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Information Exchange Between the U.S. and Latin America: The U.S. Perspective, Part 2

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SPECIAL REPORTS

Information Exchange Between the U.S. and Latin America: The U.S. Perspective, Part 2

by Bruce Zagaris

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This is the second part of a two-part special report. For Part 1, see *Tax Notes Int'l*, June 9, 2014, p. 955. An earlier version of this article was presented at the STEP conference in Miami on February 20, 2014.

IV. Simultaneous Examination Program

The SEP operates through the exchange of information provisions of treaties and TIEAs. This program is designed to facilitate the exchange of information between the United States and its treaty partners.

Currently, the United States has working arrangements with Australia, Canada, France, Germany, Italy, Japan, Korea, Mexico, Norway, the Philippines, Sweden, and the United Kingdom.[61]

A. Goals and Benefits

Simultaneous examinations involve the United States and one or more of its treaty or TIEA partners conducting separate, independent examinations of the taxpayer or a related taxpayer within their jurisdiction. The purpose of the simultaneous examination is to determine the correct tax liabilities of the taxpayer and/or related entities. The goal is to facilitate the exchange of information and to mutually secure other tax compliance benefits.

The compliance benefits that may result from a simultaneous examination include:

- the assessment of tax based on a more complete factual development of the circumstances pertaining to the tax liability;
- the exchange of information on apparent tax avoidance techniques or patterns;
- the exchange of information on tax haven transactions;
- the exchange of information on cost-sharing arrangements;
- the exchange of information on profit allocation methods in special fields such as global trading and new financial instruments;
- a more thorough understanding of multinational business practices, complex transactions, and examination issues that may be particular to an industry or group of industries; and
- the identification of noncompliance trends in a market segment.

A simultaneous examination may also enable examiners to build more complete factual evidence for tax adjustments for which the mutual agreement procedure might be requested. A simultaneous examination may also enable taxpayers to request competent authority consideration at an earlier stage than might otherwise have been the case.[62]

B. Basis for an SEP

The program is coordinated through the U.S. competent authority. Simultaneous examinations are carried out according to written working arrangements entered into by the director of the international unit at

[61]Internal Revenue Manual section 4.60.1.3 (Jan. 1, 2002).

[62]IRM section 4.60.1.3.1 (Jan. 1, 2002).

LB&I, who is the U.S. competent authority, and the competent authority of some of the United States' treaty or TIEA partners.

The absence of a working arrangement should not prevent examiners from recommending cases that are otherwise suitable for simultaneous examination with a treaty or TIEA partner. In those instances, the director of the international unit at LB&I will concurrently propose to the treaty or TIEA partner both the conclusion of a working arrangement and the conducting of a simultaneous examination.

While simultaneous examinations are most often conducted on a bilateral basis, a multilateral simultaneous examination is possible when there is a legal basis for the exchange of information between all of the potential participating countries.

When the United States has treaties or TIEAs with two or more potential participating countries that do not have exchange of information provisions among themselves, parallel bilateral simultaneous examinations may still be possible.

Specific exchanges of information between the United States and treaty or TIEA partners are conducted on a bilateral basis according to the applicable treaty or TIEA. The United States will not provide information received from one tax treaty partner to another, either in the framework of a bilateral simultaneous examination or in a multilateral simultaneous examination. This would violate the secrecy provisions of the treaty or TIEA with the country providing the information.

C. SEP Recommendations Criteria

The taxpayers selected for simultaneous examination are often large multinational corporations whose U.S. income tax returns fall within coordinated industry cases. Simultaneous examinations may also involve corporations not within the scope of the coordinated industry case program and noncorporate entities, including individuals and partnerships.

Cases considered for simultaneous examination may involve, but are not limited to:

- A taxpayer or related taxpayers with business transactions or a business nexus in the participating countries.
- Operations by the taxpayer or related group of taxpayers that are significant in scale, either worldwide or within the participating countries.
- An issue or issues that would be relevant to the participating countries in one or more compatible years. These issues may include, for example, transfer pricing practices, potential international tax avoidance techniques, and potential noncompliance trends in a market segment, or a potential for mutual benefit to be gained by the tax administrators of the participating countries.[63]

D. SEP Proposal and Acceptance Procedures

Proposals for simultaneous examinations can be initiated by either the United States or a treaty or TIEA partner. The competent authority of the initiating country transmits its proposal in writing to the other competent authority. The proposing competent authority will set forth the criteria used in deciding to propose the case along with other available information as may be useful to the receiving competent authority (for example, information about the taxpayer's business organizational structure, functions, products, intangible assets, and so forth).[64]

E. Conduct of Simultaneous Examinations

When a case is accepted for simultaneous examination, the responding competent authority will confirm acceptance in writing and will identify a designated representative who will have functional responsibility for directing that country's examination. After receiving confirmation, the proposing competent authority will confirm the designated representative.

Any meetings between the designated representatives will be coordinated with the SEP program analysts (in the office of the director, international (LB&I) and the foreign government) who will prepare the necessary competent authority correspondence and attend all meetings to oversee the exchange of information process. All information must be exchanged by the competent authority or his designee with delegated authority.

The meetings may occur either in the United States or in the foreign country.

Meetings held in conjunction with the simultaneous examination will consider the audit plans of the participating countries (although there is no exchange of formal audit plans), the possible issues to be developed, timetables and target dates for the examination, and approaches to be taken. Other considerations during the simultaneous examination meeting will include what documents, records, and so forth might need to be requested through the SEP.

All exchanges are carried out by the competent authorities in accordance with the applicable treaty or agreement.

If issues arise during a simultaneous examination that may lead to double taxation, the U.S. designated representative will inform the director of the international unit at LB&I of the details by way of a memorandum to the manager, exchange of information team, as soon as practical. The manager, exchange of information team, will consult with the manager, tax treaty and, if appropriate, a competent authority analyst may

[63]IRM section 4.60.1.3.2 (Jan. 1, 2002).

[64]IRM section 4.60.1.3.3 (Jan. 1, 2002).

become a consultant to, or a member of, the U.S. examination team. In those instances, the competent authority analyst will be responsible for providing direction to the examiners on the factual development necessary of any issues that could become subject to the MAP.

U.S. examiners in those cases will limit themselves to development of the facts and will not try to negotiate the resolution of double taxation issues. The director of the international unit at LB&I is the only person who has this authority. The IRS will issue Letter 1853(P), ''Right to Request Competent Authority Consideration Letter,'' to the taxpayer. In those cases, the taxpayer must consider the need to request competent authority consideration under Rev. Proc. 96-13, 1996-1 C.B. 616, which is under revision.

Any participating country may discontinue participation in a simultaneous examination at any time that it concludes that it would no longer be of benefit.

A simultaneous examination will be concluded at such time as the designated representatives mutually agree. The U.S. designated representative will prepare a report at the conclusion of the simultaneous examination and provide an assessment of its results.[65]

F. SEP Reports

Within 10 working days of the end of each calendar quarter (March 31, June 30, September 30, and December 31), each designated representative will provide a status report to the manager of the exchange of information team on any simultaneous examinations that have not been concluded or discontinued.

Within 30 calendar days of the conclusion or discontinuance of a simultaneous examination, the designated representative will send a report to the manager of the exchange of information team through the international territory manager. The report should include the types and amounts of adjustments to the taxpayer's taxable income or tax liability expected to be proposed regarding the issues that were covered by the simultaneous examination, a brief description of the other compliance benefits that may have been obtained from participation in the simultaneous examination, and a brief description of any particular issues or circumstances encountered that might bear on the undertaking of future simultaneous examinations with the participating country or countries.

G. Other SEP Considerations

The manager responsible for the U.S. examination informs U.S. taxpayers who have been accepted for simultaneous examination.

Since simultaneous examinations are independent examinations conducted by each of the participating countries according to their own laws and procedures, the taxpayer's consent to a simultaneous examination is not required. However, in an effort to inform the taxpayer of the SEP, Exhibit 4.60.1-2 of the IRM provides guidelines and procedures for implementing the program in the United States. This exhibit may be given to the taxpayer.

Since exchanges of information with a foreign treaty or TIEA partner result from a simultaneous examination, taxpayers may resist information requests or seek to impose restrictions or conditions on its disclosure to a foreign competent authority. Managers and examiners should reject any such conditions or restrictions and should not give any assurances that information will not be exchanged or that the taxpayer will be consulted before any exchange. Any such assurances will not be binding on the IRS or the U.S. competent authority, except as follows.

If a taxpayer resists a request for information on the basis of its possible disclosure to a foreign competent authority, the case or group manager should try to obtain a comprehensive explanation of the legal and factual grounds of the taxpayer's objections (such as a claim that the information constitutes a trade or business secret) and consult with counsel. If the international territory manager and counsel consider that it would be appropriate to agree that any items of information may not be exchanged, or may not be exchanged without prior notice to the taxpayer, they will first obtain the written consent of the director of the international unit at LB&I before agreeing to any such conditions.[66]

V. Industrywide Exchanges of Information

Industrywide exchanges with treaty or TIEA partners promote international cooperation in understanding worldwide operations of selected major industries. The main goal of the exchange is to obtain comprehensive data on worldwide industry practices and operating patterns. This information enables a more effective and knowledgeable review of the tax returns of multinational enterprises.

An exchange of letters between the United States and the treaty or TIEA partner competent authorities establishes the scope of an industrywide exchange. Generally, the director of the international unit at LB&I will designate a representative to coordinate the industrywide exchange.

Industrywide exchanges are conducted by tax officials of each country meeting periodically to:

- discuss current industry events of mutual interest;
- jointly explore common issues;
- pool resources for special studies;

[65]IRM section 4.60.1.3.7 (Jan. 1, 2002).

[66]IRM section 4.60.1.3.9 (Jan. 1, 2002).

- discuss comparative methods in establishing arm's-length standards;
- conduct seminars on major international issues; and
- cooperate on new and emerging issues.

During an industrywide exchange, taxpayers are not discussed and no taxpayer information is exchanged. Any request made by a treaty partner for specific taxpayer information is handled in accordance with the exchange of information articles of treaties or TIEAs, under the specific exchange of information program.

Any information obtained at an industrywide exchange should only be disclosed to those persons whose official tax administration duties regarding the industry issues require such disclosure.[67]

VI. Spontaneous Exchanges of Information

A spontaneous exchange of information is furnished to a treaty or TIEA partner without a prior specific request. It typically involves information discovered during a tax examination, investigation, or other procedure that suggests or establishes noncompliance with the tax laws of a treaty or TIEA partner. The information may pertain to nonresident aliens, foreign corporations, U.S. citizens and domestic corporations, or other taxpayers.

The examiner obtaining the information will transmit it to the second-level manager. The second-level manager will forward the information to the IRS tax attaché who has jurisdiction over the country to which the information pertains.

VII. FATCA IGAs

FATCA intragovernmental agreements are a subset of exchange of information agreements and provisions in treaties. As of January 18, 2014, the United States has 20 FATCA IGAs and 31 substantially completed IGAs, according to remarks on January 14, 2014, by International Tax Counsel Danielle Rolfes.

A. Overview of Model IGAs

1. Background

The model agreement will implement the information reporting and withholding tax provisions commonly known as FATCA. Enacted by Congress in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act, these provisions target noncompliance by U.S. taxpayers using foreign accounts. The model agreement was developed in consultation with France, Germany, Italy, Spain, and the United Kingdom and constitutes an important development in establishing a common approach to combating tax evasion based on the automatic exchange of information. These five countries, along with the United States, will work in close cooperation with other partner countries, the OECD, and, when appropriate, the European Commission, toward common reporting and due diligence standards in support of a more global approach to effectively combating tax evasion, while minimizing compliance burdens.

2. Joint Statement of February 2012

The model agreement follows the commitment reflected in the joint statement issued with the same countries on February 8, 2012, to collaborate on developing an intergovernmental approach to implementing FATCA. The model agreement is accompanied by another joint communiqué with France, Germany, Italy, Spain, and the United Kingdom, endorsing the agreement and calling for a speedy conclusion of bilateral agreements based on the model.[68]

The preamble to the joint statement provides that Treasury and the IRS are considering an alternative approach to implementing FATCA, based on bilateral agreements between the United States and foreign countries, to have foreign financial institutions collect and report information to authorities in their residence country, and have those foreign authorities report the information to the IRS. In this regard, on February 8, 2012, Treasury announced that the United States and five other countries (France, Germany, Italy, Spain, and the United Kingdom) are exploring a framework to share information on bank accounts across borders under a groundbreaking intergovernmental approach to implementing the FATCA.

The proposed framework would allow the United States and a partner country to conclude an agreement in which the foreign country would collect information required by FATCA and transfer that information to the IRS. As a result, FFIs in the foreign country could avoid having to directly conclude an FFI agreement with the IRS and would eliminate U.S. withholding on payments to FFIs established in the foreign country. The agreement would also obligate the United States to reciprocate regarding automatic collecting and reporting on the U.S. accounts of residents of the FATCA partner.

In order to reciprocate, the United States agreed to finalize the proposed bank interest reporting regulations (REG-146097-09) under section 6049, which it did on April 17, 2012. Those proposed rules would extend information reporting to include bank deposit interest paid to NRA individuals who are residents of any foreign country. At present, the United States reports only on interest paid to U.S. persons and Canadian residents.

[67]IRM section 4.60.1.4 (Jan. 1, 2002).

[68]Treasury, Joint Statement regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA, Feb. 8, 2012.

Treasury has said the agreements may be used as models for similar accords with other appropriate governments, acknowledging that the United States is in talks with other governments interested in this approach to implementing FATCA for their FFIs.

In the joint statement, the six countries commit to ''working with other FATCA partners, the OECD, and where appropriate, the EU, on adapting FATCA in the medium term to a common model for automatic exchange of information.''[69]

B. Two Versions of Model 1

There are two versions of the model agreement — a reciprocal version and a nonreciprocal version. Both versions establish a framework for reporting by FIs of financial account information to their respective tax authorities, followed by automatic exchange of that information under existing bilateral tax treaties or TIEAs. Both versions of the model agreement also address the legal issues that have been raised in connection with FATCA, and simplify its implementation for financial institutions. The United States has said it will conclude IGAs even with countries with which it does not have either a treaty or TIEA.[70]

1. The Reciprocal Version

The reciprocal version of the model also provides for the United States to exchange information currently collected on accounts held in U.S. FIs by residents of partner countries, and includes a policy commitment to pursue regulations and support legislation that would provide for equivalent levels of exchange by the United States. This version of the model agreement will be available only to jurisdictions with whom the United States has an income tax treaty or TIEA, and regarding whom Treasury and the IRS have determined that the recipient government has robust protections and practices in place, to ensure that the information remains confidential and that it is used solely for tax purposes. The United States will make this determination on a case-by-case basis. The nonreciprocal model provides that while FATCA partners will collect and exchange FATCA information, the United States will not reciprocate.

FATCA requires FFIs 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. Treasury and the IRS will continue to work with other governments and with businesses to implement FATCA and to achieve maximum consistency and standardization in the technical implementation of the agreed information exchange, which includes providing more detailed guidance as necessary.

Article 1 of the model agreement contains 40 definitions. One of the challenging parts of FATCA is that both the law and regulations are long and contain multitudes of technical terms and definitions not previously known. Hence, obtaining a basic understanding of the law and model agreement requires a substantial investment of time, mastering technical definitions.

Article 2 contains the obligations to obtain and exchange information on reportable accounts. The obligations of the United States are not as detailed, compared with the FATCA partner, since they do not have comparable FATCA legislation.

In article 3 the time and manner of exchange of information is detailed.

Article 4 has the application of FATCA to FATCA partner FIs, including the suspension of rules relating to recalcitrant accounts. The article also provides for specific treatment of retirement plans, identification and treatment of other deemed-compliant FFIs and exempt beneficial owners, and special rules concerning related entities that are nonparticipating financial institutions (NFIs).

Article 4 sets forth the application of FATCA to FATCA partner FIs. The provisions deal with treatment of reporting FATCA partner FIs, suspension of rules relating to recalcitrant accounts, specific treatment of retirement plans, identification and treatment of other deemed-compliant FFIs and exempt beneficial owners, and special rules regarding related entities that are NFIs.

Article 5 (collaboration on compliance and enforcement) deals with minor and administrative errors. Subject to any further terms contained in a competent authority agreement, a competent authority can make an inquiry directly to a reporting financial institution (RFI) in the other jurisdiction when it has reason to believe the administrative errors or other minor errors have led to incorrect or incomplete reporting or resulted in other infringements of this agreement. In the event of significant noncompliance, a competent authority will notify the competent authority of the other party when the former has determined that there exists significant noncompliance with the obligations under the agreement, regarding an RFI in the other jurisdiction. The competent authority of the other party must apply its domestic law (including applicable penalties) to address the significant noncompliance described in the notice.

If, in the case of a reporting FATCA partner FI, those enforcement actions do not resolve the noncompliance within 18 months after notification of significant noncompliance is first provided by the U.S. competent authority, the United States will treat the reporting FATCA partner FI as an NFI. The IRS will

[69]''IRS Final Regulations on Reporting Interest Paid to Nonresident Aliens,'' T.D. 9584, RIN 1545-BJO1, Apr. 17, 2012.

[70]Alison Bennett, ''Treasury Planning 'Standalone' Versions of FATCA Intergovernmental Pacts, Rolfes Says,'' *Daily Rep. for Exec.*, Mar. 4, 2013, at G-12.

make available a list of all reporting FATCA partner FIs that are treated as NFIs under the provisions of the article.

The parties must implement requirements to prevent FIs from adopting practices intended to circumvent the reporting required under the agreement.

Article 6 contains a mutual commitment to continue enhancing the effectiveness of information exchange and transparency. The U.S. government acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with its FATCA partner. The United States is committed to further improving transparency and enhancing the exchange relationship with its FATCA partner. The acknowledgment reflects the fact that, at present, FATCA is unbalanced with its technical matter, comprehensive requirements, and burdens, in terms of human and financial resources required of FFIs, so that FATCA partners and their FIs have much more responsibilities, burdens, and costs than their counterparts in the United States.

Article 6(3) commits the parties to working with other government partners, the OECD and EU, on adapting the terms of the agreement to a common model for automatic exchange of information, including the development of reporting and due diligence standards for FIs.

Article 6(4) states that for reportable accounts that are preexisting accounts maintained by an RFI, the United States commits to establish, by January 1, 2017, for reporting regarding 2017 and subsequent years, rules requiring U.S. RFIs to obtain and report to the FATCA partner the taxpayer identification number of each account holder of a FATCA partner reportable account. In turn, the FATCA partner commits to establish by January 1, 2017, for reporting regarding 2017 and subsequent years, rules requiring FATCA partner RFIs to obtain the U.S. TIN of each specified U.S. person.

Article 7(1) requires parties to notify each other in writing when their necessary internal procedures for entry into force have been completed. The agreement must enter into force on the later of January 1, 2013, or the date of the later of those notifications, and must continue in force until terminated.

Annex I contains due diligence obligations to identify and report on U.S. reportable accounts and on payments to some NFIs. Annex II provides for nonreporting FATCA partner FIs and products.

2. Nonreciprocal Version

The main difference between the reciprocal and nonreciprocal versions of the FATCA IGA is that the United States will not need to reciprocate, in terms of obtaining and furnishing information, to the FATCA partner for those IGAs that are nonreciprocal. The nonreciprocal IGA may be of interest to governments that have no income tax or nominal tax and that prioritize financial privacy.

3. FATCA IGA Model 2

On November 15, 2012, Treasury unveiled its second model agreement for countries to participate under FATCA, requiring direct reporting of U.S.-owned accounts by FFIs coupled with the automatic exchange of information with the United States.

The agreement is an alternative to the first model pact, which allows the intergovernmental sharing of information in IGAs. Treasury unveiled the text of that agreement in July.

Unlike the approach in Model 1, FIs in countries that adopt Model 2 pacts will have to sign a reporting agreement known as an FFI agreement.

Model 2 is for those who want to cooperate with FATCA based on direct reporting by FIs, supplemented by the exchange of information upon request. That exchange would be subject to confidentiality and other protections under the agreement, including provisions limiting the use of the information that is exchanged.

The IRS has not yet made these agreements available to any bank, Candace Ewell, a director in PricewaterhouseCoopers LLP's Washington National Tax Service, pointed out.[71] She said it may be possible that the agreements will come in two parts, one dealing with the Model 2 accord and one for FIs that are simply reporting directly under IRS regulations.

Model 2 includes a most-favored-nation clause, giving the signing partner country the benefit of any more favorable terms the United States later enters into with another jurisdiction.

Model 2 contains the option to make the pact a reciprocal accord under which the United States would share information on its own citizens in return for the information from other countries.

Model 2 may be especially useful for countries whose tax systems are not sophisticated and hence, do not want to undertake additional responsibility to help their FIs undertake FATCA reporting.[72]

4. Revised IGAs

On May 9, 2013, Treasury published updated FATCA IGAs on its website, including a model Annex II. With the final rules in place, the government no longer intends to list exempt entities that are already listed in the final regulations. To that end, a new Annex II will replace the customizable Annex II. Although not substantially different from the previous versions, the revised model IGAs reflect the existence of final regulations and include new versions of Annex I on due diligence.

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[71] G-7 meeting, Nov. 16, 2012, at G-7.

[72] For more information, see Bennett, ''Treasury Unveils Second Model Agreement for Countries to Comply With FATCA,'' *Daily Rep. for Exec.*, at G-7.

C. First FATCA IGA (U.K.-U.S.)

On September 14, 2012, the U.S. Treasury announced that it had signed the first FATCA IGA with the United Kingdom and that it closely follows the model information sharing agreements released on July 26, 2012.[73] The IGA includes a complex Annex II, which contains entities that are intricate and exclusive to a particular jurisdiction, such as pension funds.[74] These entities may be periodically updated. The list includes entities, accounts, and products that present a low risk of being used by U.S. persons to evade U.S. tax and that have similar characteristics to the entities, accounts, and products identified in Annex II as of the date of entry into force of the agreement. As a result, they are excluded from the FATCA compliance regime. The listing of those entities, accounts, and products will clarify their status and simplify compliance with FATCA.

D. Subsequent FATCA IGAs

On November 19, 2012, the United States signed reciprocal FATCA IGAs with Denmark and Mexico.

Annex II of the Mexico-U.S. IGA lists the institutions and products to be treated as exempt beneficial owners, deemed-compliant FIs (DCFIs), and exempt products. The exempt beneficial owners include the Mexican government and any of its political subdivisions, or any wholly owned agency or instrumentality of five listed governmental entities; El Banco de México and any of its wholly owned subsidiaries; and insurance institutions for pension and survival as defined in article 159, Fraction IV of Mexico's Social Security Law.

Among the deemed-compliant FIs are any exempt organizations resident in Mexico that are entitled to benefits under article 22 of the Mexico-U.S. tax treaty, some *fideicomisos* (Mexican trusts), and some investment entities that are a collective investment vehicle regulated under Mexican laws. The list of exempt products includes some Mexican personal retirement funds, insurance premiums for retirement, pension funds, mandatory savings administered by retirement funds administrators, and voluntary and complementary savings administered by retirement funds. An interesting nuance in the Mexico-U.S. IGA is the inclusion of any exempt nongovernmental organization entitled to benefits under article 22 of the treaty. The linkage of the treaty and FATCA IGA is quite beneficial to the flow of capital to transnational philanthropic organizations in both countries.

As with the U.K. and Danish IGAs, the Mexico-U.S. agreement adds three new articles that were not included in Treasury's Model 1 template:

- Article 7 contains a most-favored-nation provision giving Mexico the benefit of any more favorable terms the United States later enters into with another jurisdiction.
- Article 8 provides for consultations between the parties if difficulties arise during implementation of the agreement, and for amendments by written mutual consent.
- Article 9 clarifies that the annexes form an integral part of the agreement.[75]

In addition to the name, address, and U.S. TIN of U.S. taxpayers who own accounts in Mexico, that nation will also collect from Mexican banks:

- the account number (or functional equivalent in the absence of an account number);
- the name and identifying number of the reporting Mexican FI; and
- the average monthly account balance or value during the relevant calendar year or other "appropriate reporting period."[76]

The agreement will enter into force on January 1, 2013.

On December 3, 2012, Swiss and U.S. negotiators initialed a FATCA IGA in Washington. The exchange of information between Switzerland and the United States will take place directly between Swiss FIs and the U.S. IRS rather than through centralized government data gathering.

The agreement ensures that accounts held by U.S. taxpayers with Swiss FIs will be declared to U.S. tax authorities, either with the authorization of the account holder or through so-called group requests, Switzerland's State Secretariat for International Financial Matters (SIF) said.

In the absence of any authorization, information on the accounts will not be exchanged automatically, but only on the basis of the administrative assistance clause of the Switzerland-U.S. tax treaty.

Collective investment schemes and FIs with primarily Swiss clients will be deemed to comply with FATCA, subject to conditions and registration requirements.

The agreement also sets out simplified due diligence requirements regarding the identification of U.S. clients

[73]For a copy of the agreement, see http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf.

[74]For background on the new agreement, see Bennett, "U.S., U.K. Sign First Intergovernmental Information Sharing Accord Under FATCA," *Daily Rep. for Exec.*, Sept. 17, 2012, at G-4.

[75]Kristen A. Parillo, "Mexico, U.S. Sign FATCA Agreement," *Tax Notes Int'l*, Dec. 3, 2012, p. 875.

[76]For more information, see "U.S.-Mexico FATCA Agreement Entails Sharing of Taxpayer Identification Numbers," *Daily Rep. for Exec.*, Nov. 29, 2012, at G-1.

already subject to reporting by other Swiss FIs, in order to reduce the administrative burden of compliance, the SIF said.

If a U.S. client of a Swiss bank refuses to authorize the transfer of account information to U.S. authorities, the Swiss FI would then notify their U.S. counterparts that some of their U.S. clients were refusing to cooperate. It will then be up to the U.S. side to follow up on this through group requests for information under the Switzerland-U.S. tax treaty, identifying patterns of behavior that they suspect constitute tax evasion, rather than being required to provide the identity of the account holders.[77]

On November 20, 2012, the Spanish Ministry of Finance and Public Administrations announced that Spain and the United States initialed an IGA, but didn't specify when the initialing took place. According to the November 20 Spanish government statement, the initialed Spain-U.S. IGA is based on the reciprocal Model 1 template jointly developed in July by Germany, France, Italy, Spain, the United Kingdom, and the United States.[78]

On January 17, 2013, Treasury announced that it had concluded an IGA with Norway.[79]

Among the differences in the FATCA agreements are:

- differences in the definition of the account holder (the Danish and Mexican IGAs have language concerning intermediaries that is not included in the U.K. IGA);
- differences in the type of information that FFIs must report concerning U.S. account holders (the U.K. and Danish IGAs require annual account balances whereas the Mexican IGA requires average monthly account balances);
- differences in the competent authority process for contacting FIs if minor or administrative errors are suspected (the U.K. and Danish IGAs allow both competent authorities to directly contact the FI in the other country, while the Mexican IGA does not allow the U.S. competent authority to directly contact Mexican FIs); and
- differences regarding FFIs that will be treated as deemed compliant or exempt (Annex II of the Danish and Mexican IGAs include some collective investment vehicles but the U.K. IGA does not and, as mentioned, the Mexican IGA includes as DCFIs exempt organizations covered under the treaty).[80]

E. Final FATCA Regulations

On January 17, 2013, Treasury and the IRS issued final FATCA regulations. The regulations extend the advantages for FIs operating in jurisdictions with IGAs.

The regulations revise some chapter 4 definitions and concepts to better mirror those in the IGAs, such as the definition of a custodial institution, depository institution, and investment entity; the exemption of cash value insurance contracts with a value of $50,000 or less from treatment as financial accounts; and the expansion of the class of entities that will be treated as exempt beneficial owners or DCFIs. The revisions will facilitate compliance by FIs operating in IGA and non-IGA countries.

The final regulations keep December 31, 2015, as the end of the transition period for the requirement that all members of an expanded affiliated group be a participating or deemed-compliant FFI. The transition period addresses circumstances in which an entity within an expanded affiliated group encounters restrictions under local law. During the transition period, a branch or affiliate of an FFI in a jurisdiction that prohibits the reporting or withholding required by FATCA does not prevent the other FFIs within the same group from concluding an FFI agreement. At the end of the transition period, Treasury and the IRS expect that the restrictive jurisdiction will have signed an IGA or will have otherwise modified its domestic law or that the FFI group will have changed its business in that country.

Some stakeholders requested Treasury and the IRS to either liberalize further the expanded affiliated group requirements or extend the transition period beyond 2015. Treasury and the IRS explain in the preamble to the final regulations that they rejected those suggestions, observing that IGAs are the appropriate vehicle to address the concerns of the stakeholders. The decision not to liberalize the affiliated group requirements or extend the transition period beyond 2015 imposes pressure on multinational FIs and jurisdictions in which they do business.

The final regulations keep the 10 percent threshold for purposes of classifying an individual as a substantial U.S. owner. The 10 percent threshold in the final regulations provide an advantage to an FFI operating in a jurisdiction with an IGA, since it can rely on anti-money-laundering and know-your-customer rules,

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[77]Daniel Pruzin, ''Swiss Government Announces Agreement With United States on FATCA Implementation,'' *Daily Rep. for Exec.*, Dec. 5, 2012, at G-3.

[78]Parillo, ''U.S. Initials FATCA Agreements With Switzerland and Spain,'' *Tax Notes Int'l*, Dec. 10, 2012, p. 1000.

[79]U.S. Department of Treasury, Treasury and IRS Issue Final Regulations to Combat Tax Evasion, Jan. 17, 2013, *available at* http://www.treasury.gov/press-center/press-release/Pages/tg1825.aspz.

[80]*See* Parillo and David D. Stewart, ''U.S. Intends to Address Variations in FATCA Agreements,'' *Tax Notes Int'l*, Dec. 17, 2012, p. 1118.

which usually have a 25 percent threshold, but Treasury and the IRS chose not to align with the final regulations.[81]

F. Automatic Info Exchange: The New Standard

On September 6, 2013, during the heads of government meeting in Saint Petersburg, G-20 leaders endorsed and gave a specific timetable to meet a new global tax standard on automatic exchange of information.[82]

At the Cannes Summit in 2011, the G-20 agreed to consider exchanging information automatically for tax purposes on a voluntary basis. In 2012 at the Los Cabos Summit, the G-20 welcomed the OECD report on automatic exchange and encouraged all countries to join this practice.

The G-20 leaders' declaration observed that because of the developments in the Global Forum and other recent advances (for example, imminent start of the implementation of FATCA), it is now time to move to a more ambitious, more efficient, and higher standard: automatic exchange of information.

Recent developments involving undisclosed foreign bank accounts have also underscored the urgent need to move to this new standard, which the Global Forum will monitor to ensure its effective implementation.

In July 2013, G-20 finance ministers and central bank governors fully endorsed the ambitious OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information for tax purposes and declared their commitment to automatic exchange of information as the new global standard.

The OECD has started work with G-20 countries to develop the new single global standard for automatic exchange of information. G-20 finance ministers and central bank governors mandated the OECD to provide a progress report at the October 8, 2013, finance ministers' meeting, including a timeline for completing this work. The new standard, which is part of a model competent authority agreement, was presented at the G-20 finance ministers and central bank governors' meeting in February 2014.

According to the G-20 leaders' declaration, a clear need exists for the practical and full implementation of this new tax standard on a global scale. In this regard, the Global Forum will establish a mechanism to monitor and review the implementation of the new standard on automatic exchange of information and will work with the OECD Task Force on Tax and Development, the World Bank Group, and others to help developing countries identify their need for technical assistance and capacity building.

The G-20 annex states that the next challenge concerning automatic exchange of information is to have all jurisdictions commit to this standard and put it into practice. Calling on all other jurisdictions to join by the earliest possible date, the G-20 annex states that its members are committed to the automatic exchange of information as the new global standard, which must ensure confidentiality and the proper use of information exchanged. The G-20 fully supports the OECD work with G-20 countries aimed at presenting such a new single global standard for automatic exchange of information by February 2014 and to finalizing technical modalities of effective automatic exchange by mid-2014. On February 13, 2014, the OECD issued the Common Reporting Standard for Automatic Exchange of Information.

The G-20 also expects to start to exchange information automatically on tax matters among G-20 members by the end of 2015. The 1988 Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters is the key to ensuring rapid implementation of the new standard and to enabling developing countries to benefit from the new more transparent environment.

In 2009 the OECD and the Council of Europe quickly responded to the G-20's call for a multilateral instrument by amending the CMAATM in 2010 to meet international standards and permit all countries with domestic laws that are sufficient to uphold the confidentiality of tax information to join. All G-20 countries have signed the convention and, as of the release of the tax annex, more than 70 countries and jurisdictions are covered or are likely to be covered by the convention, including significant financial centers. The convention is a powerful tool in the fight against tax evasion and permits all forms of cooperation in tax matters, including automatic exchange of information. The G-20 expects all jurisdictions to join the convention without further delay.[83]

The tax annex to the G-20 leaders' declaration shows how the G-20 is supporting efforts by the OECD to make membership in the convention and adherence to automatic exchange of information the new international standard in tax transparency. The declaration shows the dynamic way in which government networking is shaping international standards and the tax enforcement subregime as part of the international financial enforcement regime.

G. OECD Work on Automatic Info Exchange

The OECD is developing the common reporting standard because of the globalization of FATCA. On

[81] Jaime Arora and Parillo, "FATCA Regs Fill In Blanks, but Challenges Remain," *Tax Notes Int'l*, Jan. 28, 2013, p. 315.

[82] Group of 20 Nations Report, Tax Annex to the St. Petersburg G-20 Leaders' Declaration, Sept. 2013, *available at* http://www.g20.org/load/782804366.

[83] *Id.*

June 18, 2013, the OECD presented a report to the G-8 summit on delivering a standardized and global model of automatic exchange. Some of the differences are that the OECD will not focus on citizenship. The OECD issued the common reporting standard to the G-20 in February 2014.

The OECD is developing a standardized, secure, and cost-effective model of bilateral automatic exchange for the multilateral context. The advantage of standardization is process simplification, higher effectiveness, and lower costs for all stakeholders concerned. A proliferation of different and inconsistent models would potentially impose significant costs on both government and business to collect the necessary information and operate the different models.

A standardized multilateral automatic exchange model requires a legal basis for the exchange of information. There are different legal bases upon which automatic exchange could take place, including a bilateral treaty with article 26 of the OECD model treaty, or the CMAATM.

All treaties and exchange of information instruments contain provisions regarding tax confidentiality and the obligation to keep information exchanged as secret or confidential. The OECD recently released a guide on confidentiality, ''Keeping It Safe,'' which sets out best practices related to confidentiality and provides practical guidance on how to meet an adequate level of protection.

Finally, the development of common technical solutions for reporting and exchange of information is a critical element in a standardized exchange system — especially one that will be used by a large number of countries and FIs.[84]

H. EU Proposes Automatic Info Exchange

Another critical player in tax information exchange, especially automatic exchange, is the EU. Its policies are important and it coordinates its external policies. EU member states often influence the policies of international organizations, such as the OECD, the IMF, and informal groups such as the G-8, G-20, and Financial Action Task Force.

On June 12, 2013, the European Commission proposed legislation to expand the amount of tax-related information automatically exchanged among the 27 EU members to include dividends, capital gains, and all other forms of financial income and account balances.

In what EU Tax Commissioner Algirdas Šemeta said would put the EU in the vanguard in the global fight against tax evasion, the proposal (which would take effect in 2015 if its gets the unanimous consent of all member states) emulates FATCA. It is also designed to take advantage of EU rules that require member state authorities to share as much information with each other as they do with a foreign country.

Šemeta said that the proposal would give the EU the most comprehensive information exchange system in the world for taxation.

Earlier in 2013, five EU member states agreed to pursue among themselves a pilot project modeled after FATCA in order to bolster the fight against tax evasion. However, the European Commission proposal would make the pilot project unnecessary. Instead, the EU executive body wants an amendment to the EU administrative and mutual cooperation directive, which already requires EU member states to share data regarding employment, director's fees, life insurance, pensions, property, and other information.

Šemeta also noted that unlike the current automatic information exchange outlined under the EU administrative and cooperation agreement in which the data on employment are required ''only if available,'' the tax data on dividends and bonds would be mandatory.

The European Commission proposal is separate from the EU cross-border savings tax legislation that requires all but two EU member states to automatically share information of interest-bearing income from the bank accounts of nonresidents. On March 24, 2014, the European Union's efforts to adopt a broad information-sharing initiative to crack down on tax evasion overcame a major hurdle as Luxembourg and Austria, the only two EU member states that impose a withholding tax on the income of nonresidents and then share it with the tax authorities where the nonresident resides, said they will support the plan.

Austria and Luxembourg decided to support the initiative after EU leaders agreed to use retaliatory measures against Switzerland, Liechtenstein, Monaco, Andorra, and San Marino if they don't agree to give up bank secrecy by the end of 2014.[85]

At the June 2013 meeting, the European Commission supported its approach to adopting an automatic information exchange system for all income. It is planning to push the issue at the next G-20 summit in Australia.

Despite claims that the EU is in the vanguard in the fight against tax evasion, others insist that as long as Luxembourg (which has a massive financial service industry built around bank secrecy) and Austria have not adopted automatic information exchange, it will be

[84]For more information on the OECD's work on automatic exchange of information, see OECD, ''Automatic Exchange of Information,'' *available at* http://www.oecd.org/ctp/exchange-of-tax-information/automaticexchange.htm.

[85]Joe Kirwin, ''EU Information-Sharing Effort Gets Boost As Austria, Luxembourg End Their Opposition,'' *Daily Rep. for Exec.*, Mar. 24, 2014, at I-1.

difficult to convince other countries with offshore financial centers to do the same.[86]

VIII. International Collection Assistance

International collection assistance involves offshore information gathering techniques, treaty-based collection procedures, and international seizures.

A. Offshore Information Gathering Techniques

An important aspect of international collection is offshore information gathering techniques, which include requesting assistance from foreign governments. A list of countries that have an income tax treaty or a TIEA with the United States can be accessed at http://www.irs.gov/pub/irs-apa/treaty.pdf.

The types of information that may be exchanged under an exchange of information include, but are not limited to:

- tax returns and return information such as verification of filing status, citizenship, residency, income, expenses, and tax liability;
- third-party information return filings;
- bank records;
- business records;
- public records, such as deeds, birth, death, and marriage records; and
- witness interviews.[87]

Recent changes in regulatory practice also enable the IRS through the Department of Homeland Security to stop and question a taxpayer with unpaid U.S. tax assessments at the border.[88]

B. Domestic Branches of Financial Institutions

One goal of IRS collection officials is to try to identify a taxpayer's offshore accounts and to ascertain whether the delinquent taxpayer's bank has a branch in the United States or a U.S. possession. If the delinquent payer uses a bank that has a U.S. branch, then the IRS will levy on the U.S. branch.[89]

C. Treaty-Based Collection Tools

The treaty-based collection tools potentially include U.S. treaties and TIEAs. Five treaties contain a collection assistance provision. The five countries that participate in the mutual collection assistance requests are Canada, Denmark, France, the Netherlands, and Sweden. The United States and these treaty partners help each other in the collection of taxes covered by their respective tax treaties. As noted in Section III.E.11 of part 1 of this article, the Mutual Collection Assistance Program falls within the scope of the mutual assistance article of the tax treaties in question.

Under the MCAP, a requested country will endeavor to collect taxes owed to the requesting country by a citizen of the requesting country who is residing in the requested country. The taxpayer's name, address, identification number, type of tax, amount of tax, and any other information deemed necessary to assist the collection process is exchanged with the participating treaty partner.[90]

Once the United States ratifies the 2010 protocol to the CMAATM and provided it does not reserve on the collection assistance provisions, it will significantly expand its abilities to obtain and give international assistance in collection.

D. International Seizures

The United States aggressively pursues the seizure and forfeiture of assets that are moved to, or hidden in, other countries. If successful, the result will be to achieve its primary goal to take the profit out of the crime.

For forfeiture laws to work effectively, the United States and its international partners cooperate to enforce both their domestic and international enforcement efforts. The United States pursues the forfeiture of assets found abroad, as well as assists other countries whose assets are hidden in the United States.[91]

Five basic means exist by which international cooperation can be initiated: bilateral treaties, multinational agreements, executive agreements, letters rogatory, and obtaining cooperation of the defendant. Cooperation by the defendant works by making arrangements between the government and the defendant for the latter to cooperate by agreeing to repatriate assets. The agreement is normally part of a plea agreement. In many cases, this method will substantially reduce the time it takes to complete the forfeiture process.[92]

IX. Hypotheticals

A. Hypothetical 1

Gide Flemant, a Belgian citizen who currently resides in Belgium, has extensive business dealings in the United States. Many of these business dealings involve transactions through a Canadian corporation in which he is a minority shareholder. In the United States, Mr. X helped him plan some of the transactions and also

[86]For more information, see Kirwin, "European Commission Proposes FATCA-Like Scheme for All EU Member States," *Daily Rep. for Exec.*, June 13, 2013, at I-1.

[87]IRM section 5.21.2.

[88]IRM section 5.1.18.14.5 (Mar. 27, 2012).

[89]26 C.F.R. section 301.6332-1(a)(2) outlines the procedures when a bank is in business in the United States with deposits held in a branch outside the United States.

[90]IRM section 11.3.25.5 (June 19, 2009).

[91]IRM section 9.7.10 (Oct. 23, 2013).

[92]*Id.*

helped use single-member LLCs and U.S. bank accounts to prevent the Belgian tax authorities from learning of the investments and gains from the investments. Ms. Y, an attorney and the spouse of Mr. X, has been a nominee shareholder of some of the entities and a director for others in which Flemant invested. Mr. X hired Mr. A to serve as the accountant for the entities of Flemant and for Flemant himself. Flemant learns that the IRS is auditing his returns for potential criminal violations. Until recently, he would not have had to worry about U.S. information gathering, let alone criminal cooperation between the two countries. However, the mutual legal assistance treaty (MLAT) signed on January 28, 1988, and the supplementary treaty dated December 16, 2004, and now in force between Belgium and the United States, will, among other things, be available to locate or identify persons, information, documents, and evidence; execute requests for search and seizure; and locate, trace, immobilize, seize, and forfeit proceeds of crime.

Under the 2006 Belgium-U.S. tax treaty, the U.S. government can request assistance relating to assessment, collection, enforcement, or prosecution of taxes that are the subject of the treaty. Fortunately for Flemant, the two governments do not yet have an SEP or a simultaneous criminal investigation program. Article 27 of the Belgium-U.S. treaty provides for assistance in collection. It requires that a requested state must try to collect on behalf of the requesting state those taxes imposed by that other requesting state that will ensure that any exemption or reduced rate of tax granted under the treaty will not be enjoyed by those persons not entitled to the benefits.

If the criminal investigation progresses, Flemant will be sad to learn that the proposed Belgium-U.S. extradition treaty, signed on April 27, 1987, and the supplementary treaty dated December 16, 2004, makes an offense extraditable if it is punishable under the laws of both signatory countries by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. Article 20 provides that the treaty applies to offenses committed before as well as after it enters into force. The fact that Flemant did business in Canada is not good for him, because Canada and the United States also have a new MLAT, have simultaneous civil and criminal tax programs, and have concluded a protocol to their extradition treaty that specifically includes fiscal offenses.

Can tax or law enforcement authorities interview and obtain the papers concerning allegedly illegal transactions and planning from his counsel, Mr. X and Ms. Y? It seems that the MLAT and tax treaty allow this.

Or from his accountant, Mr. A? Probably yes.

Do Mr. X and Ms. Y have any potential liability under Belgian or U.S. laws? Under U.S. laws, X and Y may have liability by virtue of the *Pasquantino* case. On April 26, 2005, the U.S. Supreme Court upheld criminal convictions arising from a scheme to avoid taxation by a foreign government. The decision in *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), increases the reach of the U.S. wire fraud statute, 18 U.S.C. section 1343, to encompass the use of interstate wire communications to fraudulently avoid paying foreign tax liabilities. The Supreme Court's decision resolved a long-running conflict between lower federal courts over whether the mere use of U.S. wires in connection with a scheme to violate only foreign law is sufficient to constitute a felony violation of U.S. law.

What about Mr. A? Presumably a Belgian prosecutor will scrutinize their conduct under Belgian tax evasion laws. For instance, the ''una via'' law, introduced in September 2012, provided a uniform way of dealing with tax fraud cases. It was agreed that major tax evasion cases would be tackled by the judiciary, while minor tax offenses are to be processed by the administration. The law also significantly increased penalties. The targets would need to seek counsel from qualified Belgian tax counsel.

B. Hypothetical 2

An investigating judge in Mexico may charge individuals, including Juan Suarez, with, among other things, narcotics violations, money laundering, and tax crimes. More than likely, the individuals also have some legal entities through which they are conducting business (that is, selling automobiles, airplanes, arms, and narcotics). What are the potential mechanisms whereby the Mexican government can request assistance? What if the Mexican authorities know that Suarez, a Mexican resident and delinquent U.S. taxpayer, has extensive dollar holdings in the Chase Manhattan Bank in Manhattan? Could the Mexican authorities provide that information and the bank account number (if known) to the IRS, along with a description of the tax years and tax issues at stake? How would the IRS respond? The IRS has a long-standing and active relationship with its Mexican counterpart on tax enforcement cooperation and would likely issue a summons to Chase Manhattan Bank, requesting the information and would notify Mr. Suarez.

If the IRS serves a summons on a bank or other third-party record keeper, what if anything could the taxpayer do? Mr. Suarez could retain counsel and try to block or at least delay compliance with the summons.

What if Mexico merely wants confirmation that Suarez still has a condominium on Calle Cinco or Biscayne Boulevard in Miami? The IRS or even the DOJ could verify that by looking at the public records. The Mexican government could also verify this information by using an online service and/or hiring someone in the private sector to obtain the information.

If U.S. counsel is retained by a target of the investigating magistrate or by a third-party intermediary, such as a financial institution or professional from whom documents are subpoenaed, what should U.S. counsel do? He should contact Mexican counsel experienced in these cases and develop a strategy to deal with the request. U.S. counsel may want to file an action in U.S. District Court, seeking to quash the summons and/or seeking a declaratory judgment that the records are protected.

What arguments can U.S. counsel make under the TIEA? The request may be too broad in terms of coverage of years and scope. They may be able to argue that it is a political witch hunt or perhaps it is barred by the statute of limitations in Mexico.

Under an MLAT? U.S. counsel could also potentially argue that the MLAT is too broad and/or politically motivated and/or barred by the statute of limitations.

To what extent should U.S. counsel rely on Mexican counsel? Without close cooperation with Mexican counsel, U.S. counsel may have difficulty effectively dealing with the request.

Felipe Suarez, Juan's son, is a beneficiary of a foreign nongrantor trust established by Juan. Felipe funded the trust with $1 million 20 years ago and has been funding it with additional money during the last six years to pay for Felipe's BA and now JD at the University of Miami. Should Felipe have separate counsel? Probably. Does he have different arguments? Yes, hopefully Felipe can argue that part or all of the money is legitimate and he has not himself been involved in any illegitimate activity and had no reason to know that the money is the illicit instrumentality or proceeds of crime.

About 10 years ago, Juan Suarez contacted XYZ law firm for advice on an extractive industry project in the mythical Latin American country of Bolivenecaudo. He acquired ABC LLC. The project has been successful, but ABC has disputes with Bolivenecaudo about the taxability of profits and royalties. In fact, Bolivenecaudo is investigating a conspiracy between the owners, the law firm, and Bolivenecaudo to defraud it of taxes. It is also investigating alleged bribes paid to the minister of mines for some permits and to customs officials to clear mining equipment. Mexico is also investigating Juan for Mexican tax violations in not declaring profits from the mining venture. Mexico requests the papers from XYZ law firm regarding the planning and operation of the mining venture. Can it obtain them?

XYZ law firm will want to hire counsel who will claim the attorney-client privilege. Mexico and its counsel (the Department of Justice) may argue that the documents should be subject to the crime/fraud exception to privilege. The DOJ would argue that the crime/fraud exception would include the conspiracy to defraud Bolivenecaudo of taxes and alleged bribes, if the DOJ could show that XYZ law firm participated in the planning and/or implementation of the bribes.

You are a partner in XYZ law firm. Can you represent Juan, Felipe, and ABC LLC? The family wants your firm to work on these cases because your firm has been involved for 20 years in representing the family.[93] Probably not. Under the circumstances of an apparent or at least potential criminal investigation, XYZ would have a non-waivable conflict since XYZ is itself the apparent target of the investigation by Bolivenecaudo.

X. Summary and Conclusion

The U.S. budgetary problems, the pay-as-you-go system, the revenue estimates obtained for the anti-tax-haven bills, and the proclivity of some members of Congress to focus on tax enforcement and compliance directed at U.S. taxpayers concealing money abroad ensures that the anti-tax-haven bills will constantly be appended to appropriations legislation in this session of Congress and in future sessions. There are so many anti-tax-haven initiatives and the lack of actual reciprocity by the U.S. government, as opposed to the rhetoric, may well lead to dispute resolution proceedings soon and to disagreements within the international initiatives of the OECD and FATF, as a result of the perceived lack of a level playing field.

A global trend toward criminalization of tax compliance and enforcement will continue. A continuing trend is the convergence of international tax enforcement cooperation with other areas of the law, including criminal law, money laundering, asset forfeiture, and international evidence gathering. The revised FATF recommendations (making tax crimes express predicates of anti-money laundering) and the Treasury advanced notice of proposed rulemaking on customer due diligence illustrate aspects of the convergence.

International organizations, such as the OECD, will continue their projects on the role of, and accountability for, banks and other financial intermediaries in tax compliance and enforcement, automatic exchange of information, tax information exchange, and transparency. Governments will continue to try to privatize tax enforcement by deputizing FIs and service providers regarding reporting, ethics, and a range of other requirements. Criminal investigations and prosecutions of noncompliant institutions and service providers will continue.

There will be a continuing convergence between stronger enforcement cooperation and tax enforcement. Hence, the OECD will continue to emphasize exchange of information in its tax transparency initiative. The FATF revised recommendations provide for strengthened enforcement cooperation obligations. In this regard, the convergence of tax enforcement, asset forfeiture, and money laundering is dynamic.

The emphasis will turn to automatic exchange of information, both in the context of the CMAATM, FATCA, and the revised EU savings directive.

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[93]The hypotheticals are based on the ones in Chapter 2 of Zagaris, *International White Collar Crime* (Cambridge U. Press 2010).

Disagreements are likely to continue among the OECD and developing countries about the proper financial architecture, not only in tax policy, but also financial regulation. If possible, the G-8 countries will try to continue to centralize decision-making in elite informal groups, such as the G-20, the Financial Stability Forum, and the OECD and the groups it controls, such as the Global Forum on Taxation.

NGOs such as Tax Justice Network, Global Integrity, Greenpeace, and others are all playing more important roles in international tax enforcement, and lobbying for more proactive uses of international tax enforcement, money laundering and forfeiture law against transnational organized crime, politically exposed persons, tax evaders, and environmental criminals.[94]

Intermediaries and service providers must take stock of professional rules of conduct, reporting rules, and conflict of jurisdiction rules to determine which laws apply and do their best to advise their clients while adhering to the ever-dynamic international compliance and enforcement regimes.

OECD and Latin American governments, including the United States, Argentina, Mexico, and Brazil, will continue to impose sanctions through blacklists and countermeasures against small financial center jurisdictions, both unilaterally and through international organizations (for example, the OECD and IMF) and informal groups (for example, G-20, FATF, and Financial Stability Board), even though small-state offshore financial centers do a much better job of enforcing the prohibition on anonymous companies and bank accounts than do large OECD countries, and the United States is the main offender in failing to enforce the international standards prohibiting anonymous companies.[95]

The biggest potential impediment to the United States achieving its global tax priorities is the political gridlock, especially regarding the budget, spending, raising taxes, and raising the debt limit. In both the short and long term, the ability of the DOJ and the IRS to implement tax compliance and enforcement depends on its civil servants being able to work on a regular basis and be motivated. Their ability to effectively implement U.S. tax compliance and enforcement also depends on their ability to recruit top professionals. The double blows of sequestration and shutdown have undoubtedly demoralized some professionals and pose uncertainty about the future ability of those civil servants to be able to work a normal schedule and continue to earn their salaries, which already are below those of their counterparts in the private sector.

As tax evaders and taxpayers considering engaging in aggressive tax conduct contemplate the potential compliance or enforcement consequences of their conduct and what steps to take, if any, to reform their conduct, they also consider the potential for the DOJ and the IRS to take enforcement action, especially if they and their assets are outside the United States. The sophisticated persons, especially in an era of active media reporting, necessarily assess the extent to which resources of agencies will permit the agencies to carry out their responsibilities. While Congress, the Sentencing Commission, and executive officials can try to impose tougher sentences, it is not a substitute for the inability of the agencies to bring and proactively prosecute civil and criminal cases.

The upshot of globalization and increased penalization of international tax and money movement flows is increased pressure on financial intermediaries, including lawyers, trust companies, banks, accountants, and other wealth management professionals who must advise clients. Increasingly, tax authorities, law enforcement, and regulators will be acting to obtain information and bring administrative and criminal cases for reporting violations, nonpayment, nonfiling, and allegedly fraudulent activities, or conspiracy to do the same. ◆

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[94] *See*, *e.g.*, David Spencer, ''Forecasting the Future,'' *Int'l Financial L. Rev.* 42, at 44 (Feb. 2012).

[95] J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Cornell Univ. Press, 2011), 94-95.