



**REPORT OF THE TASK FORCE ON FATCA IMPLEMENTATION IN BARBADOS**

**JUNE 10, 2013**

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The Task Force on FATCA implementation acknowledges the contribution of Andrew Alleyne, Corey Archer, Karol Ashby, Julie Ann Benjamin, Maria Bristol, Wythrop Catwell, Ikins Clarke, Helga Clarke, Sadie Dixon, Lorenzo Forde, Rendra Gopee, Henderson Holmes, Tamara Hurley, Melanie Jones, Dalia Littlewood, Wayne Lovell, Stefan Mayers, Beverley Manning, Anderson Padmore, Sandra Payne, Anthony Pilgrim, Judy Reynolds, Emeline Taitt, Kaeron Venner, Sabina Walcott-Denny, Louisa Ward and Peter Whitehall

## EXECUTIVE SUMMARY

1. The **Foreign Account Tax Compliance Act (FATCA)** was enacted in 2010 by the United States (US) Congress to target non-payment of Federal Taxes by U.S. taxpayers who utilise foreign accounts for this purpose. FATCA requires foreign financial institutions (FFIs) to report to the US Internal Revenue Service (IRS) information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a controlling interest.
2. The US Government is seeking international sovereign partners to implement and operationalise FATCA. Countries refusing to comply run the risk of causing their financial institutions to be subject to a 30% withholding tax on both income and capital from US sources. FATCA implementation will be on the basis of Intergovernmental Agreements (IGAs) between the US and the partner jurisdictions.
3. The Cabinet of Barbados has directed that an IGA be negotiated with the US government and consequently instituted a task force headed by the Central Bank and Invest Barbados that comprises other public and private sector representatives. There are two types of Model I agreements, a reciprocal version and a non-reciprocal version as well as a singular Model II agreement.
4. Under both types of Model I agreement, the competent tax authority of a jurisdiction collects information on US account holders from its Financial Institutions (FIs) and transmits the information to the IRS. Under the reciprocal version the IRS would collect and provide financial account information on Barbadians in the US to the Inland Revenue Department of Barbados. Pursuant to a Model II agreement, the FIs of a particular country will transmit the aforementioned information to the IRS directly.
5. Each agreement carries certain annexes. Annex I sets out what are called US “reportable accounts” as well as the due diligence procedures required to be utilized by FFIs in identifying US accounts. Annex II identifies entities

and products that present a low risk of US tax evasion and as a consequence will be excluded from the ambit of FATCA and particularly the obligation to report.

6. One of the immediate and obvious concerns of the Government of Barbados would be the cost of adopting and implementing an IGA as reflected in training and recruitment of personnel and the acquisition and integration of new technological processes if a Model I agreement is adopted. It is clear that the Barbados government would need to play the same intervention role (to ensure laws are passed or amended and to negotiate which entities and accounts would be excluded under Annex II) irrespective of which model IGA is selected. In addition, FIs may well bear the same processing cost with either a Model I or Model II IGA.
7. The Barbados Bankers Association (TBBA) has indicated that its members that have subsidiaries or affiliates in other jurisdictions are already engaged in initiatives in various jurisdictions to ensure FATCA compliance. TBBA has indicated that members are concerned about the high cost of compliance, the need to change operational systems, complexities with FATCA reporting, the legal implications of FATCA, particularly as it relates to customer privacy, and the need to prepare for customer impact.
8. It was originally thought that Model I might prove to be more costly for government than Model II and this caused some jurisdictions like Jamaica to lean towards a Model II IGA. Now that it has become clear that the US will develop many of the technical systems involved thus potentially reducing costs, Model I has come into a more favourable light.
9. The Commissioner of Inland Revenue of Barbados has indicated that because of the existing platform between Barbados and the US in relation to the existing Double Taxation Agreement (DTA) and Tax Information Exchange Agreement (TIEA), a Model I agreement is implementable. In addition, Model I creates an opportunity for the reciprocal receipt of information which may be useful in future. This, coupled with the fact that

financial sectors worldwide appear to prefer Model I agreements since it would alleviate the necessity of dealing directly with the IRS, supports the Task Force’s recommendation that Barbados seeks to negotiate a reciprocal Model I agreement with the US.

The following is a suggested list of next steps to be undertaken by Barbados in relation to FATCA:

1. Subject to Cabinet approval, the giving of official notification to the Government of the US through the Department of the Treasury and the Department of State that Barbados is willing to negotiate and sign a reciprocal Model I agreement.
2. Sensitization of the financial industry on the definitions, due diligence procedures, thresholds and timelines relating to US “reportable accounts” under Annex I of Model I.
3. Complete the draft list of entities and products that will be identified for “exempt beneficial owner or deemed compliant FFI” status under Annex II of Model I in consultation with the financial industry including credit unions.
4. Remind the financial industry of the necessity to register with the IRS as a precursor to Barbados signing an IGA so that their “deemed compliant” status will be secured once the IGA is finalised.
5. Commence the drafting of legislation that will create the platform for the incorporation of FATCA type IGAs into Barbados’ domestic law.

## 1. BACKGROUND

**FATCA** is a portion of the 2010 Hiring Incentives to Restore Employment (HIRE) Act which is a United States (US) Federal statute that requires US individuals and entities to report their financial accounts held overseas. Under the Act, Foreign Financial Institutions (FFIs) are mandated to report information on US corporate and individual account holders to the Internal Revenue Service (IRS). The salient provisions of FATCA have been incorporated into the US Internal Revenue Code.

The US Government is seeking to have countries around the world partner with it to implement and operationalise FATCA. Countries who do not comply run the risk of causing their financial institutions to be subject to a 30% withholding tax on both income and capital from US sources. FATCA implementation will be on the basis of Intergovernmental Agreements (IGAs) between the US and various countries that will have the status of a treaty. In relation to Barbados, **legislation will have to be passed** to incorporate FATCA into the domestic law of Barbados. If no such legislation was passed, Barbadian FIs would have to seek a waiver from US bank account holders in order to make appropriate disclosures.

Legislative enactment in Barbados of a FATCA IGA is therefore necessary for two reasons namely:

- To give life and domestic enforceability to what is in effect an agreement between nations
- As a method of derogating from the common law rule of Banker/Customer confidentiality

The Cabinet of Barbados has directed that an IGA be negotiated with the US government. With the leading international financial centres moving to adopt and implement FATCA, Barbados' options are limited and given the possible impact of non-compliance on its international financial services sector, Barbados must keep apace. Moreover, a regional FATCA initiative headed by CARICOM is also ongoing. In the circumstances, the Cabinet of Barbados has appointed a task force headed

by the Central Bank and Invest Barbados that comprises other public and private sector representatives. The task force has held a number of meetings to determine the best way for Barbados to proceed in relation to FATCA adoption and subsequent implementation.

## **2. FATCA MECHANISMS AND OPERATIONS AT A GLANCE**

As alluded to, FATCA has three core elements namely (1) enhanced financial due diligence (2) broader reporting of financial assets of US persons abroad and (3) a withholding tax on US source income and capital of FFIs not registered, compliant or exempt under FATCA. The US government has asserted that to relieve administrative burdens, FATCA will build on existing systems for the exchange of information under Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs).

A number of mechanisms have been developed to guide FATCA operations. These include model IGAs and their annexes. In brief there are two types of Model I agreements, a reciprocal version and a non-reciprocal version. Under both types of Model I agreement, the competent tax authority of a particular jurisdiction collects information on US account holders from its FIs and transmits the information to the IRS. Under the reciprocal version the IRS would collect and provide financial account information on Barbadians in the US to the Inland Revenue Department of Barbados. Pursuant to a Model II agreement, the FIs of a particular country will transmit the aforementioned information to the IRS directly while the competent tax authority performs a monitoring role.

Examples of countries signing Model I agreements are the United Kingdom, Denmark, Mexico and Ireland while Switzerland has signed a Model II agreement.

### **2.1 Model I Agreements**

The following are some of the more salient features of a Model I agreement;

- A FATCA partner (e.g. Barbados) agrees to collect information under its own domestic law (e.g. Income Tax Act or stand-alone new

legislation) on US account holders from FFIs and provide this information to the IRS via the domestic competent tax authority (Inland Revenue Department)

- Model I has an element of reciprocity where the IRS would collect information on Barbados citizens' accounts in the US and report this to the Inland Revenue Department.
- The IRS will, once a model I agreement is signed, deem Barbadian FIs as **compliant** with or exempt from the provisions of FATCA as the case may be and no question of the 30% withholding will arise.
- Since there is already a DTA and a TIEA between the US and Barbados, there is consequently a platform in place for the reciprocal exchange of information though it may not presently be automatic.

## 2.2 Model II Agreements

By contrast, the following are the salient features of a model II agreement

- No reciprocity in exchange of information
- Barbados will direct all its FIs except those covered by Annex II to register with the IRS
- The FIs will identify US account holders, obtain their consent (provided no domestic legislation exists) and thereafter report information directly to the IRS on these consenting account holders
- The FIs will also report aggregate account information for recalcitrant (non-consenting) account holders to the IRS who may then make individual requests for information on a case by case basis.
- The role of the Inland Revenue Department under Model II would be to monitor FIs and ensure their compliance with FATCA. No enforceability mechanisms in this regard have yet been determined.



## 2.3 Annexes

Each agreement carries certain annexes. Annex I sets out what are called US “reportable accounts” as well as the due diligence procedures required to be utilized by FFIs in identifying US accounts. **It will be necessary for all FFIs to become knowledgeable in the due diligence procedures set out in Annex 1.** The Central Bank has been paying special attention to the due diligence procedures and various definitions of “US reportable accounts” in an effort to have meaningful dialogue with the financial industry on this particular aspect of FATCA. A separate paper will be disseminated in this regard.

Annex II identifies entities and products that present a low risk of US tax evasion and as a consequence will be excluded from the ambit of FATCA and particularly the obligation to report, as **exempt beneficial owners or deemed compliant FFIs.**

The US has drafted standardised approaches to Annex I and II and slight customization is only possible in relation to Annex II. Some notable examples of entities or products that may be exempt from FATCA under Annex II include credit unions and pension funds. It will be the responsibility of countries to demonstrate that particular entities and products fall under Annex II. The FATCA task force is currently compiling a list of Barbadian financial entities and products which it will recommend for “exempt beneficial owner or deemed compliant FI” status under Annex II.

## 3. QUESTIONS AND CONCERNS

### 3.1 Costs

One of the immediate and obvious concerns of the Government of Barbados would be the cost of FATCA adoption and implementation which will be reflected in the training and recruitment of personnel and the acquisition and integration of new technological processes particularly if a Model I agreement were to be adopted. At the moment the FATCA associated costs are still an unknown variable. There are suggestions from the US Government that FATCA implementation will not be as costly as partner jurisdictions may have originally

envisaged and the reasons for this position on the part of the US Government are outlined later.

### 3.2 Precedent Setting and Pre-Conditions

Expert negotiators representing Barbados on previous international tax matters have raised the issue of precedent setting by FATCA. It is posited that FATCA presents a new and higher standard for information exchange. Currently the global standard is the OECD 'on request' model but FATCA has given added momentum to 'automatic' exchanges. FATCA-style information exchange in relation to US account holders is now being used in support of a multi-lateral standard for automatic information exchange of taxpayer information. It is the first time that an extra-territorially applied information exchange standard is being used to spawn a multi-lateral standard - or in any event the first one which now has the endorsement of a growing number of OECD states.

The EU is pursuing its own FATCA style agreement called the EU Savings Directive. FATCA has apparently galvanised other countries into making renewed calls for this type of exchange. There is the suggestion that with this new and higher standard questions about compliance will be raised again with adherence to the previous standard offering no guarantee of immunity from sanction. Execution of an IGA which is accepted and agreed as in Barbados' best interest may raise a broader policy issue for Barbados' domestic and international business and financial services sector. The important question therefore will be; “should Barbados also seek to voluntarily agree to automatic tax information exchanges with its key partners using the infrastructure that will have to be put in place for FATCA?”

While it is fairly certain that the alternative to FATCA implementation namely the 30% withholding on US source income and capital is not a matter that can be lightly treated, the Task Force is of the view that the issue of precedent setting must still be brought to the attention of the Barbados Government.

After due inquiry, the US Treasury Department has indicated that there are no preconditions that Barbados needs to meet (such as passing phase 2 of the Global Forum peer review process) before a FATCA IGA may be negotiated.

#### **4. ONGOING DEVELOPMENTS**

On April 9 and 10, 2013 officials of the US Treasury Department and the IRS conducted a workshop and bilateral meetings with representatives of Caribbean governments and private sector interested parties. The Government of Barbados was represented by Mr. Elson Gaskin, Bank Secretary of the Central Bank of Barbados and Chairman of the FATCA implementation Task Force established by Cabinet, Miss Sandra Payne of Invest Barbados and Mr. Anderson Padmore of the Inland Revenue Department. The US Government was represented by Mr. Michael Danilack a Deputy Commissioner (International) of the IRS, Ms. Tara Ferris Attorney-at-Law also of the IRS and Ms. Danielle E. Rolfes, International Tax Counsel, US Department of the Treasury.

As a consequence of the discussions, a numbers of understandings emerged which are hereinafter set out.

##### **4.1 Data Collection and Transmission**

The US Government in conjunction with the OECD is developing a standardised Universal Data Format (Schema) for collection and reporting of information under FATCA. It is the current intention of the US government to “hand” the schema to FATCA partner jurisdictions as a “turn-key” electronic solution. The US government posits that this should further relieve some of the administrative burdens associated with FATCA. It is hoped that the schema will be completed by June 2013.

The manner of transmitting data collected under FATCA is not quite settled but there are a number of options available. It was indicated that FATCA would build on existing technology within a secure environment.

- Option 1

Collect data in the universal schema - competent tax authorities or FFIs would utilize a stand-alone server that would transmit the data to a Secure Intelligent Router (SIR) for onward transmission to IRS.

- Option 2

Under option 2, FFIs would collect the information in the universal schema and forward it to the SIR which would simultaneously transmit to the IRS and the Competent Tax Authority of the FATCA partner.

Diagrammatical representations of options 1 and 2 two are set out in the appendices hereto.

The IRS asserts that Option 2 has been tested using an internet web browser. Option 2 presents a unique opportunity for the Government of Barbados and FIs to partner in relation to FATCA. If Barbados signs a Model 1 IGA, it will relieve FIs of the necessity to deal with and report directly with the IRS. If the option 2 transmission method is used, Government will be relieved of most of the administrative burden of direct collection and transmission of information on US reportable accounts. In this way, Government and FIs can take collective ownership of FATCA operations.

**While the development of the schema and transmission methodology by the US government will substantially reduce the administrative burden that will be placed on the Barbados government as a result of FATCA operations, there may still be costs associated with the training of personnel, the integration of US electronic systems with Barbados' existing systems and the acquisition of dedicated hardware. The manner of offsetting these costs and whether they should be shared should be continually raised with the US government.**

#### 4.2 Registration of FFIs with the IRS

The IRS registration system for FFIs has been completed and will “go live” on July 1 via a secure web portal that will be available 24/7. The system will have tools that are appropriate to oversee and capture group member/branch information. A lead or holding company may register for an entire group initially but subsequently all members of the group must be identified. FFIs are expected to complete their registration by October 2013.

FFIs will establish a secure on-line account and will receive a unique global intermediary identification number (GIIN) which will be applicable to all members of a particular group. Once an FFI home country signs a Model 1 IGA, this said registration will not be for the purpose of reporting but as a manner of verifying that that country’s FFIs are “deemed compliant” and therefore not liable to the 30% withholding penalty.

A registered FFI will get automatic email notifications of other FFI status changes or relevant developments under FATCA. FFIs’ IRS accounts will be capable of being accessed so changes can be made.

#### 4.3 Thresholds Timelines and Procedures Relating to US Reportable Accounts

Under FATCA there are various rules applying to US reportable accounts. Individual accounts in existence (pre-existing accounts) prior to December 31, 2013 need not be reviewed or reported if they are less than US\$50,000 (bank accounts) or \$250,000 (cash value insurance and annuity contracts) in value. Individual accounts exceeding these sums but not \$1,000,000 must be reviewed by December 31, 2015. Accounts exceeding \$1,000,000 must be reviewed by December 31, 2014.

With accounts opened on or after January 1, 2014, FFIs must obtain valid self-certification or documentation that shows whether or not an account holder is a US citizen or resident for tax purposes. A valid IRS W-8BEN form is a credible method of self-certification. The W-8 form is used by foreign persons (including corporations) to certify their non-U.S. status. The form establishes that a person is

a non-resident alien or foreign corporation, and permits the avoidance or reduction of withholding tax on U.S. source income, such as rents from U.S. property, interest on U.S. bank deposits or dividends paid by U.S. corporations. There are criminal penalties for falsifying IRS forms.

Once through self-certification the account holder is found to be a US citizen or resident the account must be treated as a US reportable account.

For pre-existing entity accounts the basic threshold for review is \$250,000. An entity is a US corporation, a US financial institution, a US controlled non-financial foreign entity (NFFE), a non US financial institution and non-participating financial institution. Accounts held by the former three entities are treated as US Reportable accounts while those held by the latter two are not US reportable accounts but payments to them would be reported to the competent tax authority of the relevant jurisdiction.

Most of the enhanced due diligence procedures for US reportable accounts must be completed by December 31, 2015 in which case reporting on such accounts must be done by December 31, 2016. In other cases the procedures must be completed and reported on by December 31, 2014 and December 31, 2015 respectively. Once any account is found to be a US reportable account in one year, that designation remains in subsequent years until some circumstance arises to change it.

US reportable accounts are those accounts for which US indicia are found through review procedures. Review procedures include electronic record searches, paper record searches including KYC/AML documentation and relationship manager enquiries. US indicia include US business organization, US citizenship or residency, unambiguous US place of birth, US addresses and telephone numbers and standing orders for fund transfers to US accounts.

## **5. SHOULD BARBADOS ADOPT A MODEL I OR MODEL II AGREEMENT?**

It is clear that the Barbados government would need to perform the same intervention role (to ensure laws are passed or amended and to negotiate which entities and accounts would be excluded under Annex II) irrespective of which model IGA is selected. In addition, FIs may well bear the same processing costs with either a Model I or Model II IGA.

The Barbados Bankers Association (TBBA) has indicated that its members that have subsidiaries or affiliates in other jurisdictions are already engaged in initiatives in various jurisdictions to ensure FATCA compliance. TBBA has indicated that members are concerned about the high cost of compliance, the need to change operational systems, complexities with FATCA reporting, the legal implications of FATCA, particularly as it relates to customer privacy, and the need to prepare for customer impact. For this reason, TBBA recommends that the focus of the government should be on a bi-lateral solution which ensures implementation of legal requirements for account holders. TBBA prefers an IGA through which government would provide information directly to the US, i.e. a Model I approach, and a national education program to prepare customers.

Until recently, there was no Model II, and the choice of Model is a political decision which governments will need to make. The idea that Model I might prove to be more costly for government than Model II would have caused some jurisdictions like Jamaica to lean towards a Model II IGA. Now that it has become clear that the US will develop many of the technical systems involved thus potentially reducing costs, Model I has assumed a more favourable light.

There are anecdotal suggestions that some financial institutions might prefer not to conduct business with Model II jurisdictions. For example it is believed that the Cayman Islands decided to adopt Model I because of the fear that some of their institutions might relocate to Model I jurisdictions.

The Commissioner of Inland Revenue of Barbados has indicated that because of the existing platform between Barbados and the US in relation to the existing DTA

and TIEA, a Model I agreement is implementable. In addition, Model I creates an opportunity for the reciprocal receipt of information which may be useful in future. This, coupled with the fact that financial sectors worldwide appear to prefer Model I agreements since it would alleviate the necessity of dealing directly with the IRS, supports the Task Force's recommendation that Barbados seeks to negotiate a reciprocal Model I agreement with the US.

The finalisation of a Model I agreement will bring important benefits to the country since it will delay the time that FFIs would ordinarily have to complete and finalise due diligence procedures to 2014 and 2015 effectively. In addition, the first data transmission will be made in or after 2015. The Model I agreement will cover all FIs domiciled in Barbados and they will consequently be deemed FATCA compliant or exempt as the case may be.

In any event FATCA cannot become operational until both Barbados and the US are satisfied that each country has in place (i) appropriate safeguards to ensure that the information received pursuant to the IGA remains confidential and will be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship (including established processes for ensuring timely, accurate, and confidential information exchanges, effective and reliable communications, and demonstrated capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges) is in place. Under the IGA both Barbados and the US will meet to ensure in good faith that the aforementioned safeguards are in place by September 30, 2015.

## **6. SUGGESTED NEXT STEPS**

The Task Force is generally of the view that consideration should be given to drafting legislation in a broad enough manner to address any other FATCA type agreements that may subsequently be entered into. There is precedent for this type of approach in the Reciprocal Enforcement of Judgments Act.

The Task Force is further of the view that Barbados should use the stance it has taken in relation to FATCA to gain leverage in relation to the argument that TIEAs



have not been as useful as previously believe and their future pursuit ought to be reconsidered. The following is therefore a suggested list of next steps to be undertaken by Barbados in relation to FATCA.

1. Subject to Cabinet approval, the giving of official notification to the Government of the US through the Department of the Treasury and the Department of State that Barbados is willing to negotiate and sign a reciprocal Model I agreement.
2. Continue dialogue with the financial industry where appropriate, on the definitions, due diligence procedures, thresholds and timelines relating to US “reportable accounts” under Annex I of Model I.
3. Complete the draft list of entities and products that will be identified for “exempt beneficial owner or deemed compliant FFI” status under Annex II of Model I in consultation with the financial industry including credit unions.
4. Remind the financial industry of the necessity to register with the IRS as a precursor to Barbados signing an IGA so that their “deemed compliant” status will be secured once the IGA is finalised.
5. Commence the drafting of legislation that will incorporate the FATCA IGA once finalised, into Barbados domestic law.

#### **TASK FORCE ON FATCA IMPLEMENTATION IN BARBADOS**

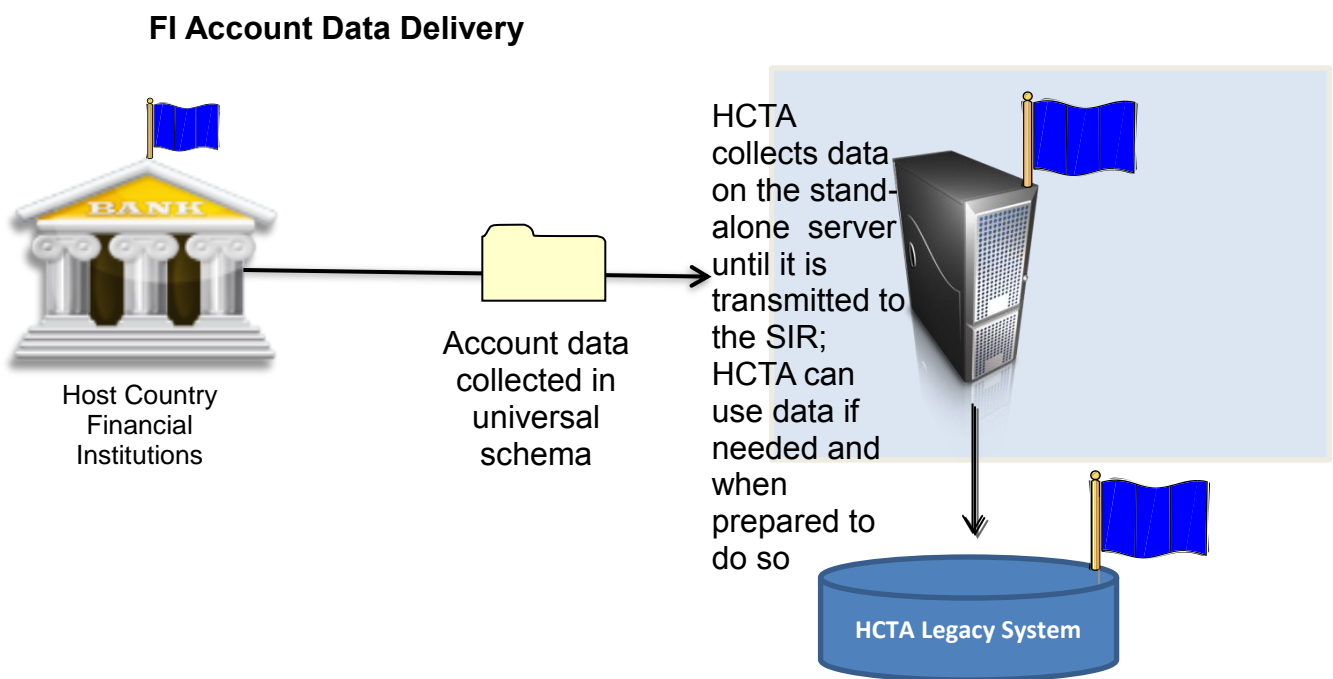
**ELSON A. GASKIN**

**CHAIRMAN**

**JUNE 10, 2013**

## APPENDIX 1

### Diagrammatical Representation of Data Transmission Option 1<sup>1</sup>

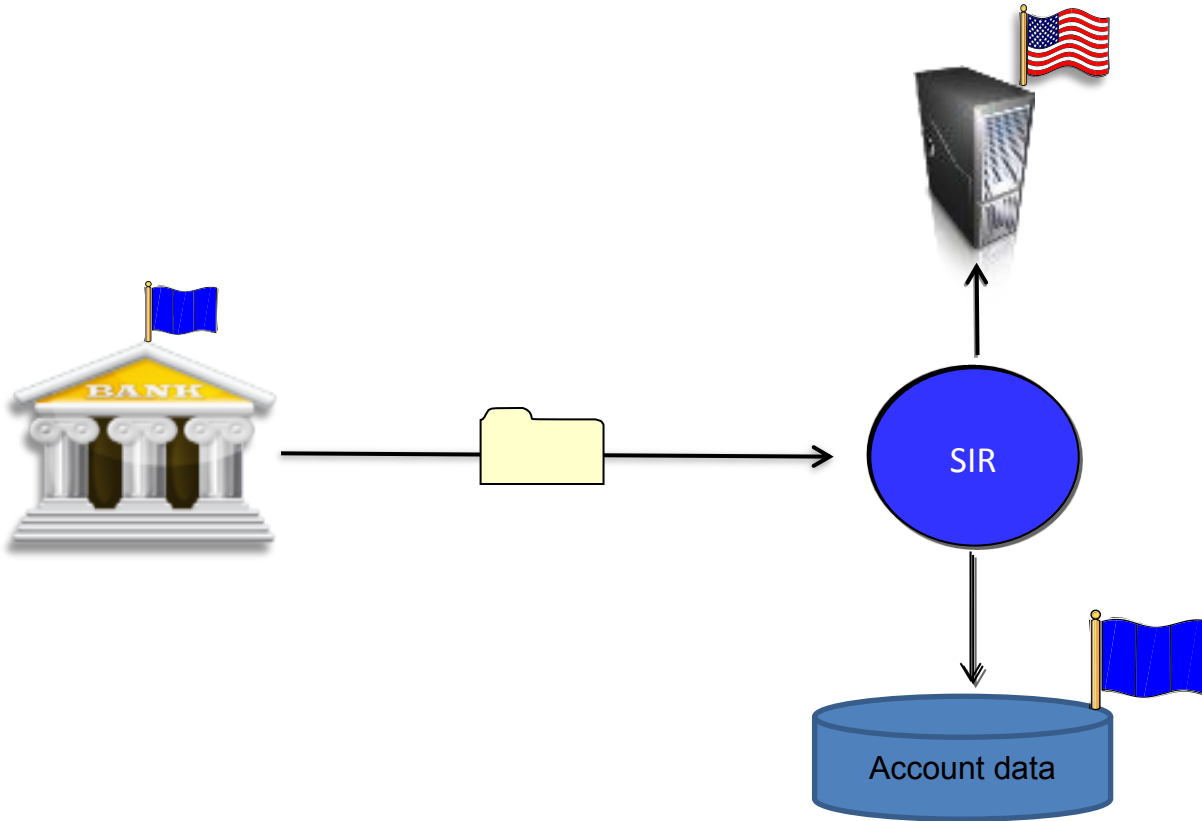


- Host country FIs transmit account data in RCTA's format/schema to HCTA's stand-alone server

<sup>1</sup> Source US Internal Revenue Service

APPENDIX II

Diagrammatical Representation of Data Transmission Option 2<sup>2</sup>



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<sup>2</sup> Source US Internal Revenue Service