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International Disclosure Obligations: "Beyond FATCA" - Further Developments in the Laws On Automatic Information Exchange and Disclosure in the Wake of FATCA

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The U.S. information reporting and withholding tax regime known as "FATCA"[1] was signed into law on March 18, 2010. In the nearly four years since, the attention of international financial institutions of every variety, investment funds and their professional advisers in the U.S. and abroad has been closely focused on understanding the compliance and reporting implications of FATCA.

At the core of FATCA is the requirement for those covered by its provisions to register with the U.S. Internal Revenue Service ("IRS"), in the absence of a specific exemption from such registration, and thereafter to report each year certain information relating to U.S. taxpayers that have a relationship with the registered institution to the IRS, or suffer a 30% withholding tax on a variety of payments received. FATCA provides that, in certain cases, compliance by foreign institutions may be via their home jurisdiction's tax authority, but the compliance obligations imposed generally are consistent.

There is growing international pressure to build on the initiative taken by the United States, as evidenced by recent projects advanced by the OECD[2] and comments made by public officials about the possibility of a multinational consensus on international information exchange.[3] Concrete steps have included intergovernmental agreements between the U.S. and other foreign governments authorized by FATCA.[4] This has been followed by non-U.S. governments entering into their own bilateral agreements (without the U.S. as a party) compelling banks and financial institutions in those countries to disclose information as well. For example, the United Kingdom has signed intergovernmental agreements ("IGAs") with Jersey, Guernsey and the Isle of Man (the "Crown Dependencies") and also with the Overseas Territories of the Cayman Islands, Gibraltar, Montserrat, Bermuda, Turks and Caicos Islands, the British Virgin Islands and Anguilla. These agreements all oblige relevant entities, such as banks and certain financial institutions, investment funds and companies, resident in those territories to report information relating to U.K. account holders. The agreements with the Crown Dependencies and Gibraltar are reciprocal and so also oblige certain entities in the U.K. to identify and report information to HM Revenue & Customs ("HMRC") on account holders and controlling persons who are resident in those states. These new automatic IGAs will apply to accounts in existence on or after 30 June 2014, with the first reports due in 2016.

The bilateral IGAs are very much in line with the mounting global pressure for greater transparency in the affairs of taxpayers across national borders. The OECD has responded to a mandate from G20 leaders to reinforce action against tax avoidance and evasion, and released last week a new draft global common reporting standard ("CRS") for the automatic exchange of information between tax authorities worldwide. A large number of countries has committed in advance to early adoption of this new standard, once finalised. Those countries include most (but not all) EU Member States, Argentina, India, South Africa and the U.K.'s Crown Dependencies and Overseas Territories. The new OECD standard will work in a broadly similar way to FATCA and the information-sharing IGAs. The CRS sets out a minimum standard for the information to be exchanged, and the actual exchanges would then take place under either existing double-tax agreements or multilateral conventions, most notably the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. One of the key concerns for taxpayers and administrations will be confidentiality of information that might be exchanged under these procedures, an issue the OECD draft CRS recognises. Another will be the fundamental change in transparency for multinational enterprises of their "worldwide" effective tax rate to tax authorities, and the related possibility that common and straightforward intercompany arrangements will be subjected to a different and enhanced level of scrutiny by tax authorities.

An ambitious timetable adopted by the various working parties means that work is expected to progress quickly on this new global standard. In particular, this new global standard was presented to, and endorsed by, the G20 finance ministers at their recently-concluded meeting in Sydney. Thereafter, the announced plan is that detailed commentary on the new standard (which will function as de facto legislative history for interpretation of the provisions once enacted) is to be presented at a subsequent meeting of G20 finance ministers in September 2014; it is expected that proposals to deal with the substantial technical and systems challenges that a multilateral system will present will be presented at that meeting as well. Should all of these projects be completed on deadline, it seems possible that the new OECD global standard on automatic information exchange will be finalised and adopted quickly by multiple states, with effective dates in 2015 (and even conceivably in late 2014).

In a parallel development, the finance ministers of France, Germany, Italy, Spain and the U.K. announced during 2013 their intention to exchange FATCA-type information among themselves, in addition to their agreements to exchange information with the United States. This pilot project has since been adopted by a total of 37 countries, many of them non-EU States. How this will mesh with the OECD global standard remains to be seen; however, all potentially affected institutions and their advisers should prepare for the possibility that there may be substantially greater information exchange between governments about their global activities and possibly pursuant to multiple international regimes – and further due diligence and reporting requirements for taxpayers likely will follow. In the meantime, affected businesses should continue their FATCA preparation, in particular, the classification of entities as a first step.

Proskauer's tax lawyers in both the U.K. and the U.S. will be monitoring all of these global developments, and as the new rules become finalised and implemented we will continue to update our clients worldwide.

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[1] "FATCA" stands for "Foreign Account Tax Compliance Act," and is the common name for the provisions codified in Sections 1471 – 1474 of the U.S. Internal Revenue Code of 1986, as amended ("Code"), as well as the voluminous U.S. Treasury Regulations promulgated thereunder.

[2] See, *e.g.*, Organization for Economic Cooperation and Development, Action Plan on Base Erosion and Profit Shifting (2013), Table A.1, Action Plan Item 13, discussed further below.

[3] See, *e.g.*, comments by Michael Danilack, IRS Deputy Commissioner, Large Business & International (International), to the New York State Bar Association Section on Taxation Annual Meeting, January 28, 2014.

[4] Although these bilateral agreements are not "treaties" in the strict sense of the word, as the U.S. government's authority to enter into these agreement is contemplated by statute, they are like treaties in that they provide (among other matters) rules for determining the jurisdiction of the high contracting parties over taxpayers in connection with the matters covered. As such, the eligibility of a non-U.S. person for the benefits of the IGA is a question of law that would appear to be similar to the more common question of eligibility for the benefits of an income tax treaty.

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