Person
  - Reporting Financial Institution ("RFI")
  - Participating Jurisdiction
  - Partner Jurisdiction
  - Controlling Person

# Beneficial Owners & Control

## FATCA

### Specified U.S. Persons

- FATCA does not employ the CRS concept of reporting beneficial owners and controlling persons, but rather the U.S. holder known as a "Specified U.S. Person"
- A U.S. specified person is:
  - **U.S. citizens**, residents, and entities organized under U.S. law, domestic estates and trusts.
  - Includes the U.S. Government, States, the District of Columbia and their agencies.
  - A U.S. person does not include
    - Captive insurance companies per IRC § 953(d), also not licensed by a State.
    - Publically traded corporations and members of an expanded affiliated group
    - 501 tax exempt organizations, retirement plans, U.S., state and municipal governments and their agencies
    - Banks, REITs, RICs (mutual funds), dealers, securities brokers, and charitable trusts

## Common Reporting Standard

### Equity & Debt Interests and Controlling Persons

- Is the trust or other entity an "investment entity" or an NFE?
- Where the trust is an investment entity, "account holders" include persons who hold "equity interests" or "debt interests in the trust. Persons who are settlors, beneficiaries, protector & natural person exercising ultimate effective control hold "equity interests" in a trust.
- Where the trust is a passive NFE, the "controlling persons" include natural persons who are the settlors, trustees, beneficiaries, protector & natural persons exercising ultimate effective control. "Look through" entities to determine who are the individuals exerting control. NB. FATF Recommendations.
- Only report **"reportable persons", i.e. individuals or entities that are resident in a partner jurisdiction.**



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# Investment Entity

## FATCA

- "Investment Entity"
  - U.S. Treasury Regulations have comparable definition of "investment entity" as CRS
- FATCA IGAs simply requires an entity **to be managed by a financial institution** to meet the definition of an "investment entity".
- Note under Regulations and IGAs "cash" is clearly a "financial asset" for the purpose of the definition of "investment entity"

## Common Reporting Standard

- "Investment Entity"

  a) An entity that conducts business **on behalf of customers** trading in money markets, foreign exchange, portfolio managements, otherwise investing, managing, administering **financial assets or money**; or

  b) An entity the gross income of which is "primarily attributable" to investing, reinvesting or trading in financial assets, if the entity is **managed by** a depositary institution, custodian or other financial institution.
- An entity's gross income is "primarily attributable" to investing etc. in financial assets if gross income from such activities is equal to/or exceeds 50% of entity's income during the 3 year period prior to 31 December or date entity was formed if sooner.

# NFFE/NFE- Passive or Active

## FATCA

- Along with the definition of "Investment Entity", the definition of a Active NFFE is a key element of FATCA
  - These two definitions **ensure that offshore trust structures** will have a FATCA reporting obligation.
- An **Active NFFE** is:
  - A foreign entity with less than 50% of the gross income for the calendar year being passive; and less than 50% of the NFFE's assets produce or are held for the production of passive income.
- **Passive NFFE is not a Active NFFE** or in other words a foreign entity with more than 50% of its gross income being passive; or more its assets produce or are held for the production of passive income.

## Common Reporting Standard

- "NFE": an entity that is not an investment entity or other financial institution
- NFE is not itself required to perform due diligence / report
- Generally, for private client structures, an **Active NFE** is an NFE if less than 50% of the NFE's gross income for preceding reporting period is passive income & less than 50% of NFE's assets in the same period are assets that are held for the production of passive income. **If not, NFE is a "passive NFE".**
  - RFIs are required to report on "controlling persons" of account holders that are **Passive NFEs**
  - RFIs not required to report account holders that are RFIs or **Active NFEs**

# Reporting

## FATCA

### Reporting Obligations

- Notice 2011-53, requires only identifying information (name, address, TIN, and account number) and account balance or value of U.S. accounts.
- Notice 2013-43 further postponed reporting until March 31, 2015 for calendar year 2014 onward.
- Notice 2015-66 postponed the date for competent authority reporting in IGA countries.
- Implementation difficulties postponed reporting on gross proceeds to 2017 (with respect to the 2016 calendar year).
- IRS Form 8966, FATCA Annual Report due March 31
  - Automatic extension of time, Form 8809-I
- Passive NFFE is required to only report substantial U.S. owners (10% or greater U.S. shareholders)

## Common Reporting Standard

### Reporting Obligations

- On Oct 1, 2014 early adopter jurisdictions agreed to exchange calendar year 2016 information by Sept 30, 2017
- Late adopters, those implementing CRS after Oct 1, 2014, will exchange calendar 2017 information by Sept 30, 2018
- Reportable information on (a/c) holders who are "reportable persons": name, address, TIN, date/place of birth of individual a/c holders or "controlling persons" of entities, a/c #, RFI name; a/c balance/value at end of reporting year or on closure, total gross amount credited to the a/c holder with respect to the a/c in the reporting period, gross amount of sale/redemption proceeds. Broadly similar to FATCA.

# Non-compliance

## FATCA

### Non-compliance and Penalties

- Non-compliance
  - Sign onto IGA
  - FFI not registering to get GIIN
  - Failure to provide W-8BEN / W-8BEN-E
  - Failure to file annual report
  - Failure to close accounts of non-compliant U.S. account holders
  - **Withholding penalties**
    - **IRS Notice 2013-69**
    - **30% of US source FDAP income (client and FFI)**
    - **30% of sales proceeds**
    - **Pass-thru payments**
    - Final Regulations (pub Sep 18, 2015) provide for withholding to be effective on pass-thru payments as of Jan 1, 2018.

## Common Reporting Standard

### Non-compliance and Penalties

- **No withholding tax**
- Anti-avoidance rules
- Penalties on RFIs and reportable persons for non-compliance
- Possible Transitional rules
- Partner jurisdictions may terminate or suspend exchange arrangements for breach
- Implications for TIEA requests

# Issues In Exchanging Information

## FATCA

- December 29, 2014, Rev. Proc. 2012-24 and 2014-64
  - Implement the Nonresident Alien Deposit Interest Regulations
    - Provide for exchange of information pursuant to various income tax or other convention or bilateral agreements, as well as receive, information.
    - Section 4 of Rev. Proc. 2014-64 lists the countries with which the U.S. will automatically exchange information with regard to deposit interest paid to NRA on or after January 1, 2013 where interest paid, aggregate, equals $10 or more paid.
    - The payor is required to make an information return on Form 1042-S for the calendar year in which the interest is paid.
- **The U.S. is not currently reciprocating.**

## Common Reporting Standard

- CRS is **intended** to be multilateral **global & fully reciprocal with few exceptions**
- **80+ jurisdictions (most notably U.S!) not participating.**
- Bahamas, Singapore and Hong Kong have signed bilateral CAA.
- Switzerland has few “partner jurisdictions” under the multilateral CAA.
- Data protection, privacy, safety concerns
- Costs to RFIs and participating jurisdictions

# Structures Minimizing Exposure

## FATCA

### US Structuring / Restructuring Considerations

- Potentially no FATCA or CRS
- Unintended results
- U.S. practitioners generally require home country certification of compliance

## Common Reporting Standard

### Structuring / Restructuring Considerations

- Consider each relevant participating jurisdiction's anti-avoidance provisions
- Consider effective date of the anti-avoidance provisions.
- Establishing or re-domiciling entities to non-participating jurisdictions or jurisdictions that have fewer partner jurisdictions
- Structuring entities as "investment entities" or "active NFEs" as opposed to passive NFEs
- Limiting the number of financial accounts held by passive NFEs
- Excluding beneficiaries
- No protectors resident in reciprocal reporting jurisdictions

# Offshore Financial Service Centre Impact

- Amount of business going to U.S. is unknown
- Selection of CRS partnering jurisdictions
- Competition with U.S. service providers
  - Offshore providers have advantage to U.S. providers
    - U.S. service providers not as familiar with offshore structures and purpose
    - U.S. providers not as aware of non-U.S. jurisdictional rules and issues
    - Popular U.S. trust jurisdictions regulators (WY, SD and DE) not comfortable with offshore structures and purpose
  - Cost of doing business in the U.S.
    - Capital requirements for trust companies
    - U.S. taxation

# Professional Profile

## Jack R. Brister, TEP

Jack has more than 25 years of experience. He specializes in U.S. tax planning and compliance for non-U.S. families with international wealth and asset protection structures which include non-U.S. trusts, estates and civil law foundations that have a U.S. connection; and non-U.S. companies wanting to do business in the U.S.

Jack also specializes in non-U.S. persons investing in U.S. real property, and other U.S. assets, pre-immigration planning, U.S. expatriation matters, U.S. persons in receipt of gifts and inheritances from non-U.S. persons, non-U.S. account and asset reporting, offshore voluntary disclosures, FATCA registration and compliance (W-8BEN-E and Form 8966) and executives working and living abroad.

Jack has been widely published, in addition to speaking at numerous international engagements. Jack has also been named a Citywealth Top 100 U.S. Wealth Advisor.

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# Thank you