

UNWISE INTEGRATION OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT INTO THE COMMON REPORTING STANDARD – TAKING TAIWAN AS AN EXAMPLE

Yi-Hsin Wu[†]

TABLE OF CONTENTS

	INTRODUCTION	566
I.	BACKGROUND OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT	568
II.	BACKGROUND OF THE COMMON REPORTING STANDARD	572
III.	COMPARISON BETWEEN THE FATCA AND THE CRS.....	574
	A. <i>Similarities of the FATCA and the CRS</i>	574
	B. <i>Differences between the FATCA and the CRS</i>	575
	C. <i>Why The Two Systems Can Not Initially Integrate With Each Other</i>	577
IV.	CASE STUDY.....	578
	A. <i>The FATCA and the CRS in Taiwan</i>	578
	1. <i>The FATCA in Taiwan</i>	578
	i. <i>Difficulties</i>	578
	ii. <i>Current Enforcement in Taiwan</i>	581
	2. <i>The CRS in Taiwan</i>	583
	B. <i>The Integration of Taiwan GAAP and the IFRS</i>	584
	C. <i>A Comparison Between the Implementations of the IFRS and the FATCA in Taiwanese Financial Institutions</i>	584
	1. <i>Similarities between Taiwan’s Adoption of IFRS and that of the FATCA</i>	584
	2. <i>Differences between Taiwan’s adoption of IFRS and the FATCA</i>	585
V.	ANALYSIS.....	587

[†] Staff Editor, *International Comparative, Policy & Ethics Law Review*, J.D. Candidate (May 2018), Benjamin N. Cardozo School of Law; Alexander Fellows Judicial Clerk: U.S. District Court for the Eastern District of New York. Sincere gratitude and thanks to Professor Edward Zelinsky for his insightful advice.

A.	<i>Integration of the FATCA and the CRS is Unnecessary</i>	587
B.	<i>Difficulties of the Integration Faced by Taiwanese Financial Institutions</i>	589
C.	<i>Benefits of Non-Integration, Postponing the CRS and Revising the FATCA</i>	592
VI.	CONCLUSION	594

INTRODUCTION

Recently, many countries have been increasing their focus on how to identify a taxpayer's offshore income.¹ Under the trend of improving global tax transparency by disclosing a taxpayer's offshore income, many regimes have developed a cooperative system or laws of sharing a taxpayer's tax information with other foreign countries.² Among the many models, the most influential two are: (1) the Foreign Account Tax Compliance Act ("FATCA"), which was developed by the United States; and (2) the Common Reporting Standard ("CRS"), which was developed by Organization for Economic Co-operation and Development ("OECD").

The FATCA is influential because it requires the resources of other countries and imposes on other countries a reporting obligation under the FATCA Intergovernmental Agreements ("IGA").³ Due to the differing U.S. taxation system with other countries,⁴ as well as the other countries' unfamiliarity with the U.S. tax code, the enforcement of the FATCA has been heavily challenged.⁵ The parties bearing the greatest

¹ See EY Global Desk, *Australia Announces Project For Voluntary Disclosure of Offshore Income*, 25 J. INT'L TAX'N 05 (2014), [http://www.ey.com/Publication/vwLUAssets/Australia_announces_Project_DO_IT_for_voluntary_disclosure_of_offshore_income/\\$FILE/2014G_CM4549_AU%20announces%20Project%20DO%20IT%20for%20voluntary%20disclosure%20of%20offshore%20income.pdf](http://www.ey.com/Publication/vwLUAssets/Australia_announces_Project_DO_IT_for_voluntary_disclosure_of_offshore_income/$FILE/2014G_CM4549_AU%20announces%20Project%20DO%20IT%20for%20voluntary%20disclosure%20of%20offshore%20income.pdf).

² See, e.g., Bruce Zagaris, *G5 Countries Agree To Exchange Beneficial Ownership Information And G20 Mandates the OECD To Develop Criteria To Identify Non-Cooperative Countries By July*, 32 No. 4 INT'L ENFORCEMENT L. REP. 122 (2016).

³ See U.S. DEP'T OF TREAS., *Foreign Account Tax Compliance Act*, <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Feb. 22, 2017) ("Following the enactment of FATCA, Treasury published the Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA.").

⁴ For example, [t]he United States uses a worldwide tax approach, under which U.S.-headquartered global companies are subject to U.S. tax on all their income, regardless of where it is earned. In contrast, most other countries today use a territorial tax approach. Under a territorial approach, companies are subject to tax in their home countries on their home-country income and generally are not subject to home-country tax on business income earned abroad.

Barbara Angus, Tom Neubig, Eric Solomon & Mark Weinberger, *The U.S. International Tax System at a Crossroads*, 30 NW. J. INT'L L. & BUS. 517, 529 (2010).

⁵ See, e.g., *Crawford v. United States Dept. of the Treasury*, 2015 WL 5697552 at *1 (S.D.

burden are the foreign financial institutions (“FFIs”)⁶, as they have to acquire additional information to fulfill the reporting requirements under the FATCA.⁷

After the enforcement of the FATCA, in response to the G20⁸ request, in July 2014, the OECD developed the CRS, which “calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions” annually.⁹ As a result, the burden on FFIs becomes heavier. On November 16, 2015, the Internal Revenue Service (the “IRS”)¹⁰ held a roundtable meeting with industries, seeking their suggestions on how to improve the enforcement of the FATCA.¹¹ One of the solutions proposed by industries was to urge the IRS to integrate the FATCA compliance system into the CRS compliance system.¹²

Although it appears more efficient for financial institutions to comply with only one standard or set of rules, this Note will argue that integrating the FATCA with the CRS may not be a good solution to reduce the compliance burdens of FFIs. As the FATCA and the CRS both have their pros and cons, the solution proposed by this Note would be postponing the enforcement of the CRS while modifying the FATCA. The benefit of postponing the CRS is to smooth its enforcement in the future, because the CRS can make certain adjustments beforehand, by learning about the ramifications of the enforcement of the FATCA. The FATCA should be modified by removing the withholding tax obligation imposed on the FFIs, as it is unnecessary and unfair to ask foreign entities to bear substantial cost and risk of penalty to collect tax payments for the benefit of the U.S.. Furthermore, it is suggested that the IRS simply the enforcement of the FATCA by modifying the language of the FATCA IGA.

Ohio, W. Div. Sept. 29, 2015) (challenging the validity of IGAs with some countries, the reporting requirements for FFIs and the withholding obligations imposed by FATCA).

⁶ See Patrick J. McCormick, *FATCA and the New Frontier in Offshore Reporting Enforcement*, 95 PRAC. TAX STRATEGIES 153, 153 (2015) (“Rather than further targeting individuals, FATCA primarily focuses on the foreign financial institutions where accounts are held.”).

⁷ See 26 U.S.C. §1471 (b)(c) (2010).

⁸ The members of G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, the United States, and the European Union (EU).

⁹ OECD, <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (last visited Oct. 30, 2016).

¹⁰ IRS, “The IRS is the U.S. government agency responsible for tax collection and tax law enforcement.” <https://www.irs.gov/>.

¹¹ See IRS, *FATCA Roundtable, Monday, November 16, 2015, Industry Concerns and Suggestions* (2015) <https://www.irs.gov/pub/fatca/irsfatcaroundtable.pdf>.

¹² See *id.* at 5. (“Industry would prefer to view CRS and FATCA as one standard, rather than two different standards. Harmonizing FATCA with CRS would help reduce industry’s burden with implementation and compliance.”).

First, this Note will briefly discuss the background of the FATCA and the CRS. Then, it will compare the integration of the FATCA and the CRS with that of International Financial Reporting Standards (“IFRS”),¹³ and Taiwan’s General Accepted Accounting Principles (“GAAP”).¹⁴ After the comparison, this Note will analyze the potential impacts of the integration on Taiwanese financial institutions and the outcome of such integration in Taiwan. This Note will also evaluate industries’ arguments for the integration in the November 16, 2015 proposal from the perspective of Taiwanese financial institutions. Finally, this Note will propose few solutions which this Note considers more beneficial to those financial institutions in the similar situation with Taiwanese financial institutions.

I. BACKGROUND OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

Because the United States taxes its citizens and tax residents¹⁵ (collectively “U.S. taxpayers”) on their worldwide income,¹⁶ tax information about the foreign income of U.S. tax payers is crucial for the purpose of tax collection. In 2010, in order to “improve compliance with tax laws by U.S. taxpayers holding foreign accounts,”¹⁷ Congress passed and President Obama signed the Federal Account Tax Compliance Act¹⁸ by adding it to the Hiring Incentives to Restore Employment Act of 2010¹⁹ and inserting “Chapter Four – Taxes To Enforce Reporting on Certain Foreign Accounts” after Chapter Three²⁰

¹³ IFRS was developed by International Accounting Standards Board (“IASB”), the independent standard-setting body of the IFRS Foundation. As of Sept. 2015, “116 jurisdictions require IFRS for all or most domestic publicly accountable entities.” IFRS, *The Global Reach of IFRS is Expanding—Our Latest Analysis*, <http://www.ifrs.org/Features/Pages/Global-reach-of-IFRS-is-expanding.aspx> (last visited Oct. 30, 2016). However, the U.S. has not adopted IFRS. See *id.*

¹⁴ Before adopting IFRS in 2012, Taiwan GAAP had a similar structure with the U.S. GAAP.

¹⁵ “The tax laws of the United States refer only to [resident] and [nonresident aliens]” IRS, *Introduction to Residency Under U.S. Tax Law*, <https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-u-s-tax-law> (last visited Oct. 30, 2016). And, “[i]n general, the controlling principle is that resident aliens are taxed in the same manner as U.S. citizens on their worldwide income.” *Id.*

¹⁶ Robert W. Wood, *FATCA’s Perfect Storm For Offshore Accounts*, 87-APR N.Y. ST. B.J. 44, 44 (2015).

¹⁷ *Crawford*, 2015 WL 5697552 at *1; Foreign Account Tax Compliance Act: A Legislative History of Public Law, Issues 111-147.

¹⁸ See *Crawford*, 2015 WL 5697552 at *1.

¹⁹ Pub. L. 111-147 (H.R. 2847) chapter 4 – Taxes to Enforce Reporting (sections 1471 through 1474) to Subtitle A of the Code, IRS, Revised Timeline and Other Guidance Regarding the Implementation of FATCA, Notice 2013-43, 2 (2013), <https://www.irs.gov/pub/irs-drop/n-13-43.pdf> (last visited Oct. 30, 2016).

²⁰ The title of Chapter Three is “26 U.S. Code Chapter 3 - WITHHOLDING OF TAX ON

of the Internal Revenue Code of 1986.²¹ The FATCA became effective on March 18, 2010 and includes Sections 1471, 1472, 1473 and 1474. Section 1471 governs “withholdable payments to foreign financial institutions”; Section 1472 governs “withholdable payments to other foreign entities”; Section 1473 provides “definitions”; and Section 1474 provides “special rules.”²²

Significant compliance obligations of FFIs are provided by §1471. Under §1471(b)(1), FFIs²³ are required “to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest”²⁴ if “an agreement is in effect between [FFIs] and the Secretary under which [FFIs agree].”²⁵ As a result, FFIs implement the FATCA through the agreement- the FATCA IGA-²⁶which has two models: Model 1 and Model 2.²⁷ Under Model 1, FFIs “would satisfy their chapter 4 requirements by reporting information about U.S. accounts to their respective tax authorities, followed by the automatic exchange of that information on a government-to-government basis with the United States;”²⁸ under Model 2, FFIs “report specified information directly to the IRS . . . supplemented by government-to-government exchange of information on request.”²⁹

Under the FATCA, §1471(b) has imposed five major obligations on FFIs to fulfill the reporting requirement. These obligations include: (1) obtaining information of each holder of each account maintained by FFIs;³⁰ (2) determining which accounts are “United States accounts” (U.S. accounts);³¹ (3) complying with the due diligence process required by the Secretary³² in respect to identification and verification of the U.S. accounts;³³ (4) reporting the information of the U.S.

NONRESIDENT ALIENS AND FOREIGN CORPORATIONS”.

²¹ IRS, “Federal tax law begins with the Internal Revenue Code (IRC), enacted by Congress in Title 26 of the United States Code (26 U.S.C.)” IRS, <https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance>.

²² See 124 Stat. 97; 124 Stat. 102; 124 Stat. 103; and 124 Stat. 104.

²³ See 26 U.S.C. §1471 (d)(4) (defining “foreign financial institution” as any financial institution which is a foreign entity).

²⁴ U.S. Dep’t of Treas., *supra* note 3.

²⁵ In general, “[t]he requirements of this subsection are met with respect to any foreign financial institution if an agreement is in effect between such institution and the Secretary under which such institution agrees.” 26 U.S.C. §1471 (b)(1).

²⁶ See U.S. Dep’t of Treas., *supra* note 3.

²⁷ See *id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 26 U.S.C §1471(b)(1)(A).

³¹ *Id.*

³² U.S. account means “any financial account which is held by one or more specified United States persons or United States owned foreign entities.” 26 U.S.C. §1471 (d)(1).

³³ 26 U.S.C. §1471(b)(1)(B).

³⁴ *Id.* at §1471(b)(1)(B) (“comply with such verification and due diligence procedures as the

accounts annually; and (5) deducting and withholding a tax of 30 percent of any passthru payment³⁵ made by FFIs to recalcitrant account holders³⁶ or to another FFI which does not comply with the FATCA.³⁷ In addition to these obligations, the Secretary reserves the discretion to terminate the agreement entered between the Secretary and a FFI if the Secretary determines that the FFI fails to comply with such agreement.³⁸ Furthermore, if a FFI fails to withhold or deduct the tax, it is liable to the tax and is “indemnified against the claims and demands of any person for the amount of any payments made.”³⁹

Although effective on March 18, 2010, “FATCA finally took effect on July 1, 2014.”⁴⁰ The U.S. Treasury Department (the “Treasury”) and the IRS delayed the effective dates several times to allow FFIs to be more prepared to comply with the FATCA and to allow the Treasury and the IRS to finalize forms and regulations for the implementation of the FATCA.⁴¹ Meanwhile, prior to July 1, 2014, the Treasury negotiated IGAs with numerous countries.⁴² “[A]lthough FATCA took effect July 1, 2014, under the transition rules certain due diligence, reporting and withholding requirements [would] not take effect until 2015 or 2016.”⁴³ The “Treasury and the IRS . . . determined that because Chapter 4 create[d] the need for significant modifications to the information management systems of FFIs, withholding agents, and the IRS, it [was] reasonable for [the] regulations to provide for a phased implementation of the various provisions of Chapter 4.”⁴⁴ “The final regulations provided for a phased implementation of the requirements of the FATCA, beginning on January 1, 2014, and continuing through 2017.”⁴⁵

During the implementation phase, there were “challenges identified relat[ing] to the compliance with [the FATCA].”⁴⁶ Those

Secretary may require with respect to the identification of United States accounts.”).

³⁵ Pass thru payment refers to “any withholdable payment or other payment to the extent attributable to a withholdable payment.” 26 U.S.C §1471(d)(7).

³⁶ Recalcitrant account holder means any account holder which “fails to comply with reasonable request “for the account information or fails to provide a waiver of complying with the FATCA. See 226 U.S.C §1471(d)(6).

³⁷ 26 U.S.C. §1471(b)(1)(D)(i).

³⁸ *Id.* at §1471(b)(1)(F)

³⁹ 28 U.S.C. §1474(a) (2012).

⁴⁰ Brian D. Christiansen, Pamela Lawrence Endreny & Roseann M. Cutrone, *FATCA Finally Takes Effect, Subject to Transition Rules*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 1 (Jan. 2015), <https://www.skadden.com/-/media/files/publications/2015/01/fatcafinallytakeseffectsubjecttotransitionrules.pdf>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ I.R.S. Notice 2011-53, 2011-32 I.R.B. 124.

⁴⁵ I.R.S. Notice 2013-43, 2013-31 I.R.B. 113.

⁴⁶ I.R.S. Notice 2011-53, *supra* note 44, at 124.

difficulties included: (1) the complex new IRS forms;⁴⁷ (2) unclear aspects of the interaction between the Treasury regulations and the IGAs;⁴⁸ (3) the uncertainty about whether the law in the IGA enacted by individual jurisdiction can be consistent with the Treasury regulation;⁴⁹ (4) coordination with a number of foreign governments;⁵⁰ and (5) interpretations in different jurisdictions of the Treasury regulations.⁵¹

The implementation is especially challenging to FFIs.⁵² The FATCA requires FFIs to adopt “new protocols apart from the know your customer and anti-money laundering

procedures and other locally-mandated protocols that FFIs currently utilize in vetting new account holders and customers.”⁵³ As a result, FFIs need to develop additional “internal procedures and information technology systems to transition into this new reporting and compliance system regime.”⁵⁴ Developing additional internal procedures and systems requires “knowledge of the IRS rules[,] . . . a significant lead time to draft new procedures and software[,] and educating personnel in these new procedures.”⁵⁵ Therefore, in order to fully comply with the FATCA, FFIs need to spend “an enormous expenditure of resources and funds, particularly for FFIs with a large customer base.”⁵⁶ “For smaller FFIs, the costs associated with complying with the FATCA may not be commensurate with the benefits derived from compliance and these entities may opt not to comply.”⁵⁷

Moreover, FFIs face a difficulty in achieving the FATCA compliance by providing authorities with accurate client’s account information while protecting client privacy.⁵⁸ “Accurate reporting hinges on a detailed understanding of the institution’s customers, a very real challenge for many financial institutions”⁵⁹ because “[c]lient information often resides on multiple IT systems, with name and address in one place and information on various accounts scattered

⁴⁷ See Christiansen et al., *supra* note 40, at 2.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See I.R.S. Notice 2011-53, *supra* note 44, at 124. (“[A] number of stakeholders have noted that complying with certain provisions may require coordination with a number of foreign governments.”).

⁵¹ See Christiansen et al., *supra* note 40, at 2. (“[I]nterpretations in different jurisdictions that have not yet been put into place but may ultimately differ from the Treasury regulations.”).

⁵² *The Foreign Account Tax Compliance Act (FATCA)*, DLA PIPER 3, <http://files.dlapiper.com/files/Uploads/Documents/FATCA-Alert.pdf> (last visited Oct. 30, 2016).

⁵³ *Id.*

⁵⁴ *Id.* at 1-2.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Denise Hintzke, *1 Year Later: FATCA Reporting Challenges and Opportunities*, 79 TAX NOTES INT’L 65, 66 (2015).

⁵⁹ *Id.*

elsewhere.”⁶⁰

Because of these difficulties, the “Treasury and the IRS have determined that because Chapter 4 creates the need for significant modifications to the information management systems of FFIs, withholding agents, and the IRS, it is reasonable for regulations to provide for a phased implementation of the various provisions of Chapter 4.”⁶¹ “The final regulations provided for a phased implementation of the requirements of the FATCA, beginning on January 1, 2014, and continuing through 2017.”⁶²

II. BACKGROUND OF THE COMMON REPORTING STANDARD

With the goal to deter tax evasion, in June 2013, “a summit of G8 leaders committed to the automatic exchange of [individual tax payer’s account information].”⁶³ In September of 2013, “the G20 leaders endorsed the OECD’s proposal for a global standard.”⁶⁴ On February 13, 2014, the OECD and G20 countries “released a proposed global standard that would enable jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.”⁶⁵ In response to the G20 request in the summit, on July 15, 2014, the OECD Council developed and approved the CRS.⁶⁶ On April 4, 2016, fifty-three jurisdictions have “committed to [the] first [information] exchange [set to take place] in 2017”⁶⁷ and “over 100 jurisdictions having committed to exchanging information with each other under the CRS.”⁶⁸ “Notably, the United States is not a CRS signatory and has not indicated that it will become one in the foreseeable future.”⁶⁹

The CRS has four key parts: (1) a model Competent Authority Agreement (“CAA”) which provides “the international legal framework

⁶⁰ *Id.*

⁶¹ See I.R.S. Notice 2011-53, *supra* note 44, at 124.

⁶² See I.R.S. Notice 2013-43, *supra* note 45, at 113.

⁶³ MARNIN J. MICHAELS, U.S. INT’L ESTATE PLANNING ¶ 22.13 (2016), Westlaw WGL-INTLEP.

⁶⁴ *Id.*

⁶⁵ *Id.*; see generally Common Reporting Standard (CRS), ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (last visited Oct. 30, 2016).

⁶⁶ See Org. for Econ. Co-Operation and Dev., *supra* note 65.

⁶⁷ CRS by Jurisdiction, OECD, <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/#d.en.345489> (last visited Feb. 22, 2017).

⁶⁸ Int’l Framework for the CRS, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/> (last visited Feb. 28, 2018).

⁶⁹ Richard LeVine, Aaron Schumacher & Shudan Zhou, *FATCA and the Common Reporting Standard: A Comparison*, 27 J. INT TAX’N 43 (2016).

for the automatic exchange of CRS information;”⁷⁰ (2) the CRS; (3) the Commentaries on the CAA and the CRS; and (4) the CRS XML Schema User Guide.

“There are four core requirements to implement CRS . . . in any order:”⁷¹ (1) “translating the reporting and due diligence rules into domestic law;”⁷² (2) “selecting a legal basis for the automatic exchange of information;”⁷³ (3) “putting in place the necessary administrative and IT infrastructure;” and (4) “protecting confidentiality and safeguarding data.”⁷⁴ Under the first requirement, “[l]egislation and guidance incorporating CRS into domestic law can align with existing legislation implementing a FATCA intergovernmental agreement (IGA) and existing [CRS] guidance.”⁷⁵ Under the second requirement, the legal basis means “a legal instrument necessary to supply . . . the exchanges of information while also affording safeguards and confidentiality of exchanged information.”⁷⁶ The major legal document⁷⁷ regarding the exchange of information is a Multilateral Competent Authority Agreement (“CRS MCAA”) under Article 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the “Multilateral Convention”).⁷⁸ The CRS MCAA provides basis for exchange relationships between jurisdictions⁷⁹ and “specifies the details of what information will be exchanged and when.”⁸⁰ Also, the CRS

⁷⁰ *What is the CRS?*, OECD, <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (last visited Oct. 18, 2016).

⁷¹ Elliott Murray, Rodney Read, Cecilia Hassan, Paul DePasquale, Joshua Odintz & Lyubomir Georgiev, *Automatic Exchange: OECD CRS Implementation*, BAKER & MCKENZIE LLP (Nov. 29, 2018), [https://uk.practicallaw.thomsonreuters.com/w-003-8808?_lrTS=20170423032804723&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-003-8808?_lrTS=20170423032804723&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Int’l Framework for the CRS*, *supra* note 68. “Jurisdictions may alternatively rely on a bilateral agreement, such as a double tax treaty or a tax information exchange agreement. In addition, certain CRS exchanges will take place on the basis of the relevant EU Directive, agreements between the EU and third countries and bilateral agreements, such as the UK-CDOT agreements.”

⁷⁸ *Convention on Mutual Administrative Assistance in Tax Matters*, OECD, <http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>, (last visited Feb. 28, 2018) (“The Convention on Mutual Administrative Assistance in Tax Matters (“the Convention”) was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The Convention is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance, a top priority for all countries.”).

⁷⁹ See *The CRS Multilateral Competent Authority Agreement (MCAA)*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/> (last visited Feb. 28, 2018).

⁸⁰ *Id.*

MCAA is a “multilateral framework agreement that provides a standardized . . . mechanism to facilitate the automatic exchange of information in accordance with the Standard for Automatic Exchange of Financial Information in Tax Matters (‘the Standard’).”⁸¹ “It avoids the need for several bilateral agreements to be concluded.”⁸²

“The CRS Framework was specifically modeled on the FATCA IGAs, and there are consequently many similarities in the structure and definitions used in the CRS framework and the FATCA IGAs. However, there are several important differences as well.”⁸³

III. COMPARISON BETWEEN THE FATCA AND THE CRS

A. Similarities of the FATCA and the CRS

The CRS is similar to the FATCA in several aspects. First, the CRS obligates the FFIs to identify “certain accounts held by . . . ‘Reportable Persons.’”⁸⁴ And unless an exception applies, FFIs must report the account information “to the domestic tax authorities for automatic transmission to the jurisdiction of residence of the Reportable Person.”⁸⁵ Second, the “CRS uses similar rules for CRS signatories to identify their taxpayers’ ‘financial assets’ held in ‘financial accounts’ outside their home countries.”⁸⁶ Third, the CRS and the FATCA also share the same goal: “to identify virtually all extraterritorial assets other than active business assets to build a factual basis to uncover tax fraud and tax evasion.”⁸⁷ Fourth, the CRS is similar to the FATCA as it incorporates the due diligence and reporting requirements under the FATCA framework.⁸⁸ Lastly, “[t]he [CRS MCAA] is roughly equivalent to a FATCA IGA in that it ‘links’ [the CRS] and the ‘legal

⁸¹ See *What is the Multilateral Competent Authority Agreement*, OECD, <http://www.oecd.org/tax/transparency/technical-assistance/aeoi/whatisthemultilateralcompetentauthorityagreement.htm> (last visited Feb. 28, 2018).

⁸² *Id.*

⁸³ Michaels, *supra* note 63 at 3; see also Christiansen, *supra* note 40.

⁸⁴ *Standard for Automatic Exchange of Financial Account Information–Common Reporting Standard*, OECD, at 191, <http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm> (last visited Feb. 22, 2017) (“The term . . . ‘Reportable Account’ means a Financial Account that is maintained by a [Jurisdiction B] Reporting Financial Institution and held by one or more . . . persons that are Reportable Persons.”).

⁸⁵ Michaels, *supra* note 63, at 4.

⁸⁶ LeVine, Schumacher & Zhou, *supra* note 69, at 44.

⁸⁷ *Id.*

⁸⁸ *Id.* (“[The CRS] provides the biggest amount of the due diligence and reporting rules under the CRS framework.”).

basis' for exchange and provides the modalities of the exchange to ensure the appropriate flows of the information.”⁸⁹

B. Differences between the FATCA and the CRS

There are few differences between the FATCA and the CRS regarding the implementation. First, while the definition of tax residence⁹⁰ in the FATCA complies with the one of the U.S. tax code, such definition in the CRS depends on each jurisdiction's “rules governing tax residence,”⁹¹ which are promulgated by each jurisdiction and vary from jurisdiction to jurisdiction. Therefore, in order to exchange information with the CRS participating jurisdictions, financial institutions of each jurisdiction has to understand the definition of tax residence of multiple countries in order to determine whether an individual is the Reportable Person under the CRS.

Second, due to the different scope of “taxable income” of a U.S. taxpayer and that of taxpayers in other countries, the tax collecting mechanisms under the FATCA and the CRS vary. Because “the U.S. is the only industrialized country that imposes taxation on its citizens' worldwide income,”⁹² under the FATCA, the IRS requests to collect information about U.S. taxpayers' non-U.S. assets and income.⁹³ Thus, the U.S. “has enacted robust mechanisms for collecting information and assessing penalties based on non-reporting of offshore assets and income.”⁹⁴ However, many CRS participants “generally do not tax their tax residents on their [foreign source] income”⁹⁵ and therefore, CRS signatories may request “assistance from other signatories to seize tax residents' overseas assets identified through CRS to satisfy domestic tax liabilities. This in turn may beg the question of whether there is an effective global foreign tax judgment enforcement mechanism in place . . .”⁹⁶

Third, unlike FATCA, which requires FFIs to report and withhold 30% of taxpayers' income, the CRS requires no withholding obligation from FFIs as all signatories agree to incorporate the CRS provisions into

⁸⁹ *Id.*

⁹⁰ Tax residents under the U.S. law include a United States person, *see* I.R.C. §7701(a)(30), and alien resident, *see* I.R.C. §7701(b).

⁹¹ *Rules Governing Tax Residence*, OECD, www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/#d.en.347760 (last visited Feb. 28, 2018).

⁹² LeVine, Schumacher & Zhou, *supra*, note 69, at 44; *see also* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 1 (Jan. 2016).

⁹³ *See* LeVine, Schumacher & Zhou, *supra* note 69, at 44.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

their domestic laws.⁹⁷ Furthermore, while the FATCA imposes penalty on FFIs for failure to comply, the real penalty for ensuring entities' CRS compliance is each jurisdiction's domestic sanction, which is promulgated by each local jurisdiction.⁹⁸

Fourth, financial institutions are required to identify more types of account holders under the CRS. While FATCA offers *de minimis* exceptions for low value accounts, the CRS only offers this for Preexisting Entity Accounts⁹⁹ of equal to or less than US\$250,000.¹⁰⁰ And the CRS "has no minimum threshold for individual accounts."¹⁰¹ Therefore, the "reportable accounts" under the CRS are more than those under FATCA.¹⁰² Moreover, under FATCA, FFIs are responsible only for accounts held by or for U.S. citizens, whereas under the CRS, FFIs must identify persons resident in any participating jurisdiction.¹⁰³ Besides, FATCA consistently seeks to identify U.S. taxpayers' beneficial ownership in non-U.S. passive assets, the idea being that tax liabilities are attached to income derived from "ownership,"¹⁰⁴ whereas, the way that the CRS rules work shows a clear policy focus on "control", apart from ownership.¹⁰⁵ Thus, for financial institutions, the CRS effectively views trust fiduciaries, (who otherwise would be controlling persons if the underlying entity was classified as a passive non-financial entities,) as accountholders.¹⁰⁶

Fifth, FATCA is a fundamentally bilateral regime . . . with each of its partner countries and they exchange information bilaterally,¹⁰⁷ whereas the CRS is a mix of bilateral and multilateral regimes in which dozens of agreements among CRS signatories are expected,¹⁰⁸ and each pair of signatories must notify each other before exchange of information begins.¹⁰⁹ As a result, who will act as the police in CRS

⁹⁷ Michaels, *supra*, note 63, at 3.

⁹⁸ See LeVine, Schumacher & Zhou, *supra* note 69, at 46 ("[T]he real penalty for FATCA violations became local jurisdictions' civil or criminal sanctions.").

⁹⁹ Tax Alert, *OECD Common Reporting Standard: A global FATCA-like regime*, Ernst and Young (February 19, 2014), [https://webforms.ey.com/Publication/vwLUAssets/EY-Tax-Alert-19-February-2014-Eng/\\$FILE/EY-Tax-Alert-19-February-2014-Eng.pdf](https://webforms.ey.com/Publication/vwLUAssets/EY-Tax-Alert-19-February-2014-Eng/$FILE/EY-Tax-Alert-19-February-2014-Eng.pdf).

¹⁰⁰ *Id.*

¹⁰¹ Stanley Foodman, *U.S. non-participation in the Common Reporting Standard (CRS) will be a challenge*, Paragon G.R.C. Solutions (Feb. 13, 2016), <http://www.paragongrc.com/single-post/2016/07/13/US-nonparticipation-in-the-Common-Reporting-Standard-CRS-will-be-a-challenge>.

¹⁰² *Id.*

¹⁰³ Michaels, *supra* note 63, at 4-5.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; see also Foodman, *supra* note 101.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

enforcement within each CRS signatory remains uncertain.¹¹⁰

C. *Why The Two Systems Can Not Initially Integrate With Each Other*

One major reason why FATCA and the CRS remain two separate systems is that the U.S. decided not to join the CRS.¹¹¹ The U.S. further explained that “[t]he rationale behind [its] decision is that FATCA . . . fulfills the needs of the U.S.”¹¹² Thus, the remaining question is why FATCA can fulfill the needs of the U.S. but the CRS cannot?

Here, the answer could be that the U.S. wants to fulfill only its own needs rather than the needs of other countries. FATCA, not the CRS, was specifically designed for the sole benefits of the U.S. because FATCA has imposed the information-disclosing obligations on other countries except for the U.S. itself.¹¹³ If the U.S. joins the CRS, it must share with other CRS participants the tax information of non-US citizens who have U.S. accounts. As a result, the new obligation imposed by the CRS would increase costs and even the risks of data privacy on the U.S.

Furthermore, through FATCA, the U.S. can request FFIs to withhold U.S. taxpayers’ income, thereby shifting the burden of collecting taxes to FFIs. However, the CRS only requests the exchange of information and doesn’t deal with tax collections. Also, if the U.S. joins the CRS, it must make additional efforts to figure out how to reconcile the differences between FATCA and the CRS.

Currently, another difficulty of integration results from the fact that the CRS is not mature enough yet.¹¹⁴ The immaturity comes from some uncertainties of the system. For example, under the CRS, “[e]ach participating country enacts its own laws and issues its own rules, regulations, and guidance for implementation and potentially imposing

¹¹⁰ *Id.*

¹¹¹ See *Financial Transparency, The biggest loophole of all - Having launched and led the battle against offshore tax evasion, America is now part of the problem*, *The Economist*, (Feb 20, 2016), <https://www.economist.com/news/international/21693219-having-launched-and-led-battle-against-offshore-tax-evasion-america-now-part>.

¹¹² Foodman, *supra*, note 101; see also Helen Burggraf, *US and OECD Showdown Seen Looming over CRS*, *International Investment*, <http://www.internationalinvestment.net/regions/us-and-oecd-showdown-seen-looming-over-crs/> (last visited Nov. 2, 2016).

¹¹³ *Id.* (“the US would be in the somewhat ironic position of being able to become a tax haven . . . by resisting new global disclosure standards . . . [is] becoming the go-to place to stash foreign wealth.”).

¹¹⁴ See Murray et. al., *supra* note 71. (“Although the Common Reporting Standard Implementation Handbook provides clarification that should increase the efficiency and consistency of CRS implementation, it also shows that many uncertainties remain.”).

additional requirements in the process.”¹¹⁵ “As a result, the CRS is unlikely to be a truly common standard across all countries.”¹¹⁶ Although under the CRS, participating FFIs can opt for applying the FATCA’s due diligence procedures and reporting requirements,¹¹⁷ it is still uncertain which parties would follow FATCA and which parties would enact their own laws.¹¹⁸ If participants choose to enact their own rules, it can create more complex problems and disputes with the implementation of the CRS due to the differences in interpreting rules of each country.

As a forerunner, though not perfectly implemented, FATCA at least has been enforced for two years prior to the CRS and the implementation has been gradually improved.¹¹⁹ However, the framework of the CRS is still loose and the success of implementation depends on the co-operation of more parties, which makes the U.S. much less likely to favor the integration and puts the CRS itself in a more uncertain situation.

IV. CASE STUDY

A. *The FATCA and the CRS in Taiwan*

1. The FATCA in Taiwan

i. Difficulties

The IGA entered between Taiwan and the IRS was effective on June 30, 2014¹²⁰ and FFIs’ reporting date was March 31, 2016.¹²¹ It was estimated that over 4,000 to 5,000 accounts would be affected.¹²² On

¹¹⁵ See Foodman, *supra* note 101.

¹¹⁶ *Id.*

¹¹⁷ See Murray et al., *supra* note 71.

¹¹⁸ See Foodman, *supra* note 101.

¹¹⁹ See Michael Cohn, *IRS Makes Progress on FATCA Implementation*, accounting Today, <http://www.accountingtoday.com/news/tax-practice/irs-makes-progress-on-fatca-implementation-76076-1.html> (last visited Nov. 3, 2016) (“[the Treasury Inspector General for Tax Administration] (TIGTA) found that the IRS has taken steps to provide information to affected stakeholders that explains the FATCA requirements and expectations.”).

¹²⁰ U.S. Dep’t of the Treas., <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Feb. 22, 2017). “Consistent with the Taiwan Relations Act, the parties to the agreement would be the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States.”

¹²¹ As Taiwan is Model 2 IGA jurisdiction, the reporting date is March 31, 2016. See *Summary of FATCA Timelines*, IRS, <https://www.irs.gov/businesses/corporations/summary-of-fatca-timelines> (last visited Feb. 22, 2017).

¹²² See Ching-Chun Wu & S.C. Chang, *More than 4,000 Taiwan bank accounts affected by FATCA*, FOCUS TAIWAN (Nov. 13, 2014, 8:57:08 PM),

June 3, 2011, The Bankers Association of the Republic of China¹²³ (“BAROC”) submitted comments to the IRS, addressing FATCA’s implementation problems specific to Taiwan.¹²⁴ These problems are primarily related to the “determination of U.S. accounts,”¹²⁵ “[d]efinitions in connection with ‘private banking’,”¹²⁶ “data quality and security,”¹²⁷ and “[p]rocess, administration and reporting matters.”¹²⁸ Besides, BAROC also asked for “subsidies from implementation of [the] FATCA,”¹²⁹ as “[p]assage of [the] FATCA has posed a huge operational and system challenges to financial institutions.”¹³⁰

The first issue is that many accounts in Taiwan that satisfy the definition of “high net worth accounts” under the FATCA are not the accounts with high tax avoidance risk targeted by the IRS.¹³¹ In determining U.S. accounts, the FATCA requires disclosure only if the deposit of a U.S. account exceeds \$50,000.¹³² As the “Taiwanese prefer to [deposit] money in [a] bank . . . they would easily fall above the category of US \$500,000.”¹³³ “Taiwanese FFIs would have to perform due diligence on these accounts which in fact, may not be on real high net worth.”¹³⁴

Furthermore, “Notice 2011-34¹³⁵ provides a higher level of diligence for . . . ‘private banking’ accounts and provides for a shorter timeline to complete the identification of accounts with US indicia.”¹³⁶ However, the definition of “private banking” in the U.S. is different from that in Taiwan and such discrepancy also raises the issue of overly

<http://focustaiwan.tw/news/aeco/201411130025.aspx>;

<http://www.epochtimes.com/b5/16/12/28/n8640831.htm>.

¹²³ “The BAROC currently represents the interest of 84 members, including banks domiciled in Taiwan, Taiwan offices of multinational banking groups and also financial holding companies.” Notices 2010-60, 2011-34 Chang, 2011 WL 7446620 (June 3, 2011).

¹²⁴ See Notices 2010-60, 2011-34 Chang, 2011 WL 7446620 (June 3, 2011).

¹²⁵ *Id.* at 2.

¹²⁶ *Id.* at 3.

¹²⁷ *Id.* at 4.

¹²⁸ *Id.*

¹²⁹ *Id.* at 6-7.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Agreement between the American Institute in Taiwan and the Taiwan Economic and Cultural Representative Office in the United States for Cooperation to Facilitate the Implementation of FATCA at

Cooperation to Facilitate the Implementation of FATCA, ANNEX I-2,A.1 <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-TECRO-12-22-2016.pdf> (last visited Feb. 22, 2017).

¹³³ See Chang, *supra* note 124, at 2.

¹³⁴ *Id.* at 2 (“Analysis shows that there would be average 7,841 numbers of account holders falls above \$500,000 while 2,858 numbers of account holders falls above US\$1,000,000.”).

¹³⁵ Search Note 2011-34, https://www.irs.gov/irb/2011-19_IRB/ar09.html (last visited Nov. 7, 2016).

¹³⁶ *Id.* at 3.

high net worth accounts. For example, the typical structure of the “wealth management” business in Taiwan and in the U.S. is different.¹³⁷ In Taiwan, people with a smaller amount of money can open an account under the “wealth management” business.¹³⁸ So, “the threshold for recognizing accounts to be under wealth management in Taiwan is relatively low - accounts valued at . . . around US\$ 17,000,”¹³⁹ which “are . . . not the types of high net worth accounts thought of as private banking accounts.”¹⁴⁰

Moreover, the FATCA imposes additional burden on the Chief Compliance Officer (“CCO”) or equivalent officer of Taiwan financial institutions. In Taiwan, the CCOs are not obligated for the process of identifying U.S. accounts,¹⁴¹ but Notice 2011-34 requires that “the [CCO] or another equivalent-level officer of the FFI [] certify to the IRS when the FFI has completed the procedures . . . for its preexisting individual accounts.”¹⁴² As “Notice 2011-34 does not provide standards for determining whether the CCO has properly made the certification,”¹⁴³ the FATCA also subjects the CCOs to uncertain responsibilities.¹⁴⁴

The incompatibility of Taiwanese regulations and the FATCA also increases the cost of FFAs in Taiwan in order to accommodate the FATCA requirement. For example, under Notice 2011-34, “an FFI must ensure that all the written requests and responses related to the search are retained by the FFI for ten years;”¹⁴⁵ however, pursuant to the Taiwan Business Entity Accounting Act, “Taiwan document retention policies require records be retained for five years for accounting records.”¹⁴⁶ Therefore, “[t]en years could significantly increase

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 4.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Notice 2011-34, Section I.A.3, Internal Revenue Bulletin, IRS, https://www.irs.gov/irb/2011-19_IRB/ar09.html (last visited Feb. 22, 2017) (“[T]he responsible officer will be required to certify that, between the publication date of this notice and the effective date of the FFI’s FFI Agreement, FFI management personnel did not engage in any activity, or have any formal or informal policies and procedures in place, directing, encouraging, or assisting account holders with respect to strategies for avoiding identification of their accounts as U.S. accounts under the procedures described above.” And certifies that the responsible officer will further be required to certify that the FFI had written policies and procedures in place as of the effective date of the FFI’s FFI Agreement prohibiting its employees from advising U.S. account holders on how to avoid having their U.S. accounts identified.)

¹⁴⁵ See *id.*

¹⁴⁶ See Chang, *supra* note 124, at 4-5; see also Taiwan Business Entity Accounting Act Art. 38 (“All the accounting documents, except those which should be permanently kept or which are related to unsettled accounting events, must be kept for at least five years after the completion of annual closing procedures.”),

administrative costs for Taiwan FFIs.”¹⁴⁷

ii. Current Enforcement in Taiwan

In 2013, the final regulations of the FATCA released by the IRS raised the threshold for reportable accounts from \$500,000 to \$1,000,000,¹⁴⁸ thereby reducing the compliance burden of financial institutions in Taiwan. Furthermore, the final regulations granted an exemption to financial institutions with deposit businesses not exceeding \$175 million. This was especially favorable for Taiwan because local Taiwanese banks in relatively small scales have represented 84% of total financial institutions in Taiwan.¹⁴⁹

Although the IRS has raised the threshold for reportable U.S. accounts, the cost of implementing the FATCA is still very high. Currently, “Taiwan has created an interagency task force, including the [Taiwan Financial Supervisory Commission (“FSC”)], the [Ministry of Finance], and the Ministry of Justice and the Ministry of Economic Affairs to study compliance options under [the] FATCA.”¹⁵⁰ Additionally, most financial institutions are actively building their internal compliance systems.¹⁵¹ In Taiwan, 172 financial institutions have registered with the IRS.¹⁵² It was estimated in 2014, that in 2017, the FATCA would impact approximately 5,000¹⁵³ Taiwanese who are

<http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0080009> (last visited Nov. 7, 2016).

¹⁴⁷ See Chang, *supra* note 124, at 5.

¹⁴⁸ See *The road ahead: An in-depth analysis of the final FATCA regulations* at 38, Deloitte, https://www2.deloitte.com/content/dam/Deloitte/se/Documents/financial-services/FATCA_In-depth_Analysis_us_tax_130422.pdf (last visited Feb. 22, 2017); see also GenPro Consulting, Inc. http://www.genpro.com.tw/index_main.php?c3=56&l=290.

¹⁴⁹ As of Sep. 30, 2016, among 403 financial institutions, 339 are exempt from the FATCA. See Financial Supervisory Commission, Table 2- Number of Financial Institutions, BANKING BUREAU http://www.banking.gov.tw/ch/home.jsp?id=157&parentpath=0,4&mcustomize=bstatistics_view.jsp&sermo=201105120009.

¹⁵⁰ Oliver Chen, *Taiwan agrees to FATCA with U.S.*, CPA WORLDWIDE TAX SERVICE PC (June 9, 2016), <http://www.cpa-worldwidetax.com/blog1.php?id=14>.

¹⁵¹ *Id.*

¹⁵² *List of FATCA Status and GIIN of SITE*, SECURITIES INVESTMENT TRUST & CONSULTING ASSOCIATION OF THE R.O.C.,

http://www.sitca.org.tw/OPF/K0000/files/CWeb/%E8%AD%89%E5%88%B8%E6%8A%95%E8%B3%87%E4%BF%A1%E8%A8%97%E6%A5%AD%E8%88%87%E8%AD%89%E5%88%B8%E6%8A%95%E8%B3%87%E9%A1%A7%E5%95%8F%E6%A5%AD_FATCA%E8%A8%BB%E5%86%8A%E6%83%85%E5%BD%A2%E5%85%AC%E5%91%8A%E7%B6%B2%E7%AB%99%E5%BD%99%E6%95%B4%E8%A1%A8_%E7%B7%A8%E8%A3%BD%E6%97%A5%E6%9C%9F2014%E5%B9%B4%E6%9C%8816%E6%97%A5.pdf; see also *List of FATCA Status and GIIN of Securities Firms*, TAIWAN SECURITIES ASSOCIATION <http://www.csa.org.tw/downdoc/doc/協助宣導事項/證券業FATCA註冊情形統計彙整表>; see also *List of FATCA Status and GIIN of Banks*, THE BANKERS ASSOCIATION OF THE REPUBLIC OF CHINA, http://ba.org.tw/upload/LatestNews/e1ed196a-3272-40f4-a5fb-25f0c8bde422/FATCA註冊情形1040408_本銀總行.pdf.

¹⁵³ See *5,000 Taiwanese with a U.S. citizenship could be investigated under the FATCA*,

also U.S. tax residents. Assuming that each Taiwanese citizen who is also a U.S. tax resident opens one account, on average, each financial institution in Taiwan has the obligation to comply with the FATCA for around 25 accounts over \$1,000,000.¹⁵⁴ Assuming that each of these accounts can generate interest revenues of \$89,400 annually,¹⁵⁵ the revenues of 25 such accounts would be \$732,500.¹⁵⁶ However, for large financial institutions, the cost of complying with the FATCA, such as the cost of building up a system and training personnel, was estimated from one to ten million dollars.¹⁵⁷ Admittedly, it is arguable that the long-term benefits could exceed the initial cost. However, considering more and more Taiwanese people are renouncing their U.S. citizenship,¹⁵⁸ thereby reducing the account of U.S. citizens, revenues generated from fewer accounts may not cover the initial and on-going cost of complying with the FATCA.¹⁵⁹

For smaller banks subject to the FATCA, the situation could be worse. Their costs of obeying the FATCA can more substantially outnumber the benefits because the accounts over \$1,000,000 in these banks could be fewer than those in larger FFIs. And the cost of enforcing the FATCA may not be reduced as much by having less of such accounts.

Furthermore, the compliance of the FATCA could cause local Taiwan financial institutions to become less competitive with the U.S. franchised financial institutions in Taiwan. Unlike the U.S. franchised financial institutions in Taiwan, local Taiwanese financial institutions are lacking mature anti-money laundering systems¹⁶⁰ and the familiarity

WORLD JOURNAL, <https://www.worldjournal.com/4677500/article-%E6%8A%93%E8%82%A5%E5%92%96-5000%E7%BE%8E%E7%B1%8D%E5%8F%B0%E4%BA%BA%E6%81%90%E8%A2%AB%E6%9F%A5%E7%A8%85/>.

¹⁵⁴ *The 30% Penalty on the Failure to Withhold Is Going to be Crossed Out from the FATCA Regulations*, BUSINESS INTELLIGENCE MANAGEMENT CONSULTING INC., <http://www.biagent.com.tw/ocnews/20140410010.html>.

¹⁵⁵ $1,000,000 \times 8.94\% = \$ 89,400$.

¹⁵⁶ $\$732,500 = 25 \times \$1,000,000 \times 2.93\%$ (Taiwan Prime Lending Rate for December 2016), see *Taiwan Prime Lending Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/taiwan/bank-lending-rate>.

¹⁵⁷ Yin-Ju Ho (何殷如), *The Impact of the Implementation of the FATCA on Taiwanese Financial Institutions*, 39 (Jan. 16, 2013), [file:///Users//Downloads/%E5%AF%A6%E5%8B%99%E6%96%B0%E7%9F%A531-1%20\(1\).pdf](file:///Users//Downloads/%E5%AF%A6%E5%8B%99%E6%96%B0%E7%9F%A531-1%20(1).pdf).

¹⁵⁸ Robert W. Wood, *Record Numbers Renounce Their U.S. Citizenship*, FORBES (Feb. 6, 2016), <http://www.forbes.com/sites/robertwood/2016/02/06/record-numbers-renounce-their-u-s-citizenship/#2f5e6965a6e6>.

¹⁵⁹ Brian Garst, *Taiwanese Banks Pulling Billions Out Of US Over FATCA Legislation*, CENTER FOR FREEDOM AND PROSPERITY (Nov. 9, 2011), <http://freedomandprosperity.org/2011/blog/taiwanese-banks-pulling-billions-out-of-us-over-fatca-legislation/>.

¹⁶⁰ *How to Control Management Risks and Act Ahead under the Trend of International Anti-*

of the U.S. tax law.¹⁶¹ As some U.S. franchised banks may have greater knowledge about the FATCA and more resources to fund its implementation from their U.S. affiliates, Taiwanese local banks are facing a disadvantage of competing with U.S. banks in Taiwan when bearing higher cost of implementing the FATCA.

2. The CRS in Taiwan

Although Taiwan has not yet signed the multilateral competent authority agreement (“MCAA”),¹⁶² and is planning to adopt it in 2019,¹⁶³ Taiwanese financial institutions have already been affected by it.¹⁶⁴ As Taiwanese financial institutions have set up subsidiaries or branches in the countries that signed the MCAA, these subsidiaries and branches also have to comply with the CRS to provide required account information.¹⁶⁵ Furthermore, in the near future, although financial institutions have no withholding obligations under the CRS, more costs will be incurred from the increase in the reporting volumes caused by the increasing jurisdictions which join the CRS.¹⁶⁶ As a result, the CRS may require Taiwanese financial institutions to identify more “accounts” as a result of the increase in CRS participants. Because the definition of “accounts” under CRS will be determined by the domestic tax rule of each signatory country, the various definitions of the “accounts” will subject Taiwanese FFIs to uncertainty in regard with the enforcement and interpretation of the CRS.

Tax Avoidance, KPMG MONTHLY VOL. 177, 7 (Oct. 2016), <https://assets.kpmg.com/content/dam/kpmg/tw/pdf/2016/10/201610-kpmgmonthly.pdf>.

¹⁶¹ *Financial Institutions Have to Cautious in Response to the Newly Released FATCA Regulations*, PRICEWATERHOUSECOOPERS (Mar. 10, 2014), <http://www.pwc.tw/zh/news/press-release/press-20140310.html>.

¹⁶² *Activated Exchange Relationships For CRS Information*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>.

¹⁶³ Mark D. Orlic, *Taiwan publishes Draft CRS Regulation*, PRICEWATERHOUSECOOPERS (Aug. 11, 2017), <http://blogs.pwc.de/citt/2017/08/11/taiwan-publishes-draft-crs-regulation/>.

¹⁶⁴ Yu-Ping Kuo (郭雨萍) & Chia-Wen Li (李嘉雯), *The Impact of the CRS on Taiwanese Financial Institutions*, DELOITTE, <https://www2.deloitte.com/tw/tc/pages/tax/articles/newsletter16-03-40.html>.

¹⁶⁵ *Id.*

¹⁶⁶ Pascal Eber et al., *Common Reporting Standard A Work In Progress requiring high reactivity*, DELOITTE, <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/lu-common-reporting-standard.pdf>.

B. The Integration of Taiwan GAAP and the IFRS¹⁶⁷

In Taiwan, listed company and financial institutions started adopting IFRS to prepare financial reports in 2013.¹⁶⁸ The application of IFRS is different for a publicly traded company and a private company.¹⁶⁹ Currently, Taiwanese publicly traded companies can prepare their financial statements under IFRS as endorsed by the Taiwan Financial Supervisory Commission (“FSC”),¹⁷⁰ full-IFRS, or US GAAP. Furthermore, “[a]ll IFRS as issued by the International Accounting Standards Board¹⁷¹ (“IASB”) are translated into traditional Chinese by the Accounting Research and Development Foundation (“ARDF”).”¹⁷² “[T]ranslations are then reviewed by and the standards are endorsed by the FSC.”¹⁷³ However, a “reconciliation from full-IFRS or from US GAAP to IFRS is required to assist users of financial statements in performing comparisons and analyses.”¹⁷⁴

C. A Comparison Between the Implementations of the IFRS and the FATCA in Taiwanese Financial Institutions

Since 2013, Taiwanese financial institutions have adopted the IFRS standards in preparing their financial statements. During the transition from Taiwan GAAP to the IFRS, Taiwanese financial institutions are keeping abreast with the development of the IFRS. Therefore, the comparison between the adoption of IFRS and the FATCA is aimed at forecasting the possible consequences of the implementation of the FATCA in Taiwan.

1. Similarities between Taiwan’s Adoption of IFRS and that of the FATCA

For Taiwan, the adoption of IFRS and compliance with FATCA share some similarities. For example, because the U.S. decided not to

¹⁶⁷ *IFRS Application Around the World Jurisdictional Profile: Taiwan*, THE IFRS FOUNDATION (June 2016), <http://www.ifrs.org/Use-around-the-world/Documents/Jurisdiction-profiles/Taiwan-IFRS-Profile.pdf>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 3.

¹⁷⁰ *Introduction*, FINANCIAL SUPERVISORY COMMISSION REPUBLIC OF CHINA (TAIWAN), <http://www.fsc.gov.tw/en/home.jsp?id=1&parentpath=0>.

¹⁷¹ *About the IASB*, DELOITTE, <https://www.iasplus.com/en/resources/ifrsf/iasb-ifrs-ic/iasb>.

¹⁷² *Id.* at 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

adopt the IFRS, Taiwanese enterprises that want to do business in the U.S. must follow the U.S. GAAP, even though there is a global accounting principle, the IFRS, adopted by most of countries. Here, as to FATCA, Taiwanese financial institutions also must comply with the U.S. rules when a global tax information exchange system, the CRS, is being adopted by most countries, except for the U.S.

2. Differences between Taiwan's adoption of IFRS and the FATCA

There are many critical differences between Taiwan's adoption of IFRS and compliance with FATCA. First, the adoption of IFRS is not to implement a whole new system and therefore the cost is lower. Before adopting IFRS, Taiwan had already developed relatively mature accounting principles and most financial institutions had been preparing financial statements based on Taiwan GAAP for years. The additional cost incurred by adopting the IFRS include translation and issuance of Taiwan-IFRS, preparation of another set of financial statements pursuant to IFRS, and training expenses.¹⁷⁵ These are different from the costs of FATCA, which require Taiwan financial institutions to develop new information technology systems, design a compliance program, and educate and train staff to comply with U.S. law.¹⁷⁶

Second, the FATCA involves a much higher level of complexity than IFRS. As IFRS is a "principle based standard"¹⁷⁷ with minimum guidance, there is more flexibility for FSC Taiwan to set up rules that do not only satisfy the IFRS core objectives but also accommodate the needs and the unique attributes of Taiwanese financial institutions. As a result, misinterpretation or misunderstanding of IFRS could be reduced. However, to implement the FATCA, a rule-based Act with regulations promulgated by the Treasury, Taiwanese financial institutions must adapt to the rules, which could be more time-consuming because they have to solve the issue of interpreting and understanding the rules.

Third, the expected benefits of IFRS are different from those of the FATCA. By adopting IFRSs, local Taiwanese financial institutions can improve "their international image"¹⁷⁸ and enhance their global

¹⁷⁵ See Agreement, *supra* note 132, at 1.

¹⁷⁶ See PwC, <http://www.pwc.tw/zh/news/media/media-20130427.html> (last visited Nov. 22, 2016).

¹⁷⁷ David Tweedie, *IFRS and Taiwan –The Move to Global Accounting Standards* at 30, https://www.tpex.org.tw/storage/ifrs_download/David%20Tweedie_IFRS%20and%20Taiwan-The%20Move%20to%20Global%20Accounting%20Standards.pdf (last visited Feb. 23, 2017).

¹⁷⁸ *Roadmap toward IFRS Adoption in Taiwan*, ARDF, <http://www.ardf.org.tw/english/Roadmap%20toward%20IFRS%20Adoption%20in%20Taiwan-2009.pdf> (last visited, Nov. 19, 2016).

rankings.¹⁷⁹ When they issue foreign securities, they do not have to re-issue their financial statements pursuant to various standards. Therefore, “[f]or local companies with investments overseas, use of a single set of accounting standards will reduce the cost of account conversions and improve management efficiency.”¹⁸⁰ However, under the FATCA framework, compliance only satisfies the U.S. requirement. If other jurisdictions require an account information exchange, Taiwanese financial institutions must follow the rules of different jurisdictions. Furthermore, although under Model 2 IGA, which Taiwan signed with the IRS, the Taiwanese government can share Taiwanese accounts information with U.S. financial institutions,¹⁸¹ such reciprocal exchange of information primarily benefits Taiwanese tax authorities rather than Taiwanese financial institutions, which bear the highest cost to implement the FATCA.

Last, the risk of non-compliance with the FATCA is larger than the risk of not adopting the IFRS. Under Article 4 of the Model 2 IGA, “the U.S. Competent Authority may make an inquiry directly to a Reporting [FATCA Partner] Financial Institution where it has reason to believe that administrative errors or other minor errors may have led to incorrect or incomplete information reporting inconsistent with the requirements of an FFI Agreement.”¹⁸² Additionally, the U.S. Competent Authority has the power to determine whether there is “significant non-compliance with the requirements of an FFI Agreement or [the IGA] with respect to a Reporting [FATCA Partner] Financial Institution.”¹⁸³ These terms subject Taiwanese financial institutions to risk of being penalized at the arbitrary discretion of the U.S. Competent Authority because the U.S. Competent Authority “has reason to believe” that administrative or other errors occur and can determine whether or not a non-compliance is “significant” without a clear standard. Furthermore, if non-compliance determined by U.S. Competent Authority, Taiwanese financial institutions may be subject to penalties from \$10,000 to \$50,000 and “a forty percent penalty on an understatement of tax attributable to non-disclosed assets.”¹⁸⁴ Under

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Agreement Between The American Institute In Taiwan And The Taipei Economic And Cultural Representative Office In The United States For Cooperation To Facilitate The Implementation Of Fatca*, U.S. DEPT. OF TREAS., 13, <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-TECRO-12-22-2016.pdf> (last visited Nov. 19, 2016) (Article 7 Reciprocal Information Exchange provided that “the United States shall continue to cooperate with [FATCA Partner] to respond to requests pursuant to the Convention to collect and exchange information on accounts held in U.S. financial institutions by residents of [FATCA Partner]”).

¹⁸² *Id.* at 10.

¹⁸³ *Id.*

¹⁸⁴ See *Summary of FATCA Reporting for U.S. Taxpayers*, IRS,

IFRS, however, Taiwanese financial institutions work closely with auditors and accountants with regard to applying accounting principles.¹⁸⁵ The errors of the financial statements can be corrected timely by accountants when these financial institutions prepare and maintain their daily accounting books. Even though there are errors on the financial statements, those errors can be corrected by adjusting the financial statements of the next period.¹⁸⁶

V. ANALYSIS

In the report on the FATCA Roundtable¹⁸⁷ held on November 16, 2015, industry¹⁸⁸ suggested that the IRS “view [the] CRS and [the] FATCA as one standard”.¹⁸⁹ Although industry claimed that “[h]armonizing [the] FATCA with [the] CRS would help reduce the industry’s and the IRS’s burden with implementation and compliance”,¹⁹⁰ the integration of the two standards is not only unnecessary but also creates new burdens on financial institutions.

A. *Integration of the FATCA and the CRS is Unnecessary*

First, industry argued that integrating the two standards into one standard will reduce the burden of compliance because the FATCA and its rules of enforcement are so complex that financial institutions are worried that if they misinterpreted the rules they would be subject to penalties.¹⁹¹ This argument is flawed. Admittedly, one of the key differences between the two standards is that unlike the FATCA, the CRS imposes no penalty for incorrect enforcement of a participating

<https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-u-s-taxpayers> (last visited Nov. 23, 2016).

¹⁸⁵ See *Corporate Social Responsibility (CSR)*, International Federal of Accountants, [www.roccpa.org.tw/archive/3\(55\).doc](http://www.roccpa.org.tw/archive/3(55).doc) (last visited Nov. 23, 2016).

¹⁸⁶ See IAS 8 Correction of Prior Period Accounting Errors, <http://accounting-simplified.com/standard/ias-8/correction-of-accounting-errors.html#sthash.ToQe4wva.dpuf> (last visited, Nov. 23, 2016).

¹⁸⁷ *Foreign Account Tax Compliance Act (FATCA): FATCA Roundtable, Industry Concerns and Suggestions*, IRS (Nov. 16, 2015) (“The FATCA Roundtable provides a forum for members of representative industry associations and IRS officials to discuss FATCA implementation efforts to date, along with present and future FATCA compliance challenges from the perspectives of both industry and the IRS.”).

¹⁸⁸ Here, “industry” refers to the parties in the FATCA Roundtable report dated on Nov. 16, 2015, see IRS, *infra* note 154.

¹⁸⁹ *Id.* at 5.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

jurisdiction.¹⁹² However, even adopting the CRS as the sole standard, financial institutions are still faced with the interpretation problems and their burden will not be significantly alleviated. Under the current CRS framework, which provides standards rather than detailed rules,¹⁹³ jurisdictions have options to either follow the FATCA or enact its own rules compatible with the CRS standards.¹⁹⁴ If the FATCA is integrated into the CRS, those jurisdictions choosing to enact its own rules will subject foreign financial institutions to interpretations of more versions of rules in order to comply with the CRS and increase the risk of misinterpretation.

Industry also argued that because of the complexity of the FATCA, financial institutions tend to over-file and over-withhold in order to avoid the penalty of under-reporting/withholding.¹⁹⁵ As a result, the burden on the IRS also increases because the IRS “may be handling and processing more data and information than is needed or even useful to carry out its compliance enforcement mission.”¹⁹⁶ Industry further concluded that because of this additional burden on the IRS, there should be only one standard.¹⁹⁷ This observation is also defective. Industry did not factor in the additional burdens borne by the IRS to interpret the CRS and integrate the FATCA into the CRS. Furthermore, if the CRS becomes the sole standard, which means no penalty will be imposed on financial institutions for misreporting or non-compliance, the lack of such penalty might shift the burden of due diligence from financial institutions to the IRS. Without penalty, financial institutions might also increase the burden on the IRS to verify or correct the filing information, as financial institutions might tend not to strictly follow the rules and therefore make mistakes.

Therefore, first, to solve the problem caused by the complexity of the FATCA, the harmonization of the FATCA into the CRS may not be the best solution. Instead, to solve the problem with the complexity of the rules, it is more cost worthy to clarify certain language and practice of the FATCA. The IRS has been working on this issue. For example, on November 16, 2016, the IRS published “Summary of FATCA Reporting for U.S. Taxpayers” in plain language to instruct taxpayers on how to follow the FATCA and to report their information of foreign accounts.¹⁹⁸

Furthermore, as industry indicated that the penalty could lead

¹⁹² See Discussion, *supra* Part III.B.

¹⁹³ *Id.*

¹⁹⁴ See Discussion, *supra* Part III.C.

¹⁹⁵ See IRS, *supra* note 187, at 5.

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.*

¹⁹⁸ See IRS *supra*, note 184.

financial institutions to over-report or over-withhold payments, which increase the burden of the IRS, the penalty still could be valuable to “promote tax compliance.”¹⁹⁹ Therefore, instead of integrating the FATCA into the CRS, which will eliminate the penalty, the over-reporting issue can be solved by revising the language of the penalty and providing more guidance or examples of situations where non-compliance could result in a penalty. For example, the IRS may consider requiring financial institutions to report accounts and withhold payment “on the basis of legal positions that the filing FFI reasonably and in good faith believes to be correct.”²⁰⁰

It will take time to reconcile the differences between the FATCA and the CRS.²⁰¹ Thus the most important question for the differences is, whether the governing authority should be the FATCA or the CRS, an issue which may trigger more controversy and is hard to resolve because of the U.S.’s strong position in favor of the FATCA.²⁰²

Finally, the integration may not be necessary from the perspective of reducing implementation cost. Currently, there is plenty of commercial software helping financial institutions comply with both the FATCA and the CRS.²⁰³ Therefore, financial institutions do not have to initiate two different software systems even though the FATCA and the CRS have different requirements for compliance.

B. *Difficulties of the Integration Faced by Taiwanese Financial Institutions*

As previously discussed, because Taiwan has not yet been a participant jurisdiction of the CRS, Taiwanese financial institutions may face more difficulties if the FATCA is integrated into the CRS.

First, as Taiwanese financial institutions have directed a lot resources toward training employees and developing compliance programs, which were tailored for the requirements of the FATCA, the integration of the FATCA and the CRS would make the sunk costs of training and developing compliance programs a waste. Taiwanese financial institutions start implementing the FATCA in 2016.²⁰⁴

¹⁹⁹ Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (Winter 2009) (“[T]he function of tax penalties is solely to promote tax compliance.”).

²⁰⁰ See Richard J. Wood, *Accuracy-Related Penalties: A Question of Values*, 76 IOWA L. REV. 309, 331 (Jan. 1991).

²⁰¹ See discussion, *supra* Part III.C.

²⁰² See discussion, *supra* Part III.B.

²⁰³ See, e.g., FATCA and CRS, *Stay One Step Ahead: CRS and FATCA Overview and Regulations*, THOMSON REUTERS, <https://tax.thomsonreuters.com/fatca-crs/> (last visited Feb. 24, 2017).

²⁰⁴ See Deloitte, <https://www2.deloitte.com/tw/tc/pages/tax/articles/newsletter16-03-39.html>

Because at that time, it was uncertain whether Taiwan would participate in the CRS, without considering the possibility of the CRS, all the costs spent by Taiwanese financial institutions on training and developing compliance programs were specific to the implementation of the FATCA. If the FATCA and the CRS integrate, these financial institutions must spend extra costs on designing new compliance programs.

Secondly, the integration of the two tax compliance schemes may create unfairness to local Taiwanese financial institutions. Foreign-owned financial institutions in Taiwan whose parent or affiliate is a participant of the CRS may access resources about the integration from their affiliates because their affiliates have been devoted resources in advance to familiarize themselves with the CRS. Equipped with a better understanding of the CRS, if the FATCA and CRS integrate, these FFIs can develop a more timely and well-prepared strategy to serve clients who have offshore accounts, thereby attracting more clients. Local Taiwanese financial institutions may face unfair competition due to the integration.

The integration may cause unfairness also in a sense that such integration may force Taiwan to follow a set of rules which it did not agree to before. It is likely that such integration will result in additional rules or standards which deviate from the FATCA previously agreed to by Taiwan. As a result of the integration, Taiwanese financial institutions are forced to comply with the CRS, which Taiwan has not adopted and has no opportunities to negotiate. Faced with this problem, industry must first figure out a mechanism for jurisdictions such as Taiwan before considering the integration. However, so far, nothing indicates that any solution has been proposed.

Besides, the integration can cause Taiwanese financial institutions additional costs without generating the additional effects on curbing tax evasion. As previously discussed, one major difference between the FATCA and the CRS is that the FATCA requires FFIs to identify U.S. taxpayers' "beneficial ownership" in non-U.S. passive assets but the CRS only requires the identification of the "control" of the foreign account.²⁰⁵ As a result, the FATCA may be more beneficial for Taiwanese financial institutions to comply with to achieve the goal of tax transparency. This conclusion can be supported by the reasons stated below.

Based on the investigation of International Consortium of Investigative Journalists ("ICIJ"),²⁰⁶ all of the top twelve richest

(last visited Feb. 23, 2017).

²⁰⁵ See discussion, *supra* Part III.B.

²⁰⁶ "The International Consortium of Investigative Journalists is a global network of more than 190 investigative journalists in more than 65 countries who collaborate on in-depth investigative

families avoid income tax by having their assets owned by offshore companies.²⁰⁷ Generally, they hide their money outside Taiwan by investing into a company registered in a tax haven²⁰⁸ - an “offshore company”. Then, they use the offshore company as a special purpose vehicle²⁰⁹ to invest in another offshore company, which also owns Taiwanese companies that have real business functions and market values. The multi-layered shareholding structure obstructs Taiwanese tax authorities’ trace of the ultimate shareholder, or “beneficial owner”.²¹⁰ A beneficial owner evades income tax at the individual level by having the Taiwanese companies pay cash dividends to their offshore company shareholders and avoiding having these offshore companies pay cash dividends back to these Taiwanese individuals, that is, the ultimate shareholders. Their earnings in cash are retained in the offshore company and subject to a lower income tax rate. Because the cash dividends are never paid back to Taiwan, Taiwanese tax authorities can hardly impose tax on the offshore income of these Taiwanese individuals. For example, a few Taiwanese individuals own Ting Hsin International Group, a Taiwanese instant noodle maker, by setting up five-layered offshore companies.²¹¹ And it is noteworthy that recently, in Taiwan, setting up offshore companies to avoid income tax becomes a popular practice not only by high net worth taxpayers but also by taxpayers in the middle class.²¹² Under this trend, it is more effective to curb tax evasion if Taiwanese financial institutions focus on identifying the “beneficial owner” of a foreign account because the beneficial owner should be traced to the ultimate individual shareholders. If the FATCA follows the CRS, which only requires the identification of the “control” of foreign, Taiwanese financial institutions may have a hard

stories.” It also published a well-known report called the Panama Papers, which revealed wealthy individuals’ use of offshore companies for illegal purposes. See <https://www.icij.org/about> (last visited Feb. 9, 2017).

²⁰⁷ See Yi-Shan Chen (陳一珊) & Chao-Yi Lin (林昭儀), *Twelve Taiwanese Tycoons Who Used Tax Haven to Avoid Tax* (Jan. 21, 2014), *Common Wealth Magazine* No.540, <http://www.cw.com.tw/article/article.action?id=5055452>.

²⁰⁸ According to Black’s Law Dictionary, the term “tax haven” means “[a] jurisdiction, esp. a country, that imposes little or no tax on the profits from transactions carried on there or on persons resident there.” *Tax Haven*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁰⁹ According to Black’s Law Dictionary, the term “special purpose entity” means “[a] business established to perform no function other than to develop, own, and operate a large, complex project.”

Special Purpose Entity, BLACK’S LAW DICTIONARY (10th ed. 2014).

²¹⁰ According to Black’s Law Dictionary, the term “beneficial owner” means “[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else.” *Beneficial Owner*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²¹¹ See *supra*, note 172.

²¹² *Id.*

time determining to which level they should trace the “controlling shareholder” due to the vagueness of the term “control”. And they may not be able to trace to the ultimate shareholders.

C. Benefits of Non-Integration, Postponing the CRS and Revising the FATCA

At current stage, instead of integrating the FATCA into the CRS, revising the FATCA and simultaneously postponing the implementation of the CRS is the better solution to reduce the burden of Taiwanese financial institutions and deter tax evasion. First, considering feasibility and the reality, as discussed above, the integration of the FATCA into the CRS may not benefit the U.S. in the same way as sole implementation of the FATCA. Requiring the FATCA to be integrated into the CRS would incur additional cost for the U.S. Therefore, from the U.S. government’s perspective, the integration is only possible if a solution can be proposed to secure the current benefits of the U.S., derived from implementing the FATCA, without imposing too much burden on the U.S. However, currently, no such solution has been proposed.

Secondly, considering the immature development of the CRS, the integration of the FATCA and the CRS may not be efficient now. Like the IFRS, which provides the standards allowing each participant jurisdiction to enact its detailed accounting rules under the IFRS framework,²¹³ the CRS also allows each participant jurisdiction to enact their own tax rules as long as these rules compatible with the standards under the CRS.²¹⁴ There are six factors, in order of importance, accounting for the successful conversion of local GAAP into the IFRS, which are: (1) technology to support the conversion; (2) trained people; (3) a good change management plan; (4) sufficient funding; (5) executive and board support; and (6) professional support with IFRS experience.²¹⁵ Although the success factors for the conversion of local GAAP into the IFRS may not be identical to the implementation of the CRS, these six factors are also determinative to the successful implementation of the FATCA.²¹⁶ However, currently, Taiwanese

²¹³ See IFRS *supra*, note 132, at 2.

²¹⁴ See Discussion *supra*, note Part III.C.

²¹⁵ See *6 Key Success Factors for IFRS Conversion [Survey]*, Accounting, Finance and Tax, <http://accounting-financial-tax.com/2010/02/6-key-success-factors-for-ifrs-conversion-survey/> (last visited Feb. 22, 2017).

²¹⁶ See *Id.*; See *Foreign Account Tax Compliance Act (FATCA) Implications, Considerations and Responses* at 4, Accenture, https://www.accenture.com/t20150714T065458__w_/chen/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Industries_6/Accenture-FATCA-Implications-

financial institutions still lack few of the above successful factors. As to the first factor, although there is software²¹⁷ developed to streamline the integration of the FATCA and the CRS, there still a problem with the implementation of the CRS since the IT requirements of the CRS implementation are not officially released by the OECD.²¹⁸ The second factor may not be an issue because there are abundant training programs and online training resources for the CRS.²¹⁹ However, as to the third factor – a good management plan, it is critical for companies “to get started early.”²²⁰ “And the scale, scope and complexity of the initiative can be significant, so it behooves companies to take advantage of the time they have to tackle the [IFRS conversion] challenge.”²²¹ Here, while fifty-two jurisdictions adopted the CRS²²² and started exchanging tax information in 2017, Taiwanese tax authority decided to start adopting the CRS in 2019 and released a draft regulation on CRS in August 2017.²²³ Lagging behind the timeline of implementation of the CRS, Taiwanese financial institutions may require longer time for the integration. As to the factor of sufficient funding, “[s]maller companies likely will have a disproportionately higher cost to begin the [IFRS] conversion process.”²²⁴ Similarly for the integration of the FATCA and the CRS, as discussed earlier, since local Taiwanese financial institutions are relatively in a smaller scale than multinational financial institutions, this factor may put local Taiwanese financial institutions in more unfavorable situations to compete with mega financial institutions. As to the executive and board support, and professional support with relevant experience, although the OECD is providing “implementation assistance,”²²⁵ and an online help desk²²⁶ to solve individual questions,

Considerations-Responses.pdf (last visited Feb. 19, 2017) (It is important for the FATCA implementation by “structuring a strong change management plan managed by a dedicated team with the involvement of the Marketing and Communications, Training, Legal and Compliance functions.”).

²¹⁷ See *IFRS supra*, note 168.

²¹⁸ See OECD, <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/> (last visited Feb. 22, 2017).

²¹⁹ For example, FATCA and CRS guidance and training services provided by CITCO Company, see <https://www.citco.com/our-thinking/latest-news/fatca-and-crs-guidance-and-training-services/> (last visited Feb. 22, 2017).

²²⁰ See Accounting, Finance and Tax, *supra* note 215.

²²¹ *Id.*

²²² See OECD, <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/#d.en.345489> (last visited Oct. 10, 2017).

²²³ See *News Flash - Taiwan: Ministry of Finance Releases Draft Regulation on Common Reporting Standard*, Aug. 8, 2017, PwC Taiwan, <http://www.pwc.tw/en/publications/fs/assets/fsta-201708.pdf> (last visited Oct. 10, 2017).

²²⁴ *Id.*

²²⁵ See OECD, <http://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/> (last visited Feb. 19, 2017).

²²⁶ See OECD, <http://www.oecd.org/tax/transparency/technical-assistance/help/> (last visited Feb. 19, 2017).

at the initial stage, it may be more helpful if there are “in-house [consultants] who establish[] a position as the ‘go-to’ person on [the CRS] within a company.”²²⁷ Therefore, as the CRS is still immature, it is advised to postpone the implementation and the integration of the FATCA into the CRS.

Furthermore, as the FACTA is being improved in many aspects such as making the language easier and having the initiative of the Offshore Voluntary Disclosure Program (“OVDP”)²²⁸, it is suggested that those jurisdictions which already joined the CRS opt to follow the FATCA, which is allowed under the CRS. For those jurisdictions which have not joined the CRS, such as Taiwan, they should follow the FATCA first and set up a specific timeline and action plan for the CRS adoption. As the CRS has a larger scope than the FATCA,²²⁹ postponing joining the CRS allows these jurisdictions to devote their resources mainly on the FATCA and meanwhile learn about the implementation of the CRS, which make them more well-prepared for the implementation of the CRS and the future integration.

VI. CONCLUSION

Industry’s proposal of integrating the FATCA into the CRS is not totally impractical. However, before the integration, the following factors should be considered and certain actions should be taken. First, it is more worthwhile to clarify and simplify the language and the practice of the FATCA. Then, the integration should be started only when the implementation of both the FATCA and the CRS becomes more mature. Furthermore, for countries which have complied with the FATCA but have not joined the CRS, such as Taiwan, a mechanism as to how to protect these jurisdictions from unwillingly accepting the CRS due to the integration should be provided.²³⁰ Finally, as the integration is impossible without the U.S.’s support, it is urged that strong incentives be provided to the U.S. to compromise on the integration of the FATCA and the CRS.

²²⁷ See Accounting, Financial and Tax, *supra* note 215.

²²⁸ OVDP is a program that gives U.S. citizens who have foreign accounts an opportunity to voluntarily disclose their account information, before bank reporting, by rewarding some benefits to these self-reporting account holders. According to the IRS, this program has enabled the IRS “to resolve a very large number of cases without examination”. See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014*, IRS, <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers-2012-revised> (last visited Feb. 22, 2017).

²²⁹ See Foodman, *supra* note 63.

²³⁰ See Discussion, *supra* Part V.B.