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Analysis

Non-US Citizens' Account Info Could Fall Through Cracks

By [Natalie Olivo](#) · April 8, 2019, 7:41 PM EDT

The American system for exchanging people's financial information with tax administrations in different jurisdictions is relatively one-sided compared with how other

nations swap data, which could mean U.S. bank accounts belonging to noncitizens won't get reported to their home countries.



[Internal Revenue Service](#) headquarters in Washington, D.C. The U.S. has not adopted the common reporting standard for sharing bank account information, though it's based on the U.S. system created under the Foreign Account Tax Compliance Act. (AP)

The global framework for tax administrations to share individuals' bank account information, called the common reporting standard, is based on the U.S. system that was enacted under the Foreign Account Tax Compliance Act. But unlike the rest of the world, which taxes people based on residence, the U.S. taxes based on citizenship — a key difference that allows the Internal Revenue Service to get more information than its counterparts in other countries, potentially making the U.S. an attractive place for noncitizens to stash assets.

A [recent study](#) from the U.S. [Government Accountability Office](#) acknowledged the separate tax systems but ultimately said adopting the common reporting standard, or CRS, “would result in no additional benefit” to the IRS in terms of obtaining information on offshore accounts of U.S. citizens. However, the report doesn't discuss how FATCA could allow non-U.S. citizens to potentially skirt disclosure obligations, according to Peter Cotorceanu, who is of counsel to the Zurich office of Anaford AG.

“They're basically saying there's no reason the U.S. should adopt the CRS because ... we get all the information we need under FATCA,” he said of the GAO report, released April 1. “That's absolutely correct, but it doesn't focus on the fact that the U.S. isn't living up to an honorable position in the world as far as information exchange is concerned.”

Under FATCA, which Congress passed in 2010 and which went into full effect in 2014, Americans must report holding more than \$50,000 in foreign assets. In addition, foreign financial institutions must disclose information on U.S. taxpayer accounts to the IRS

through intergovernmental agreements, or IGAs.

When FATCA was introduced, no international platform existed for sharing account information between countries. But other nations “became more interested in understanding the financial assets held abroad by their residents through an exchange of account information among themselves,” the GAO said. In response, the [Organization for Economic Cooperation and Development](#) drew on FATCA to develop its own reporting system, which became the CRS, according to the report.

The difference between the two systems lies in how information is exchanged between countries. Under the CRS, most of the 100 jurisdictions involved have preferred a multilateral approach when implementing an international framework to automatically exchange information, according to the OECD.

Meanwhile, FATCA involves bilateral IGAs between the U.S. and individual countries. A template for this agreement states that the U.S. government “acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange” with the other country involved.

But according to Cotorceanu, the data isn’t exchanged equally between the two countries. Rather, American banks are sending a “narrowly limited” set of information that the IRS was already collecting, he said.

The two account activities that trigger reporting from U.S. banks — interest earned by a foreign individual and earnings from investments in U.S. securities by a foreign individual or entity — were on the books before FATCA, Cotorceanu said.

He added that non-U.S. citizens can structure their accounts to avoid these disclosure requirements, including by creating an entity in a jurisdiction that doesn’t have an IGA with the U.S.

“A lot of people are finding the U.S. [to be] very attractive as a place to move their money to if they don’t want to be reported,” Cotorceanu said. “As long as they are careful and structure it correctly, they can remain completely anonymous from their home jurisdiction.”

In addition, the U.S. government’s decision not to participate in the CRS means that

certain information about foreign individuals' accounts simply won't leave American shores, according to John Richardson, a Canada-based attorney who helps dual U.S. citizens with FATCA compliance.

“The CRS is a mechanism that [makes it] very attractive for foreign capital to come into the United States,” he said.

However, FATCA isn't the only way a foreign country can get information about its residents' American accounts. The resources available to these jurisdictions outside IGAs suggest that the overall information exchange relationship between the U.S. and other countries may not be as one-sided.

For example, a country can use its tax treaty with the U.S. to request information outside FATCA, according to William Byrnes, an executive professor at Texas A&M University School of Law. He noted there may be some hoops the country has to jump through, but the ultimate result is the same.

“The IRS is not out to make the U.S. some kind of nefarious haven,” he said. “It's not as simple as other countries, but you can get to the same outcome.”

Beyond tax treaties, the IRS announced last July that it had formalized [an agreement](#) with revenue authorities from the U.K., Canada, Australia and the Netherlands to share information and collaborate on investigations into tax evasion and other financial crimes.

This group, the Joint Chiefs of Global Tax Enforcement, focuses on criminal matters — while FATCA and the CRS are used for civil issues — but it points to an overall emphasis on sharing information, according to [Hogan Lovells](#) partner Bill Lovett.

“The focus for everybody now is on data and analyzing data to identify unreported accounts [and] unreported income,” he said. “And there's a lot of data sharing and analytics that are being applied to the data between the U.S. and other countries.”

As for FATCA and the CRS, a report published in October by a [European Union](#) parliamentary group found flaws with both systems. Specifically, the report concluded that each one could prevent information related to an account's beneficial owner — the individual who ultimately controls the assets — from disclosure to the relevant jurisdiction.

With FATCA, the EU report said, the system doesn't require the U.S. to exchange information at the beneficial ownership level, which means that "EU individuals will be able to avoid reporting by holding their bank accounts in the U.S. not directly under their own name," but through companies or other entities.

On the other hand, the EU report pointed out that while the CRS "involves full reciprocity among all countries" at the beneficial ownership level, the system also allows a jurisdiction to choose to send information, but not receive it.

A country's deliberate decision not to receive information it's entitled to "could be part of an avoidance scheme that exploits golden visas or residency and citizenship by investment schemes offered by many tax havens," according to the EU report.

The EU report also noted that FATCA hits back at foreign banks that don't comply in the form of a 30% withholding tax on payments from the U.S.

"Unlike the sanctions imposed by the U.S, there are no sanctions or incentives for countries to join the CRS or to exchange information with EU countries," the report said.

The author of the EU study was Andres Knobel, a lawyer and consultant with the Tax Justice Network, a U.K.-based group campaigning for tax transparency.

Knobel told Law360 the biggest concern about FATCA is that it doesn't require the exchange of beneficial ownership information. But there are risks with the CRS as well, he said.

For example, people could convince their banks that they reside somewhere else, which would get their information sent to the wrong country.

"We're not saying that the CRS is the perfect system," Knobel said.

--Editing by Robert Rudinger and John Oudens.

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