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Innovations in the War on Tax Evasion

Tracy A. Kaye *

ABSTRACT

Offshore tax evasion is a global problem that requires a global solution. Nevertheless, the United States unilaterally responded to the offshore tax evasion problem by enacting the Foreign Account Tax Compliance Act. FATCA requires foreign banks to report information about financial accounts held by U.S. taxpayers directly to the Internal Revenue Service and imposes a thirty percent withholding tax on certain U.S. payments to any bank that will not cooperate. Yet, U.S. banks were not required to report any information on nonresident account holders (except for Canadians) to anyone.

FATCA garnered worldwide attention. The European Union expressed its concerns to the U.S. Treasury about the compliance burden on the financial industry and the conflict with EU Member States' laws on privacy and data protection. Treasury is resolving these issues by negotiating bilateral agreements known as Intergovernmental Agreements (IGAs) that will require reciprocity on the part of the United States in the exchange of information. These IGAs are furthering the movement toward global transparency as most FATCA partner jurisdictions intend to require reporting on

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all nonresident accounts rather than just U.S. accounts. This could lead to the development of a multilateral platform for the exchange of information that is critical to combating offshore tax evasion.

This Article urges the United States to adopt the regulations and legislation that are necessary before the United States can provide its FATCA partners with the same information that they have been asked to give the U.S. government. The United States should play a leadership role in furthering global transparency and take the steps required to no longer function as a tax haven for tax evaders from other countries. The IGA with Mexico that entered into force on January 1, 2013, is an appropriate vehicle for the United States to demonstrate this renewed commitment to the exchange of information.

I. INTRODUCTION

Offshore tax evasion is a global problem.¹ It requires a global solution. Nevertheless, the United States chose a unilateral response to the offshore tax evasion problem that could no longer be ignored after the Swiss bank UBS scandal. The Foreign Account Tax Compliance Act (FATCA) was enacted in 2010 as part of the Hiring Incentives to Restore Employment Act² and essentially enlists foreign financial institutions to report directly to the Internal Revenue Service (IRS) certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.³ Failure to do so will result in a withholding tax on a variety of payments from the United States to these nonparticipating financial institutions.⁴

This garnered worldwide attention. A letter from the European Union to the IRS and U.S. Treasury expressed concerns about the

1. A report by the Tax Justice Network estimates between \$21 trillion to \$32 trillion of unreported private financial wealth was held offshore by wealthy individuals at the end of 2010. See James S. Henry, *The Price of Offshore Revisited*, TAX JUST. NETWORK, 36 (July, 5 2012),

http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf. The Tax Justice Network is an independent organization that focuses on the harmful effects of tax evasion, tax competition, and tax havens. *About Tax Justice Network*, TAX JUSTICE NETWORK, <http://www.taxjustice.net/about/who-we-are/goals/>.

2. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501-35, 124 Stat. 71, 97-115 (2010) [hereinafter HIRE Act].

3. See I.R.C. § 1471(b) (2012).

4. See I.R.C. § 1471(a) (2012).

compliance burden on the EU financial industry and the potential conflict with the various EU Member States' laws on privacy and data protection.⁵ The European Union Savings Directive took effect in the Member States in 2005 and inter alia enables Member States' tax administrations to automatically exchange information on an individual's interest income.⁶ Given the European Unions' initiatives in information exchange, the European Commission had hopes of negotiating an EU-wide accommodation.

In a speech on January 24, 2012, before the New York State Bar Association, Acting Assistant Treasury Secretary McMahon acknowledged that some countries face legal impediments to complying with the requirement to report account holder information directly to the IRS.⁷ For example, the German Banking Industry Committee pointed out several areas of potential legal conflicts such as national data protection laws conflicting with FATCA requirements and national public and/or civil laws conflicting with the requirements to terminate certain customer relationships.⁸ Acting Assistant Treasury Secretary McMahon observed that foreign governments had previously revised their laws to accommodate the Qualified Intermediary program but stated that the Treasury was exploring an intergovernmental approach to address this problem.⁹

On February 8, 2012, the Treasury Department issued a joint statement announcing that it was negotiating agreements with the

5. See Annex to Letter from European Union to U.S. Treasury, IRS on Impact of FATCA on European Financial Service Industry, 11 TaxCore No. 67, Apr. 7, 2011; see also Joe Kirwin, EU Letter to IRS, *Treasury Raises Concerns over Impact of FATCA on Financial Services*, BNA Daily Tax Rep., March 24, 2011, No. 57, at I-2; see also Press Release, European Comm'n., Taxation: EU/US Dialogue on the Foreign Account Tax Compliance Act (Apr. 06, 2011), available at http://europa.eu/rapid/press-release_IP-11-413_en.htm (confirming letter).

6. Council Directive 2003/48, on Taxation of Savings Income in the Form of Interest Payments, 2003 O.J. (L 157) 38, 43, 45 [hereinafter Savings Directive] (regarding the taxation of savings income).

7. Press Release, U.S. Dep't of Treasury, Remarks by Acting Assistant Secretary Emily McMahon at the NY State Bar Association Annual Meeting (Jan. 25, 2012), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1399.aspx> [hereinafter McMahon Remarks].

8. Letter from German Banking Industry Committee to U.S. Dep't of Treasury at 4 (May 10, 2011), available at http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_GBIC_100511_122011.pdf.

9. McMahon Remarks, *supra* note 7. See *infra* Part IV (discussion of Qualified Intermediary Program).

United Kingdom, France, Germany, Italy, and Spain that would allow their financial institutions to provide the required U.S. account holder information to their own governments with reciprocal automatic information exchange between governments.¹⁰ Despite the movement toward “transnational tax information exchange networks,”¹¹ the United States chose to resolve any issues that arise in the implementation of FATCA through bilateral agreements known as Intergovernmental Agreements (IGAs).¹² This continues the ad hoc approach, “reciprocal bargaining in the national interest” that characterizes international tax regulation, but does remove some of the criticisms regarding the extraterritoriality of the FATCA legislation.¹³ Furthermore, as evidenced by the OECD and EU reactions, the initial unilateral action of the United States appears to be having a snowball effect, forcing countries and international organizations to deal more expeditiously with the offshore tax evasion problem than otherwise would have occurred and will hopefully lead to a multilateral platform for the exchange of information.

The remainder of this Article proceeds as follows: Part II traces the evolution of FATCA and explores its ramifications and the international response to its requirements. Part III focuses on one specific consequence of FATCA: the finalization of regulations on the reporting of nonresident alien bank deposit interest. Part IV provides some background on previous tax compliance programs, such as the Qualified Intermediary Program and the Offshore Volunteer Disclosure Program, including discussion of the respective failures and successes. Part V discusses the European Union’s initiatives with respect to information exchange and the impact of FATCA on these initiatives. Part VI highlights some proposals to

10. Press Release, U.S. Dep’t of Treasury, Joint Statement from the U.S., Fr., Ger., It., Spain and the U.K. Regarding an Intergovernmental Approach to Improving Int’l Tax Compliance and Implementing FATCA (Feb. 8, 2012), *available at* <http://www.treasury.gov/press-center/press-releases/documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf>.

11. Miranda Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, 4 *WORLD TAX J.* 152, 153 (2012).

12. For example, the United States could have worked through the Convention on Mutual Administrative Assistance in Tax Matters. See Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 *UCLA L. REV.* 304, 371–72 (2012).

13. Stewart, *supra* note 11, at 155 (citing J. BRAITHWAITE & P. DRAHOS, *GLOBAL BUSINESS REGULATION* (2000)).

further the movement toward global transparency and a multilateral platform for the exchange of information as well as the role that the United States should play.

II. FOREIGN ACCOUNT TAX COMPLIANCE ACT

One of the most important innovations in the U.S. war on offshore tax evasion is the Foreign Account Tax Compliance Act (FATCA), which added Sections 1471 to 1474 to the Internal Revenue Code in 2010.¹⁴ FATCA requires U.S. taxpayers holding financial assets with an aggregate value exceeding \$50,000 offshore to report those assets to the IRS beginning with their 2011 tax return.¹⁵ Failure to report foreign financial assets will result in a penalty of \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification).¹⁶

The Bank Secrecy Act already requires U.S. taxpayers to file a Report of Foreign Bank and Financial Accounts (FBAR) on June 30th of each year that they have ownership of a foreign financial account of more than \$10,000.¹⁷ The FBAR was intended to provide law enforcement with information primarily to combat illegal activities such as money laundering and expand protection against terrorist financing.¹⁸ However, the new form 8938 required by FATCA is used to report the total value of all specified foreign financial assets.¹⁹ This is a significant expansion because it includes

14. Sections 1471 to 1474 of the Internal Revenue Code (I.R.C. or Code) were enacted in the “Foreign Account Tax Compliance” title (Title V) of the HIRE Act. HIRE Act, *supra* note 2, at 97–115.

15. I.R.C. § 6038D(a) (2012).

16. I.R.C. § 6038D(d) (2012). Underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an additional substantial understatement penalty of 40 percent. *See* Instructions for Form 8938, IRS, (Nov. 2011), *available at* <http://www.irs.gov/pub/irs-pdf/i8938.pdf>.

17. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114–24 (1970) (codified as amended at 12 U.S.C. §§ 1829b, 1951–59 (2012); 31 U.S.C. §§ 5311–22 (2012)); *see also* TD F 90-22.1, Report of Foreign Bank and Financial Accounts IRS (Jan. 2012), *available at* <http://bsaefiling.fincen.treas.gov/NoRegFBARFiler.html>. In 2009, 543,043 FBARs were filed. Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 701 (2012) (citing to a 2010 TIGTA report).

18. *See* 12 U.S.C. § 1951 (2012) (discussing usefulness of reports in criminal and tax proceedings as Congressional purpose); *see also* 31 U.S.C. § 5311(2012) (concerning protection from international terrorism as purpose).

19. Form 8938, Statement of Specified Foreign Financial Assets, IRS (Nov. 2011), *available at* <http://www.irs.gov/pub/irs-pdf/f8938.pdf>.

foreign stock or securities not held in a financial account as well as investment vehicles, such as foreign hedge funds and foreign private equity funds.²⁰ These are not required to be reported on the FBAR.

But more importantly, FATCA imposes reporting requirements on the foreign banks where U.S. taxpayers are holding these offshore accounts.²¹ Using third parties to increase compliance with the federal income tax has been a highly successful technique in the U.S. system.²² “This bill offers foreign banks a simple choice—if you wish to access our capital markets, you have to report on U.S. account holders,” said Rangel (then Chairman of the House Ways and Means Committee), in the press release for FATCA.²³ Thus, not later than March 31, 2015,²⁴ a foreign financial institution (FFI) will be required to annually file reports directly to the IRS regarding financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest,²⁵ with respect to U.S. account information for calendar year 2014.

FATCA requires that foreign financial institutions enter into agreements with the IRS that obligate the “participating” FFI to perform identification and due diligence procedures concerning account holders.²⁶ There is a different level of diligence expected with respect to individual accounts and entity accounts and between new and preexisting accounts.²⁷ It is expected that FFIs that comply with the due diligence guidelines will be deemed compliant with the requirement to identify U.S. accounts and not held to the strict liability standard.

20. This includes foreign partnership interests. See Instructions for Form 8938, *supra* note 16, at 4.

21. I.R.C. § 1471(c)(1) (2012).

22. Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 698 (2008).

23. Lee A. Sheppard, *Getting Serious About Offshore Evasion*, 56 TAX NOTES INT’L 399, 402 (2009).

24. The final regulations phase in implementation of the reporting requirements. See Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 78 Fed. Reg. 5874, 5877 (2013) [hereinafter FATCA Preamble]. These dates were further amended by 78 Fed. Reg. 55202, 55203 (2013).

25. I.R.C. § 1473(2)(A) defines a substantial U.S. owner as a person owning an interest greater than 10 percent directly or indirectly.

26. See I.R.C. § 1471(b)(1)(A), (B) (2012).

27. Treas. Reg. § 1.1471-4(c) (2012).

The enforcement mechanism is that the participating FFIs agree to withhold thirty percent of U.S.-source income paid to (a) nonparticipating FFIs (known as passthru payments),²⁸ (b) individual account holders who fail to provide sufficient information to determine whether they are a U.S. person,²⁹ or (c) foreign entity account holders who fail to provide sufficient information about the identity of its substantial U.S. owners.³⁰ Approximately four hundred pages of proposed regulations interpreting FATCA were released in February 2012.³¹ This guidance did contain an exception from the withholding requirement for local FFIs where at least ninety-eight percent of their accounts are held by residents of the country in which the FFI is organized.³²

The IRS held a public hearing with respect to this guidance on May 15, 2012, where financial industry representatives expressed concerns over the complexity and pleaded for the IRS to simplify the regulations and to delay various effective dates.³³ Witnesses representing both foreign and domestic financial institutions as well as investment funds “focused their testimony primarily on documentation burdens, modifying effective dates, conflicts with local law, and the regs’ [sic] overall complexity.”³⁴ There was a “sharp demand for IRS to conform its account identification and documentation requirements to the . . . rules that foreign banks already have in place[.]”³⁵ Representatives from “countries ranging

28. See I.R.C. § 1471(a); see also I.R.C. § 1471(b)(1)(D)(i); I.R.C. § 1471(d)(7) (defining “passthru” payments as any withholding payment).

29. See I.R.C. § 1471(d)(6) (specifying that an account holder who fails to provide information sufficient to determine whether the account is a U.S. account is a recalcitrant account holder).

30. *Id.*

31. See Internal Revenue Service, Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, (Feb. 8, 2012), available at <http://www.irs.gov/pub/newsroom/reg-121647-10.pdf>.

32. Prop. Treas. Reg. § 1.1471-5(f)(1)(i)(A)(5), 77 Fed. Reg. at 9090; see also Wesley Elmore & Kristen A. Parillo, *Proposed FATCA Regulations Explained*, 134 TAX NOTES 1069, 1070 (2012).

33. See Shamik Trivedi, *Bank Representatives Seek Delay of FATCA Regs*, 66 TAX NOTES INT’L 695 (2012).

34. *Id.* at 695.

35. Alison Bennett, *Financial Institutions: Witnesses Urge IRS to Give Banks More Time to Comply with FATCA, Air Many Concerns*, BNA DAILY TAX REP., May 16, 2012, at GG-1.

from Australia to Japan” expressed the “universal message: Give us more time.”³⁶

In response to the growing concern over the looming deadlines, the IRS has twice announced later implementation dates for the due diligence and documentation procedures as well as the reporting requirements under FATCA.³⁷ The new timelines aligned the regulatory guidance for U.S. withholding agents and FFIs in countries without IGAs with the deadlines specified in the IGAs. Financial institutions were also given more time to implement system changes.³⁸ The proposed regulations were finalized on January 17, 2013, and coordinate the regulatory obligations of financial institutions with those found in the various intergovernmental agreements.³⁹ For example, the amended final regulations delay the effective date of the FFI agreement until April 25, 2014, for those participating FFIs that have received a global intermediary identification number.⁴⁰ Adopting a risk-based approach to implementing the statute, the final regulations grandfather all obligations outstanding on July 1, 2014 from withholding and expand the categories of FFIs that are deemed compliant without having to enter into an agreement with the IRS.⁴¹ Accounts outstanding as of June 30, 2014, are treated as pre-existing accounts.⁴²

The final regulations also provide a transition rule for a FFI if it has one or more branches that cannot satisfy the obligations of the FFI agreement because those branches are operating in jurisdictions

36. *Id.*

37. Timeline for Due Diligence and Other Requirements Under FATCA, Announcement 2012-42, 2012-47 Internal Revenue Bull. 561 (Nov. 19, 2012); Revised Timeline and Other Guidance Regarding the Implementation of FATCA, Notice 2013-43, 2013-31 Internal Revenue Bull. 113, 114 (July 29, 2013). *See also* Jaime Arora, *New FATCA Timelines Increase Conformity Between Regs, IGAs*, 137 TAX NOTES 470 (2012).

38. Diane Freda, *IRS Coordinates Due Diligence Timelines for Requirements Related to FATCA*, BNA DAILY TAX REP., Oct. 25, 2012, at G-3.

39. *See Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities*, 78 Fed. Reg. 5874, (Jan. 28, 2013) (to be codified at 26 C.F.R. pts. 1, 301); *see also* FATCA Preamble, *supra* note 24, at 5882.

40. FATCA Preamble, *supra* note 24, at 5882; *see also* Notice 2013-43, *supra* note 37, at 114.

41. FATCA Preamble, *supra* note 24, at 5876; *see also* Notice 2013-43, *supra* note 37, at 114.

42. Notice 2013-43, *supra* note 37, at 114.

with legal restrictions impeding FATCA compliance.⁴³ If the FFI otherwise satisfies the requirements of a participating FFI, it will be allowed to become a participating FFI until December 31, 2015.⁴⁴ This deadline “puts pressure on FFIs to encourage other countries to sign IGAs”⁴⁵ because signing an IGA with the United States is the most efficient way to overcome any legal impediments to FATCA implementation.

FATCA provisions apply to “withholdable” payments made after June 30, 2014.⁴⁶ The term “withholdable payment” includes any payment of U.S. source fixed or determinable (FDAP) income and any gross proceeds from sales or dispositions of property capable of producing U.S. source FDAP income. However, the term excludes certain payments, such as effectively connected income and ordinary course of business payments.⁴⁷ Beginning July 1, 2014, the withholding requirements will apply to FDAP payments.⁴⁸ After December 31, 2016, withholding will also apply to gross proceeds from the sale or disposition of any property capable of producing U.S. source FDAP income.⁴⁹ Finally, withholding will eventually include “some foreign passthrough payments, derivatives that give rise to dividend equivalent payments, and obligations to make a payment regarding collateral posted on a notional principal contract.”⁵⁰

43. See Treas. Reg. § 1.1471-4(e)(2)(i) (2013); see also Treas. Reg. § 1.1471-4(e)(2)(iii).

44. See Treas. Reg. § 1.1471-4(e)(2). There is a similar rule for “limited affiliates.” See Treas. Reg. § 1.1471-4(e)(3).

45. Marie Sapirie, *The Intersection of FATCA and IGAs*, 138 TAX NOTES 405, 406 (2013).

46. See Treas. Reg. § 1.1471-2(a)(1), 78 Fed. Reg. at 5911–12 (mandating 30 percent withholding of any “withholdable payment” unless excepted by an exemption or treated as a grandfathered obligation by § 1.1471-2(b)). Notice 2013-43 announced the IRS’s intent to amend the regulations. Notice 2013-43, *supra* note 37, at 113.

47. See I.R.C. § 1473(a) (2012); see also Treas. Reg. § 1.1473-1(a), 78 Fed. Reg. at 5981.

48. See I.R.C. § 1471(b) (2012); see also Treas. Reg. § 1.1471-2(a)(1), 78 Fed. Reg. at 5911–12.

49. See Treas. Reg. § 1.1473-1(a)(1)(ii), 78 Fed. Reg. at 5981. Note that IGAs do not require withholding on gross proceeds. Arora, *supra* note 37, at 471; see also Patrick Temple-West, *IRS Delays Key Start Dates For Global Tax Evasion Law*, REUTERS, <http://www.reuters.com/article/2012/10/24/us-usa-tax-fatca-idUSBRE89N1PS20121024> (last visited Jan. 11, 2013).

50. Arora, *supra* note 37, at 471; see also I.R.S. Announcement 2012-42, *supra* note 37.

FFIs entering into an agreement with the IRS are required to report certain information regarding their U.S. accounts, but the extent of the information requested is implemented in phases.⁵¹ The initial reporting requirements of 2014 have been extended to March 31, 2015, and mandate only identifying information, such as name, address, account number, and TIN, as well as the balance of the account for calendar year 2014.⁵² Beginning in 2016, the aggregate amount of interest and dividends paid or credited to depository and custodial accounts in calendar year 2015 must be reported.⁵³ Finally, in 2017 “full reporting” is required to include information on gross proceeds from broker transactions in calendar year 2016.⁵⁴

The same day that the proposed regulations were released, the Treasury Department also released a joint statement with the United Kingdom, French, German, Italian, and Spanish governments regarding an intergovernmental approach that would allow the financial institutions of these countries to report the required FATCA information to their own governments. The respective government would then transmit the data to the IRS (Treasury Model I).⁵⁵ The framework for the intergovernmental approach would include elimination of the obligation of the FFI to negotiate a separate agreement with the IRS.⁵⁶ Treasury officials stressed that these IGAs are solely an alternative approach to obtaining the information required by FATCA, not an exception to the statute.⁵⁷ The European Commissioner of Taxation has stated that the goal is to develop a Model Agreement that could be used by all of the Member States and ultimately lead to automatic information exchange between countries.⁵⁸

51. See I.R.C. § 1471(c)(1); see also Treas. Reg. § 1.1471-4(d)(1), 78 Fed. Reg. at 5951.

52. See Treas. Reg. § 1.1471-4(d)(7)(ii)(A), 78 Fed. Reg. at 5955; see also Notice 2013-43, *supra* note 37, at 115 (limited reporting of identifying information with respect to calendar year 2014).

53. See Treas. Reg. § 1.1471-4(d)(7)(ii)(B), 78 Fed. Reg. at 5955; see also Treas. Reg. § 1.1471-4(d)(4)(iv), 78 Fed. Reg. at 5953.

54. See FATCA Preamble, *supra* note 24, at 5877 (respecting calendar year 2016).

55. Press Release, U.S. Dep’t of Treasury, *supra* note 10.

56. *Id.* at 2.

57. Alison Bennett, *Much Work Ahead on Information Sharing Agreements Under FATCA*, *Official Says*, BNA DAILY TAX REP., Feb. 21, 2012, No. 33, at G-1.

58. Alison Bennett, *Semeta Says EU Member States Working Toward Uniform Model Pacts Under FATCA*, BNA DAILY TAX REP., May 8, 2012, No. 88, at J-1.

The Treasury Department is engaged in active negotiations with more than fifty countries and jurisdictions; thus it is conceivable that FATCA could become the worldwide standard.⁵⁹ Speaking at the ABA Tax Section Plenary luncheon on January 26, 2013, McMahon said, “[u]ltimately we believe that these intergovernmental frameworks can serve as a basis for the development of a broader system of global information exchange and the establishment of a common intergovernmental approach to combating offshore tax evasion.”⁶⁰

This is an extremely important development. One ramification is that the United States realized that in order to undertake these bilateral arrangements, it will also have to be willing to provide these countries with information.⁶¹ “In this regard the United States is willing to reciprocate in collecting and exchanging on an automatic basis information on accounts held in U.S. financial institutions by residents of France, Germany, Italy, Spain, and the United Kingdom.”⁶² Speaking on behalf of the Treasury, Assistant Secretary McMahon stated:

[W]e recognize that bilateral solutions require reciprocity. . . . [W]e see no principled basis on which to require that financial institutions based in other countries collect and provide us with information on U.S. taxpayers, if we take the position that our own institutions should be exempt from similar requirements. To the contrary, we believe that it will be critical to the success of our efforts to implement FATCA that we are able to reciprocate.⁶³

59. Press Release, U.S. Dep’t of Treasury, U.S. Engaging with More than 50 Jurisdictions to Curtail Offshore Tax Evasion (Nov. 8, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx>; see also Jeremiah Coder, *Extensive FATCA Negotiations Underway*, *Treasury Announces*, 137 TAX NOTES 722 (2012). It has also been reported by unofficial sources that there are ongoing negotiations with China. Vanessa Houldner et al., *US Deal on Tax Reporting Rules Eases Foreign Bank Fears*, FIN. TIMES (Feb. 8, 2012, 8:00 PM), <http://www.ft.com/intl/cms/s/0/31ed2cbe-527f-11e1-ae2c-00144feabdc0.html#axzz2448nAmph>. Without cooperation from the world’s second-largest economy, FATCA’s effectiveness may be diluted. See Patrick Temple-West, *U.S. in Talks with Dozens of Nations on Anti-tax Dodge Pacts*, REUTERS, <http://www.reuters.com/article/2012/11/08/us-usa-tax-havens-idUSBRE8A71LY20121108> (last visited Jan. 11, 2013).

60. Kristen A. Parillo, *Treasury Working to Expand FATCA Agreement Network*, 138 TAX NOTES 568, 568 (2013).

61. See McMahon Remarks, *supra* note 7.

62. Press Release, U.S. Dep’t of Treasury, *supra* note 10, at 1.

63. See McMahon Remarks, *supra* note 7.

In some cases, this is information that the United States did not currently collect such as the bank deposit interest on nonresident account holders.⁶⁴ However, at the May 2012 ABA Tax Section meeting in Washington D.C., a Treasury official stated that “even where agreements are negotiated that include reciprocity, this does not necessarily mean information will be shared on an item-by-item basis to exactly match what the United States receives from the other country.”⁶⁵ Furthermore, “the government is working on specific procedures to ensure information shared with other countries would be kept secret,” checking “with other U.S. government agencies to determine their experience with sharing information with other countries,” as well as “consulting with other countries on their experiences with third-party countries.”⁶⁶ According to Michael Plowgian, an attorney-adviser in the Treasury Office of Tax Policy, “the information will be shared only with jurisdictions where the United States has an agreement in place.”⁶⁷

On June 21, 2012, the Treasury Department released separate joint statements with Japan⁶⁸ and Switzerland⁶⁹ with respect to an alternative arrangement for implementing FATCA. Treasury Model II, as it is being referred to, retains the structure of direct reporting by the FFIs to the IRS followed by information exchange upon request by the governments choosing this alternative arrangement in lieu of the automatic exchange being promised under Treasury Model I.⁷⁰

The Japanese Joint Statement stresses a willingness to work together to develop a common model for the automatic exchange of

64. *See infra* Part IV.

65. Alison Bennett, *IRS, Treasury Working with Other Countries on Single Model Agreement Under FATCA*, BNA DAILY TAX REP., May 14, 2012, No. 92, at G-10.

66. *Id.*

67. *Id.*

68. Press Release, U.S. Dep’t of Treasury, Joint Statement from the United States and Japan Regarding a Framework for Intergovernmental Cooperation to Facilitate the Implementation of FATCA and Improve International Tax Compliance (June 21, 2012), *available at* <http://www.treasury.gov/press-center/press-releases/Documents/FATCA%20Joint%20Statement%20US-Japan.pdf> [hereinafter Press Release–Japan].

69. Press Release, U.S. Dep’t of Treasury, Joint Statement from the United States and Switzerland Regarding a Framework for Cooperation to Facilitate the Implementation of FATCA (June 21, 2012), *available at* <http://www.treasury.gov/press-center/press-releases/Documents/FATCA%20Joint%20Statement%20US-Switzerland.pdf>.

70. *See* Press Release–Japan, *supra* note 68.

information over the medium term.⁷¹ Japan also agrees to direct and enable its FFIs that are not exempt or deemed compliant to register with the IRS and comply with official guidance that will be issued by the Japanese Financial Services Association (consistent with the FATCA reporting and due diligence rules).⁷² Like the Swiss, Japan will accept and honor requests for U.S. account information on an aggregate basis.⁷³

The United States agrees to eliminate the obligation of each compliant Japanese FFI to: (1) enter into a separate agreement with the IRS as long as it is registered with the IRS; (2) withhold on foreign passthru payments; and (3) terminate accounts of recalcitrant U.S. account holders.⁷⁴ Treasury Model II allows the FFIs to obtain the consent of account holders so as to mitigate the legal obstacles of Japanese laws that prevent disclosure directly to the IRS.⁷⁵ The Treasury Department released a template for an “Agreement between the United States of America and [FATCA Partner] for Cooperation to Facilitate the Implementation of FATCA” (Treasury Model II) in November 2012 that has since been updated.⁷⁶ Japan and the United States issued a statement setting forth a Model II type intergovernmental cooperation framework allowing Japanese banks to report directly to the United States that is effective as of June 11, 2013.⁷⁷

Treasury Model II takes into consideration the special characteristics of the Swiss financial industry to address potential

71. *See id.* at 2.

72. *Id.*

73. *Id.*; *see also* Press Release, U.S. Dep’t of Treasury, *supra* note 69, at 2.

74. *See* Press Release–Japan, *supra* note 68, at 3.

75. *Id.* at 2.

76. U.S. Dep’t of Treasury, Model 2 Template, Agreement between the United States of America and [FATCA Partner] for Cooperation to Facilitate the Implementation of FATCA, *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>; *see* Model 2 Agreement, Preexisting TIEA or DTC (updated 11-4-2013) [hereinafter Treasury Model II].

77. Press Release, U.S. Dep’t of Treasury, Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA, (June 11, 2013) *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (FATCA-Statement-Japan-6-11-2013.pdf). “[T]he Japan-U.S. arrangement appears to have been carefully drafted to avoid being called an agreement,” which would have necessitated approval by the Japanese Diet. Kristen A. Parillo, *Japan, U.S. Release FATCA Statement*, 2013 WTD 113-1 (June 12, 2013).

legal and contractual impediments.⁷⁸ The Swiss Joint statement notes that the Swiss government would create an exception for FFIs from the Swiss Criminal Code that would ordinarily prevent Swiss Companies from performing acts for a foreign State.⁷⁹ Switzerland also agreed that it would accept and honor group requests from the United States with respect to recalcitrant U.S. accounts on an aggregate basis.⁸⁰

The Swiss FATCA Cooperation Agreement was signed on February 14, 2013, and follows the business-to-government reporting approach of Treasury Model II.⁸¹ Those Swiss financial institutions not deemed compliant must enter into an agreement directly with the IRS and comply with the due diligence, reporting, and withholding requirements of the FFI agreement.⁸² The Enabling Clause of Article 4 of the Swiss FATCA Cooperation Agreement absolves any Swiss financial institutions with FFI agreements or registered with the IRS from any penalties under the Swiss Criminal Code.⁸³ In return, the United States eliminates the withholding requirement under FATCA for Swiss FFIs.⁸⁴ Furthermore, compliant Swiss FFIs are not required to terminate a recalcitrant U.S. account holder's account⁸⁵ or impose foreign passthru payment withholding.⁸⁶

This Swiss FATCA Cooperation Agreement is a major breakthrough in U.S. negotiations with Switzerland and reflects tremendous progress in resolving the conflict between Switzerland's bank secrecy laws and tax transparency at least with respect to the United States.⁸⁷ Inconsistent with the "Rubik" agreements that

78. See Press Release, U.S. Dep't of Treasury, *supra* note 69, at 1.

79. *Id.* at 2.

80. *Id.* at 1.

81. Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA U.S.-Switz., Feb. 14, 2013 [hereinafter Swiss FATCA Cooperation Agreement], *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

82. *Id.* at 7.

83. *Id.* at 9.

84. *Id.* at 10.

85. *Id.* at 11. Note that the Swiss Competent Authority must exchange the requested information with the IRS within eight months from receipt of such a request. *Id.*

86. *Id.* ("The Parties are committed to work together . . . to develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment and gross proceeds withholding that minimizes burden.")

87. Missing from the Swiss FATCA Cooperation Agreement is language found in article

Switzerland has negotiated with Austria, Germany, and the United Kingdom,⁸⁸ the Swiss FATCA Cooperation Agreement with the United States requires Swiss financial institutions to actually exchange information on U.S. account holders with the IRS including aggregate information on U.S. recalcitrant accounts.⁸⁹ The U.S. Competent Authority would then be able to make a group request for the additional information once the Protocol has entered into force.⁹⁰ The previously negotiated Protocol to the U.S.-Swiss Tax Convention signed in 2009 included an agreement to honor group requests, but unfortunately, the U.S. Senate has yet to ratify this Protocol.⁹¹

The U.S. Treasury has also published two versions (Reciprocal Version and Nonreciprocal Version) of a Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA (Treasury Model I), reflecting the government-to-government information sharing approach.⁹² In Treasury Model I, the United States accepted the need to coordinate the FATCA reporting obligations with other U.S. tax reporting obligations of the foreign financial institutions to avoid duplicative reporting, and the United States committed to working together with the FATCA partners in

5(2) of Treasury Model II on the development of common reporting and due diligence standards as well as a common model for automatic exchange of information.

88. See *infra* notes 263–76 for a discussion of the “Rubik” agreements.

89. Swiss FATCA Cooperation Agreement, *supra* note 81, art. 3, at 7–8.

90. *Id.* art. 5, at 9–10.

91. See Protocol Amending Tax Convention with Swiss Confederation, U.S.-Switz., Sept. 23, 2009, S. Treaty Doc. No. 112-1 (2011); see also Kristen A. Parillo, *U.S. Senator Puts Hold on Pending Tax Treaties*, 2012 WTD 5-1 (Jan. 9, 2012) (arguing that ratification delayed because of Senator Rand Paul’s objection to the information sharing provisions of the treaty).

92. See Press Release, U.S. Dep’t of Treasury, Treasury Releases Model Intergovernmental Agreement for Implementing the Foreign Account Tax Compliance Act to Improve Offshore Tax Compliance and Reduce Burden (July 26, 2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1653.aspx>. Treasury revised the text of both versions of Treasury Model I on November 14, 2012, to reflect the texts of the negotiated IGAs. See U.S. Dep’t of Treasury, Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, *available at* <http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf> [hereinafter Treasury Model I]; see also U.S. Dep’t of Treasury, Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA [hereinafter Treasury Model I Nonreciprocal Version], *available at* <http://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf> [hereinafter Treasury Model I Nonreciprocal Version]. For the November 4, 2013 versions of these models, see, for example, Model IA IGA Reciprocal, Preexisting TIEA or DTC, *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>.

the future to “achiev[e] common reporting and due diligence standards for financial institutions.”⁹³ The IGAs enter into force either on January 1, 2013, or when notifications of completions of necessary internal procedures are made, whichever comes later.⁹⁴ The IGA with Mexico is the only agreement that has actually entered into force as of January 1, 2013.⁹⁵

Countries that sign an IGA afford their financial institutions simplified FATCA implementation procedures because these countries (1) will be treated as compliant and not subject to the withholding requirements,⁹⁶ (2) will not be required to close recalcitrant accounts or to withhold tax on such accounts,⁹⁷ and (3) will be considered participating FFIs regardless of the status of their affiliates in other jurisdictions.⁹⁸ The FATCA partner may allow its FFIs to choose between the due diligence procedures found in the regulations or those provided in the agreement.⁹⁹ Other changes include the substitution of the concept of “controlling persons” (to be interpreted using the Recommendations of the Financial Action Task Force)¹⁰⁰ for the definition of “substantial U.S. owner” found in the proposed regulations.¹⁰¹ Furthermore, the term “Financial

93. Treasury Model I, *supra* note 92, preamble, at 1.

94. *Id.*, art. 7(1), at 14; *see also* Treasury Model I Nonreciprocal Version, *supra* note 92, art. 7(1), at 12.

95. *See* Agreement Between the Department of the Treasury of the United States of America and the Ministry of Finance and Public Credit of the United Mexican States to Improve International Tax Compliance Including with Respect to FATCA, U.S.-Mex., art.10(1), Nov. 19, 2012, *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Mexico-11-19-2012.pdf> [hereinafter Mexico IGA].

96. Treasury Model I, *supra* note 92, art. 4(1), at 11.

97. *Id.*, art. 4(2), at 11; *see also* Treasury Model I Nonreciprocal Version, *supra* note 92, art. 4(2), at 10.

98. Treasury Model I, *supra* note 92, art. 4(5), at 12; *see also* Treasury Model I Nonreciprocal Version, *supra* note 92, art. 4(5), at 10. Some commentators have raised concerns about the extent of relief from the FATCA requirements and lack of enforcement mechanism to replace the withholding requirement. *See, e.g.*, Lee Sheppard, *FATCA Intergovernmental Agreements*, 67 TAX NOTES INT'L 1083, 1086 (2012).

99. Mary C. Bennett et al, *Treasury Opens New Chapter in FATCA Implementation*, 136 TAX NOTES 1299, 1306 (2012) (citing Treasury Model I, *supra* note 92, annex I,(I)(C), at 16); *see also* Treasury Model I Nonreciprocal Version, *supra* note 92, annex I,(I)(C), at 14.

100. *See* FINANCIAL ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS (2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

101. Treasury Model I, *supra* note 92, art. 1(1)(nn), at 7; *see also* Treasury Model I

Institution” does not include persons engaged in investing and trading for their own accounts.¹⁰² Finally, Treasury Model I extends the first reporting date to September 30, 2015.¹⁰³

Under the nonreciprocal version of Treasury Model I, the IRS will not exchange information with respect to the FATCA partner’s residents’ accounts held in U.S. financial institutions.¹⁰⁴ The nonreciprocal version could be used by foreign countries without a tax treaty or information exchange agreement with the U.S. to report the FATCA information to the IRS.¹⁰⁵ This allows jurisdictions without a treaty relationship with the United States to take advantage of the “intergovernmental approach to implementing FATCA.”¹⁰⁶ The Treasury Deputy Assistant Secretary also has indicated that the United States would be amenable to simultaneously signing a tax information exchange agreement or using the Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (Multilateral Convention).¹⁰⁷ The Multilateral Convention is an agreement produced under the auspices of the OECD and the Council of Europe that “provides a legal framework to facilitate international cooperation through multi-country exchanges of tax information and assistance.”¹⁰⁸ The

Nonreciprocal Version, *supra* note 92, art. 1(1)(ii), at 7.

102. Bennett, *supra* note 99, at 1305; *see also* Treasury Model I, *supra* note 92, art. 1(2)(j), at 2–3; Treas. Reg. § 1.1471-5(e)(1)(iii), (2012); 78 Fed. Reg. at 5966; Treasury Model I Nonreciprocal Version, *supra* note 92, art. 1(2)(j), at 2–3.

103. Treasury Model I, *supra* note 92, art. 3(5), at 10; *see also* Treasury Model I Nonreciprocal Version, *supra* note 92, art. 3(5), at 9.

104. Kristen A. Parillo & Shamik Trivedi, *Treasury Releases First FATCA Model Agreement*, 136 TAX NOTES 482, 482 (2012).

105. Lee A. Sheppard, *Eggert Provides Update on FATCA Intergovernmental Agreements*, 137 TAX NOTES 472, 473 (2012) (“Eggert said the United States would not sign a reciprocal version with countries that lacked robust protections to handle taxpayer information confidentiality and restrict its use to tax enforcement.”).

106. Kristen A. Parillo & Jaime Arora, *Intergovernmental Agreements Could Be FATCA Reporting Vehicles*, 136 TAX NOTES 987, 987 (2012).

107. Rick Mitchell, *Corwin Says Lack of Information Exchange Vehicle Need Not Bar FATCA Implementation*, BNA DAILY TAX REP., Sept. 24, 2012, no. 184, at I-2.

108. *See* The Convention on Mutual Administrative Assistance in Tax Matters—Background, OECD, June 4, 2010, <http://www.oecd.org/tax/exchange-of-tax-information/theconventiononmutualadministrativeassistanceintaxmatters-background.htm> (last visited Jan. 11, 2013) (“Its objective is to enable each Party to the Convention to counter international tax evasion and better enforce its national tax laws, while at the same time respecting the rights of taxpayers.”).

United States signed the Multilateral Convention in 1989, and it was ratified by the U.S. Senate in 1991.¹⁰⁹

The OECD welcomed the “new model international tax agreement designed to improve cross-border tax compliance and boost transparency.”¹¹⁰ The endorsement included hosting a briefing session on the intergovernmental approach to FATCA where U.S. Treasury officials as well as British, French, Italian, Spanish, and German officials held discussions with European banks and others.¹¹¹ The OECD has pledged to work in coordination with interested countries to adapt the Treasury Model Agreements into a “common model for automatic exchange of information” as well as to design common systems for reporting and performing the due diligence tests.¹¹²

This is unprecedented engagement with a single country’s tax legislation and speaks to the global frustration with the tax evasion problem. The OECD has already updated Article 26 of the OECD Model Tax Convention to allow for group requests of

109. Henry Ordower, United States of America, in: *Experience with and Administrative Practice Concerning Mutual Assistance in Tax Affairs*, in MUTUAL ASSISTANCE AND INFORMATION EXCHANGE 569, 579 (Amsterdam, 2010) (noting that the United States reserved on the provisions regarding assistance for taxes of political subdivisions, collection assistance, and service of process except by mail). The Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters of May 27, 2010, was signed by the United States but is not yet in force. Stafford Smiley, *Mutual Administrative Assistance in Tax Matters*, 3 J. CORP. TAX’N 40 (2013).

110. Press Release, OECD, Tax: OECD Welcomes Multilateral Efforts to Improve International Tax Compliance and Transparency (July 26, 2012) *available at* <http://www.oecd.org/newsroom/taxoecdwelcomesmultilateraleffortstoimproveinternationaltaxcomplianceandtransparency.htm>. In January 2010, the OECD’s Committee on Fiscal Affairs created the Treaty Relief and Compliance Enhancement (TRACE) Group to: (1) develop efficient treaty relief systems “to minimize administrative costs and allocate the costs to the appropriate parties;” and (2) identify “solutions that enhance countries’ abilities to ensure proper compliance with tax obligations, from the perspective of both source and residence countries.” Treaty Relief and Compliance Enhancement (TRACE), OECD, <http://www.oecd.org/ctp/exchange-of-tax-information/aboutthetracegroup.htm> (last visited Oct. 7, 2013). *See also* discussion of TRACE proposal, *infra* notes 311–314 and accompanying text.

111. Lee Sheppard, *United States Sells Europeans on FATCA Intergovernmental Agreements*, 136 TAX NOTES 1504, 1504 (2012); *see also* Parillo & Arora, *supra* note 106.

112. Press Release, OECD, *supra* note 110. The OECD has recently released two reports on information exchange. *See* OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (2012), *available at* http://www.oecd.org/ctp/exchange-of-tax-information/Keeping%20it%20Safe_EN_FINAL_forweb.pdf; OECD, *Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains to Be Done* (2012), *available at* http://www.oecd.org/ctp/exchangeofinformation/AEOI_FINAL_with%20cover_WEB.pdf.

information.¹¹³ Article 26 sets forth the international standard on exchange of information, and new paragraph 5 includes information exchange on request, “regardless of bank secrecy and a domestic tax interest.”¹¹⁴ Thus, signatories are precluded from refusing to provide information solely because the information is held by a bank or a trustee.¹¹⁵

The reciprocal version of Treasury Model I “acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange” with the FATCA partner and commits to pursue the adoption of regulation and support of legislation that would achieve this result.¹¹⁶ The U.S. government will only entertain a reciprocal IGA with a country where it has determined that the foreign government has sufficient safeguards for protecting the confidentiality of the information.¹¹⁷ Thus, it was not surprising that the first bilateral agreement based on Treasury Model I was signed September 12, 2012, with the United Kingdom.¹¹⁸ A similar IGA

113. OECD, Update to Article 26 of the OECD Model Tax Convention and its Commentary, at 5.2 (2012), available at [http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchangeofinformation/120718_Article%2026-ENG_no%20cover%20(2).pdf); see also Lee A. Sheppard, *U.S. Sells FATCA IGAs to Europeans*, 68 TAX NOTES INT’L 7, 7 (2012) (stating that the update “require[s] signatories to agree to accept group information requests as ‘foreseeably relevant’ under article 26 of their treaties”).

114. Press Release, OECD, Tax: OECD Updates OECD Model Tax Convention to Extend Information Requests to Groups (July 18, 2012), available at <http://www.oecd.org/newsroom/tax/oecdupdatesoecdmodeltaxconventiontoextendinformationrequeststogroups.htm>.

115. See OECD, Article 26 of the OECD Model Tax Convention on Income and Capital (2012), available at <http://www.oecd.org/ctp/taxtreaties/article26oftheoecdmodeltaxconventiononincomeandcapital.htm> (explaining that the update “make[s] it clear that a state cannot refuse a request for information solely because it has no domestic tax interest in the information or solely because it is held by a bank or other financial institution”).

116. Treasury Model I, *supra* note 92, art. 6(1), at 13.

117. See Letter from Debbie Wasserman Schultz, U.S. Cong., to Timothy Geithner, U.S. Sec’y of the Treas. (July 26, 2012) (on file with author); see also Letter from Timothy Geithner, U.S. Sec’y of the Treas., to Debbie Wasserman Schultz, U.S. Cong. (Sept. 11, 2012), Tax Analyst Doc 2012-19441.

118. Press Release, U.S. Dep’t of Treasury, Treasury, United Kingdom Sign Bilateral Agreement to Improve Tax Compliance, Combat Offshore Tax Evasion and Implement FATCA (Sept. 14, 2012), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1711.aspx>. It should be noted however, that the UK’s “Rubik” agreement with Switzerland, which entered into force on January 1, 2013, is inconsistent with this commitment to fiscal transparency. See Pasquale Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, 67 BULL. INT’L TAX’N 216, 217 (2013) (“Rubik agreements . . . clash with the spirit of fiscal transparency.”).

was signed with Denmark¹¹⁹ and with Mexico on November 19, 2012.¹²⁰ In 2013, France, Germany, Ireland, Norway, and Spain are the major countries that have also signed such an agreement.¹²¹

U.K. financial institutions will benefit from due diligence rules that resemble the existing anti-money laundering rules¹²² and reporting requirements in lieu of withholding and account termination requirements. The U.S.-U.K. FATCA Agreement also includes a requirement that the United States grant the U.K. any more favorable terms that it might negotiate with another country (a most-favored-nation article).¹²³ Annex II, which varies from country to country, identifies the entities and products that are exempt from FATCA because of the perceived low risk of their use to evade U.S. tax.¹²⁴ For example, retirement plans specifically identified in the U.S.-U.K. Annex II “will not be subject to the FATCA due diligence, verification, and information collection and reporting

119. See Agreement to Improve International Tax Compliance and to Implement FATCA, U.S.-Den., Nov. 15, 2012, *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Denmark-11-19-2012.pdf>.

120. See Mexico IGA, *supra* note 95; see also Kristen A. Parillo, U.S., Mexico Sign FATCA Agreement, *Tax Notes Today* (Nov. 28, 2012); *U.S.-Mexico FATCA Agreement Entails Sharing of Taxpayer Identification Numbers*, BNA DAILY TAX REP., Nov. 29, 2012, no. 229, at G-1.

121. U.S. Dep’t of Treasury, Foreign Account Tax Compliance Act (FATCA), <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Jan. 11, 2014); see also Press Release, U.S. Dep’t of Treasury, Treasury, Switzerland Sign Bilateral Agreement to Improve Tax Compliance, Combat International Tax Evasion and Implement FATCA (February 14, 2013), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1853.aspx>. Serious negotiations are also underway with many other countries such as Jamaica and Bermuda. See, e.g., Steven Jackson, *Jamaica, US to Sign Agreement on FATCA*, THE GLEANER (Kingston, Jamaica), May 10, 2013, *available at* <http://jamaica-gleaner.com/gleaner/20130510/business/business4.html>; *Bermuda to Sign Model IGA 2 for USA and UK FATCA*, BDA SUN (Bermuda), Apr. 20, 2013, *available at* <http://www.bermudasun.bm/Content/BUSINESS/Business/Article/Bermuda-to-sign-Model-IGA-2-for-USA-and-UK-FATCA/72/205/65971>.

122. For example, most family trusts are excluded, as these are investment entities that are not required to apply UK anti-money laundering rules. See HM Revenue & Customs, Implementing the UK-US FATCA Agreement: Consultation Document, ¶ 3.8–9, at 10, Sept. 18, 2012, *available at* http://customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile?contentID=HMCE_PROD1_032308.

123. Agreement to Improve International Tax Compliance and to Implement FATCA, U.S.-U.K., art. 7, Sept. 12, 2012, *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf> [hereinafter U.K.-U.S. Agreement to Implement FATCA].

124. Press Release, U.S. Dep’t of Treasury, *supra* note 118.

requirements” nor will it be subject to “FATCA withholding.”¹²⁵ In August 2013, the U.S. Treasury Department released a revised Model I, Annex II that uses a rules-based approach instead of lists.¹²⁶ It is expected that in the future, negotiations between the U.S. Treasury and other countries will be much more limited, given the details provided regarding categories of institutions and products deemed compliant or exempt included in Model Annex II.¹²⁷

For U.S. purposes, the U.S.-U.K. FATCA Agreement is an executive agreement that does not need to be submitted to the Senate for approval.¹²⁸ The United Kingdom, however, will require legislation to be put forward in the Finance Bill 2013 process. The HM Revenue & Customs has “issued draft regulations and guidance indicating how it will implement its obligations under its agreement with the United States.”¹²⁹ Thus, each country that signs such an IGA will have discretion as to how to implement it. This is cause for concern because financial institutions may end up complying with a multitude of requirements that vary from country to country.¹³⁰

The U.S.-U.K. Bilateral FATCA Agreement clearly specifies that the United States will provide the relevant information with respect to U.K. account holders using procedures to be established under Article 27 of the U.S.-U.K. Income and Capital Gains Tax Convention.¹³¹ Unfortunately, there seems to be an acceptance of the limitations on the availability of U.S. information. “While legislative constraints in the US mean that authorities there are unable to collect certain information, most notably with regard to entities, they are providing the UK with a broader scope of

125. Bennett et al., *supra* note 99, at 1305.

126. See Treasury Model I, *supra* note 92, annex II, at 31.

127. *Id.*; see also 2013 WTD 113-1.

128. For a discussion of the controversy over the legal status of IGAs, see Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1404 (2013) (arguing that presenting IGAs “as diplomatic agreements . . . represents a significant expansion of the competent authority’s interpretive role”). See also response by Susan Morse, *Why FATCA Intergovernmental Agreements Bind the U.S. Government*, 70 TAX NOTES INT’L 245 (2013).

129. See HM Revenue & Customs, *supra* note 122.

130. See generally Jaime Arora, *Bank Representatives Discuss FATCA Concerns in Light of IGAs*, 2012 TAX NOTES TODAY 225-2 (Nov. 21, 2012).

131. U.K.-U.S. Agreement to Implement FATCA, *supra* note 123, art. 2(2)(b); see also Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.S.-U.K., art. 26, at 33-35, July 24, 2001, available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/uktreaty.pdf>.

information on individual accounts than we are providing them.”¹³² However, the Agreement does contain a commitment by the U.S. Government to support “relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.”¹³³

I anticipate that many countries will seek to take advantage of the reciprocal version of Treasury Model I.¹³⁴ To the extent that these agreements are negotiated, multilateral information exchange will be enhanced. According to a Treasury official, most prospective FATCA partner jurisdictions intend to require reporting on all nonresident accounts rather than imposing “a U.S.-specific reporting obligation.”¹³⁵ On April 9, 2013, the finance ministers of France, Germany, Italy, Spain, and the U.K. agreed on a pilot multilateral exchange facility between their countries based on their IGAs with the United States in order to “provide a template as to the wider multilateral agreement we hope to see in due course.”¹³⁶

The IRS is coordinating with foreign governments to standardize the international exchange of information process.¹³⁷ As Pascal Saint Amans, head of OECD’s center for Tax Policy and Administration, explained, “FATCA is a big catalyst toward an [eventual] multilateral platform for automatic information exchange.”¹³⁸ Furthermore, he hopes that FATCA leads more countries to sign the Multilateral Convention.¹³⁹ In fact, at an OECD conference in Cape Town, South Africa, in October 2012, the Czech Republic, Malta, and New

132. Press Release, HM Treasury, UK-US Agreement Strengthens UK Ability to Tackle Tax Evasion (Sept. 14, 2012), *available at* <https://www.gov.uk/government/news/uk-us-agreement-strengthens-uk-ability-to-tackle-tax-evasion>.

133. U.K.-U.S. Agreement to Implement FATCA, *supra* note 123, at art. 6; *see also* HM Treasury, *supra* note 132.

134. *See generally* Jaime Arora, *U.S. Treasury Official to Discuss FATCA Implementation in Europe, Asia*, WORLDWIDE TAX DAILY, Sept. 19, 2012.

135. Marie Sapirie, *Finding a Silver Lining in FATCA*, 135 TAX NOTES 1551, 1552 (2012).

136. Letter from Pierre Moscovici, Wolfgang Scauble, Vittorio Grilli, Cristobal Montoro Romero, and George Osborne, to Algirdas Semeta, Comm’r for Taxation & Customs Union, Audit & Anti-Fraud, Eur. Comm’n [hereinafter Finance Ministers’ Letter] (Apr. 9, 2013), *available at* http://www.hm-treasury.gov.uk/d/g5_letter_to_european_commission_090413.pdf.

137. Jaime Arora, *Details on FATCA Registration Process Remains Hazy*, 68 TAX NOTES INT’L 791, 791 (2012).

138. Mitchell, *supra* note 107.

139. *Id.* “[T]he multilateral pact is definitely a piece in the patchwork of many pieces that will go into such a platform.”

Zealand signed the Multilateral Convention, and Lithuania, Nigeria, Gabon, Kazakhstan, and Latvia signed letters of intent to sign the Convention.¹⁴⁰ It remains to be seen, however, how much automatic information will be exchanged on the part of the United States given the experience discussed below with respect to the bank deposit interest of nonresident account holders.

III. REGULATIONS ON REPORTING BANK DEPOSIT INTEREST OF NONRESIDENTS

Certain commentators have noted that “[t]he United States is a tax haven.”¹⁴¹ The United States has negotiated tax treaties or tax information exchange agreements with seventy-nine countries,¹⁴² but only has meaningful information exchange with Canada.¹⁴³ Banks were not required to automatically report the interest payments made to foreign persons unless the U.S. bank deposit interest was paid to Canadian residents.¹⁴⁴ This resulted in de facto bank secrecy.¹⁴⁵

All treaties negotiated since 1974 contain a standard tax information exchange article,¹⁴⁶ but the U.S.-Canada treaty also

140. Press Release, OECD, Global Forum on Tax Transparency Welcomes New Members and Reviews 12 Countries (Oct. 29, 2012), available at <http://www.oecd.org/newsroom/globalforumontaxtransparencywelcomesnewmembersandreviews12countries.htm>. Further, Romania had signed the Multilateral Convention earlier in October while Albania, Belize, Estonia, Morocco, and Niue had also recently signed letters of intent to sign the Convention. *Id.*

141. Lee A. Sheppard, *FATCA Is a Drone: What to Do About Compliance*, 64 TAX NOTES INT’L 10, 11 (2011) (“[An] expensive, failed war of choice, Vietnam, prompted the United States to set itself up as a tax haven for foreign investors wanting the safety of Treasury securities. . . . [Now] [t]he United States is a tax haven for Latin Americans. The government will not disclose information to their governments, chiefly Mexico, and conveniently does not have information sharing agreements with other important ones, chiefly Brazil and Argentina.”); see also Charles Gnaedinger, *U.S. Ranks First in Financial Secrecy*, 56 TAX NOTES INT’L 407, 407 (2009); David Spencer, *New U.S. Regs. on Reporting Nonresident Alien Bank Deposit Interest*, 22 J. INT’L TAX’N 30, 30 (2011).

142. See Rev. Proc. 2012-24, 2012-20 I.R.B. 913 (listing seventy-nine “countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information”).

143. Robert Goulder, *How the U.S. is a Tax Haven for Mexico’s Wealthy*, 55 TAX NOTES INT’L 695, 695 (2009).

144. *Id.*

145. Spencer, *supra* note 141, at 30, 32.

146. See U.S. Gov’t Accountability Office, GAO-11-730, Tax Administration: IRS’s Information Exchanges with Other Countries Could Be Improved Through Better Performance Information, App. IV (2011).

contains an “assistance in collection” article¹⁴⁷ not found in the U.S. Model Treaty. U.S. regulations implemented this treaty obligation by requiring bank deposit interest payment information with respect to Canadian residents to be collected and reported to the U.S. government.¹⁴⁸ This information was then shared automatically with the Canadian government. Mexico had been asking for a similar arrangement to no avail as evidenced by the then Mexican Secretary of Finance Agustin Carstens’ letter to U.S. Treasury Secretary Geithner on February 9, 2009.¹⁴⁹ “[D]ue to the fact that the United States does not tax interest income paid by banks to non-resident aliens, and both countries do not have a solid and reliable mechanism to verify actual residence of foreign depositors, we simply are allowing both the tax avoiders and the criminals to move their money untaxed.”

This information had not been available for any other jurisdiction besides Canada. Under U.S. international tax law, foreign individuals are not subject to tax in the United States on investment income unless from sources within the United States.¹⁵⁰ Investment income is defined as any payment of fixed or determinable annual or periodical income such as interest and dividend income.¹⁵¹ However, interest earned on most deposits in U.S. banks and other financial institutions is exempt from tax even though treated as U.S.-source income in order to encourage foreign persons to use U.S. banks.¹⁵² Foreign individuals do not need to have any sort of U.S. taxpayer identification number as long as the investment earning interest “is not effectively connected with a trade or business” in the United

147. See Sheppard, *supra* note 23, at 404; Revised Protocol Amending the Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Apr. 12, 1995, S. Treaty Doc. No. 104-4.

148. Treas. Reg. §§ 1.6049-4(a), (b)(1), 1.6049-8 (2012).

149. Letter from Agustin Carstens, Mexican Sec’y of Fin., to Timothy Geithner, U.S. Sec’y of the Treas. (Feb. 9, 2009), Tax Analysts Doc 2009-5928 (“The exchange of information on interest paid by banks will certainly provide us with a powerful tool to detect, prevent and combat tax evasion . . .”). *But see infra* notes 192–94 for current developments with respect to an IGA with Mexico.

150. In general, U.S. tax is imposed at a flat rate of thirty percent on the U.S.-source passive investment income of nonresident alien individuals. I.R.C. § 871(a) (2012). I will refer to nonresident alien individuals as foreign individuals.

151. I.R.C. § 871(a)(1)(A) (2012).

152. I.R.C. § 871(i)(2)(A) (2012). Furthermore, U.S.-source interest from most debt obligations is exempt from U.S. tax for foreign individuals pursuant to the “portfolio interest exception.” I.R.C. § 871(h) (2012).

States.¹⁵³ Such persons simply provide a form to the U.S. payor to claim their exemption from domestic information reporting and foreign-person withholding.¹⁵⁴ In return, with the exception of Canada, the bank then had no obligation to issue any information to the IRS. Thus, the government had no information to exchange with its other treaty partners.¹⁵⁵

Proposed regulations issued in 2002 modified the regulations by requiring reporting of U.S. bank deposit interest paid to residents of fifteen countries in addition to Canada.¹⁵⁶ After a public hearing on December 5, 2002, no action was taken with respect to these regulations. On January 7, 2011, these proposed regulations were withdrawn and replaced by new proposed regulations.¹⁵⁷

The 2011 proposed regulations extended “the information reporting requirement to include bank deposit interest paid to nonresident alien individuals who are residents of any foreign country.”¹⁵⁸ The preamble to these proposed regulations noted the “growing global consensus regarding the importance of cooperative information exchange for tax purposes.”¹⁵⁹ It also noted that this change would “further strengthen the United States exchange of information program, consistent with adequate provisions for reciprocity, usability, and confidentiality in respect of this information.”¹⁶⁰ Finally, the expansion of the deposit interest reporting requirement would “help to improve voluntary compliance by U.S. taxpayers by making it more difficult to avoid the U.S. information reporting system (such as through false claims of foreign status).”¹⁶¹

153. Spencer, *supra* note 141, at 32.

154. I.R.S., Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United State Tax Withholding (2006); I.R.S., Instructions for Form W-8BEN, at 1. (2006).

155. Spencer, *supra* note 141, at 32.

156. See Guidance on Reporting of Deposit Interest Paid to Nonresident Aliens, 67 Fed. Reg. 50,386, 50,389 (Aug. 2, 2002) (to be codified at 26 C.F.R. pts. 1, 31). These regulations replaced proposed regulations published on January 17, 2001, proclaiming them to be “overly broad in requiring annual information reporting with respect to U.S. bank deposit interest paid to any nonresident alien.” 67 Fed. Reg. at 50,386–50,387.

157. See Guidance on Reporting Interest Paid to Nonresident Aliens, 76 Fed. Reg. 1105, 1105–1106 (Jan. 7, 2011).

158. *Id.* at 1106.

159. *Id.*

160. *Id.*

161. *Id.*

On April 19, 2012, these bank deposit regulations were finalized with some changes.¹⁶² Starting with payments of interest not effectively connected with a U.S. trade or business made in 2013 from an account maintained at a U.S. office,¹⁶³ both U.S. and certain non-U.S. resident accounts will be uniformly disclosed to the IRS.¹⁶⁴ This will facilitate “the ability of the United States to offer cooperative, reciprocal tax information exchange arrangements” with designated foreign tax administrations.¹⁶⁵

Representatives of the banking industry had called for the withdrawal of these regulations at the public IRS hearing held on May 18, 2011, stating that the FATCA legislation was the appropriate vehicle to address the issue of U.S. persons establishing foreign entities for investment in the United States.¹⁶⁶ The Florida banking industry speakers predicted a massive outflow of capital to other countries, perhaps as much as \$100 billion in deposits¹⁶⁷ and expressed concern that this would lead “to a weakening of bank liquidity levels, significantly diminishing lending capacity of U.S. banks, and the loss of many U.S. jobs.”¹⁶⁸ They also submitted a letter from the entire Florida House delegation to the President demanding withdrawal of the proposed regulations.¹⁶⁹ A survey done by the Commissioner for Financial Regulation for the State of Florida found that forty-one percent of deposits in south Florida state-chartered commercial banks are nonresident alien deposits, of

162. T.D. 9584, 77 Fed. Reg. 23391-01 (2012).

163. Treas. Reg. §§ 1.6049-4(b)(5), 1.6049-8(a) (as amended in 2012).

164. Treas. Reg. §§ 1.6049-4, 1.6049-5, 1.6049-6 (as amended in 2012).

165. *Proposed Regulations to Require Reporting of Nonresident Alien Deposit Interest Income: Hearing Before the H. Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Financial Services*, 112th Cong. 96 (2011) (letter from Sen. Carl Levin to Comm’r Douglas H. Shulman) [hereinafter *Hearing on Interest Reporting Regulations*].

166. U.S. Dep’t of Treasury, Internal Revenue Service, Public Hearing on Proposed Regulations 26 CFR Part 31, “Guidance on Reporting Interest Paid to Nonresident Aliens” (May 18, 2011), Tax Analysts Doc 2011-10811, at 15 (statement by Francisca Mordi, Vice President and Sr. Tax Counsel, American Banker’s Association) [hereinafter *Public Hearing Transcript*]; see also David D. Stewart, *IRS Hears of Dire Consequences From Nonresident Alien Interest Reporting*, 131 TAX NOTES 783 (2011).

167. Public Hearing Transcript, *supra* note 166, at 5 (statement by Alex Sanchez, President, and Chief Exec. Officer, Fla. Bankers Ass’n).

168. *Id.* at 3 (statement by Maria Grisel Vega, Bd Member, Treasurer, Fla. Int’l Bankers Ass’n (FIBA)).

169. See Letter from Bill Posey et al., U.S. Cong., to Barack Obama, President of the United States (Mar. 2, 2011), available at <http://posey.house.gov/uploadedfiles/irs-delegationletter-march3-2011.pdf>.

which twenty-six percent of these are individual deposits. Furthermore, ninety percent of deposits in foreign banks in south Florida are nonresident alien deposits, of which thirty-one percent of these are individual deposits.¹⁷⁰ For Latin Americans, the United States is an “offshore” tax haven.

The speaker from the Financial Accountability and Corporate Transparency Coalition stressed that recent agreements between various governments have demonstrated that bank secrecy is no longer allowable as grounds for refusing to exchange information.¹⁷¹ According to Senator Carl Levin (Chairman of the Permanent Subcommittee on Investigations in the U.S. Senate), the proposed regulations would “help detect U.S. taxpayers who are evading U.S. taxes by opening U.S. accounts and fraudulently claiming foreign status.”¹⁷²

Senator Levin strongly recommended that the bank deposit regulations also be made applicable to accounts opened by corporations, trusts, or other entities that are beneficially owned by individuals.¹⁷³ “[I]f a financial institution knows that the beneficial owner of an account is a non-U.S. individual, the financial institution should disclose the account to the IRS, even if the account is nominally held in the name of a foreign entity.”¹⁷⁴ Unfortunately, this recommendation was not followed in the final bank deposit regulations even though FATCA requires foreign financial institutions to report on accounts held by an entity where more than ten percent is owned by a U.S. person. Thus, the bank deposit reporting rules only apply to the nonbusiness interest on directly held bank deposits of certain nonresident individuals.¹⁷⁵

Senators Levin, Grassley, Feinstein and Harkin have reintroduced the Incorporation Transparency and Law Enforcement Assistance Act (S. 1465), which would, if enacted, ensure that beneficial owners of corporations or limited liability companies are disclosed as part of

170. Public Hearing Transcript, *supra* note 166, at 8 (statement by Thomas Cardwell, Comm’r, State of Fla. Office of Fin. Regulation).

171. *Id.* at 11–12 (Statement by Rebecca Wilkins).

172. *Hearing on Interest Reporting Regulations*, *supra* note 165, at 96.

173. *Id.* at 99.

174. *Id.*

175. See Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing Continue?*, 138 TAX NOTES 253, 256 (2013) (“[I]n other words, the stupid rich. Because the sophisticated rich use corporations and Delaware LLCs, they would not be affected.”).

the incorporation process.¹⁷⁶ This bill requires a corporation to provide the beneficial owner's name, address, and a U.S. driver's license or passport number or the information from a non-U.S. passport.¹⁷⁷ If enacted, the legislation would assist domestic law enforcement in detecting, preventing, and punishing terrorism, money laundering, and other misconduct involving U.S. corporations, as well as bring the United States into compliance with international standards issued by the Financial Action Task Force on Money Laundering.¹⁷⁸

The preamble to the finalized bank deposit regulations addressed the concerns raised that the information might be used inappropriately.¹⁷⁹ Treasury stressed that information will only be exchanged where the United States has been satisfied that the "foreign jurisdiction's legal framework" guarantees the confidentiality of the taxpayer information.¹⁸⁰ Thus, the finalized bank deposit regulations only require reporting of "interest paid to a nonresident alien individual resident in a country with which the United States has" an information exchange agreement in force.¹⁸¹ This is extremely unfortunate because from a compliance standpoint it is easier for financial institutions to report all interest. Payors of course, "may elect to report interest payments to all nonresident alien individuals,"¹⁸² but financial institutions may not feel that they can do so unless mandated by law. As the United States is expecting global compliance from foreign financial institutions, U.S. financial institutions should be collecting the same information.

A revenue procedure published at the same time as the bank deposit regulations lists the seventy-nine eligible countries and

176. See Sen. Carl Levin, Senate Floor Statement on the Introduction of the Incorporation Transparency and Law Enforcement Assistance Act (Aug. 1, 2013), available at <http://www.levin.senate.gov/newsroom/speeches/speech/senate-floor-statement-on-the-introduction-of-the-incorporation-transparency-and-law-enforcement-assistance-act>. The previous bill, S.1483, was referred to the Committee on Homeland Security and Governmental Affairs and hearings were held in the Committee on Foreign Relations on May 24, 2012. Bill Summary & Status, S. 1483, 112th Cong. (2011–2012).

177. Incorporation Transparency and Law Enforcement Assistance Act, S. 1465, 113th Cong. (2013).

178. Sen. Carl Levin, *supra* note 176.

179. T.D. 9584, 77 Fed. Reg. at 23392.

180. *Id.*

181. *Id.* at 23393.

182. *Id.*

territories that have the appropriate agreements to exchange information by request.¹⁸³ These countries must be willing and able to reciprocate as well as have effective confidentiality laws and practices that ensure the use of the information only for the purposes of administering and enforcing their own tax laws.¹⁸⁴ In a letter to the Secretary of the Treasury, Congresswoman Schultz has asked for confirmation that the IRS would not consider exchanging information with Venezuela, a country on the list, given its inability to meet these criteria.¹⁸⁵ Treasury Secretary Geithner confirmed that regardless of the existence of an income tax treaty,¹⁸⁶ the IRS “will not share tax information with another country absent a determination that the recipient country has sufficient safeguards in place to ensure the proper use of the information and to protect its confidentiality.”¹⁸⁷ Thus, it appears that taxpayer privacy concerns are being adequately safeguarded.

A second list in the revenue procedure details the countries with whom the information will be shared automatically.¹⁸⁸ So far, only Canada is on this second list, but the IRS has promised to provide updates to this revenue procedure.¹⁸⁹ Even with such narrow applicability of the regulatory changes, a bill passed in July, 2012, by the House included an amendment by Rep. Bill Posey of Florida¹⁹⁰ that sought to delay the effective date of the regulations.¹⁹¹ However, the bank deposit regulatory changes took effect in 2013.

183. Rev. Proc. 2012-24, *supra* note 142.

184. T.D. 9584, 2012-20 I.R.B. 902.

185. See Letter from Debbie Wasserman Schultz, U.S. Cong., to Timothy Geithner, U.S. Sec’y of the Treas. (July 26, 2012) (on file with author).

186. The U.S. Model Income Tax Convention of Nov. 15, 2006 precludes the disclosure of any information that “would be contrary to public policy.” U.S. Treas. Dep’t, United States Model Income Tax Convention of November 15, 2006, art. 26, para. (3)(c), *available at* <http://www.irs.gov/pub/irs-trty/model006.pdf>.

187. Geithner Addresses Lawmaker’s Concerns About Security of Nonresident Aliens’ Tax Information, Tax Notes Today (Tax Analysts), Doc. 2012-19441 (Sept. 19, 2012), *available at* LEXIS 2012 TNT 182-12.

188. Rev. Proc. 2012-24, *supra* note 142.

189. *Id.*

190. H. Amend. 1469, Red Tape Reduction and Small Business Job Creation Act, H.R. 4078, 112th Cong. (2012). Specifically, the stated purpose of the Amendment by Posey aims, “to make it clear that the definition of significant regulatory action would include new Treasury regulations regarding non-resident alien deposits.” *Id.* at Amendment Purpose.

191. Lee A. Sheppard, *News Analysis: The Fashion in FATCA Intergovernmental Agreements*, 136 TAX NOTES 1235, 1238 (2012).

Thus, banks must collect information on the interest paid on certain deposits held by nonresident alien individuals.

As discussed earlier, Mexico was the third country to sign an IGA with the United States that will require reciprocity in information exchange and the only country where the agreement has entered into force as of January 1, 2013.¹⁹² The IGA with Mexico provides that the United States must annually exchange information on “Reportable Accounts” on an automatic basis.¹⁹³ Under the agreement, the United States must provide the information that is now required to be collected under the bank deposit regulations for 2013, no later than September 30, 2015.¹⁹⁴ The Competent Authorities of Mexico and the United States must establish procedures for the automatic exchange of such information.¹⁹⁵ Thus, Mexico will provide the litmus test for U.S. willingness to exchange information.¹⁹⁶

FATCA reporting for the 2014 tax year will not be required until 2015,¹⁹⁷ so it is too early to evaluate its effectiveness. However, in order for FATCA to work and in light of the various bilateral arrangements being undertaken, the IRS must also be able to cooperate with foreign tax authorities. Finalizing this bank deposit regulation was an important but minor step in global information sharing. It “reaffirm[s] U.S. opposition to international tax evasion, mak[ing] it clear [that] our country is willing to do its part to stop it, and giv[ing] moral force to U.S. efforts to convince other countries to share information about U.S. taxpayers with the IRS.”¹⁹⁸ IRS officials have nevertheless acknowledged that “U.S. rules don’t require U.S. financial institutions to provide the exact same

192. See *supra* note 120 and accompanying text.

193. Mexico IGA, *supra* note 95, at art. 2, para. 1.

194. *Id.* at arts. 2–3; see also Treas. Reg. § 1.6049-4(b)(5).

195. Mexico IGA, *supra* note 95, at art. 3, para. 6 (“The Competent Authorities of Mexico and the United States shall enter into an agreement under the mutual agreement procedure provided for in Article 5 of the TIEA.”).

196. The American Bankers Association has already strongly objected to the “NRA reporting automatic exchange provision included in the U.S.-Mexico IGA” in a letter to Treasury Secretary Geithner on December 12, 2012. *Bankers’ Group Opposes Automatic Exchange Provision Under Mexico-U.S. FATCA Agreement*, TAX NOTES TODAY (Tax Analysts) Doc. 2012-26924 (Jan. 3, 2013), available at LEXIS 2013 TNT 2-14.

197. For practical purposes, the regulatory guidance issued has moved the actual implementation of FATCA from 2013, as in the statute, to 2014. See FATCA Preamble, *supra* note 24, at 5881.

198. Hearing on Interest Reporting Regulations, *supra* note 165, at 96.

information that a foreign institution has to under FATCA.”¹⁹⁹ It is also a travesty that the bank deposit regulations were knowingly finalized with a loophole for entity accounts beneficially owned by individuals. Thus, these interest reporting rules will suffer from the same problems experienced by the implementation of the European Union Savings Directive.²⁰⁰

III. QUALIFIED INTERMEDIARY PROGRAM AND OTHER TAX COMPLIANCE INITIATIVES

“[T]he United States loses moral leadership on the tax evasion issue as long as it has an active program encouraging foreign tax cheats to invest in the United States.”²⁰¹ Professor McIntyre is referring to the Qualified Intermediary (QI) program that was established in 2001 to ensure that non-U.S. investors paid the appropriate amount of U.S. taxes on their U.S.-source investment income. The United States imposes a statutory withholding rate of thirty percent on U.S.-source portfolio dividends.²⁰² If the beneficial owner of the dividend resides in a qualifying treaty country, this rate can be reduced as prescribed by the treaty.²⁰³ Thus, the banks need to know the identity of the client in order to properly withhold. The negotiated compromise was effectuated by obtaining QI agreements from non-U.S. banks and other financial intermediaries that they provide summary information regarding the treaty-based withholding positions of their clients without disclosing the identity of these foreign account holders.²⁰⁴

A QI agreement allows a foreign financial institution to maintain the confidentiality of its foreign direct account holders, provided they fulfill certain withholding and information reporting requirements. Banks not signing such QI agreements are required to

199. Andrew M. Ballard, *Full Reciprocity Under FATCA Is a Work in Progress*, IRS Official Says, Daily Tax Rep. (BNA) No. 18, at G-9 (Jan. 28, 2013) (statement of Ted Setzer, manager of IRS’s Large Business & International Division).

200. See *infra* Part IV.A.

201. Michael J. McIntyre, *How to End the Charade of Information Exchange*, 56 TAX NOTES INT’L 255, 259 (2009).

202. I.R.C. § 871 (West Supp. 2013).

203. U.S. Treas. Dep’t, United States Model Income Tax Convention of November 15, 2006, art. 10, available at <http://www.irs.gov/pub/irs-trty/model006.pdf>.

204. Susan C. Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529, 532 (2012).

collect information from their non-U.S. customers who want a reduced withholding rate and to remit “that information up the chain of financial institutions and potentially all the way to the IRS.”²⁰⁵ QI status also means reduced reporting and documentation requirements to receive the lower rate of withholding available under an applicable treaty. As Professor Grinberg points out, this program “provided one of the conceptual seeds for the anonymous withholding approach currently being promoted by Switzerland as a means to address residence country tax concerns.”²⁰⁶

The QI rules define a foreign corporation as a foreign beneficial owner.²⁰⁷ This rule allows U.S. account holders to mask their identity by making their investments through foreign corporations.²⁰⁸ The UBS scandal disclosed that some foreign banks were advising their clients to arrange their affairs in this manner.²⁰⁹ In 2009, the Department of Justice (DOJ) charged UBS, a huge bank based in Zurich that has extensive operations in the United States, with conspiracy to defraud the United States by enabling their U.S. customers to mask “their ownership of, or beneficial interest in, income and assets held through offshore accounts in Switzerland and other jurisdictions.”²¹⁰ The DOJ argued that UBS assisted as many as 17,000 of its American clients to evade \$300 million a year in taxes through hidden offshore accounts. In order to avoid criminal prosecution, UBS agreed to a \$780 million fine.²¹¹ In November, 2010, the bank finalized an agreement under which the Swiss government transferred data on approximately 4450 client accounts allowing UBS to avoid any further action by the DOJ.²¹²

205. Grinberg, *supra* note 12, at 326.

206. *Id.* at 323.

207. Treas. Reg. § 1.1441-1(c)(3); *see also* Morse, *supra* note 204, at 533.

208. Morse, *supra* note 204, at 533.

209. *Id.* *see also* J. Richard (Dick) Harvey Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 57 VILL. L. REV. 471, 476-79 (2012) (describing the problems with the QI system).

210. Grinberg, *supra* note 12, at 315.

211. Press Release, U.S. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), *available at* <http://www.justice.gov/opa/pr/2009/February/09-tax-136.html>.

212. *See* Agreement Between the United States of America and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, U.S.-Switz, Aug. 19, 2009, *available at* http://www.irs.ustreas.gov/pub/irs-drop/us-swiss_government_agreement.pdf.

The IRS responded in part to this scandal by launching an amnesty program known as the Offshore Voluntary Disclosure Program (OVDP) to encourage people with hidden offshore accounts to come forward and get current with respect to their tax liabilities.²¹³ Taxpayers who participated in the program had to disclose the names of the bankers and others who facilitated opening the offshore accounts and establishing shell foreign corporations.²¹⁴ In return, the taxpayers were promised that they would avoid civil fraud charges, information return non-filing penalties, and criminal prosecution, although they would still have to pay back taxes, interest, and certain accuracy or delinquency penalties.²¹⁵ Interest was so strong that a second special disclosure initiative was available through September 9, 2011.²¹⁶ Approximately 33,000 people have participated in these initiatives since 2009.²¹⁷ The 2009 and 2011 programs have generated collections of more than \$5 billion in back taxes, interest, and penalties.²¹⁸

The IRS announced a third version of this program in January, 2012. This program does not have a deadline for application and the terms of the program—including increased penalties—can be altered at any time by the Service.²¹⁹ This is in conjunction with a widening

213. See Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 502–04 (2012) for a history of voluntary disclosure programs.

214. See *IRS Releases FAQ on Voluntary Disclosure Program for Offshore Accounts*, TAX NOTES TODAY, May 7, 2009, at 86-14.

215. *Id.*

216. “Due to . . . Hurricane Irene, the IRS on Aug. 26 extended the due date for offshore voluntary disclosure initiative (OVDI) requests until Sept. 9, 2011.” I.R.S., 2011 Offshore Voluntary Disclosure Initiative, <http://www.irs.gov/newsroom/article/0,,id=234900,00.html> (last visited Jan. 11, 2013). “The first special voluntary disclosure program closed with 15,000 voluntary disclosures on Oct. 15, 2009.” I.R.S. News Release IR-2011-14 (Feb. 8, 2011), available at <http://www.irs.gov/uac/Second-Special-Voluntary-Disclosure-Initiative-Opens;-Those-Hiding-Assets-Offshore-Face-Aug.-31-deadline>.

217. I.R.S. News Release IR-2012-64 (June 26, 2012), available at [http://www.irs.gov/uac/IRS-Says-Offshore-Effort-Tops-\\$5-Billion,-Announces-New-Details-on-the-Voluntary-Disclosure-Program-and-Closing-of-Offshore-Loophole](http://www.irs.gov/uac/IRS-Says-Offshore-Effort-Tops-$5-Billion,-Announces-New-Details-on-the-Voluntary-Disclosure-Program-and-Closing-of-Offshore-Loophole).

218. *Id.*; see also McMahon Remarks, *supra* note 7.

219. See Lee Sheppard, *Don't Ask, Don't Tell: Swiss Behavioral Patterns*, 66 TAX NOTES INT'L 7, 7 (2012); Marie Sapirie, *IRS Announces Third Offshore Voluntary Disclosure Program*, 134 TAX NOTES 276 (2012); I.R.S. News Release IR-2012-5 (Jan. 9, 2012), available at [http://www.irs.gov/uac/IRS-Offshore-Programs-Produce-\\$4.4-Billion-To-Date-for-Nation's-Taxpayers;-Offshore-Voluntary-Disclosure-Program-Reopens](http://www.irs.gov/uac/IRS-Offshore-Programs-Produce-$4.4-Billion-To-Date-for-Nation's-Taxpayers;-Offshore-Voluntary-Disclosure-Program-Reopens); see also Lederman, *supra* note 213, at 517–27 for an excellent analysis of the program.

investigation of foreign banks, including banks in Switzerland, Liechtenstein, Israel, and other foreign jurisdictions.²²⁰ These offshore probes by the IRS are increasing as four thousand professionals from its Criminal Investigation division have been stationed abroad across ten countries, with plans to expand this international presence.²²¹ An increasing number of banks are turning over client information to the United States voluntarily, by Court order or because of Treaty obligations. Although the penalties for the 2012 program have been raised to 27%, this is “less than the 50% penalty that the IRS has been imposing in recent criminal tax fraud prosecutions.”²²²

The fallout of the UBS scandal continues. In the fall of 2011, the Swiss Government ordered Credit Suisse to release certain wealthy American clients’ account data.²²³ The IRS requested, pursuant to the 1996 United States–Switzerland Tax Convention, that the Swiss Federal Tax Administration assist in locating U.S. account holders that the IRS had identified, in some cases through the Offshore Voluntary Disclosure Programs. However, on April 5, 2012, the Federal Administrative Court in Bern upheld an appeal of one of these clients and determined that Credit Suisse did not have to comply.²²⁴ On July 9, 2012, the IRS filed a new more detailed treaty request for information.²²⁵ The IRS has also announced that taxpayers failing to notify the DOJ of any challenges to this

220. William M. Sharp Sr., Larry R. Kemm & William T. Harrison III, *The 2012 Offshore Voluntary Disclosure Program: Analysis, Insight, and Intrigue*, 67 TAX NOTES INT’L 681, 684 (2012). For example, the Justice Department asked for assistance under the Liechtenstein-U.S. Tax Information Exchange Agreement for information on undeclared accounts at the Liechtensteinische Landesbanke AG on May 11, 2012. *Id.*; see also Laura Saunders, *Israeli Tax Preparers Snared*, WALL ST. J. (June 17, 2012, 7:38 PM), <http://online.wsj.com/article/SB1000142405270230341040477468901036376714.html>. 5

221. John Herzfeld, *Charges Expected from Offshore Probes Outside of Switzerland*, IRS Official Says, BNA DAILY TAX REP. No. 202, at G-7 (Oct. 19, 2012).

222. Asher Rubinstein, *The IRS Offensive Against Offshore Accounts: New Attacks and New Relief*, ASSETLAWYER.COM, <http://www.assetlawyer.com/irs-offensive-against-offshore-accounts.htm> (last visited Jan. 11, 2013).

223. David Jolly, *Credit Suisse to Turn Over Data on Some U.S. Accounts*, DEALBOOK, Nov. 8, 2011, 11:31 AM), <http://dealbook.nytimes.com/2011/11/08/credit-suisse-to-turn-over-data-on-some-u-s-accounts/>.

224. David Jolly, *Swiss Court Ruling Hampers a Tax Deal*, N.Y. TIMES, Apr. 12, 2012, at B5.

225. Kristen A. Parillo & Marie Sapirie, *I.R.S. Submits New Treaty Request to Switzerland on Credit Suisse Data*, 136 TAX NOTES 770 (2012).

disclosure of tax information in foreign courts will be ineligible for participation in the OVDP.²²⁶

As discussed previously, Switzerland has negotiated a FATCA Cooperation Agreement that will allow its foreign financial institutions to report directly to the U.S. government.²²⁷ Pursuant to this agreement, all new U.S. accounts must consent to disclosure.²²⁸ Furthermore, the agreement will require Switzerland to promptly honor group information requests from the U.S. Competent Authority based on the aggregate information reported to the IRS.²²⁹ Unfortunately, this requirement does not become operational until the Swiss Protocol to the 1996 United States–Switzerland Tax Convention that was signed on September 23, 2009, enters into force.²³⁰ The U.S. Senate must ratify this Protocol without further delay for the Swiss FATCA Cooperation Agreement to be fully effective.

On February 2, 2012, private Swiss bank Wegelin was indicted for conspiring to conceal more than \$1.2 billion in U.S. taxpayer funds. Many clients had moved their undeclared accounts from UBS to Wegelin.²³¹ On January 3, 2013, Wegelin pled guilty in U.S. District Court in Manhattan to assisting wealthy American taxpayers evade taxes and will pay \$74 million in restitution, fines, and forfeiture proceeds to the United States.²³² The United States is continuing to pressure foreign banks, bank officials, asset managers, and attorneys.²³³ The U.S. government has successfully prosecuted

226. I.R.S. News Release IR-2012-64, *supra* note 217.

227. Swiss FATCA Cooperation Agreement, *supra* note 81; *see also* Sheppard, *supra* note 113, at 7.

228. Swiss FATCA Cooperation Agreement, *supra* note 81, at art. 3(1)(c); *see also* J. Richard Harvey, *FATCA—A Report From the Front Lines*, 136 TAX NOTES 713 (2012).

229. Swiss FATCA Cooperation Agreement, *supra* note 81, at art. 5(1); *see also* Press Release, U.S. Dep’t of Treasury, *supra* note 69.

230. Swiss FATCA Cooperation Agreement, *supra* note 81, at art. 5(1).

231. Press Release, U.S. Dep’t of Justice, *Swiss Bank Indicted on U.S. Tax Charges* (Feb. 2, 2012), <http://www.justice.gov/tax/2012/txdv12153.htm>.

232. Peter Lattman, *Swiss Bank Pleads Guilty to Helping American Tax Dodgers*, N.Y. TIMES, Jan. 4, 2013, at B5. The private bank will close once these matters are settled. Chad Bray, *Swiss Bank Pleads Guilty in Probe—Wegelin & Co. Admits It Helped Americans Avoid Taxes with Secret Accounts*, WALL ST. J. (Jan. 4, 2013), at C2.

233. *See* Asher Rubinstein, *Offshore Update: Continued Investigation and Prosecution of Foreign Accounts Amidst a New Opportunity for Pre-emptive Disclosure*, ASSETLAWYER.COM (Jan. 19, 2012, 9:57 PM), <http://www.assetlawyer.com/wordpress/?p=1170> (“Negotiations are currently underway between the U.S. and Switzerland for a global settlement that will

approximately fifty criminal tax evasion cases including negotiating a \$22 million payment from Mary Estelle Curran for filing false returns and evading \$668,000 in taxes on the \$40 million secret bank account left by her husband.²³⁴ Clients are being advised to come forward as “[i]n light of the erosion of foreign banking secrecy, discovery of the account by the IRS is very likely.”²³⁵ So in effect, FATCA has already started working as the fear of bank disclosure is encouraging taxpayers to disclose first.

IV. EUROPEAN UNION INITIATIVES

A. European Union Savings Directive

With the liberalization of capital movements, both within the European Union and with respect to third countries, it became necessary “to ensure a minimum level of taxation on interest income.”²³⁶ After years of negotiations, the Savings Directive (“EUSD”) finally took effect in the Member States in 2005.²³⁷ Because of certain bilateral agreements, the Directive also impacts jurisdictions such as Jersey, Guernsey, and the Cayman Islands.²³⁸ Equivalent measures are also applied to five European non-EU countries: Switzerland, Liechtenstein, San Marino, Monaco, and Andorra.²³⁹ The goal of the EUSD is to ensure effective taxation by the beneficial owner’s state of residence of the interest payments made to the individual from another Member State. This is enabled

involve all Swiss banks.”) [hereinafter Rubinstein].

234. Laura Saunders, *U.S. is Preparing More Tax-Evasion Cases*, WALL ST. J. (Jan. 31, 2013), at C1.

235. Rubinstein, *supra* note 233. “If the banker is then criminally charged, the banker is likely to cooperate with prosecutors and divulge bank account information as part of a negotiated settlement. For instance, Renzo Gadola, a former UBS banker in Switzerland was charged with facilitating US tax fraud. He pled guilty in December 2010 and has been cooperating with DOJ prosecutors. He has provided information about U.S. clients and other Swiss bankers who assisted in hiding foreign assets. As part of Gadola’s settlement, he must return to the U.S. annually to further assist DOJ investigations of foreign banking.” *Id.*

236. Sabine Heidenbauer, *The Savings Directive*, in INTRODUCTION TO EUROPEAN TAX LAW: DIRECT TAXATION 167, 168 (Michael Lang et al. eds., 2d ed. 2010).

237. Savings Directive, *supra* note 6.

238. See Jens Schroder, *Savings Taxation and Banking Secrecy*, in EXCHANGE OF INFORMATION AND BANK SECRECY 59, 60 (Alexander Rust & Eric Fort eds., 2012) (the “10 dependent or associated territories of the Netherlands and the UK”).

239. *Id.* at 62–63.

by the automatic exchange of information between tax administrations on the individual's interest income.²⁴⁰

However, Belgium, Luxembourg, and Austria, instead of exchanging information automatically, were obliged only to "levy a withholding tax at a rate of 15% during the first three years of the transitional period, 20% for the subsequent three years and 35% thereafter."²⁴¹ These "banking havens" negotiated the choice between identifying customers or withholding tax,²⁴² claiming that they would be at a competitive disadvantage unless other jurisdictions such as Switzerland and the United States agreed to the "exchange of information upon request as defined in the OECD Model Agreement . . . with respect to interest payments."²⁴³ This transition rule allowed Austria, Belgium, and Luxembourg to apply a "withholding tax to the savings income without having to divulge details on individual clients or their income earned to the tax authorities."²⁴⁴ Belgium began participating in the automatic exchange of information as of January 1, 2010, but Austria and Luxembourg continue to withhold at the thirty-five percent rate.²⁴⁵ Luxembourg, however, has agreed to begin participating in the automatic exchange of information within the European Union as of January 1, 2015.²⁴⁶

The Commission proposed amendments to the EUSD in 2008 in order to close loopholes and to ameliorate tax evasion.²⁴⁷ The

240. Savings Directive, *supra* note 6, art. 1, at 39.

241. *Id.* art. 11, at 43. Seventy-five percent of the revenues are transferred to the residence state of the investor. Schroder, *supra* note 238, at 62.

242. Sheppard, *supra* note 23.

243. Savings Directive, *supra* note 6, art. 10, at 43.

244. Charles-Henry Courtois, *The Impact of the European Commission on the Council of Ministers' Decisions in the Field of European Taxation: The Case of the European Savings Directive*, 2 INT'L PUB. POL'Y REV., no. 2, Nov. 2006, at 33.

245. Schroder, *supra* note 238, at 62; *see also* European Commission, Rules Applicable, (Sept. 26, 2013, 11:03 PM), http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/rules_applicable/index_en.htm (last visited Jan. 11, 2013).

246. Ian Wishart, *Luxembourg agrees to tax-exchange legislation*, EUROPEANVOICE.COM (Apr. 4, 2013), www.europeanvoice.com/article/imported/luxembourg-agrees-to-tax-exchange-legislation/76912.aspx; *see also* *European Commission Backs Luxembourg on its Efforts to End Banking Secrecy*, BNA DAILY TAX REP., Apr. 9, 2013, No. 68, at I-1.

247. Press Release, European Comm'n., Taxation of Savings: The European Commission Proposes Changes to Eliminate Tax Evasion, (Nov. 12, 2008), IP/08/1697, *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1697>. László Kovács, Commissioner for Taxation and Customs, said: "The first report on the operation of the

amendments are intended to ensure the taxation of interest payments that are routed through intermediate tax-exempt structures such as foreign trusts as well as to extend the scope of the Savings Directive to other interest income from certain financial and insurance products.²⁴⁸ The Savings Directive requires that the Commission evaluate its performance every three years.²⁴⁹ The Commission's initial reports had found that the EUSD's definitions of interest, paying agent, and beneficial owner were deficient in fulfilling the goal of effective taxation.²⁵⁰ The second mandated review reported that between the years 2000 and 2010, an average of thirty-five percent of non-bank deposits in Member States and applicable jurisdictions are held by untaxed offshore structures that are being used to hide the actual beneficial owner.²⁵¹ The report also documented a substantial increase in the sale of structured financial products.²⁵²

In June 2009, the EU Finance Ministers announced recommendations agreed to by all twenty-seven Member States for strengthening the Savings Taxation Directive.²⁵³ In March 2011, ECOFIN published a revised proposal that took into account concerns expressed by various Member States as well as the opinions of the European Parliament and the European Economic and Social

Savings Taxation Directive concluded that the Directive, although effective within the limits of its scope, can be easily circumvented. The current scope of the Directive needs to be extended, in order to meet our goal of stamping out tax evasion, which affects the national budgets and creates disadvantages for the honest citizens." *Id.*

248. See Commission of the European Communities, Proposal for a Council Directive Amending Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, at 2–3, COM (2008) 727 final (Nov. 2008), available at [http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/savings_tax/savings_directive_review/com\(2008\)727_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/savings_tax/savings_directive_review/com(2008)727_en.pdf) [hereinafter Proposal for Savings Directive Amendments].

249. Savings Directive, *supra* note 6, at art. 18, at 45.

250. Proposal for Savings Directive Amendments, *supra* note 248, at 2.

251. See European Commission, Report from the Commission to the Council in Accordance with Article 18 of Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, at 6–7, COM (2012) 65 final (Mar. 2, 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/savings_tax/savings_directive_review/com_2012_65_en.pdf.

252. *Id.* at 10–11.

253. Charles Gnaedinger, *ECOFIN Agrees on Approach to Improve Savings Tax Directive*, 54 TAX NOTES INT'L 921, 922 (2009).

Committee.²⁵⁴ Discussions are ongoing.²⁵⁵ In its 2012 Communication on Tax Evasion, the Commission urged the adoption of the revisions to the Savings Directive in order to put the EU “in a stronger position to seek equivalent improvements from other countries.”²⁵⁶

The EU leaders are trying to negotiate a tax transparency deal that would update the Savings Directive in order to close loopholes and to ameliorate tax evasion. The European Commission estimates that tax evasion is costing Member States approximately one trillion euros annually (\$1.3 trillion).²⁵⁷ The amendments are intended to ensure the taxation of interest payments that are routed through intermediate tax-exempt structures such as foreign trusts as well as to extend the scope of the Savings Directive to other interest income from certain financial products and insurance products.²⁵⁸

The European Commission had been hoping to convince the United States to piggyback onto its approach with respect to third countries. Unfortunately, objections by Austria and Luxembourg with respect to the proposed revision of the EU Savings Directive have hindered such a result.²⁵⁹ The Commission has issued a statement applauding the “coordinated bilateral agreements” being negotiated with the United States, noting that it could, at a later stage, form the foundation for wider cooperation on information

254. Council of the European Union, *Proposal for a Council Directive Amending Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments*, CNS (2008) (Mar. 4, 2011), available at <http://register.consilium.europa.eu/pdf/en/11/st06/st06946.en11.pdf>.

255. European Commission, First Review and Amending Proposal, (Sept. 29, 2013, 11:03 PM), http://ec.europa.eu/taxation_customs/taxation/personal_tax/savings_tax/savings_directive_rev_iew/index_en.htm.

256. Communication from the Commission to the European Parliament and the Council on Concrete Ways to Reinforce the Fight Against Tax Fraud and Tax Evasion Including in Relation to Third Countries, at 7, COM (2012) 351 final (June 27, 2012) [hereinafter Communication on Tax Evasion].

257. European Commission, EU gets tough on tax evasion—11/12/2012, http://ec.europa.eu/news/economy/121211_en.htm (last visited Mar. 13, 2014).

258. Communication on Tax Evasion, *supra* note 256, at 6–7.

259. Bruce Zagaris, *Bilateral Agreement Alternative to FATCA Implementation Brings New Twist to International Tax Cooperation*, 28 INT’L ENFORCEMENT L. REP. 113 (2012); see also Pistone, *supra* note 118, at 221 (noting that Austria and Luxembourg want to preserve the symmetry between the Savings Directive and the external agreements to avoid any competitive disadvantage).

exchange between the EU and the United States.²⁶⁰ The hope is that this cooperation will lead to progress in the “EU’s efforts to promote global application of the automatic exchange of information for tax purposes.”²⁶¹

The Commission had asked for a mandate to allow it to negotiate amendments to the existing savings agreements with Andorra, Liechtenstein, Monaco, San Marino, and Switzerland that would align these agreements with the new standards for information exchange.²⁶² Certain Member States—under pressure from their prominent financial institutions—had resisted, not wanting to further the automatic exchange of information regime.²⁶³ Instead, Germany and the United Kingdom began their own negotiations with Switzerland.²⁶⁴ The German and British tax cooperation agreements signed with Switzerland in 2011 (known as the Rubik agreements) were challenged as being incompatible with the current EU-Switzerland Savings Agreement in part because they would have allowed a lower rate of withholding tax than the thirty-five percent rate currently imposed and applied to interest income already covered by the EU-Swiss Savings Agreement.²⁶⁵ Germany and the United Kingdom revised their agreements to overcome these

260. European Commission, Commission Welcomes US Move to Ensure Enhanced International Tax Cooperation in a More Business-Friendly Way, MEMO/12/88 (Brussels, Feb. 8, 2012); see also Bennett, *supra* note 58.

261. Tanguy Verhoosel, *FATCA: Five EU States Work Out Compromise with Washington*, EUROPOLITICS (Feb. 09, 2012), <http://www.europolitics.info/external-policies/fatca-five-eu-states-work-out-compromise-with-washington-art325662-44.html>.

262. Communication on Tax Evasion, *supra* note 256, at 10.

263. See generally Kaspar Villiger, Chairman of the Board of Directors of UBS AG, Annual General Meeting (May 3, 2012), in *UBS Chair Warns Against Tax Information Exchange Requirements*, 66 TAX NOTES INT’L 753, 756 (2012).

264. Francesco Carelli, *The New Tax Agreement Between Switzerland and the United Kingdom—An Analysis*, 52 EUR. TAX’N 301 (June 2012).

265. *Id.* at 301, 305; see also Agreement Between the European Community and the Swiss Confederation Providing for Measures Equivalent to Those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, 2004 O.J. (385) 30, available at <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=567> (last visited Jan. 11, 2013).

objections.²⁶⁶ However, not all commentators believe that all inconsistencies have been overcome.²⁶⁷

These Rubik agreements are extraordinarily complex with unique mathematical formulas to calculate final withholdings on previously untaxed assets in Switzerland as well as the future investment income that they produce.²⁶⁸ Germany and the United Kingdom were to receive a guaranteed CHF 2 billion and CHF 500 million respectively because of the untaxed assets held in Switzerland with further payments expected to surpass CHF 4 billion and CHF 1.3 billion, an indication of the seriousness of the tax evasion problem in Europe.²⁶⁹ The Swiss-UK agreement entered into force on January 1, 2013. However, the Swiss-German agreement was rejected by the German Bundesrat (Upper House) on November 23, 2012, as not being compatible with Germany's international obligations or national policy.²⁷⁰

Austria signed its own agreement with Switzerland on April 13, 2012, which entered into force on January 1, 2013.²⁷¹ Reportedly, negotiations are also taking place with Italy, Greece, and Belgium.²⁷² Although intended to establish cooperation equivalent to the

266. Randall Jackson, EU Accepts Swiss Tax Agreements with Germany, U.K., 66 TAX NOTES INT'L 314 (2012); HM Revenues & Customs, UK-Swiss Confederation Taxation Cooperation Agreement, Oct. 6, 2011, *available at* <http://www.hmrc.gov.uk/taxtreaties/ukswiss.htm> [hereinafter Switz-UK Agreement]; Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Ger.-Switz., Oct. 27, 2011; Protocol to the Swiss-German Agreement, Apr. 20, 2012; Protocol to the Swiss-UK Agreement, Mar. 20, 2012, *available at* www.hmrc.gov.uk/taxtreaties/swiss-uk-letters.pdf; *see also* BBC, *Tax Evasion Treaty Signed by Switzerland and Germany*, (Apr. 5, 2012, 08:31 ET), <http://www.bbc.co.uk/news/business-17624364>.

267. Pistone, *supra* note 118, at 221–24 (asserting that the protocols to the Rubik agreements do not resolve the problem).

268. Carelli, *supra* note 264, at 302–03. This payment can be avoided by authorizing full disclosure to the UK authorities. *See* Switz-UK Agreement, *supra* note 266, art. 10.

269. Communication on Tax Evasion, *supra* note 256, at 10.

270. Pistone, *supra* note 118, at 218; *see also* Rolf Eicke, *The Germany-Switzerland Withholding Tax Agreement: Stalled for Good?*, 68 TAX NOTES INT'L 191, (2012) (noting that because of domestic political pressures in Germany, it appears that the agreement between Germany and Switzerland may not be enacted).

271. *See* Stefanie Steiner & Christian Wimpissinger, *Thoughts on the New Austria-Switzerland Tax Agreement*, 66 TAX NOTES INT'L 412 (2012).

272. *See* Marc Quaghebeur, *Switzerland and Belgium Discuss Withholding Agreement*, 67 TAX NOTES INT'L 1091 (2012) (“Switzerland is also negotiating Rubik agreements with Greece and Italy.”).

automatic exchange of information,²⁷³ Professor Grinberg rightly points out that these agreements are troubling as more and more countries relinquish their tax sovereignty.²⁷⁴ Not every country will be able to negotiate such an agreement with Switzerland, and the terms will reflect the bargaining power of the nation. Note that Austria was not able to negotiate any guaranteed revenues from Switzerland.

Professor Pistone laments that the Rubik agreements harm global fiscal transparency by reducing “cross-border flows of information and provid[ing] a shelter for tax opacity.”²⁷⁵ The agreements provide that those individuals who close their accounts before the expected entry into force date of January 1, 2013 will be unaffected.²⁷⁶ However, Switzerland will collect data on the destination of funds withdrawn from the country following the announcement of the agreement with the United Kingdom, and will share that data—for the top ten jurisdictions that funds have moved to as well as the number of “relevant persons” who have transferred assets to each of the ten jurisdictions—with the United Kingdom.²⁷⁷

The Liechtenstein-UK agreement provides another model for addressing the offshore tax evasion problem, the Liechtenstein Disclosure Facility (LDF). Since 2009, Liechtenstein has been offering a taxpayer assistance program to UK taxpayers to help them declare their Liechtenstein investments to HMRC.²⁷⁸ Any UK taxpayer that cannot prove that they are UK tax compliant must participate in registration and disclosure or move their assets to another jurisdiction. The penalties (ten percent penalty on the underpaid liabilities) are much lower than the Offshore Voluntary

273. Switz-UK Agreement, *supra* note 266, at art. 1. The objective of this Agreement is to exchange information about certain individuals “on an automatic basis.” *Id.*

274. Jurisdictions relying on anonymous withholding are placing some of their resources in the hands of the other sovereign state. Grinberg, *supra* note 12, at 361. Whereas anonymous withholding reduces policy flexibility and sovereign authority, information reporting preserves sovereign policy autonomy. *Id.* at 364.

275. Pistone, *supra* note 118, at 217. (The Rubik agreements “clash with the spirit of fiscal transparency and are an inappropriate way to reconcile the basic right to confidentiality with the global effort against tax evasion.”) *Id.*

276. *See, e.g.*, Carelli, *supra* note 264, at 302.

277. Switz-UK Agreement, *supra* note 266, at Art. 18.

278. *See* HM Revenue & Customs, Liechtenstein Disclosure Facility: Frequently Asked Questions (FAQs), (Mar. 27, 2013), <http://www.hmrc.gov.uk/disclosure/liechtenstein-faq.htm> (last visited Jan. 11, 2013).

Disclosure program of the United States. Other special terms include no criminal prosecution and an option to either use a composite tax rate of forty percent or to calculate the actual tax liability on an annual basis.²⁷⁹

Will the signing of FATCA agreements by various Member States with the United States stem the tide of these alternative arrangements? These single country agreements do nothing to prevent future tax evaders from seeking to hide their assets and income in jurisdictions with which their country has not negotiated such an arrangement. Even current evaders do not have much of a disincentive to move their assets to other tax haven jurisdictions to avoid complying with the agreements. However, even Luxembourg is negotiating an IGA with the United States that would allow it to share information with the IRS regarding bank accounts held in Luxembourg by U.S. citizens and residents.

As one of the largest financial centers relying on bank secrecy laws, Luxembourg has been intensely pressured to step up enforcement on tax evasion. As previously discussed, Luxembourg has pledged to participate in automatic exchange of information within the EU beginning in 2015, a move necessary if it will be sharing information with the United States.²⁸⁰ An effective FATCA regime will put pressure on Austria to relinquish its use of the transitional withholding rule available to it in the Savings Directive. It is also possible that FATCA will provide the necessary impetus for finalizing the amendments necessary to make the Savings Directive function as it was intended. Although the EU Finance Ministers failed to approve the Savings Directive amendments at their May 2013 meeting, they did give the Commission the mandate to negotiate updated savings tax agreements with Switzerland, Liechtenstein, Monaco, Andorra, and San Marino.²⁸¹ As stated in the Commission's June 2012 Communication on Tax Evasion, "[r]ecent developments at [the] international level as regards the US Foreign Account Tax Compliance Act (FATCA) open new perspectives for

279. *Id.*

280. Wishart, *supra* note 246.

281. Ian Wishart, *Finance Ministers Fail to Reach Deal on Tax Avoidance*, EUROPEANVOICE.COM (May 14, 2013), www.europeanvoice.com/article/2013/may/finance-ministers-fail-to-reach-deal-on-tax-avoidance/77227.aspx. See also Press Release, Council of the European Union, Economic and Financial Affairs (May 14, 2013), at 2.

strengthening automatic information exchange between Member States and third countries thus improving transparency at a global level.”²⁸²

B. 2011 Exchange of Information Directive

Progress toward administrative cooperation was accelerated by the global financial crisis that highlighted the need for more effective exchange of information to combat tax avoidance and tax evasion.²⁸³ In February of 2009, the European Commission proposed a new council directive on administrative cooperation in the field of taxation, which set up procedures, scope, and conditions for the exchange of information on request, the automatic exchange of information, spontaneous exchange of information, and administrative notification among Member States and between Member States and third countries.²⁸⁴ One goal was to implement the OECD Standard on exchange of information that is set forth in Article 26 of the OECD Model Convention.²⁸⁵

After difficult negotiations, this proposal was formally adopted by the Council in 2011 and generally became effective January 1, 2013.²⁸⁶ The 2011 Exchange of Information Directive is intended to apply to all taxes except for those specifically listed and to all taxpayers including both natural and legal persons.²⁸⁷ The 2011 Directive allows the information to be “used for the administration and enforcement of the domestic [tax] laws” as well as associated judicial and administrative proceedings.²⁸⁸ Member States must provide the required information within certain time limits (two months for information they already possess and six months for other information)²⁸⁹ and are obligated to provide the information

282. Communication on Tax Evasion, *supra* note 256, at 11.

283. See Irma Johanna Mosquera Valderrama, *EU and OECD Proposals for International Tax Cooperation: A New Road?*, 59 TAX NOTES INT’L 609 (2010).

284. Commission Proposal for a Council Directive on Administrative Cooperation in the Field of Taxation, COM (2009) 29 final (Feb. 2, 2009).

285. Press Release, Council of the European Union, Economic and Financial Affairs (June 9, 2009), at 23.

286. Directive 2011/16 of the Council on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, 2011 O.J. (L 64/1) (EU) [hereinafter 2011 Exchange of Information Directive].

287. *Id.* at arts. 2, 3(11).

288. *Id.* at art. 16.

289. *Id.* at art. 7(1).

even if they do not need it for their own tax purposes and even if held by a bank or other financial institution.²⁹⁰ This means that Member States cannot justify refusing to provide information on the basis of their banking secrecy laws.²⁹¹ However, this provision is not retroactive.²⁹²

Commentators note that the articles on exchange of information on request conceivably go beyond the OECD Standard in its obligation to transmit any “information that is foreseeably relevant to the administration and enforcement of the domestic [tax] laws” because the requirements for a valid request are less onerous than those in the OECD Model Agreement on the Exchange of Information on Tax Matters.²⁹³ The most important feature, however, is the extension of the mandatory automatic exchange of information that exists with respect to savings income to income from employment, director’s fees, certain life insurance products, pensions, and immovable property to the extent that information is available.²⁹⁴ Although the article prescribing the automatic exchange of information does not take effect until January 1, 2015, it will cover tax periods beginning January 1, 2014.²⁹⁵

It is generally understood that the automatic exchange of information is the most effective way to fight tax evasion. Thus, the Directive provided that automatic information exchange may be extended to other categories of income such as dividends, capital gains, and royalties in the future.²⁹⁶ The Commission is developing computerized formats for the income covered by the 2011 Exchange of Information Directive so that secure automatic exchange of information can be implemented within the EU and is assessing the efficacy of a European Tax Identification Number for taxpayers engaged in cross-border activity.²⁹⁷

290. *Id.* at art. 18.

291. Marius Vascega & Servaas van Thiel, *Assessment of Taxes in Cross-Border Situations: The New EU Directive on Administrative Cooperation in the Field of Taxation*, 20 EC TAX REV. 148, 152 (2011).

292. 2011 Exchange of Information Directive, *supra* note 286, at art. 18(3).

293. *See* Vascega, *supra* note 282, at 152–53; *see also* 2011 Exchange of Information Directive, *supra* note 286, at arts. 1, 20.

294. 2011 Exchange of Information Directive, *supra* note 286, at art. 8.

295. *Id.* at arts. 8, 29.

296. *Id.* at pmbl. ¶ 10, art. 8(5).

297. Communication on Tax Evasion, *supra* note 256, at 7.

One interesting innovation in the Directive is the addition of a most-favored-nation clause such that no Member State may refuse to extend its wider cooperation arrangements with third countries to another “Member State wishing to enter into such mutual wider cooperation.”²⁹⁸ One question is what effect the FATCA agreements worked out with respect to various Member States will have with respect to cooperation within the EU? Will the increased exchange of information with the United States serve to accelerate the timetable for the automatic exchange of information between the Member States? Legally, any Member State has the right to demand from another Member State the same level of cooperation that is being provided to the United States. Thus, on June 12, 2013, the Commission proposed an extension of mandatory automatic information exchange to dividends, capital gains, other financial income and account balances as of January 1, 2015 for information from the 2014 tax year.²⁹⁹ The Commission acknowledged that the IGAs that many Member States have concluded or will conclude with the United States with regard to FATCA “have given further impetus to [automatic exchange of information] as a way of combating tax fraud and evasion.”³⁰⁰ If adopted, there will be substantial overlap with the information required by FATCA.

The finance ministers of the EU’s five largest economies are calling for Europe to “take a lead in promoting a global system of automatic information exchange” by implementing the Information Exchange Directive and effectively applying its most favored nation clause.³⁰¹ I am hopeful that this constitutes the positive fallout from the implementation of FATCA.

298. 2011 Exchange of Information Directive, *supra* note 286, at art. 19; *see also* Valderrama, *supra* note 283, at 614.

299. *See* Commission Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, at 9–10, COM (2013) 348 final (June 12, 2013), *available at* http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/com_2013_348_en.pdf.

300. *Id.* at 3.

301. Finance Ministers’ Letter, *supra* note 136.

V. PROPOSALS

Professor Grinberg persuasively argues that anonymous withholding erodes sovereign policy flexibility and “institutionalizes differentiated treatment of the most sophisticated taxpayers from the rest of society,” thereby undermining domestic tax morale.³⁰² He critiques the argument that anonymous withholding is less expensive and more administratively feasible than automatic information reporting,³⁰³ given that a multilateral anonymous withholding system following “the Swiss model must (1) . . . identify taxpayers’ country of residence, (2) collect information about amounts of interest, dividends, capital gains, and other income . . . , (3) determine which financial institutions are included in the withholding system,” and “(4) ensure financial institutions comply” with the taxpayer identification and withholding requirements.³⁰⁴ Cross-border information reporting, on the other hand, undergirds tax morale and strengthens the capacity to govern particularly for less powerful sovereigns.³⁰⁵ Accessible to all countries,³⁰⁶ Professor Grinberg posits that the amended Multilateral Convention³⁰⁷ provides a multilateral framework for establishing such an automatic transnational tax information exchange. The 2010 “protocol incorporates the internationally accepted standards for the exchange of foreseeably relevant information regardless of bank secrecy” and requires signatories to accept requests with respect to “ascertainable groups

302. Grinberg, *supra* note 12, at 347.

303. *Id.* at 351.

304. *Id.* at 351–52. Only the information reporting requirement for taxpayer identification numbers (TINs) is more burdensome than anonymous withholding requirements. *Id.* at 352.

305. *Id.* at 347.

306. *Id.* at 371; see also OECD, *The Convention on Mutual Administrative Assistance in Tax Matters—Background*, June 4, 2010, <http://www.oecd.org/tax/exchange-of-tax-information/the-conventiononmutualadministrativeassistanceintaxmatters-background.htm> (last visited Jan. 11, 2013). As of February 17, 2013, forty-three countries had signed the Protocol to the Multilateral Convention. Council of Europe, *Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol*. (Feb. 17, 2013) (EC), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=127&CM=1&DF=&CL=ENG> (last visited Jan. 11, 2013).

307. *Convention on Mutual Administrative Assistance in Tax Matters*, OECD, pmb., at 4 (May 27, 2010), available at http://www.oecd.org/ctp/exchange-of-tax-information/Convention_On_Mutual_Administrative_Assistance_in_Tax_Matters_Report_and_Explanation.pdf [hereinafter *Multilateral Convention*].

or classes of persons.”³⁰⁸ The Multilateral Convention also includes provisions to facilitate automatic information exchange.³⁰⁹

A blueprint for such a multilateral system would involve “reconciling the current EU, OECD, and U.S. approaches . . . [with respect to] routing, identification, reporting, scope, verification, and incentives.”³¹⁰ In January 2010, the OECD’s Committee on Fiscal Affairs created the Treaty Relief and Compliance Enhancement (TRACE) Group to: (1) develop efficient treaty relief systems “to minimize administrative costs and allocate the costs to the appropriate parties”; and (2) identify “solutions that enhance countries’ abilities to ensure proper compliance with tax obligations, from the perspective of both source and residence countries.”³¹¹ The TRACE group issued a report on improving procedures for tax relief for cross-border investors in 2010³¹² and released an implementation package for a standardized system for effective withholding tax relief procedures for cross-border portfolio income in 2013.³¹³ Under the OECD’s TRACE approach, financial institutions report information annually regarding specific items of income received by investors to the source country tax administrators who will automatically exchange the information with the “government of the investor’s residence country.”³¹⁴

EU financial institutions report on specific items of income received by an EU resident to the “government where the financial institution managing the assets resides.”³¹⁵ This taxpayer information is then exchanged between the EU Member States pursuant to the EU Savings Directive and the Information Exchange Directive.

308. Grinberg, *supra* note 12, at 371; *see also* Explanatory Report to the Convention as Amended by the Protocol, Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters (May 27, 2010), *available at* http://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf.

309. *Multilateral Convention*, *supra* note 307, art. 6, at 31–32.

310. Grinberg, *supra* note 12, at 373.

311. OECD, *Treaty Relief and Compliance Enhancement (TRACE)—Implementation Package approved by CFA*, <http://www.oecd.org/ctp/exchangeofinformation/treatyreliefandcomplianceenhancementtrace.htm> (last visited Jan. 11, 2013).

312. ORG. FOR ECON. COOPERATION & DEV., POSSIBLE IMPROVEMENTS TO PROCEDURES FOR TAX RELIEF FOR CROSS-BORDER INVESTORS: IMPLEMENTATION PACKAGE (2010), *available at* <http://www.oecd.org/ctp/taxtreaties/44556378.pdf>.

313. ORG. FOR ECON. COOPERATION & DEV., TRACE IMPLEMENTATION PACKAGE FOR THE ADOPTION OF THE AUTHORISED INTERMEDIARY SYSTEM (2013).

314. *Id.* at 5.

315. *Id.*

However, FATCA, as legislated, requires foreign financial institutions to report directly to the United States on assets held and income earned by U.S. persons. The IRS is evaluating the feedback received on the TRACE project before deciding whether to adopt any of the TRACE information exchange framework.³¹⁶

Many commentators have pointed out the conflict-of-law issues that arise with financial institutions reporting directly to the United States.³¹⁷ Professor Morse recommended involvement of the non-U.S. governments in the implementation of FATCA, and the intergovernmental agreements being negotiated accomplish this goal.³¹⁸ Treasury Model I makes available a system similar to that used by the European Union in both the Savings Directive and Information Exchange Directive. Treasury Model II continues the direct bank to U.S. government reporting model but involves the foreign governments in removing any legal impediments to their financial institutions complying with FATCA. FATCA, as legislated, provides the mechanism for financial institutions in countries that did not sign an intergovernmental agreement to cooperate.

Of course, the ability to implement FATCA in three distinct ways complicates the horizon. However, in July 2013, the G-20 finance ministers unanimously endorsed the OECD's proposal for a global model for multilateral automatic exchange of tax information and committed "to automatic exchange of information as the new global standard."³¹⁹ This is noteworthy as the G-20 also includes countries such as China, India, Saudi Arabia, Russia, Brazil, Indonesia, South Africa, and Argentina that are not members of the

316. Arora, *supra* note 137.

317. *See, e.g.*, Harvey, *supra* note 209, at 478–79 (noting the conflict-of-laws issue with respect to the disclosing customer information to the IRS). In a 2011 report, the Information Reporting Program Advisory Committee cautioned the IRS that implementation of FATCA could run afoul of foreign laws. *See* Internal Revenue Service, 2011 IRPAC Report: International Reporting & Withholding Subgroup, <http://www.irs.gov/Tax-Professionals/2011-IRPAC-Report:-International-Reporting-&-Withholding-Subgroup> (last visited Jan. 11, 2013) ("The obligations that FATCA imposes on FFIs . . . potentially conflict with legal constraints imposed on such FFIs under foreign law in a number of respects. For example, FATCA's reporting requirements potentially contravene the privacy or data protections laws of a number of jurisdictions.").

318. Morse, *supra* note 204, at 542–54.

319. G20 Leaders' Declaration, at Tax Annex to the Saint Petersburg G20 Leaders Declaration G20 (Sept. 6, 2013), *available at* <http://www.g20.org/news/20130906/782776427.html>.

OECD.³²⁰ The OECD is working with the G-20 countries to develop this new global standard for the G-20 Finance Ministers and Central Bank Governors' meeting in February 2014.³²¹ The Multilateral Convention would play a key role in the implementation of the new standard.

Clearly, FATCA has served as a lever for modernizing information exchange among governments.³²² "As old information exchange processes evolve through initiatives like FATCA, the automatic exchange of information is fast becoming the gold standard."³²³ The United States must further this movement toward global transparency by vigorously honoring the commitments made in the intergovernmental agreements with FATCA partners to support "relevant legislation to achieve such equivalent levels of automatic exchange."³²⁴ This should include expansion of the bank deposit regulations to entity accounts beneficially owned by individuals as well as enactment of the Incorporation Transparency and Law Enforcement Assistance Act, S. 1465. As mentioned previously, Senators Levin, Grassley, and others are advocating this legislation to require states to document the beneficial owners of the corporations.³²⁵

VI. CONCLUSION

In conclusion, is FATCA "a drone, an obnoxious, expensive, arrogant, extraterritorial program likely to cause a fair amount of collateral damage while occasionally hitting its targets" as Lee Sheppard points out or a snowball slowly collecting participants in the painful move toward automatic reporting? If "the endgame is a significant expansion of transparency that will feature increased automatic information exchange,"³²⁶ I believe that FATCA will

320. Daniel Pruzin, *OECD Secretary-General Sees Broad G-20 Support for Tax Initiatives*, Bloomberg Law, ITM Issue No. 135 (2013).

321. G20 Leaders' Declaration, *supra* note 319.

322. Coder, *supra* note 59.

323. Arora, *supra* note 137 (citing Theodore Setzer, territory manager (international), LB&I).

324. U.K.-U.S. Agreement to Implement FATCA, *supra* note 123, art. 6, at 13-14; *see also* Press Release, HM Treasury, *supra* note 132.

325. *See* Incorporation Transparency and Law Enforcement Assistance Act, *supra* notes 176-178 and accompanying text.

326. Sapirie, *supra* note 135.

accomplish this goal. I am encouraged that the OECD and EU are seizing this opportunity to work with the United States in developing common reporting and due diligence standards for financial institutions.

In part, success depends on those governments negotiating intergovernmental agreements demanding real reciprocity from the U.S. government. The IGA with Mexico has entered into force as of January 1, 2013 and sets forth a timeline for ever increasing items of information to be exchanged with Mexico. This agreement is an appropriate vehicle for the United States to demonstrate its renewed commitment to the exchange of information. The U.S. government must honor its promise to support the adoption of the relevant regulations and legislation that are necessary before the United States is able to provide its FATCA partners with the same information that they have been asked to provide the U.S. government. The United States should take this opportunity to be a role model for transparency by improving the bank deposit regulations to take into consideration entity accounts beneficially owned by individuals as well as pursuing whatever legislation is necessary so as to no longer function as a tax haven for tax evaders from other countries.

