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B: Exchange of information: issues, use and collaboration

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Summary and conclusions

Treaties and other agreements authorizing exchange of information (EOI) provide the United States with a potentially important source of data for tax enforcement and administration. The United States has a broad network of EOI partners, with its EOI relationships largely arising from bilateral agreements, namely income tax treaties, tax information exchange agreements (TIEAs), mutual legal assistance treaties (MLATs) and agreements (MLAAs), and intergovernmental agreements (IGAs) with foreign jurisdictions to implement the Foreign Account Tax Compliance Act (FATCA).

EOI articles in US treaties and TIEAs generally contain several main features. They contain a standard, generally consistent with the OECD Model, describing the circumstances in which information will be exchanged and the types of information that will be exchanged. A second usual feature of US EOI provisions is a statement regarding when information otherwise covered need not be exchanged, such as when the requested information is not obtainable under the laws or in the normal course of the administration of either country. However, US EOI provisions typically provide that a request should not be denied simply because the matter is not of interest to the requested country. Some US tax treaties also specifically address the interaction of bank secrecy and EOI and provide that a country should not decline to supply information solely because the information is held by a bank or financial institution, nominee or person acting in an agency capacity or because the request relates to ownership interests in a person. A third general feature of US EOI articles is a restriction on the use of the information exchanged. US EOI articles typically state that the country to which the information is provided must keep it secret and that information exchanged will be subject to the same disclosure constraints as information obtained under the laws of the requesting country.

The United States exchanges information through various methods, including specific EOI (also referred to as EOI on request), automatic EOI, and spontaneous EOI. The United States conducts EOI through the simultaneous examination program (SEP), the simultaneous criminal investigation program (SCIP), and industry-wide exchanges of information. In addition, the United States participates in several tax administration cooperation initiatives that may involve EOI, including the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) and joint audits.

When responding to a request for information under a tax treaty, the United States seeks

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to obtain the requested information in the same manner and to the same extent as if a US tax were involved. The Internal Revenue Service (IRS) may seek to obtain tax returns and return information by invoking its summons power. US courts have ruled that the IRS may use its summons authority to obtain information in response to a request made by a treaty partner even though no US interest is involved.

US law provides protections against the unauthorized disclosure of tax returns and tax return information. The law contains an exception for the disclosure of returns and/or return information to the competent authority of a foreign government under a tax treaty, TIEA, or MLAT "but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement." The terms of the relevant agreements require countries to keep exchanged information confidential.

The IRS recognizes the importance of EOI and cross-border cooperation in tax administration. However, US government agencies (independent of the IRS) have recommended that the IRS improve elements of its EOI program, including making better use of information provided by other countries. The IRS has stated that it is making improvements to internal processes, including with respect to training, recordkeeping, written procedures, and communication.

The authors are not aware of publicly available studies or data specifically addressing the impact of EOI on US revenue collection. However, EOI has certainly increased transparency and flows of information with respect to cross-border transactions. One could hypothesize that information exchange has at least indirectly increased the United States' ability to enforce its tax laws by providing the IRS with additional information to pursue cases and by serving as a deterrent to would be tax-evaders. The impact of FATCA on US revenue collection also remains to be seen.

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) has assessed the United States as largely compliant with the OECD standards for EOI on request. The Global Forum has recommended that the United States improve the availability of ownership information under domestic law and the timeliness of its responses to EOI requests. In addition, given recent delays in ratifying tax treaties with EOI provisions as well as the 2010 Protocol to the Multilateral Convention on Mutual Assistance in Tax Matters, the Global Forum has recommended that the United States ratify its signed EOI agreements expeditiously.

The United States is undertaking several BEPS-related EOI measures, including exchange of tax ruling information and country-by-country reporting (CbCR). In its 2017 Peer Review Reports on the Exchange of Information on Tax Rulings, the OECD concluded that the United States met the Action 5 minimum standards for EOI on tax rulings. The OECD did not make any recommendations and noted that the peer input was generally positive, indicating that the United States provided complete information in a timely manner.

With respect to CbCR, the United States has the domestic law framework in place to gather and exchange CbCR data and has begun exchanging such information. The United States exchanges CbCR data pursuant to bilateral competent authority arrangements (CAAs), which rely on the EOI provisions in either tax treaties, TIEAs, or the Multilateral Convention.

With the rise of cryptocurrencies and virtual currencies, the IRS is keen to learn more about the application and uses of virtual currencies as well as ensuring that US taxpayers report and pay taxes relating to cryptocurrencies. There are still many unsettled questions regarding the tax treatment of cryptocurrency, particularly with respect to cross-border issues, but it is clear that the IRS believes that cryptocurrency presents important compliance and enforcement issues.

1. Instruments and processes of international application

1.1. Introduction

Treaties and other agreements authorizing exchange of information (EOI) provide the United States with a potentially important source of data for tax enforcement and administration.[3] The United States has a broad network of EOI partners.[4] Its EOI relationships predominantly emanate from bilateral agreements, namely income tax treaties, tax information exchange agreements (TIEAs), and mutual legal assistance treaties (MLATs) and agreements (MLAAs).[5] The United States is also a party to over one hundred intergovernmental agreements (IGAs) with foreign jurisdictions to implement the Foreign Account Tax Compliance Act (FATCA).[6] In addition, the United States has EOI relationships pursuant to the Multilateral Convention on Mutual Assistance in Tax Matters (Multilateral Convention), as adopted in 1998. The United States has signed the 2010 Protocol amending the Multilateral Convention, but the protocol has not yet been ratified by the US Senate.

The US Internal Revenue Service (IRS) recognizes the importance of EOI and cross-border cooperation in tax administration.[7] The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) has assessed the United States as largely compliant with the OECD standards for EOI on request.[8] The Global Forum has recommended that the United States improve the availability of ownership information under domestic law and the timeliness of its responses to EOI requests. In addition, given recent delays in ratifying tax treaties with EOI provisions as well as the 2010 Protocol to the Multilateral Convention, the Global Forum has recommended that the United States ratify its signed EOI agreements expeditiously.

US government agencies (independent of the IRS) have recommended that the IRS improve elements of its EOI program, including making better use of information provided by other countries.[9] The IRS has stated that it is making improvements to internal processes, including with respect to training, recordkeeping, written procedures, and communication.[10]

The authors are not aware of publicly available studies or data specifically addressing the impact of EOI on US revenue collection. However, EOI has certainly increased transparency and flows of information with respect to cross-border transactions. One could hypothesize

3 *See* Treasury Inspector General for Tax Administration, Exchange of Information Capabilities are Underutilized by the Internal Revenue Service, No. 2017-30-077 (11 September 2017), at 5 (hereinafter TIGTA Report); US Government Accountability Office, GAO-11-730, Tax Administration: IRS's Information Exchange with Other Countries Could Be Improved through Better Performance Information (September 2011) (hereinafter GAO-11-730).

4 Rev. Proc. 2018-36, 2018-38 I.R.B. 442 (listing jurisdictions with which the United States has in effect an agreement relating to the exchange of information).

5 For a list of income tax treaties, see US Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx.

6 FATCA is the common name used to refer to § 501 of the Hiring Incentives to Restore Employment (HIRE) Act of 2010, P.L. 111–147, which enacted 26 USC. §§ 1471-1474.

7 TIGTA Report, *supra* n. 1, at 36 (Management's Response to the Draft Report).

8 Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Review Report on the Exchange of Information on Request: United States, OECD (2018) (hereinafter Global Forum Peer Report).

9 TIGTA Report, *supra* n. 1, at 5; GAO-11-730, *supra* n. 1.

10 TIGTA Report, *supra* n. 1, at 36-42.

that information exchange has at least indirectly increased the United States' ability to enforce its tax laws by providing the IRS with additional information to pursue cases and by serving as a deterrent to would be tax-evaders.

1.2. Treaties

As stated above, the United States' EOI relationships arise from bilateral tax treaties, TIEAs, MLATs and MLAAS, the Multilateral Convention, and intergovernmental agreements under FATCA.

1.2.1. Bilateral tax treaties

All but one of the United States' 58 income tax treaties address EOI. The sole exception is the US treaty with the former Union of Soviet Socialist Republics, or USSR. That treaty remains in effect with respect to Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan (although not all of those countries reciprocate in continued application of the treaty).[11]

The US Department of Treasury (Treasury) uses the United States Model Income Tax Convention (US Model) in its treaty negotiations. The US Model generally reflects the current US treaty policy at the time of its release. The most recent draft of the US Model was issued in February 2016.[12] The prior US Model was released in 2006.[13] The US Model is similar in many respects to the Organization for Economic Co-operation and Development Model Treaty (OECD Model); however, it includes a required limitation on benefits (LOB) article. The 2016 US Model also contains several novel provisions addressing double non-taxation, though these provisions generally have not yet been incorporated into signed US tax treaties. EOI articles in US treaties generally contain several main features consistent with the US Model. Critically, US EOI provisions set a standard for information exchange by describing the circumstances and types of information that will be exchanged. The standard for exchange in US treaties (usually included in article 26(1)) is generally consistent with the OECD Model. More specifically, US tax treaties typically provide that, to the extent not contrary to the treaty, that competent authorities shall exchange information "foreseeably relevant" (as in the 2016 US Model) or "as may be relevant" (as in the 2006 US Model) for carrying out the provisions of the treaty or the domestic tax laws of the contracting states. Of the US treaties that do not explicitly state the "foreseeably relevant" or "as may be relevant" standard, there is generally alternative wording (e.g., "as is necessary") considered to provide an equivalent standard.

The Treasury Technical Explanation to the 2006 US Model provides that the "may be relevant" clause is consistent with the standard in Section 7602 of the United States Code (Code), which authorizes the IRS to examine "any books, papers, records or other data which

[11] US Tax Treaties, IRS Pub. No. 901 (rev. September 2016). The United States' tax treaty with Bermuda does not contain an information exchange article, but the treaty does include a provision regarding mutual assistance in tax matters that permits the exchange of information for criminal tax matters. The United States also has a TIEA with Bermuda.

[12] The 2016 US Model is available at https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf.

[13] The 2006 US Model is available at https://www.irs.gov/pub/irs-trty/model006.pdf.

may be relevant or material" (emphasis added).[14] The US Supreme Court has interpreted this standard to reflect "Congress's express intention to allow the IRS to obtain 'items of even potential relevance to an ongoing investigation, without reference to its admissibility.'"[15] However, the Technical Explanation provides that the "may be" standard would not support a request in which a contracting state asks for information pertaining to all bank accounts maintained by residents of that contracting state in the other contracting state or even all accounts maintained by its residents with respect to a particular bank.[16]

A notable example of a US tax treaty stating a different standard was the 1996 US-Switzerland Tax Treaty, which provided for the exchange of information "as is necessary for carrying out the provisions of the present Convention or for the prevention of tax fraud . . . ." A protocol modifying this "as is necessary" standard was signed in 2009 but was not ratified by the US Senate until 2019. In September 2019, the new protocol came into effect and provided for EOI "as may be relevant" for carrying out the provisions of the treaty or the administration or enforcement of domestic tax laws. A protocol between the United States and Luxembourg also took effect within that same month and provided for EOI under an "as is foreseeably relevant" standard.

Article 26(1)'s reach is expansive and applies to a broader category of taxes than those covered in article 2 (Taxes Covered). It allows for EOI with respect to taxes "of every kind" including those pertaining to national-level tax laws such as gift and estate taxes, excise taxes or, with respect to a contracting state, value-added taxes.[17] In addition, the United States interprets its treaty EOI obligations to allow exchange with respect to all persons regardless of their residence if the treaty provides for EOI for the purposes of domestic tax laws, even where the treaty does not explicitly state that EIO is not restricted by article 1 (i.e., with respect to persons covered).[18]

A second usual feature of US EOI provisions is a statement regarding when information otherwise covered need not be exchanged, such as when the requested information is not obtainable under the laws or in the normal course of the administration of either country. In the 2016 US Model, article 26(3) provides that a contracting state is not obliged (i) to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting state; (ii) information that is not obtainable under the laws or in the normal course of the administration of that or other contracting state; and (iii) to supply information that would compromise trade, business, industrial, commercial, or professional secret, or would be contrary to public policy.[19]

Article 26(4) of the US Model provides that a request from one state to another should not be denied simply because the matter is not of interest to the other contracting state.[20] Thus, the other contracting state should use its information gathering measures to obtain the requested information despite not having a domestic tax interest. Although not all of the United States' tax treaties contain a version of this provision, it is US practice to respond

14 2006 US Model Technical Explanation (discussing art. 26(1)). Treasury has not yet released a Technical Explanation to the 2016 US Model Treaty.

15 *United States v. Arthur Young & Co.*, 465 US 805, 814 (1984).

16 2006 US Model Technical Explanation, art. 26(1).

17 *Id.* at 87.

18 Global Forum Peer Report, *supra* note 6, at 98.

19 2006 US Model, art. 26(3).

20 2006 US Model, art. 26(4).

to requests for information regardless of whether it has a tax interest in the information.[21]

Some US tax treaties also specifically address the interaction of bank secrecy and EOI. In the 2016 US Model, article 26(5) states that in no case should the article 26(3) restrictions be construed to allow a state to decline to supply information solely because the information is held by a bank or financial institution, nominee or person acting in an agency capacity, or because it relates to ownership interests in a person.[22]

A third general feature of US EOI articles is a restriction on the use of the information exchanged. For example, 2016 US Model article 26(2) provides that the country to which the information is provided must keep it secret and that information exchanged will be subject to the "same disclosure constraints as information obtained under the laws of the requesting State." Thus, the information collected may be disclosed only to specified functional persons (i.e., government personnel tasked with the assessment, collection, or administration of taxes including enforcement and prosecution, or for appeals purposes, including courts and judicial bodies).

Certain provisions intended to facilitate examination and other administrative cooperation also often appear in US EOI provisions. In the 2016 US Model, article 26(6) provides that, if so requested, the competent authority of the requested state shall provide information in the form of depositions of witnesses and authenticated copies of unedited original documents. The purpose of this paragraph is to ensure that evidence obtained abroad will be usable in court.[23] Article 26(7) provides that treaty partners will cooperate in the collection of taxes to the extent necessary to ensure that any reduced rate of tax at source granted under the treaty is not enjoyed by persons not entitled to those benefits.[24] Article 26(8) provides that the requested state shall allow representatives of the requesting state to interview individuals and examine books in the requested state with the consent of the persons subject to examination.[25] Article 26(9) authorizes the competent authorities of the contracting states to liaise as to how the exchange of information should be handled.

1.2.2. TIEAs

In addition to bilateral tax treaties, the United States has also entered into over thirty TIEAs.[26] Unlike tax treaties, which cover a wide variety of tax matters, TIEAs deal only with information exchange. The United States generally enters into TIEAs where there are not sufficiently compelling reasons to enter into a comprehensive tax treaty with a country (e.g., there is not significant cross-border investment or the other country does not impose tax) but where it is desirable to have an information exchange relationship.

Like tax treaty information exchange provisions, TIEAs require the contracting states to exchange information meeting a certain standard. US TIEAs typically include the Model TIEA "foreseeably relevant" standard or generally equivalent wording. TIEAs also typically provide that the contracting states are not obligated to carry out administrative measures at variance

21 Global Forum Peer Report, *supra* n. 6, at 102.

22 2006 US Model art. 26(5); 2006 US Model Technical Explanation (discussing art. 26(5)).

23 2006 US Model, art. 26(6).

24 2006 US Model, art. 26(7).

25 2006 US Model, art. 26(8).

26 For a list of TIEAs, see US Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx.

with the laws and administrative practice of either contracting state, supply information that the contracting states would not be able to obtain under their own laws, or provide information that would disclose trade, business, industrial, commercial, or professional secrets. TIEAs also require that the information exchanged be kept secret.

Unlike tax treaties, TIEAs are executive agreements—they are signed by the President and do not require the advice and consent of the Senate. TIEAs are entered into pursuant to Internal Revenue Code Section 274(h)(6)(C), which authorizes the Treasury Secretary to negotiate and conclude agreements that provide for the exchange of information. Because TIEAs do not require Senate approval, they generally may enter into force after an exchange of diplomatic notes.

1.2.3. MLATs

The United States is also a party to MLATs with over 60 countries. Under MLATs, jurisdictions agree to provide each other a broad range of legal assistance in specified criminal matters. Most of the US MLATs define criminal matters to include criminal tax felonies.[27] Some MLATs require that the conduct in question constitute a crime under both the laws of the requesting state and the requested state ("dual criminality") in order for assistance to be provided whereas others explicitly state that dual criminality is not required.

Assistance provided under MLATs may include the provision of information relevant to criminal tax matters or a contracting state's laws, regulations, and practices in criminal matters, as well as assistance in supplying official records, locating persons, providing service of process, executing search and seizures of property, arranging for the appearance of witnesses or experts before a judicial authority, securing extraditions, and transferring accused persons. MLATs do not all authorize the same types of assistance and some do not allow for the exchange of tax information.[28] The US Department of Justice, Office of International Affairs, Criminal Division acts as the US "central authority" (the person authorized to act on behalf of the United States under an MLAT), while the IRS may provide assistance in certain cases, such as when a request is made for tax returns or return information or financial investigative assistance.[29] There are specific internal IRS procedures pertaining to foreign-initiated MLATs requests.[30]

1.2.4. Multilateral agreements

The United States is a party to the Multilateral Convention on Mutual Assistance in Tax Matters (Multilateral Convention), as adopted in 1998. The United States has signed the 2010 Protocol amending the Multilateral Convention, but the protocol has not yet been ratified by the US Senate. The United States can exchange information under the Multilateral Convention with all jurisdictions that have (i) signed and ratified the original Multilateral Convention and are a member of the OECD or the Council of Europe; (ii) signed and ratified the 2010 Protocol to the Multilateral Convention and are a member of the OECD or the Council of Europe; or (iii)

[27] Unless otherwise indicated, all sections refer to the US Internal Revenue Code of 1986 (I.R.C.), as amended.

[28] I.R.M. § 4.60.1.7(3) (15 October 2018).

[29] I.R.M. § 4.60.1.7(4) (15 October 2018).

[30] I.R.M. §§ 4.60.1.7 (1)-(12) (15 October 2018).

had the Multilateral Convention extended to them pursuant to article 29 of the convention by a jurisdiction under (i) or (ii). If the jurisdiction was not a party to the Multilateral Convention prior to its amendment by the 2010 Protocol, the United States and the jurisdiction must come to an agreement on the application of the convention prior to exchanging information.[31]

1.2.5. FATCA IGAs and CRS

In response to concerns that Americans were using offshore financial accounts to conceal income and assets, Congress enacted FATCA in March 2010. FATCA generally imposes a 30% withholding tax on certain US-source payments to foreign financial institutions (FFIs) unless they agree to identify and report to the IRS their US account holders. Non-financial foreign entities are subject to the 30% withholding tax unless they report their direct and indirect 10% US owners.

To ensure that financial institutions comply with FATCA without violating local law, the United States entered into bilateral executive agreements, known as IGAs, with numerous foreign jurisdictions.[32] Treasury has released two model IGAs that are used as the starting point in the IGA negotiation process. A Model 1 IGA requires FFIs in the FATCA partner country to report information regarding US accounts to the competent authority of the FATCA partner, which in turn provides the information to the IRS. Some Model 1 IGAs are reciprocal and require the IRS to exchange automatically with the FATCA partner information regarding FATCA partner residents. A Model 2 IGA requires FFIs in the FATCA partner jurisdiction to enter into an "FFI Agreement" with the IRS in which the FFI agrees to undertake the due diligence and reporting requirements described in the US Treasury regulations.[33]

The United States does not participate in the Common Reporting Standard (CRS). As a result, it does not utilize the Multilateral Competent Authority Agreement. However, as mentioned above, the United States has agreed to exchange with FATCA partners certain financial account information pursuant to reciprocal Model 1 IGAs, though US domestic law does not currently require all of the reporting necessary for the United States to fully reciprocate in information exchange.

1.3. Regional regulatory framework

The United States is not subject to any additional regional EOI regulatory framework.

1.4. BEPS-related measures

The United States is undertaking several BEPS-related EOI measures, including exchange of tax ruling information and country-by-country reporting (CbCR).

In its 2017 Peer Review Reports on the Exchange of Information on Tax Rulings, the OECD

[31] Global Forum Peer Report, *supra* note 6, at 103-104.

[32] See US Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.

[33] For a comprehensive overview of FATCA, see US Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.

concluded that the United States met the Action 5 minimum standards for EOI on tax rulings.[34] The OECD did not make any recommendations and noted that the peer input was generally positive, indicating that the United States provided complete information in a timely manner. Rulings were exchanged with over 30 countries in the period reviewed and largely consisted of cross-border unilateral advance pricing arrangements.

With respect to CbCR, the United States has the domestic law framework in place to gather and exchange CbCR data and has begun exchanging such information.[35] The United States exchanges CbCR data pursuant to bilateral competent authority arrangements (CAAs), which rely on the EOI provisions in either: tax treaties, TIEAs, or the Multilateral Convention. As of the date of this writing, the United States has signed CAAs with 41 countries.[36]

The United States participates in the International Compliance Assurance Program (ICAP), a pilot program in which multiple tax administrators simultaneously conduct real-time risk assessments of taxpayers using CbCR information and other taxpayer-provided information. The IRS participated in the first ICAP (often referred to as "ICAP 1.0," which had eight country participants and eight taxpayer participants) and is also a participant in the second ICAP (ICAP 2.0), which has 18 country participants. US taxpayer participants have generally praised ICAP as an effective tool for presenting their business and tax profile to multiple tax administrators simultaneously and for enhancing certainty. IRS officials have also spoken positively about ICAP, noting its utility for making effective risk assessments and having constructive discussions about areas of disagreement between countries.

1.5. Global Forum related measures

In its 2018 peer review report on the EOI on request, the Global Forum rated the United States largely compliant with OECD standards. The Global Forum classified the United States as compliant with respect to the competent authority's access to information, notification rights and safeguards for persons in the requested jurisdiction, whether exchange of information on request mechanisms cover all relevant partners, confidentiality of exchanged information, and rights and safeguards of taxpayers and third persons. The Global Forum classified the United States as largely compliant with respect to availability of accounting information, availability of banking information, whether EOI mechanisms allow for effective EOI, and quality and timeliness of responses. The United States was classified as partially compliant with respect to availability of beneficial ownership and identity information.

According to the Global Forum peer review, the United States carries out EOI consistent with the standards for exchange stated in the relevant agreements (described above), which are generally consistent with the OECD standard. The United States provides information to the widest possible extent, including pursuant to "group requests" that do not identify a specific taxpayer.[37]

The United States exchanges information through various methods, including specific EOI (also referred to as EOI on request), automatic EOI, and spontaneous EOI. Specific EOI usually arises from an examination, inquiry, or investigation of a taxpayer's tax liability for a

[34] Harmful Tax Practices–2017 Peer Review Report on the Exchange of Information on Tax Rulings, OECD 466 (2017).

[35] *See* Treas. Reg. § 1.6038-4 (2016).

[36] Country-by-Country Rep. Jurisdiction Status Table, IRS, https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table.

[37] Global Forum Peer Report, *supra* n. 6, at 94.

specific period.[38] Specific protocols govern the process of "incoming" and "outgoing" specific requests.[39]

The automatic exchange of information program is the systematic and regular delivery of certain tax or financial account-related information.[40] In the United States, the automatic EOI (AEOI) program administers and coordinates all automatic exchanges of information.[41] Examples of AEOI include exchanges pursuant to a FATCA IGA, CbCR reporting pursuant to a CAA, and information on certain US-sourced payments (i.e., fixed, determination, annual and periodical, or "FDAP") to foreign persons.[42]

The spontaneous EOI program involves the exchange of information not specifically requested by a treaty party, but which the providing authority determines may be of interest to its treaty partner. The exchanges are generally those discovered during a tax examination, investigation, and other administrative procedure that may suggest non-compliance with the tax laws of the treaty partner.[43] Specific protocols govern the process of US-initiated spontaneous exchange of information requests and foreign-initiated spontaneous EOI.[44]

The United States utilizes several other EOI programs. Under the simultaneous examination program (SEP), the United States and a treaty partner conduct independent examinations of a selected taxpayer within their respective jurisdictions and exchange information in connection with the examinations.[45] The purpose of SEP is to facilitate exchanges of information by promoting collaborative technical discussion and coordinating strategies to mutually secure tax compliance efficiencies and benefits.[46] Similarly, the simultaneous criminal investigation program (SCIP) permits the United States and a treaty partner to conduct separate, independent criminal investigations of selected taxpayers within their respective jurisdictions.

Furthermore, to promote international cooperation in achieving comprehensive understanding of worldwide industry practices and operating patterns, the United States may also participate in industry-wide exchanges of information. Such exchanges involve meetings between the tax officials of two or more countries and do not involve taxpayer-specific data (e.g., return) matters or inquiries.[47] The purpose of these exchanges is to focus on "issues, trends, policies, and operating practices in particular industries, economic sectors, or other areas of common interest."[48]

The Global Forum Peer Report raised three main issues: (i) the availability of ownership information; (ii) the United States' network of EOI mechanisms; and (iii) the timeliness of responses to EOI requests. With respect to the latter two issues, the Global Forum recommended that the United States ratify all of its signed EOI Agreements, including the 2010 Protocol to the Multilateral Convention, and speed up the provision of requested information.

38 I.R.M. § 4.60.1.2(1) (15 October 2018).
39 *Id.*
40 I.R.M. § 4.60.1.4 (15 October 2018).
41 *Id.*
42 *Id.*
43 I.R.M. § 4.60.1.3 (15 October 2018).
44 *Id.*
45 I.R.M. § 4.60.1.4.1 (15 October 2018).
46 *Id.*
47 I.R.M. § 4.60.1.9 (15 October 2018).
48 *Id.*

With respect to the availability of ownership information, the Global Forum noted that "the availability of beneficial ownership information poses a challenge."[49] In the United States, each of the 50 states and the District of Columbia has its own laws controlling the formation and governance of legal entities. In other words, states do not require legal entities to disclose their owners to the state when an entity is formed.[50] However, certain state and federal laws mandate the gathering and/or disclosure of beneficial ownership information. For example, state laws may require business entities to maintain ownership information, such as a shareholder list. Other laws, such as anti-money laundering laws applicable to financial institutions, require the gathering of beneficial ownership information in certain instances.[51]

Several federal tax laws also require beneficial owner reporting in certain instances. For instance, business entities, including corporations, limited liability companies, and partnerships, seeking an employer identification number (EIN) from the IRS must identify a "responsible party" (i.e., the person who controls, manages, or directs the applicant entity and the disposition of its funds and assets). Entities must have an EIN if they are subject to a federal tax filing requirement, including an information reporting requirement. In addition, in 2016, the Treasury Department and IRS issued final regulations requiring all domestic single-member limited liability companies owned by foreign persons to report and maintain ownership information, effective for taxable years beginning after 31 December 2016.[52] The Global Forum recommended that the United States monitor the implementation of the new rule and take further measures to ensure that all beneficial owners of all relevant entities and arrangements are identified.

According to a report prepared by the US Government Accountability Office (GAO), between 2006 and 2010, 5,111 requests for information to or from the United States and 75 foreign jurisdictions were completed; 4,217 inquiries related to tax returns or corporate records and 894 were outgoing requests from the United States.[53] GAO analysis of IRS data revealed that the United States takes more time to close incoming requests for certain groups.[54] The GAO concluded that, although the IRS collects data on exchanges between the United States and its treaty partners, the agency does not "consistently collect or analyze performance information, such as the type of information requested, whether the information was collected successfully, or feedback from staff making the requests about the usefulness of the information or their views on the process for obtaining it."[55]

In a September 2017 report prepared by the US Treasury Inspector General for Tax Administration (TIGTA) to evaluate the IRS's efforts to improve tax compliance via the use of information obtained through EOI agreements, TIGTA found that the IRS did not have an adequate tracking system to account for the records foreign countries provide on a regular basis under the AEOI Program.[56] In addition, TIGTA concluded that the IRS is not using the

49 Global Forum Peer Report, *supra* n. 6, at 13.

50 There have been recent federal legislative proposals to create a beneficial owner registry accessible to federal and state law enforcement agencies. Corporate Transparency Act of 2019, H.R. 2513 (as reported in the House, 11 June 2019).

51 *See, e.g.*, Bank Secrecy Act, 31 USC. §§ 5311-5314 (2012); USA Patriot Act, Pub. L. No. 107-56 (2001).

52 Treas. Reg. § 1.6038A-1(c) (2016).

53 GAO 11-730, *supra* n. 1.

54 *Id.*

55 *Id.*

56 TIGTA Report, *supra* n. 1.

mutual collection assistance available from foreign countries to its full potential, and the criteria for withdrawing issued collection assistance requests has not been established.[57] Furthermore, TIGTA found deficiencies with the EOI Program's Office's processing of spontaneous information provided by foreign countries that they believed was of interest to the United States for tax purposes.[58] The concerns raised include lack of tracking on whether the information was properly forwarded to the IRS compliance functions.[59] The IRS agreed with TIGTA's findings and stated that the IRS would improve record-keeping requirements in the AEOI Program and reinforce the importance of mutual collection assistance requests.[60]

The authors are not aware of reports, issued by the government or otherwise, that show the impact of EOI on US tax revenues. However, it can be observed that EOI has led to increased transparency in general with respect to international transactions. One could hypothesize that information exchange has at least indirectly increased the United States' ability to enforce its tax laws by providing the IRS with additional information to pursue cases and by serving as a deterrent to would be tax-evaders. However, based on the government data released by the GAO and TIGTA reports, the IRS could make improvements to the use of exchanged information for US tax enforcement and administration.

1.6. Financial information

1.6.1. Foreign Account Tax Compliance Act (FATCA)

As stated above, FATCA imposes certain obligations on FFIs and NFFEs in order to avoid US withholding tax. In addition, FATCA imposes a new reporting requirement (IRS Forms 8938, Statement of Specified Foreign Financial Assets) on US taxpayers with foreign financial assets. The information provided by the taxpayer is then matched against information received by the IRS from FFIs and foreign governments.[61]

The International Data Exchange Service (IDES) is an electronic delivery system where financial institutions and host country tax authorities (HCTA) can securely transmit and exchange information pertaining to FATCA directly with the IRS. IDES also enables the United States to make reciprocal exchanges as described in IGAs. Information received by the IRS relating to IRS Form 8966, FATCA Report, is first processed through the IDES and then through the International Compliance Management Model (ICMM).[62]

According to government review and oversight reports, the IRS has not timely met its targeted FATCA implementation goals, including taking appropriate enforcement action or

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *See, e.g.*, IRS Form 8966 (FATCA Report).

62 US Treasury Inspector General for Tax Administration, Despite Spending Nearly $380 Million, the Internal Revenue Service is Still Not Prepared to Enforce Compliance with the Foreign Account Tax Compliance Act, No. 2018-30-040 (5 July 2018) (hereinafter 2018 TIGTA FACTA Report).

tracking its performance.[63] Causes contributing to the delay include, among others, lack of automated processes, need for development and updating of systems, guidance delays, and the lack of data to verify compliance.[64]

In a July 2018 study conducted by TIGTA to evaluate the IRS's efforts in enforcing FATCA, TIGTA determined that "despite spending nearly USD 380 million, the IRS has taken limited or no action on a majority of activities" outlined in the IRS's FATCA Compliance Roadmap, the purpose of which is "to document planning involving FATCA data and to provide a baseline for future compliance planning and implementation activities across the IRS."[65] Some of the concerns included mismatching and lack of reporting of taxpayer identification numbers (TINs), which frustrated the IRS's enforcement of FATCA requirements for individual taxpayers.

To enhance FATCA reporting, TIGTA recommended that the IRS implement the following measures: (i) establish follow-up procedures and initiate action to address error notices relating to file submissions that are rejected with foreign financial institutions; (ii) enhance efforts to match IRS form data to identify non-filers and underreporting; [66] (iii) educate taxpayers on how to obtain a global intermediary number (GIIN); and (iv) strengthen the overall compliance efforts, including improving the accuracy of reporting by IRS Form 1042-S filers.[67]

US government reports have also focused on the burdens created by FATCA. In April 2019, the GAO conducted a study to evaluate FATCA implementation and the effects on US citizens living abroad.[68] The GAO report made seven recommendations to the IRS and other agencies to enhance the IRS's ability to leverage FATCA data "to enforce compliance, address unnecessary reporting, and better collaborate to mitigate burdens on US persons living abroad."[69]

1.6.2. Interaction of FATCA with the OECD Common Reporting Standard

Before FATCA, there was no global system in place to share account information between countries, other than those available via EOI agreements. Inspired largely by FATCA, the OECD established CRS for the reporting and automatic exchange of financial account information between treaty partners.

CRS reporting is different from FATCA reporting in material ways. Because the United States taxes its citizens and residents on their worldwide income, FATCA looks to both citizenship and tax residence. In contrast, CRS looks to a person's tax residency (i.e., taxation

63 US Treasury Inspector General for Tax Administration, The Internal Revenue Service has Made Progress in Implementing the Foreign Account Tax Compliance Act, No. 2015-30-085 (September 2015) (hereinafter 2015 TIGTA FATCA Report); US Government Accountability Office, Foreign Account Reporting Requirements – IRS Needs to Further Develop Risk, Compliance, and Cost Plans, GAO-12-484 (April 2012).

64 2015 TIGTA FATCA Report, *supra* n. 63, at 7.

65 2018 TIGTA FACTA Report, *supra* n. 62.

66 For example, a US taxpayer is required to self-certify information on IRS Form 8938 (Statement of Specified Foreign Financial Assets (provided by the taxpayer), which should match information provided by a foreign financial institution in IRS Form 8966 (FATCA Report).

67 GAO-12-484, *supra* n. 63.

68 US Government Accountability Office, Foreign Asset Reporting, Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on US Persons Abroad, GAO-19-180 (April 2019).

69 GAO-12-484, *supra* n. 63.

based on residency). As a result, the systems impose different due diligence requirements. Legislative action by the US Congress would be necessary to implement the CRS requirements fully in the United States.

1.7. Administrative cooperation

The United States participates in several initiatives involving information exchange with other countries to cooperate on tax administration matters. The United States is a member of the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), which joins tax administrations that have committed to more effective and efficient ways to deal with tax avoidance and offers a platform to enable its members to collaborate within the tax treaty and information exchange network. Using the JITSIC platform, the IRS has been successful in identifying taxpayers who have engaged in abusive tax schemes.[70] JITSIC's network has grown to include forty members.[71]

In addition, as mentioned above, the IRS has a simultaneous examination program (and a simultaneous criminal investigation program) under which the United States and a treaty partner conduct separate, independent examinations of the taxpayer or a related taxpayer and may exchange information in connection with the examinations. Moreover, the IRS has also participated in joint audits (i.e., a single audit by two or more jurisdictions of a single taxpayer), although they are relatively infrequent.[72]

1.8. Other issues

The United States has not entered into any other bilateral or multilateral EOI agreements not already mentioned herein

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2. Incorporation of the instruments and processes into domestic legislation

2.1. Domestic adoption

2.1.1. CbCR

The Treasury and the IRS have issued final regulations governing CbCR. The regulations require the ultimate parent entity of a US multinational entity group with USD 850 million or more of consolidated group revenue to file an annual report including, on a country-by-country and entity-by-entity basis, information related to the group's income, taxes, and other indicators of economic activity.[73] There are no special rules or exceptions for reporting with

[70] IRS News Release IR-2006-121 (3 August 2006).

[71] *Forum on Tax Administration: Joint International Taskforce on Shared Intelligence and Collaboration*, OECD, https://www.oecd.org/tax/forum-on-tax-administration/jitsic/.

[72] I.R.M. § 4.60.1.11.1 (15 October 2018).

[73] Treas. Reg. § 1.6038-4.

respect to certain jurisdictions. Information also must be provided with respect to entities considered "stateless," i.e., that do not have a tax jurisdiction of residence. The report is made on Form 8975 (Country-by-Country Report) and Schedule A to Form 8975 (Tax Jurisdiction and Constituent Entity Information). The reporting regulations apply to reporting periods of ultimate parent entities of US multinational entity groups that begin on or after the first day of the first taxable year of the ultimate parent entity that begins on or after 30 June 2016.

As is generally required by US administrative procedure requirements, the final regulations were preceded by a notice of proposed rulemaking (containing proposed regulations) and a comment period. The preamble to the final regulations described several modifications that were made to the rules in response to comments. Treasury and the IRS have also made other changes to the reporting requirements in response to industry feedback. For example, although the final regulations did not incorporate a requested national security exception, the IRS subsequently issued Notice 2018-31, which provides that "specified national security contractors," i.e., US entities for which more than 50 percent of annual revenue is attributable to contracts with the Department of Defense or other US government intelligence or security agencies, are required to report only certain summary information for the group rather than country-by-country and entity-by-entity information. In addition, in response to concerns that other countries were adopting reporting requirements effective for periods prior to the effective date of the US regulations and could require local filing for the earlier period, Treasury and the IRS issued Notice 2017-23, providing a procedure for ultimate parent entities of US multinational entities to file Form 8975 for early reporting periods.

The United States has also been responsive to concerns about unauthorized disclosure or improper use of exchanged information. The IRS has stated that if the United States determines that a tax jurisdiction is not in compliance with the confidentiality and appropriate use restrictions under the relevant information exchange agreement, the United States may cease exchanging information with the jurisdiction. The IRS has also created an e-mail mailbox for taxpayers or other persons to report suspected unauthorized disclosures or use of exchanged information.[74]

Country-by-country reporting data is exchanged by the United States pursuant to bilateral competent authority arrangements (CAAs) entered into in connection with tax treaties and TIEAs that permit automatic exchanges of information. A US multinational group's information will only be exchanged with those countries in which the group reports doing business. Exchanged information is confidential and subject to the protections in the underlying legal instrument.

The US CbCR reporting requirements likely increase the tax compliance costs of US parent entities meeting the USD 850,000,000 threshold. However, the US CbCR requirements likely will not materially impact US foreign direct investment or overall business operation costs.

[74] See Reporting Unauthorized Disclosure or Use of Tax Information Exchanged under an International Agreement, IRS, https://www.irs.gov/businesses/corporations/reporting-unauthorized-disclosure-or-misuse-of-tax-information-exchanged-under-an-international-agreement.

2.2. Tax administration authority

2.2.1. Tax authority powers to request information domestically

When responding to a request for information under a tax treaty, the United States is required to obtain the requested information in the same manner and to the same extent as if a US tax were involved.[75]

Under US domestic law, the IRS may obtain certain tax return and return information by invoking its summons power. Section 7602(a) of the Internal Revenue Code empowers the IRS to summon persons to appear and produce books and records as well as to provide testimony as may be relevant to ascertaining a person's tax liability. In *United States v. Powell*,[76] the US Supreme Court held that, in a summons enforcement proceeding, the IRS must prove the following factors: (i) that the investigation will be conducted pursuant to a legitimate purpose; (ii) that the inquiry may be relevant to the purpose; (iii) that the information sought is not already within the Commissioner's possession; and (iv) that the administrative steps required by the Code have been followed.[77] The burden of proof to show abuse of a court's proceeding in a summons enforcement action is on the taxpayer.[78]

Certain rules apply where the IRS issues summons to a third party relating to a specific taxpayer.[79] In such a case, the IRS is required to provide notice of the summons to the taxpayer that is the subject of the summons.[80]

In addition, under Section 7609(f) of the Internal Revenue Code, the IRS may issue a "John Doe" summons to determine the identities of certain taxpayers. However, the law requires the IRS to ensure certain safeguards, including: (i) ensuring that the summons relates to the investigation of a particular person or ascertainable group of persons; (ii) there is a reasonable basis for believing that such person or group of persons may fail or have failed to comply with the provisions of the tax laws; and (iii) the information sought is not available through other sources.[81]

In *United States v. A.L. Burbank & Co.*,[82] the US Court of Appeals for the Second Circuit held that the IRS may use its summons authority to obtain information in response to a request made by a treaty partner. The Second Circuit held that the United States may receive information from persons under its jurisdiction even though no US interest is involved.[83] The court rejected the argument that the United States is required to enforce reciprocity of obligations with a treaty partner.[84]

In general, the summons powers extend to documents physically located overseas provided a person under the control of a US court controls the documents. In *United States v.*

75 2006 US Model Treaty, art. 26(4); I.R.M. § 4.60.1.2.2.4 (15 October 2018).

76 *United States v. Powell*, 379 US 48 (1964), *rev'g and rem'g* 325 F.2d 914 (3d Cir. 1963).

77 *Id.*

78 *Id.* at 57-58.

79 26 USC. § 7609(a)(1).

80 *Id.*

81 26 USC. § 7609(f)(1)-(3). *See e.g.*, *In re Tax Liabilities of John Does*, No. 08-21864-MC Lenard/Garber (S.D. Fla. 2008) (discussing UBS); *In re Tax Liabilities of John Does*, No. 3:09-CV-2290-N (N.D. Tex. 2009) (discussing the Stanford International Bank Group).

82 *United States v. A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975).

83 *Id.*

84 *Id.*

Bache Halsey Stuart, Inc.,[85] the US District Court of the Southern District of New York held that the IRS summons power extends to information requested by a treaty partner.[86]

2.2.2. The IRS's digital initiatives

To improve taxpayer services and transparency, the IRS has launched the IRS Modernization Plan (the "Plan"), which includes dozens of initiatives to review and improve how the agency interacts with taxpayers and the tax community while maintaining a strong hold on cybersecurity protections and information technology systems. One of the main goals of the Plan is to leverage existing data to detect taxpayer noncompliance. The Plan will aim to increase taxpayer services and enforcement activities over a period of six years. The IRS estimates the Plan will cost between USD 2.3 and USD 2.7 billion dollars to fully implement the modernization initiatives.[87] However, a 2016 Government Accounting Office report has concluded that while the IRS has developed a structured process for allocating funding to its operations activities consistent with best practices, it has not fully documented this process.[88]

2.2.3. IRS's tools for taxpayer assistance

The IRS has a number of vehicles available to taxpayers to voluntarily correct previous noncompliance and errors. These programs include the IRS Streamlined Filing Compliance Procedures,[89] the Delinquent FBAR Submission Procedures,[90] the Delinquent International Information Return Submission Procedures,[91] and the traditional Voluntary Disclosure Program.[92]

2.3. Institutional framework

The competent authority is responsible for all inbound and outbound EOI. In the United States, the Secretary of the Treasury is typically the competent authority to administer US income

85 82-2 USTC Par. 9614 (S.D.N.Y. 1982), aff'd by an unreported decision of the Second Circuit (filed 15 December 1982).

86 The standards are stated in § 442(1)(a) of the Restatement (Third) Foreign Relations Law of the United States (1987), which provide that, where authorized by domestic law, a court may order a person to provide documents or other information "relevant to an action or investigation even if the information or person in possession of the information is located outside the United States." *Id.*

87 See, IRS Modernization Plan Provides Plan to Improve Services for Taxpayers, IRS (April 2019), https://www.irs.gov/newsroom/irs-modernization-plan-provides-plan-to-improve-services-for-taxpayers-tax-community.

88 US Government Accountability Office, GAO-16-545, IRS Needs to Improve Its Processes for Prioritizing and Reporting Performance of Investments (29 June 2016).

89 Streamlined Filing Compliance Procedures, IRS (27 June 2019), https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures.

90 Delinquent FBAR Submission Procedures, IRS (27 June 2019), https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures.

91 Delinquent International Information Return Submission Procedures, IRS (27 June 2019), https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures.

92 *See* I.R.M. § 9.5.11.9 (2 December 2009). In September 2018, the IRS shut down the Offshore Voluntary Disclosure Program.

tax treaties as well as TIEAs and FATCA IGAs. This authority is delegated through a series of delegation orders. At this time, the US Competent Authority is the Deputy Commissioner (International) Large Business and International Division (LB&I).[93] With respect to MLATs, the US Department of Justice, Office of International Affairs, Criminal Division is authorized to act as the US Central Authority.

Under IRS internal procedures, all exchanges of information under bilateral and multilateral tax treaties, TIEAs, and FATCA IGAs (excluding certain transfer pricing and mutual agreement proceedings) are administered by the Program Manager, Exchange of Information (EOI Program); the Program Manager, Automatic Exchange of Information (AEOI Program); and the Program Manager, Assistant Deputy Commissioner International (ADCI) and Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC).[94]

2.4. Confidentiality and data protection

Section 6103 of the Internal Revenue Code provides that tax returns and return information are confidential and that, except as specifically authorized by the law, no US employee or certain other persons receiving returns or return information may disclose such information. The terms "return" and "return information" include all tax and information returns as well as a taxpayer's identity, tax information (e.g., income, deductions, credits, payments), and tax status. Unauthorized disclosures of taxpayer information by a government employee may result in civil or criminal liability.[95]

The law contains an exception for the disclosure of returns and/or return information to the competent authority of a foreign government under a tax treaty, TIEA, or MLAT "but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement."[96] As discussed above, the terms of the relevant agreements require countries to keep confidential information exchanged under their provisions.

Although US law provides strong protections against the unauthorized disclosure of taxpayer information, taxpayers sometimes fear that US treaty partner tax authorities may misuse information received from the IRS under tax treaties by, for example, disclosing it to the press or using it to improperly coerce the taxpayer. A least one taxpayer has brought suit against the IRS seeking damages for unauthorized disclosure of its return information to a treaty partner where the return information was leaked to the local media.[97] In the authors' experiences, the IRS takes unauthorized disclosure of taxpayer information seriously and is responsive to concerns regarding potential improper disclosure by foreign tax authorities.

Section 6105 of the Internal Revenue Code is another provision that specifically governs the confidentiality of information provided to the United States by treaty partners. It provides a general rule that "tax convention information" may not be disclosed.[98] "Tax convention information" is defined as any agreement entered into with a competent authority pursuant to a tax convention (defined as any income tax or gift and estate tax convention or certain other agreements including those providing for tax information exchange or mutual assistance in

93 Delegation Order 4-12 (Rev. 2) (1 July 2010), printed in I.R.M. § 1.2.43.12.

94 I.R.M. § 4.60.1 (15 October 2018).

95 18 USC. § 1905; I.R.C. § 7213(a).

96 I.R.C. § 6103(k)(4).

97 *Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153 (9th Cir. 2012).

98 I.R.C. § 6105(a).

tax matters), application for relief under a tax convention, background information related to such agreement or application, document implementing such agreement, and any other information exchanged pursuant to a tax convention which is required to be treated as confidential or secret under the tax convention.[99] However, there are exceptions to the general prohibition against disclosure. For example, tax convention information may be disclosed to persons or authorities (including courts and administrative bodies) entitled to such disclosure pursuant to a tax convention.[100]

Given the increasing dissemination of tax information through electronic channels, including under the IDES system to report and exchange financial account information, questions have arisen regarding when the confidentiality protections of the Internal Revenue Code apply.[101] The IRS Office of Chief Counsel has concluded that outbound information, i.e., information that is provided by the IRS to foreign tax administrators, is return information under Section 6103 in the hands of the IRS, so throughout the exchange process should be protected by Section 6103. In the case of inbound information, i.e., information provided to the IRS by foreign tax administrations, the IRS has stated that the moment when legal protection arises is less certain, pointing to two possibilities: (i) the moment information is uploaded to IDES by the foreign tax authority and (ii) the moment when the United States downloads the information from IDES. Although the IRS's analysis is partially redacted, the IRS conclusion is that Section 6103 protection arises on the inbound transfer of information at the time that the information is uploaded to IDES. Accordingly, Section 6105 and treaty protections are likely to follow the conclusion reached under Section 6103. The analysis notes, however, that the conclusion is "highly fact dependent."

A variety of federal and state statutes offer incentives and/or certain protections from retaliation for persons who "blow the whistle" with respect to tax issues.[102] Section 7623 of the Internal Revenue Code authorizes the IRS to provide monetary awards to whistleblowers, up to 30% of the tax, interest, and penalties in dispute.[103] The IRS has established a form (IRS Form 211) for making claims and an IRS Whistleblower Office to evaluate information provided. In recent years, there have been several high-profile tax whistleblowers, including a case that led to numerous investigations of whether foreign banks facilitated US tax evasion.[104]

99 I.R.C. § 6105(c)(1).

100 I.R.C. § 6105(b)(1).

101 IRS Office of Chief Counsel, OECD Common Transmission System, AM2016-004 (14 October 14, 2016), https://www.irs.gov/pub/lanoa/am2016-004.pdf .

102 *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (29 January 29, 2009); Sarbanes-Oxley Act, P.L. 107-204 (30 June 2002); False Claims Act, 31 USC. §§ 3729-3733 (2009). In addition, many states have false claims acts and other whistleblower protection laws. Note, however, that anti-retaliation laws are not absolute, and whistleblowers can still face legal action as a result of providing confidential information, such as under a nondisclosure agreement or by breaching the attorney-client privilege.

103 If the total amount of tax, interest, and penalties in dispute exceeds USD 2 million, the whistleblower shall receive an award of at least 15% but not more than 30% of the collected proceeds. If the total amount in dispute is less than USD 2 million, the IRS has discretionary authority to make an award.

104 *See* David Kocieniewski, Whistle-Blower Award $104 Million by IRS, New York Times (11 September 2012) ("By divulging the schemes that UBS used to encourage American citizens to dodge their taxes, Mr. Birkenfeld led to an investigation that has greatly diminished Switzerland's status as a secret haven for American tax cheats and allowed the Treasury to recover billions in unpaid taxes.").

3. Impact of digitalization on the established network

With the rise of cryptocurrencies and virtual currencies, the IRS is keen to learn more about the application and uses of virtual currencies as well as ensuring that US taxpayers report and pay taxes relating to cryptocurrencies.[105]

3.1. Blockchain technology

Very generally, a blockchain permits participants in a network to confirm transactions without the need for a trusted third-party intermediary. More broadly, a distributed ledger in a blockchain allows participants in the network to simultaneously access the information on the blockchain. Blockchain technology has disrupted a number of ways information is stored, in addition to acting as a medium of exchange for value referred to as a cryptocurrency.

A cryptocurrency (e.g., Bitcoin) is an electronic payment system that is based on cryptographic proof, permitting parties to exchange the cryptocurrency with each other using the blockchain technology. It does not require a third-party clearinghouse (e.g., a bank) to validate the transaction. Users who contribute computing power to a network are referred to as "miners." Alternate coins are created through "mining"—a process of using computers to devise algorithm cryptographic hashes that support blocks in a blockchain.

3.2. Cryptocurrencies and rise of initial coin offerings

In initial coin offerings (ICOs), purchasers may use fiat currency (e.g., US dollars) or virtual currencies to purchase virtual coins or tokens. In general, a company may wish to issue a token to either (i) raise capital or (ii) use the company's platform to purchase goods and services. Some tokens have equity-like features, such as right to dividend-like payments based on the issuer's predefined performance objectives. In 2017, the use of ICOs as an alternative to raising capital accelerated.[106] In July 2017, the US Securities and Exchange Commission issued a report to address ICOs.[107]

[105] The OECD has initiated a working group to assess cryptocurrencies and their impact on corruption and fraudulent activities. Ciupa Katarzyna, Cryptocurrencies: Opportunities, Risks and Challenges for Anti-Corruption Compliance Systems, OECD (March 2019), http://www.oecd.org/corruption/integrity-forum/academic-papers/Ciupa-Katarzyna-cryptocurrencies.pdf.

[106] Ani Banerjee et. al., The State of the Token Market: A Year in Review & an Outlook for 2018, Fabric Ventures and TokenData (January 2018), https://static1.squarespace.com/static/5a19eca6c027d8615635f801/t/5a73697bc8302551711523ca.

[107] SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities, SEC (25 July 2017), https://www.sec.gov/news/press-release/2017-131.

3.3. Statistical data

As of 26 September 2019, there are 2,899 cryptocurrencies.[108] The total market amount is nearly USD 209 billion.[109] The number of users on the popular US website Coinbase.com is over 30 million[110] and the number of Blockchain.com wallets is over 42 million.[111] More and more businesses in the United States are accepting Bitcoin to transact goods and services.[112] In addition, the trends show that virtual currencies and blockchain technology have grown in popularity in recent years by offering an alternative to traditional currencies issued by governments and allowing for a secure method of transferring digital assets continuously without interruption.[113]

3.4. Taxation of virtual currencies in the United States

In March 2014, the IRS published Notice 201421, providing for basic guidance relating to taxation of cryptocurrencies in the United States. The IRS analyzed whether a cryptocurrency should be classified as a currency or property for US income tax purposes. The notice describes "virtual currency" as "digital representations of value that functions as a medium of exchange, a unit of account, and/or a store of value."[114] A convertible virtual currency is defined as a sub-category of a virtual currency or one "that has an equivalent value in real currency, or that acts as a substitute for real currency."[115] Notice 2014-21 provides a list of potential US federal income tax consequences from the use of cryptocurrencies. However, it fails to provide other specific guidance.[116]

In March 2018, the IRS reminded taxpayers to report virtual currency transactions or else become liable for penalties and interest (and possibly criminal exposure for failing to report).[117] On 2 July 2018, the IRS announced a campaign to better understand virtual currencies to enforce individual compliance.[118] On 26 July 2019, to educate and persuade taxpayers with unreported or unpaid taxes relating to cryptocurrency transactions to voluntarily comply with

108 Top 100 Cryptocurrencies by Market Capitalization, CoinMarketCap, https://coinmarketcap.com.

109 *Id*.

110 About Coinbase, Coinbase, https://www.coinbase.com/about.

111 Blockchain Wallet Users, Blockchain, https://www.blockchain.com/charts/my-wallet-n-users.

112 Who Accepts Bitcoin as Payment?, 99Bitcoins, https://99bitcoins.com/bitcoin/who-accepts/.

113 US Government Accountability Office, GAO-18-396SP, Trends Affecting Government and Society, Strategic Plan (2018).

114 Notice 2014-21, 2014-16 I.R.B. 838, § 2 Background.

115 *Id*.

116 For a comprehensive review of the US taxation of cryptocurrencies, see S. Assar, Bloomberg Tax, Taxation of Cryptocurrencies: In Anticipation of the IRS's Call (September 2019).

117 IRS Reminds Taxpayers to Report Virtual Currency Transactions, IR-2018-71 (23 March 2018), https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions.

118 IRS Announces the Identification and Selectin of Five Large Business and International Compliance Campaigns, IRS (2 July 2018), https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-five-large-business-and-international-compliance-campaigns.

the law, the IRS issued a news release entitled, "Reporting Virtual Currency Transactions."[119] The release provides three sample letters (Letter 6173, Letter 6174, and Letter 6174-A, together the "Letters") to prepare taxpayers to fully understand their US federal tax and reporting obligations. According to the news release, by the end of August 2019, the IRS will have sent more than 10,000 letters to taxpayers it suspects may have unreported income during tax years 2013 through 2017 relating to transactions using cryptocurrencies. Taxpayers are warned to actively report their holdings, correct any previous erroneous reporting and calculate the tax.[120]

On 9 October 2019, the IRS released additional guidance on the taxation of cryptocurrency. Revenue Ruling 2019-24 addresses whether a taxpayer has gross income as a result of a "hard fork" of cryptocurrency.[121] Answers to frequently asked questions expand on the examples provided in Notice 2014-21.[122]

3.5. Potential international reporting requirements

Notice 2014-21 does not provide for any specific guidance as to whether owners of virtual currencies must fulfill international reporting requirements. In general, US citizens and residents must file a Foreign Bank Account Report (FBAR) with the Treasury Department's Financial Crimes Enforcement Network (FinCen) where the US person has a financial interest in, or authority over, any financial account outside of the United States where the aggregate maximum value of the account(s) exceeds USD 10,000 at any time during the calendar year. The definition of a "financial account" for FBAR reporting requirements does not specifically address cryptocurrencies.

In addition to the above, US persons must also provide an IRS Form 8938 (Statement of Specified Foreign Financial Assets) annually with their income tax return.[123] The financial assets that must be reported on the Form 8938 include among other categories, "any financial account . . . maintained by a foreign financial institution" and "any interest in a foreign entity."[124] It remains a query as to whether "financial assets" would encompass cryptocurrencies.

There is also no authority directly addressing whether entities facilitating the trading of currencies should be considered FFIs under FATCA.

119 IRS has Begun Sending Letters to Virtual Currency Owners Advising Them to Pay Back Taxes, File Amended Returns; Part of Agency's Larger Efforts, IR-2019-132 (26 July 2019), https://www.irs.gov/newsroom/irs-has-begun-sending-letters-to-virtual-currency-owners-advising-them-to-pay-back-taxes-file-amended-returns-part-of-agencys-larger-efforts.

120 *Id*.

121 A hard fork is unique to distributed ledger technology and occurs when a cryptocurrency on a distributed ledger undergoes a protocol change resulting in a permanent diversion from the legacy or existing distributed ledger.

122 See IRS, *Frequently Asked Questions on Virtual Currency Transactions*, available at https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions.

123 26 USC. § 6038D; 26 C.F.R. §§ 1.6038D0 to 1.6038D8.

124 *See* Treas. Reg. § 1.6038D-1.

3.6. Use of cryptocurrencies in tax evasion & the government's response

In 2013, the IRS's Criminal Investigation (IRS-CI) unit created a Cyber Crimes Unit staffed with tech specialists well versed in data software and computers. The IRS-CI unit is tasked with pursuing tax and money laundering violations, including crypto kiosks and dark web marketplaces.[125] The IRS, with the assistance of the US Department of Justice, has been expanding its enforcement reach in prosecuting taxpayers who have failed to report and pay tax on their cryptocurrency transactions.[126]

Internationally, in response to the OECD's call to action for countries to enhance measures to prevent enablers of tax crimes, the United States, along with Australia, Canada, the United Kingdom, and the Netherlands, is a party to the Joint Chiefs of Global Tax Enforcement (the J5). The J5 is committed to combatting transnational tax crimes through increased enforcement collaboration.[127] The group actively monitors and collaborates to investigate parties who enable transnational tax crimes and money laundering, as well as those threats to tax administrations posed by cryptocurrencies and cybercrime.[128]

[125] Examples of investigations include, Liberty Reserve, BTCe, Silk Road I and II, and Alphabay.

[126] *United States v. Coinbase, Inc.*, 2017 WL 3035164, at *12 (N.D. Cal. 18 July 2017); *United States v. Coinbase, Inc.*, 2017 WL 5890052, at *4 (N.D. Cal. 18 November 2017).

[127] Joint Chiefs of Global Tax Enforcement, IRS (25 June 2019), https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement.

[128] JP Buntinx, Dutch Police Shuts Down Bitcoin Mixing Service Bestmixer, Cryptomode (22 May 2019), https://cryptomode.com/dutch-police-shuts-down-bitcoin-mixing-service-bestmixer/; Westwood Man Agrees to Plead Guilty to Federal Narcotics, Money Laundering Charges for Running Unlicensed Bitcoin Exchange and ATM, US Department of Justice (23 August 2019), https://www.justice.gov/usao-cdca/pr/westwood-man-agrees-plead-guilty-federal-narcotics-money-laundering-charges-running.

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