

## 以 BVI 视角研究比较 CRS 与 FATCA

### BVI comparative study of CRS and FATCA



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The Common Reporting Standard (CRS) is the standard for automatic exchange of financial account information produced by the Organization for Economic Co-operation and Development (OECD), which provides for exchange of client due diligence (CDD) information between various jurisdictions.

CRS is similar to the US Foreign Account Tax Compliance Act (FATCA). It is a requirement for financial institutions (FIs) to report to the local authority – the International Tax Authority (ITA). The ITA will be the repository of all of the reported information and will exchange CDD information under CRS (and FATCA) with the equivalent authorities in the jurisdictions. The first reporting under CRS is scheduled for 31 May 2017.

FATCA was implemented on 23 October 2014, under the Mutual Legal Assistance (Tax Matters) Order 2014, as subsidiary legislation to the Mutual Legal Assistance (Tax Matters) Act 2003 (MLAT). On 4 June 2015, the Mutual Legal Assistance (Tax Matters) Order 2015 was implemented to give effect to identifying financial accounts, the reporting obligations of reporting FIs under FATCA, the appointment of third parties, information on inspection and compliance, offences for non-compliance, and the guidance notes.

CRS was implemented on 31 December 2015 as the Mutual Legal Assistance (Tax Matters) (Amendment) (No. 2) Act 2015 (CRS Law). The CRS Law is subsidiary legislation to the MLAT. Some differences are:

- Under CRS only residents of a reportable jurisdiction are considered reportable jurisdiction persons, with residence meaning tax residence. While entities do not have a

共同报告标准 (CRS) 是经合组织制定的财务账户信息自动交换标准, 其规定了在不同管辖区之间自动交换客户尽职调查 (CDD) 信息的事宜。CRS 类似于《美国外国帐户税务合规法案》(FATCA) 规定的制度。其核心是要求各辖区的需申报的金融机构 (FI) 向当地主管机关报告, BVI 的主管机关是国际税务局 (ITA)。国际税务局将作为所有报告信息的本地保管处, 并与各辖区的相应主管机关交换 CRS (及 FATCA) 项下的客户尽职调查信息。根据 CRS 进行的首次报告定于 2017 年 5 月 31 日。

美国 FATCA 于 2014 年 10 月 23 日根据《2014 年共同法律援助 (税务事宜) 令》(作为《2003 年共同法律援助 (税务事宜) 法案》(MLAT) 的附属立法) 开始在英属维尔京群岛 (BVI) 实施。2015 年 6 月 4 日, 开始实施《2015 年共同法律援助 (税务事宜) 令》(2015 年令), 以落实如何确定财务账户的问题, 并规定了需申报 FI 根据美国 FATCA 负有的报告义务、第三方的任命、关于检查和合规的信息、不遵守规定将构成何种罪行、以及指导说明的发布等事项。

CRS 于 2015 年 12 月 31 日开始在 BVI 实施, 具体表现为《2015 年共同法律援助 (税务事宜) 法案 (修订) (第 2 号)》(CRS 法)。CRS 法以 MLAT 的附属立法通过。虽然 CRS 与 FATCA 很类似, 但仍有一些细微差别:

1. 根据 CRS, 只有呈报辖区的居民才被视为呈报辖区人员, 而居所一般视作所界定的税收居所。CRS 规定了无税收居所的实体应使用的实际管理地点。到目前为止, BVI 只发布了一份参与辖区清单。在没有呈报辖区清单的情况下, 难以确定是否要与某些未列在清单上的辖区交换客户尽职调查信息。根据 FATCA, 美国公民属于美国纳税居民。美籍人士包括美国公民和居民。因此, CRS 要求的是税收居

residence, CRS indicates that the place of effective management should be used. The British Virgin Islands (BVI) has published a list of participating jurisdictions. The absence of a list of reportable jurisdictions makes the process of determining whether to exchange CDD with non-listed jurisdictions challenging. Under FATCA, a US citizen is a US tax resident. US persons include both US citizens and residents. Under CRS, tax residency is key, whereas under FATCA the test is citizenship. Under FATCA, there is no reference to participating or reportable jurisdictions.

- FATCA includes non-reporting FIs that are not included in CRS, e.g., retirement funds, investment entities wholly owned by exempt beneficial owners, local banks, FIs with a local client base, FIs with only low value accounts (US\$50,000 and under), sponsored investment entities and controlled foreign corporations, and sponsored closely held investment vehicle advisors and managers. More entities will have to report under CRS compared with FATCA, since the concept of sponsorship is not provided for under CRS.
- Investment entity is defined differently in the intergovernmental agreements (IGAs), the US regulations and CRS. The BVI FATCA Guidance Notes indicate that since CRS is likely to be the global standard and is substantially similar to the US regulation definition, this has also been included in BVI regulation. As such, an entity may choose which definition to apply when determining whether it is an investment entity. The test under the IGA definition is the “managed by” test. When an entity is professionally managed by a third party it will generally be an investment entity. “Managed by” should be differentiated

住地，而美国FATCA要求的是公民身份。FATCA制度没有提到参与辖区或呈报辖区的概念。

2. FATCA中包含一些CRS未包含的无需作出报告的非申报FI，例如退休基金、由豁免受益拥有人全资拥有的投资实体、当地银行、有本地客户基础的FI、仅具有小额账户（50,000美元及以下）的FI、受赞助投资实体和受控外国公司、受赞助封闭式投资工具投资顾问和经理。与美国FATCA相比，根据CRS，更多实体必须进行申报，因为CRS未规定赞助的概念。
3. 投资实体在政府间协定（IGA）、美国法规和CRS中的定义有所不同。但是，BVI FATCA指引要点指出，由于CRS可能成为全球标准，且与美国法规的定义大致相似，因此也载于BVI法规之中。因此，某实体可以选择适用的定义以确定其是否属于投资实体。根据IGA的定义，其关键是“被……管理”。当某实体被第三方专业管理时，其通常是一个投资实体。“被……管理”应与“管理”不同。当公司拥有董事时，这本身并不会导致该公司属于“被管理”的情况。根据CRS，在以下情况下，某实体被视为主要开展投资实体定义第(a)款所述活动之一，或实体的总收入主要归因于投资实体定义第(b)款所述的投资、再投资或金融资产交易：该实体的可归因于相关活动的总收入等于或超过该实体总收入的50%。本规定适用于在进行确定时所在年份之前的三年（于12月31日结束）或开始之后的期间（以较短者为准）。
4. 根据BVI FATCA指引要点，“控制人”是指直接或间接控制某实体的自然人，且应根据金融行动特别工作组的建议进行解释。如果FI属于被动的非金融外国实体（NFFE）的控制人，则该被动NFFE无需证明该FI的任何控制人是该被动NFFE的控制人。仅就NFFE而

from “administering”. Where directors are provided, this on its own will not cause the company to fall within the “managed by” test. Under CRS, an entity is treated as primarily conducting as a business one of the activities described in paragraph (a) of the definition of investment entity, or an entity’s gross income is primarily attributable to investing, reinvesting or trading in financial assets for the purposes of paragraph (b) of the definition of investment entity, if the entity’s gross income attributable to the relevant activities equals or exceeds 50% of the entity’s gross income. This test applies to the three years ended 31 December of the year preceding the year in which the determination is made, or the period since commencement, if shorter.

- “Controlling person” under the BVI FATCA Guidance Notes refers to a natural person who exercises direct or indirect control over an entity, and that term should be interpreted under the Financial Action Task Force Recommendations. If an FI is a controlling person of a Passive Non-Financial Foreign Entity (Passive NFFE) then it is not necessary for the Passive NFFE to certify any controlling person of the FI as controlling persons of the Passive NFFE. In relation only to NFFEs, a 25% ownership threshold applies for companies, partnerships, trusts and foundations. For trusts, this would only apply to beneficiaries, settlors when they are also beneficiaries, and protectors where they have the power to change the trustee, therefore influencing the distribution of the trust assets. Under the CRS regime, there is little guidance on who should be considered controlling persons. The test under CRS refers to 25% but is left wider, for

言，25%的所有权阈值适用于公司、合伙企业、信托和基金会。对于信托而言，这只适用于受益人、委托人（当他们也是受益人时）及保护人（只要彼等有更改受托人的权力，从而影响信托资产的分配）。对于谁应被视为控制人的问题，CRS制度几乎没有提供什么指导。CRS也提到了25%，但它的范围更宽，例如，规则规定，如果不存在符合这种条件的人，则对实体行使管理控制权的任何自然人（例如公司的高级管理人员）将作为控制人。

5. 在这两种制度下，非FI实体将被视为NFFE。NFFE分为被动和主动非金融实体。根据FATCA，该定义仅限于（1）其并非活跃的NFFE；或（2）根据相关美国财政条例，其并非进行预扣的外国合伙机构或进行预扣的外国信托。但是，根据CRS规定的定义，该概念更为宽泛，包括（1）非活跃的NFFE；或（2）投资实体定义第(b)款中所述的、非参与辖区FI投资实体。
6. 对于FI未遵守负有的任何监管或向国际税务局报告义务的情形，CRS没有明确的处罚规定。但是，由于CRS法是MLAT的附属立法，因此如发生违反CRS法的情况，则可适用MLAT。根据2015年令，该立场是明确的，并明确规定MLAT中的一般处罚规定适用于2015年令和政府间协定。此外，美国FATCA对来源于美国的收入及与美国有关的其他付款征收30%的预扣税。但是，对于未遵守CRS的情形，没有规定预扣税。

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example the rule provides that if no such person exists, then any natural person that exercises control over the management of the entity (e.g., the senior managing official of the company) would be a controlling person.

- Under both regimes, any entity that is not an FI will be considered an NFFE. NFFEs are divided into passive and active NFFEs. Under FATCA, the definition is limited to any NFFE that is not: (1) an active NFFE; or (2) withholding foreign partnership or withholding foreign trust pursuant to relevant US Treasury regulations. However, under CRS, this concept is broader and is defined to include: (1) an NFFE that is not active, or (2) an investment entity described in paragraph (b) of the definition of investment entity that is not a participating jurisdiction FI.
- Under CRS, there is no express penalty provision for failing to comply with any of the reporting obligations to the ITA by FIs. However, since the CRS Law is subsidiary legislation to the MLAT, the MLAT can apply where a breach is found to have taken place. Under the 2015 order, the position is clear and expressly provides that the general penalty provision in the MLAT applies to the 2015 order and the IGA. FATCA imposes a 30% withholding tax on US sourced income and other US payments. There is no withholding tax under CRS.

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