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Trump yet to *play his cards*

WHAT NEXT FOR FATCA AGREEMENTS AND TRANSPARENCY IN THE US? **BRUCE ZAGARIS** TAKES A LOOK

THERE IS STILL great uncertainty regarding the Trump Administration and its approach to international tax. The Secretary of the United States Department of the Treasury (the Treasury), Steve Mnuchin, was sworn in only on 13 February 2017. The position of Treasury Deputy Assistant Secretary for international tax affairs remains vacant as of March 2017.

INFORMATION EXCHANGE

One major issue the Trump Administration will have to address is automatic exchange of information. The US has neither fully reciprocated on exchange of information in the *Foreign Account Tax Compliance Act* (FATCA) intergovernmental agreements (IGAs), nor signed the Common Reporting Standard, which the OECD developed in response to a G20 request and approved on 15 July 2014.

President Trump prioritised his 'America first' policy in his inaugural address.[1] He has expressed indifference to the demand that he release his own tax returns, both during the election campaign and as President. He has promised to audit US funding for international organisations, and has vowed to reduce funding by 40 per cent for organisations with agendas he believes are 'contrary to American interests'.[2] Hence, the Trump Administration is not likely to prioritise ratifying the 2011 protocol to the Council of Europe and the OECD's *Convention on Mutual Administrative Assistance in Tax Matters*, even though the US has, in the past, championed international tax enforcement, and more than 80 other countries participate in the convention.

Revenue authorities that have not implemented FATCA will need to show the Trump Administration why the US should still treat their countries as if they have implemented it. In Announcement 2016-27, released on 29 July 2016, the Internal Revenue Service (IRS) updated guidance for jurisdictions that are treated as having an IGA in effect for the purposes of FATCA.[3]

To give more time to implement the FATCA rules, which, in many cases, violated foreign law, the US concluded FATCA IGAs. However, even after concluding IGAs, many governments still needed more time to enact legislation, issue regulations and make changes to their electronic-exchange mechanisms to bring the law into force.

As a result, the IRS gave each jurisdiction with an IGA that is not yet in force (yet wants to continue being treated as having an IGA in effect) until 31 December 2016 to provide the Treasury with a detailed explanation as to why it had not yet brought the IGA into force. The IRS also requested a step-by-step plan that the jurisdiction intends to follow in order to sign the IGA (if it has not yet been signed) and bring it into force. The explanation was to include expected dates for achieving each step.

The Treasury said it will consider whether or not:

- **the jurisdiction has submitted the explanation and plan (with dates); and**
- **the explanation and plan, as well as the jurisdiction's prior course of conduct, show that the jurisdiction continues to show resolve to bring an IGA into force.**

Section 1472 of the *Internal Revenue Code* requires that a withholding agent must withhold 30 per cent of any withholdable payment to a foreign financial institution that is not FATCA-compliant.

At the time of Announcement 2016-27, the US had signed IGAs with 83 jurisdictions. Of those, 61 are in force. The US has also reached agreements in substance with 30 jurisdictions. As of March 2017, 28 jurisdictions still did not have FATCA IGAs in force.[4]

Some countries are still trying to persuade the Treasury to treat them as having implemented FATCA. Hence, the Caribbean Community countries will jointly contribute USD240,000 to lobbyists to act on behalf of Caribbean-based banks to avoid censure and loss of correspondent banking access.[5]

TAX REFORM

A major issue for the Republican-controlled legislature is the promise of tax reform, and whether or not the Trump Administration will agree to the plan championed by Speaker of the House Paul Ryan, in which border tax adjustments are the centrepiece. Such adjustments are believed to violate the non-discrimination clause of tax treaties. However, on 2 March 2017, the Trump Administration released a 336-page report, including a section on 'The President's 2017 Trade Policy Agenda', which states that the administration may ignore select rulings by the World Trade Organization if those rulings infringe on US sovereignty.[6]

Another major issue is likely to be entity transparency. Although the Financial Action Task Force found the US non-compliant with respect to entity transparency in both the 2006 and 2016 editions of its *Mutual Evaluation Report*, the Trump Administration is not likely to prioritise legislation to remedy the situation.[7]

1 Full text available at bit.ly/2mLGtmvt
2 Karen DeYoung and Philip Rucker, 'Trump Lays Groundwork to Change US Role in World', *Washington Post*, 26 January 2017, wapo.st/2nGmrid
3 IRS, 'Update on Jurisdictions Treated as if They Have an IGA in Effect', Announcement 2016-27, bit.ly/2nOOx9x
4 For a list of FATCA IGAs and their status, see the Treasury website: bit.ly/1M567y8
5 'Caricom to Hire Lobbyists to Avoid FATCA Fallout', *Trinidad Express*, 18 February 2017, bit.ly/2m2CUcn
6 Damian Paletta and Ana Swanson, 'White House Says US May Ignore Some WTO Rulings', *Washington Post*, 2 March 2017
7 For additional background on the Trump Administration's international tax enforcement developments, see Bruce Zagaris, 'How Trump Could Affect International Tax Enforcement Cooperation', 85 Tax Notes Int'l 735 (20 February 2017)

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