SHOULD THE UNITED STATES ADOPT CRS?

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The United States' one-sided approach to tax transparency might lead to an unprecedented clash with the European Union (EU) in the near future. In light of the EU's deadline for the United States, the U.S. Treasury and Congress should urgently engage in a discussion on whether the United States should adopt the Common Reporting Standard (CRS) for automatic exchange of financial account information. A recent report from the U.S. Government Accountability Office considered this issue and did not recommend adopting CRS. This Essay discusses the contents of the report, as well as important considerations that were left out of the report.

INTRODUCTION

While the United States revolutionized the way that countries share financial account information by enacting the Foreign Account Tax Compliance Act (FATCA),[1] it has refused to adopt the global version of FATCA—the Common Reporting Standard (CRS)—that has been adopted by over 100 jurisdictions.[2] This means that while the Internal Revenue Service (IRS) re-

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1. In general, FATCA is a U.S. law that facilitates the annual reporting to the IRS of offshore financial assets held by U.S. citizens and tax residents. *See* Part I *infra*.

2. In general, CRS facilitates reporting of offshore financial assets held by foreign tax residents to the account holders' countries of tax residence. It was developed by the Organisation for Economic Co-operation and Development (OECD). *See* Part I *infra*.

ceives information about U.S. persons' financial accounts in foreign financial institutions (FFIs), U.S. financial institutions (U.S. FIs) report little or no information about foreigners holding financial accounts in the United States.[3] Several commentators have argued that the United States is becoming the "world's new tax haven," as foreigners can evade the taxes they owe in other countries by holding unreported funds in U.S. FIs.[4] Another consequence is that FFIs around the world need to comply with both FATCA and CRS, resulting in higher compliance costs.

The international pressure against the United States' one-sided approach to information exchange has been mounting. The European Union (EU) is reportedly considering including the United States in its list of non-cooperative tax jurisdictions if the United States does not agree by June 2019 to adopt CRS.[5] The EU has previously shown that it is willing to blacklist countries such as South Korea—the EU's eighth largest trading partner—if they do not align their policies with the EU's standards.[6] If the EU blacklists the United States as a non-cooperative tax jurisdiction, then the EU member states may adopt measures against U.S. FIs,[7] such as imposing a withholding tax on payments to U.S. FIs, similar to FATCA withholding.

In April 2019, the U.S. Government Accountability Office (GAO) published a report that considers, among other matters, whether the United States should adopt CRS in lieu of FATCA.[8] This discussion in the GAO report is a rare occasion on which a government agency published a report advising Congress on whether the United States should adopt CRS. The report concludes as follows:

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3. *See* Allison Christians, *What You Give and What You Get: Reciprocity Under a Model 1 Intergovernmental Agreement on FATCA*, CAYMAN FIN. REV., Apr. 2013, at 24, 24; Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-U.S. Persons Can* Legally *Avoid Reporting Under Both FATCA and GATCA*, 21 TRUSTS & TRUSTEES 1050, 1050 (2015).

4. *See, e.g.*, Editorial Board, *The U.S. Is Becoming the World's New Tax Haven*, BLOOMBERG OPINION (Dec. 28, 2017, 7:00 AM), https://www.bloomberg.com/view/articles/2017-12-28/the-u-s-is-becoming-the-world-s-new-tax-haven (on file with the *Michigan Law Review*).

5. Joe Kirwin, *EU's Expanded Tax Haven Blacklist Could Apply to U.S.*, BLOOMBERG TAX (Dec. 13, 2018, 3:30 AM), https://news.bloombergtax.com/daily-tax-report-international/eus-expanded-tax-haven-blacklist-could-apply-to-us-1 [https://perma.cc/ST47-DZK9]; Joe Kirwin, *U.S. on Course to Land on European Tax Blacklist: EU Official*, BLOOMBERG TAX (May 15, 2018), https://www.bna.com/us-course-land-n73014475976/ [https://perma.cc/VCJ7-H2N9].

6. Council Conclusions on the EU List of Non-cooperative Jurisdictions for Tax Purposes (EU) No. 15429/17 of 5 Dec. 2017.

7. *See id.* at 5.

8. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-180, FOREIGN ASSET REPORTING: ACTIONS NEEDED TO ENHANCE COMPLIANCE EFFORTS, ELIMINATE OVERLAPPING REQUIREMENTS, AND MITIGATE BURDENS ON U.S. PERSONS ABROAD 3–4 (2019) [hereinafter GAO Report].

> While having the United States adopt the CRS reporting system in lieu of FATCA could benefit FFIs that may otherwise have to operate two overlapping reporting systems, it would result in no additional benefit to IRS in terms of obtaining information on U.S. accounts. Additionally, it could generate additional costs and reporting burdens to U.S. financial institutions that would need to implement systems to meet CRS requirements. The extent of these costs is unknown. Further, adoption of CRS would create the circumstance where foreign accounts held by U.S. citizens with a tax residence in partner jurisdiction—including U.S. citizens who have a U.S. tax obligation—would not be reported to IRS.[9]

The GAO report did not recommend adopting CRS in lieu of FATCA, which can be read as support for the status quo. GAO's recommendations (or lack thereof) are particularly interesting in light of GAO's influence on policies related to tax transparency.[10]

This Essay shows that a key consideration in the GAO report against adopting CRS is based on an unnecessary and probably unrealistic assumption about the way that CRS would apply to U.S. citizens. There is no reason to expect that U.S. citizens residing overseas will not be subject to CRS reporting if the United States adopts CRS. U.S. citizens will be reported if they are considered as U.S. tax residents for CRS purposes under U.S. domestic law. The OECD already noted that defining U.S. citizens as U.S. tax residents is consistent with CRS.[11] The OECD and countries that implement CRS will probably agree to certain amendments in CRS so that the United States will continue to obtain the same information it currently receives under FATCA.

This Essay also draws attention to the GAO report's choice not to mention certain considerations in support of adopting CRS. The report does not mention the concern that foreigners evade taxes in other countries by holding unreported funds in U.S. FIs. Other countries have an obvious interest in receiving their taxpayers' U.S. account information. The United States should be interested in preventing foreigners from using its financial industry to commit foreign tax evasion and in acting reciprocally following the international standards that it initiated. Finally, the report does not consider the international pressure on the United States, and the EU-imposed deadline. This suggests that the U.S. government is ignoring these international efforts. As the EU's threat appears to be credible, ignoring it may suggest that the U.S. government prefers to address this issue only after the EU takes action against the United States. Ignoring this matter until it leads to an unprecedented clash with the EU does not appear to be optimal. Considering this matter sooner rather than later is in the United States' best interest.

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9. *Id.* at 33–34.

10. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION (2013); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 12-484, FOREIGN ACCOUNT REPORTING REQUIREMENTS: IRS NEEDS TO FURTHER DEVELOP RISK, COMPLIANCE, AND COST PLANS (2012).

11. *See* discussion *infra* Section III.A.

The structure of this Essay is as follows: Part I provides a brief overview of FATCA and CRS. Part II discusses the EU's response and the potential blacklisting of the United States. Part III discusses the considerations for and against adopting CRS following the discussion in the GAO report. Part IV proposes issues that the U.S. Treasury and Congress should consider.

I. Brief Background of FATCA and CRS

FATCA was signed into law as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010[12] with the purpose of forcing FFIs to report information about their U.S. account holders to the IRS.[13] Under FATCA, FFIs are required to register with the IRS, implement certain due diligence procedures to identify account holders or controlling persons of certain account holders who are U.S. persons, and report their personal information, account balance, and income to the IRS.[14] Where an FFI does not comply with FATCA, a withholding of 30 percent is imposed on certain payments made to that FFI.[15]

These obligations became effective on July 1, 2014. Around that time, the U.S. government entered into bilateral intergovernmental agreements (IGAs) with many other governments for the implementation of FATCA by these countries' FFIs. The U.S. Treasury offers two types of IGAs: Model 1 IGA and Model 2 IGA.[16] Countries had an incentive to enter into IGAs because the IGAs substantially reduced the risk that compliant FFIs in these countries would be subject to FATCA withholding.[17] Under Model 1 IGA,

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12. I.R.C. §§ 1471–1474 (2012); Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, §§ 501–535, 124 Stat. 71, 97–115 (2010).

13. For more background and discussion about FATCA, see William H. Byrnes & Robert J. Munro, LexisNexis Guide to FATCA and CRS Compliance ch. 1 (2018); Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 Tax Notes 1245, 1245 (2014); Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. Rev. 304, 334–39 (2012); J. Richard (Dick) Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 57 Vill. L. Rev. 471, 473 (2012); S. Bruce Hiran, *Overview of FATCA*, 152 Tax Notes 1297, 1298 (2016); Young Ran (Christine) Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 Fla. Tax Rev. 335, 359–70 (2017); Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 Emory L.J. 655, 682–84, 689–93 (2018); and Reuven S. Avi-Yonah & Gil Savir, *Find It and Tax It: From TIEAs to IGAs* (Mich. Law Pub. Law & Legal Theory Research Paper Series, Paper No. 443, 2015).

14. Treas. Reg. § 1.1471-4(c) (2018); Rev. Proc. 2017-16, 2017-3 I.R.B. 501. Reportable U.S. persons (defined as "specified U.S. persons" under FATCA) generally include U.S. citizens, permanent residents ("green card" holders), alien residents, and U.S. entities such as U.S. corporations (with certain exceptions) and U.S. trusts. Treas. Reg. § 1.1473-1(c).

15. I.R.C. § 1472(a) (2012).

16. Foreign Account Tax Compliance Act (FATCA), U.S. Dep't of the Treasury [hereinafter FATCA Resource Center], https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx [https://perma.cc/8YP9-CVJ6].

17. *See, e.g.*, U.S. Dep't of the Treasury, Model 1A IGA Reciprocal, Preexisting TIEA or DTC art. 4

FFIs must report the required information to the local tax authority in the relevant jurisdiction, which will transfer the information to the IRS.[18] Under Model 2 IGA, FFIs must report the information to the IRS directly.[19] Most countries have adopted Model 1 IGAs.[20] Many of the countries that adopted IGAs have incorporated the FATCA requirements into their domestic laws and regulations.

After the United States introduced FATCA, other countries wanted to adopt a similar automatic exchange of financial account information (AEOI) regime that would provide tax authorities with information about their taxpayers' offshore financial accounts.[21] The OECD, supported by the G20, developed the CRS and introduced it in 2014. More than 100 jurisdictions, including all major economies and financial centers (excluding the United States), have committed to adopting CRS. One hundred jurisdictions started conducting AEOI under CRS in either 2017 or 2018.[22] CRS is modeled after FATCA Model 1 IGA. This means that FIs[23] need to give details of reportable persons to the local tax authority, which will exchange this information with the reportable persons' jurisdictions of tax residence. CRS adopted most of FATCA's definitions, due diligence, and reporting obligations.[24]

The United States has not adopted CRS. Some of the FATCA IGAs are "reciprocal" and should provide some reporting from the United States to the relevant IGA jurisdictions. However, this reporting is much more limited

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§ 1 (Nov. 30, 2014) [hereinafter Model 1A IGA], https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf [https://perma.cc/D4DC-7E62]; U.S. Dep't of the Treasury, Model 2 IGA, Preexisting TIEA or DTC art. 3 § 1 (June 6, 2014) [hereinafter Model 2 IGA], https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf [https://perma.cc/G3H5-3SUP].

18. *See* Model 1A IGA, *supra* note 17, art. 2, § 1.

19. Model 2 IGA, *supra* note 17, art. 2, § 1.

20. As of June 26, 2019, ninety-two jurisdictions have signed Model 1 IGA. Seven other jurisdictions have agreed in substance to adopt a Model 1 IGA, but the agreements have not been finalized. Eleven jurisdictions signed Model 2 IGA, and three jurisdictions have agreed in substance to adopt Model 2 IGA, but the agreements have not been finalized. *FATCA Resource Center*, *supra* note 16.

21. For an overview of the history of CRS, see ORG. FOR ECON. CO-OPERATION & DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS 9–10 (2d ed. 2017).

22. Forty-nine jurisdictions started conducting AEOI in 2017; fifty-one started in 2018; and eight are expected to start by 2020. This is the status of commitments as of November 2018. *AEOI: Status of Commitments*, OECD, https://www.oecd.org/tax/transparency/AEOI-commitments.pdf [https://perma.cc/68FY-R86L].

23. FATCA uses the term foreign (i.e., non-U.S.) financial institution, or "FFI." CRS uses the term financial institution, or "FI."

24. For further discussion about the differences between FATCA and CRS, see Noam Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, 22 FLA. TAX REV. 77, 99–100 (2018).

than the required reporting under CRS.[25] Reporting by U.S. FIs under "reciprocal" IGAs only concerns interest in depository accounts held by individuals who earn interest of $10 or more and limited categories of U.S. source income earned on other accounts.[26] There is no reporting of depository (i.e., cash) accounts held by entities or non-cash accounts that do not earn U.S. source income.[27] This reality stands in contrast with the language of the "reciprocal" Model 1 IGA, which states that the U.S. government "acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with [FATCA Partner]" and that it "is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange."[28] Despite this commitment, the U.S. government has taken no such steps.[29] To adopt CRS or enable fully reciprocal IGAs, Congress would need to enact legislation mandating that U.S. FIs follow certain due diligence procedures to identify reportable account holders and controlling persons, and report their information to the IRS.[30]

II. The EU's Response

Foreign governments, nonprofit organizations, and commentators have criticized the United States for its one-sided approach to information exchange. For example, a *Bloomberg* editorial stated that "[w]hile the rest of the world provides the transparency that the U.S. demanded, the U.S. is rapidly becoming the new Switzerland."[31] The EU has been pressing the United

25. *See* Leopoldo Parada, *Intergovernmental Agreements and the Implementation of FATCA in Europe*, 7 World Tax J., no. 2, 2015, § 3.3.2.

26. Cotorceanu, *supra* note 3, at 1054 n.10.

27. *Id.* at 1052.

28. *See* Model 1A IGA Reciprocal, *supra* note 17, art. 6(1).

29. The Obama Administration proposed providing full reciprocity under FATCA, but these proposals were rejected by Congress. For further discussion, see Bruce Zagaris, The International Financial Regulation and Enforcement Regime: Implications for Financial Intermediaries, Presented at the 13th Annual International Estate Planning Institute NYC 11–12 (Mar. 24, 2017), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=71287 [https://perma.cc/S6RG-4H8A].

30. *See* Peter Cotorceanu, *Why America Loves Being the World's No. 1 Tax Haven*, Politico (Apr. 8, 2016), https://www.politico.eu/article/why-america-loves-being-the-worlds-no-1-tax-haven-panama-papers-data/ [https://perma.cc/S6HT-BZ2P].

31. Editorial Board, *supra* note 4; *see also* Andres Knobel, The Greens/EFA in the European Parliament, The Role of the U.S. as a Tax Haven: Implications for Europe (2016); Tax Justice Network, Financial Secrecy Index 2018: Narrative Report on USA (2018), http://www.financialsecrecyindex.com/PDF/USA.pdf [https://perma.cc/2MK5-37JQ]; Noam Noked, *Tax Evasion and Incomplete Tax Transparency*, 7 Laws, no. 3, at 4 (2018); Craig Rose, *The Biggest Tax Haven of Them All? The U.S., FATCA and the CRS*, Bloomberg Tax (Mar. 29, 2016), https://www.bna.com/biggest-tax-haven-b57982069147 [https://perma.cc/3RAD-5JG9]; Nick Shaxson, *Loophole USA: The Vortex-Shaped Hole in Global Financial Transparency*, tax justice network (Jan. 26, 2015), https://www.taxjustice.net/2015/01/26/

States to implement information exchange on a reciprocal basis.[32] According to media reports and statements of senior EU tax policy officials, the EU is considering including the United States in its list of non-cooperative tax jurisdictions—commonly referred to as the EU's tax haven black list—if the United States does not commit by June 2019 to implementing AEOI under CRS.[33]

The EU's criteria for determining which jurisdictions should be on the black list include the implementation of CRS.[34] Notably, the EU's criteria provide a temporary exception, until June 30, 2019, for jurisdictions that fulfill some but not all of the tax transparency requirements.[35] After June 2019, the EU is expected to require stricter compliance with the tax transparency standards.

The EU published its black list for the first time in December 2017. The list included seventeen non-EU jurisdictions,[36] some of which were subsequently removed from the list after they agreed to comply with the EU's requirements.[37] The list was updated in June 2019, and it now includes eleven jurisdictions.[38] While many of the blacklisted jurisdictions are small countries that have been considered as "traditional" tax havens, the 2017 list also included South Korea—a member of the G20 and the OECD and a country that is generally considered to be compliant with international tax standards.[39] Korea was blacklisted for its preferential tax regime that offered tax

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loophole-usa-vortex-shaped-hole-global-financial-transparency-2 [https://perma.cc/8X43-4AJQ].

32. *See* Resolution of 5 July 2018 on the Adverse Effects of the U.S. Foreign Account Tax Compliance Act on EU Citizens, EUR. PARL. DOC. 2018/2646(RSP), P8_TA-PROV(2018)0316; Joe Kirwin, *EU Politicians Step Up Pressure for U.S. FATCA Reciprocity*, BLOOMBERG TAX (May 5, 2017), https://www.bna.com/eu-politicians-step-n73014450512/ [https://perma.cc/ASX3-A6X6].

33. Kirwin, *U.S. on Course to Land on European Tax Blacklist: EU Official*, *supra* note 5 ("If the U.S. doesn't agree by June 2019 to exchange the bank account details of non-U.S. citizens with governments around the world, it will be placed on the European Union's tax haven blacklist.").

34. Council Conclusions on the Criteria for and Process Leading to the Establishment of the EU List of Non-cooperative Jurisdictions for Tax Purposes (EU) No. 14166/16 of 8 Nov. 2016.

35. *Id.* at 6.

36. Council Conclusions, *supra* note 6. These jurisdictions are American Samoa, Bahrain, Barbados, Grenada, Guam, Republic of Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia, and the United Arab Emirates. *See id.* at 8–12.

37. *See Common EU List of Third Country Jurisdictions for Tax Purposes*, EUROPEAN COMM'N, https://ec.europa.eu/taxation_customs/tax-common-eu-list_en [https://perma.cc/4QJA-J32N].

38. *See id.* The jurisdictions are American Samoa, Guam, Samoa, Trinidad and Tobago, US Virgin Islands, United Arab Emirates, Marshall Islands, Belize, Fiji, Oman, and Vanuatu. *Id.*

39. *See, e.g.*, Ted Tae-Gyung Kim, *Tax Transparency and Disclosure in Korea*, BULL. FOR INT'L TAX'N, Apr. 2018, at 1.

benefits only to foreigners.[40] It was removed from the list after agreeing to abolish these tax benefits.[41] The United States has not been blacklisted so far. The non-blacklisting of the United States has been questioned by EU lawmakers,[42] nonprofit organizations, and analysts.[43]

What are the potential consequences of being blacklisted by the EU? The EU noted "that effective and proportionate defensive measures, in both non-tax and tax areas could be applied by the EU and member states vis-à-vis the non-cooperative jurisdictions, as long as they are part of such list."[44] The EU also stated that member states can apply various other defensive measures, including withholding tax measures, as well as special documentation and disclosure requirements.[45]

One potential response could be a FATCA-like withholding on certain payments from EU payors to U.S. FIs. For example, the EU may decide that the FIs in a blacklisted country that does not implement CRS would be subject to withholding if they do not follow the CRS due diligence procedures and report directly to member states information of account holders who are EU tax residents. As CRS does not include such an enforcement mechanism, the EU would need to flesh out the details that may follow the FATCA regulations. This means that if the strategy of naming and shaming the blacklisted jurisdictions fails, the EU may adopt other measures, although we do not know at this stage if and when such measures might be introduced. Politics, international relations, lobbying efforts, and other factors may affect this process.

III. The GAO Report

The GAO report listed several objectives, one of which was to "describe similarities and differences between FATCA and Common Reporting Standard (CRS) reporting requirements."[46] After identifying the similarities and differences, the report also "used the collected information to identify what changes, if any, the United States and other countries could implement to

40. *See* Council Conclusions, *supra* note 6, at 9.

41. *See Taxation: Eight Jurisdictions Removed from EU List*, Delegation of Eur. Union to Can. (Jan. 24, 2018, 2:36 AM), https://eeas.europa.eu/delegations/canada/38654/taxation-eight-jurisdictions-removed-eu-list_en [https://perma.cc/9ERY-GZTU].

42. *See* Kirwin, *U.S. on Course to Land on European Tax Blacklist: EU Official*, *supra* note 5.

43. *See, e.g.*, Petr Janský et al., *Is Panama Really Your Tax Haven? Secrecy Jurisdictions and the Countries They Harm* (Inst. Econ. Studies, Working Paper No. 23, 2018); Johan Langerock, Oxfam, Off the Hook: How the EU Is About to Whitewash the World's Worst Tax Havens 3 (2019), https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620625/bn-off-the-hook-eu-tax-havens-070319-en.pdf [https://perma.cc/8XW7-A4FK].

44. Council Conclusions, *supra* note 6, at 5.

45. *See id.* at 19.

46. GAO Report, *supra* note 8, at 48.

align FATCA and CRS reporting requirements."[47] Another objective of the report was to "examine the effects of FATCA implementation that are unique to U.S. persons living abroad."[48] The report finds that U.S. persons living overseas have encountered reduced access to financial services in part because of the costs FFIs incur from implementing FATCA.[49] The report notes that "[w]hile better aligning FATCA and CRS to some extent is possible, anything short of the United States fully adopting CRS would not fully eliminate the burdens of overlapping requirements that FFIs must currently meet under the two different systems."[50]

The report identifies three considerations against adopting CRS in lieu of FATCA: (a) under CRS, U.S. citizens with a tax residence abroad would not be reported to the IRS; (b) adopting CRS "could generate additional costs and reporting burdens to U.S. financial institutions that would need to implement systems to meet CRS requirements," and the "extent of these costs is unknown"; and (c) adopting CRS "would result in no additional benefit to IRS in terms of obtaining information on U.S. accounts."[51] In addition, the title of the relevant part in the report reads as follows: "FFIs Face Overlapping Foreign Account Reporting Systems, but Alignment Would Entail Significant Changes in Law."[52] It is possible that the drafters of the report view the fact that the required changes are significant as an additional consideration against adopting CRS. The report does not include a recommendation to adopt CRS in lieu of FATCA, which can be read as a support for the status quo.[53] The following sections discuss these considerations and the considerations that were left out of the report.

A. *No Reporting of U.S. Citizens Residing Overseas?*

The GAO report states that "IGAs implementing FATCA require FFIs to report the foreign-held accounts of U.S. citizens and residents—including resident aliens—while CRS requires financial institutions in jurisdictions participating in CRS to report on almost all accounts held by nonresidents of the reporting country."[54] It further states that "[u]nder CRS rules, information about foreign accounts held by a U.S. citizen with a tax residence abroad would not be reported to IRS, but rather to the jurisdiction in which

47. *Id.* at 50.

48. *Id.* at 48.

49. *Id.* at 34–36.

50. *Id.* at 33.

51. *Id.* at 33–34.

52. *Id.* at 28.

53. *See id.* at 43–45. The GAO report's recommendations do not include a recommendation for Congress or the Treasury Department to consider adopting CRS in lieu of FATCA. *Id.*

54. *Id.* at 31.

they were a resident for tax purposes."[55] The report provides the following table:[56]

TABLE 5

Comparison of FFI Reporting to IRS Under FATCA and Hypothetically Under CRS		
	FATCA (on basis of U.S. citizenship and tax residency)	**CRS** (on basis of tax residency)
U.S. citizen living in the United States with a U.S. account	n/a	n/a
U.S. citizen living in the United States with a foreign account	✓	✓
U.S. citizen with a tax residence abroad and a foreign account	✓	X
Permanent resident alien with a tax residence abroad and a U.S. account	n/a	X
Permanent resident alien living in the United States with a U.S. account	n/a	n/a
Permanent resident alien living in the United States with a foreign account	✓	✓
Nonresident alien living in the United States with a U.S. account	n/a	n/a
Nonresident alien living in the United States with a foreign account	X	X
n/a = Account is reported to IRS through the use of IRS Form 1099 ✓ = Account reported X = Account not reported Source: GAO. | GAO-19-180		

This analysis is based on an unnecessary and probably unrealistic assumption about the way CRS would apply to U.S. citizens. Under CRS, a reportable person generally means an individual or entity that is resident in a reportable jurisdiction "*under the tax laws of such jurisdiction*."[57] If a person is resident for tax purposes in multiple reportable jurisdictions, then this person's information will be reported to all the jurisdictions of residence.[58]

55. *Id.*

56. *Id.* at 32 (footnotes omitted).

57. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 21, at 57 (emphasis added) ("The term 'Reportable Person' means a Reportable Jurisdiction Person other than [certain entities] . . . . The term 'Reportable Jurisdiction Person' means an individual or Entity that is resident in a Reportable Jurisdiction under the tax laws of such jurisdiction . . . .").

58. *Id.* at 96 ("In the case of a Reportable Person that is identified as having more than one jurisdiction of residence, the jurisdictions of residence to be reported are all the jurisdic-

Therefore, if the United States adopts CRS, FIs in countries in the United States' AEOI network will report any person who is considered a "U.S. tax resident" under U.S. tax law.

If the United States defines U.S. citizens as U.S. tax residents for CRS purposes, CRS will require the reporting of their offshore financial accounts. As explained below, the U.S. government's position is that U.S. citizens are U.S. tax residents.[59] Even if this position needs to be better clarified in the law, Congress can define U.S. citizens as U.S. tax residents in the United States' CRS legislation. The OECD, in the CRS Implementation Handbook, explicitly notes that defining U.S. citizens as U.S. tax residents is consistent with CRS's approach to the definition of "Reportable Jurisdiction Persons," which generally determines residence under the tax laws of the relevant jurisdiction.[60]

Are U.S. citizens considered as U.S. tax residents under U.S. tax law? According to a document the U.S. government gave the OECD to be posted on the OECD website, "[a]s a general matter, under the U.S. Internal Revenue Code (Code), all U.S. citizens and U.S. residents are treated as U.S. tax residents."[61] This statement reflects the U.S. government's position that the definition of "U.S. tax resident" is the same as "United States person," which is defined in the Code as including "a citizen or resident of the United

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tions of residence identified by the Reporting Financial Institution for the Reportable Person with respect to the relevant calendar year or other appropriate reporting period."). For the OECD guidance materials, including the CRS Commentaries and the CRS Implementation Handbook, see *Automatic Exchange Portal*, OECD, http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ [https://perma.cc/4T9Z-ESZR].

59. There is a policy debate on whether the U.S. citizenship taxation is appropriate, especially with respect to "accidental" Americans. *See, e.g.*, EUR. PARL. DOC. 2018/2646(RSP), *supra* note 32; Kim, *supra* note 13; Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443 (2007); Ruth Mason, *Citizenship Taxation,* 89 S. CAL. L. REV. 169 (2016); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens* (Univ. of Mich. Law & Econ., Empirical Legal Studies Ctr., Paper No. 10-009, 2010). This debate is outside of the scope of this Essay.

60. ORG. FOR ECON. CO-OPERATION & DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS: IMPLEMENTATION HANDBOOK 134 (2d ed. 2018). The Handbook states the following:

> Since under US tax law a US citizen is also a US tax resident, the Model 1 FATCA IGA provides that both US citizens and US residents are included in the definition of US person (see Article 1,1,ee) of the Model 1 FATCA IGA).
>
> The approach taken in the Standard definition generally determines residence under the tax laws of a Reportable Jurisdiction. Because in the case of the US, a US tax resident includes a US citizen and a US resident, *the approach in the Model 1 FATCA IGA is consistent with the Standard* and Financial Institutions will need to consider US citizenship as well as residence in order to fulfil the requirements of the Model 1 FATCA IGA.

Id. (emphasis added).

61. *United States - Information on Residency for Tax Purposes*, OECD, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/United-States-Tax-Residency.pdf [https://perma.cc/F7AK-YD2P].

States."[62] As the Code uses the term "United States person," there has been no need to define U.S. citizens as U.S. tax residents in the Code. This need arose in the context of tax treaties, which generally apply to "residents of Contracting States."[63] In its tax treaties, the United States has adopted a definition of residency that includes any person liable to tax by reason of citizenship.[64]

For the avoidance of doubt, if the United States were to adopt CRS, the CRS legislation should provide that any "United States person" shall be considered as U.S. tax resident for CRS purposes. This will ensure that U.S. citizens will always be subject to CRS reporting, even if they are tax residents in other jurisdictions, including treaty jurisdictions.

Therefore, the assertion in the GAO report that the "adoption of CRS would create the circumstance where foreign accounts held by U.S. citizens with a tax residence in partner jurisdiction . . . would not be reported to IRS"[65] is problematic. First, it is inconsistent with the U.S. government's position that U.S. citizens are generally considered as U.S. tax residents under the current law. Second, even if the U.S. government's position is incorrect, the GAO report assumes that the United States' CRS legislation will not define U.S. citizens as U.S. tax residents for CRS purposes. This assumption is unlikely considering the U.S. government's expressed position that U.S. citizens should be considered as U.S. tax residents.

The GAO report also notes that the differences between the U.S. tax system and other tax systems "drive variations in due diligence procedures between FATCA and CRS."[66] In particular, the report notes that "CRS rules would need to require identification of account holders' citizenship in member countries where they are residents if FATCA were to be aligned with CRS."[67] Although there are some differences between FATCA and CRS, they can be reconciled so that the United States will obtain the same information

62. I.R.C. § 7701(a)(30) (2012). The Code defines "resident alien" as follows: "An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual" is "a lawful permanent resident of the United States" (the "green card test"), meets the "substantial presence test," or elects to be taxed as a resident of the United States. I.R.C. § 7701(b)(1).

63. *See* U.S. Dep't of the Treasury, United States Model Income Tax Convention art. 4 (2016) [hereinafter U.S. Model Treaty], https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf [https://perma.cc/4LYR-A2JX].

64. *Id.* ("For the purposes of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, *citizenship*, place of management, place of incorporation, or any other criterion of a similar nature . . . ." (emphasis added)). The OECD Model Tax Convention on Income and on Capital does not include "citizenship" in its definition of "resident." Org. for Econ. Co-operation & Dev., Model Tax Convention on Income and on Capital (2017), https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1 [https://perma.cc/79DG-2VE6].

65. GAO Report, *supra* note 8, at 34.

66. *Id.* at 31.

67. *Id.*

that it currently receives under FATCA.[68] The OECD and the countries that implement CRS will probably agree to such changes. First, these changes do not impose any additional cost on FFIs, because they need to comply with the FATCA requirements anyway. On the contrary, there is potential cost saving for FFIs from the repeal of FATCA even if CRS is amended to include some U.S.-related due diligence requirements. Second, these countries would like to receive information about their tax residents' accounts in U.S. FIs. Thus, countries are likely to agree to adopt changes in their CRS laws if such changes are required by the United States to ensure that it will obtain the same information that it currently receives under FATCA.

B. *Costs for U.S. FIs*

The GAO report states that adopting CRS "could generate additional costs and reporting burdens to U.S. financial institutions that would need to implement systems to meet CRS requirements."[69] This is undoubtedly true. Similar to the costs borne by FFIs implementing FATCA and CRS, U.S. FIs will incur additional costs if the United States adopts CRS.

The GAO report further states that "[t]he extent of these costs is unknown."[70] This assertion is questionable because FIs—including many U.S. FIs operating overseas—have been complying with CRS for a while now. There are already some estimates for these costs.[71] The U.S. government can gather information on CRS compliance costs and use it to prepare an estimate for the expected costs to be borne by U.S. FIs.

In addition to CRS implementation costs, U.S. FIs may see an outflow of funds. If the United States adopts CRS, some foreigners who hold funds in U.S. FIs may try to shift them elsewhere. Some U.S. FIs may be more concerned about losing this business than incurring the CRS implementation costs.[72] However, it is impossible to justify demanding tax transparency from other jurisdictions while refusing to impose similar requirements on U.S. FIs to protect their business. Allison Christians observed in 2013 that "the United States perversely positions itself to gain from the very behavior it seeks to eliminate in other jurisdictions."[73] As Peter Cotorceanu noted, "[u]nder im-

68. For example, under FATCA, a non-IRS self-certification form for individuals should include the account holder's country of birth. Treas. Reg. § 1471-3(c)(6)(v)(B) (2018). Under CRS, the place of birth is not required to be reported unless the FI is otherwise required to obtain and report it under the applicable domestic law. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 21, at 31. CRS can be amended so that the place of birth will be required in CRS self-certification forms.

69. GAO Report, *supra* note 8, at 34.

70. *Id.*

71. For estimates of FATCA-related costs, see BYRNES & MUNRO, *supra* note 13, chs. 1, 18B; Oei, *supra* note 13, at 710–13; Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 606–07 (2018).

72. *See* Cotorceanu, *supra* note 30.

73. Christians, *supra* note 3, at 24.

mense U.S. pressure, those jurisdictions have thrown open their doors and hurt their own economies only to see the United States usurp their previous role."[74]

C. *No Benefit for the IRS and Other Considerations*

The GAO report correctly states that adopting CRS "would result in no additional benefit to IRS in terms of obtaining information on U.S. accounts."[75] But there is no mention of other important considerations. First, there is no mention of other countries' benefit from obtaining information on their tax residents' financial accounts in U.S. FIs.[76] The report only considers the information that the IRS receives from other countries, while it disregards other countries' interests in protecting their tax base against tax evasion opportunities created by the United States.[77]

Second, the report does not consider the United States' commitment to act reciprocally following the international standard that the United States itself initiated. As stated above, the U.S. government, in its "reciprocal" IGAs, acknowledged "the need to achieve equivalent levels of reciprocal automatic information exchange" with its FATCA partners, and committed to "further improve transparency . . . by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange."[78] The report does not mention any of these commitments.

Third, the report does not mention the United States' interest in preventing foreigners from using its financial industry to evade tax in other jurisdictions, which may constitute a crime under U.S. laws. The Supreme Court held in *Pasquantino v. United States*[79] that a plot to defraud a foreign government of tax revenue violated the federal wire fraud statute.[80] As wire fraud is a predicate offence for money laundering, conducting a transaction

74. Cotorceanu, *supra* note 30.

75. GAO Report, *supra* note 8, at 33–34.

76. Countries with tax treaties with the United States can file specific exchange of information requests under the treaties. U.S. Model Treaty, *supra* note 63, art. 26. However, this option does not help to detect tax evasion where countries do not know if and where their tax residents hold unreported offshore funds. The advantage of AEOI is that it facilitates the operation of a mechanism to routinely identify and report foreign tax residents' financial accounts.

77. If the United States were to adopt CRS, it should only exchange information with jurisdictions that have in place appropriate safeguards protecting the confidentiality of the information. *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 21, at 13; ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 60, at 52–54. For further discussion, see William Byrnes, *How May the United States Leverage Its FATCA IGA Bilateral Process to Incentivize Good Tax Administrations Among the World of Black Hat and Grey Hat Governments? A Carrot & Stick Policy Proposal*, 31 EMORY INT'L L. REV. 1033, 1046–47 (2017).

78. Model 1A IGA, *supra* note 17, art. 6(1).

79. 544 U.S. 349 (2005).

80. 18 U.S.C. § 1343 (2012).

with the proceeds of wire fraud may constitute money laundering.[81] Adopting CRS will make it harder for foreign tax evaders to use the U.S. financial industry to defraud their governments. This consideration of how to prevent these federal crimes is missing from the report.

Finally, the report does not consider the international pressure on the United States and the EU's June 2019 deadline. According to Alex Cobham from the Tax Justice Network, "[t]he EU may be the only actor big enough to discipline the U.S. as it emerges as the biggest global threat to financial transparency and cooperative corporate tax behavior."[82] As discussed in Part II, the EU member states could impose a FATCA-like withholding tax on payments from EU payors to U.S. FIs. As the United States successfully encouraged countries to adopt IGAs under the threat of FATCA withholding, the EU may adopt a similar approach vis-à-vis the United States.

It is somewhat puzzling that the GAO report, which was published in April 2019, does not mention the EU's June 2019 deadline for the United States to adopt CRS. This suggests that the U.S. government or parts of it ignore this development. As the EU's threat appears to be credible, ignoring it may suggest that the U.S. government prefers to address this issue only after the EU takes action against the United States. Currently, there is no political will to adopt CRS.[83] If the EU adopts defensive measures against U.S. FIs, the U.S. financial industry may lobby for adopting CRS. Then, if Congress realizes that the costs incurred by the current policy exceed the benefits, it might adopt the international standards on tax transparency.

However, ignoring this matter until it leads to an unprecedented clash with the EU does not appear to be in the best interest of the United States. Such a clash may damage the U.S. financial industry, and it is hard to predict what the ramifications would be. If the United States is blacklisted by the EU and forced to adopt CRS under the EU's pressure, it would damage the United States' international standing. We should also expect more conflicts between the United States and the EU if the EU decides that the only way to resolve disagreements is through taking unilateral measures against the United States.

CONCLUSION

The U.S. Treasury and Congress should urgently consider whether the United States should adopt CRS in lieu of FATCA. The GAO report is the first step in this direction, although further analysis is required. Among other issues, the U.S. Treasury and Congress should consider the following: (a) What are the expected implementation costs for U.S. FIs from adopting CRS?; (b) What is the expected cost saving for FFIs (including foreign

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81. The money laundering criminal provisions are in 18 U.S.C. §§ 1956–1957.

82. *See* Kirwin, *U.S. on Course to Land on European Tax Blacklist: EU Official*, *supra* note 5.

83. *See* Kirwin, *EU's Expanded Tax Haven Blacklist Could Apply to U.S.*, *supra* note 5; Cotorceanu, *supra* note 30.

branches of U.S. FIs) from the United States' adoption of CRS in lieu of FATCA?; (c) To what extent is the U.S. financial industry currently used by foreigners to hide unreported financial assets?; (d) What changes should be made in CRS in order to protect the United States' interests if the United States were to adopt CRS in lieu of FATCA?; and (e) How likely is the United States to be blacklisted by the EU if it does not adopt CRS, and what would be the likely consequences of such blacklisting? As the United States will not be able to ignore this matter for much longer, policymakers should engage in this important and timely policy discussion.