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## U.S. Regulators Looking to India As Swiss Bank Users Move Accounts East

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### BNA Snapshot

**Key Development:** India's implementation of its intergovernmental agreement with U.S. to implement FATCA will eventually give U.S. authorities a powerful tool for catching taxpayers with unreported accounts.

**Context:** India among countries that U.S. suspects received "leaver" accounts, or unreported U.S. accounts in Switzerland that their owners pulled out after U.S. crackdown on Swiss banks.

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By Rick Mitchell

Oct. 7 — India's implementation of the Foreign Account Tax Compliance Act will eventually pose serious problems for U.S. holders of unreported accounts in India, though current U.S. offshore enforcement actions are still focused more on Switzerland, analysts said.

The attention on India has grown amid reports that U.S. citizens have been moving their money to the Asian nation as scrutiny of Switzerland's banks has intensified. So far, it is seen as a relatively safe play for those who want to keep their offshore bank accounts hidden because India hasn't yet signed an information-sharing agreement with the U.S.

The U.S. Treasury Department lists India as a jurisdiction that has reached a FATCA Model 1 intergovernmental agreement (IGA) "in substance." The Reserve Bank of India said in June that India and the U.S. had reached an IGA, but that it wouldn't be signed until the Indian Cabinet approves it (127 DTR I-1, 7/2/14).

The 2010 FATCA statute requires foreign financial institutions, and some insurance companies, fiduciary companies, external asset management firms and some individual foreign trusts, to report their U.S.-owned accounts to the Internal Revenue Service or face up to a 30 percent withholding tax on certain U.S.-source payments made to them.

Once it takes effect, India's IGA will enhance the IRS's ability to get current-year reporting information about U.S. persons' accounts in India, but also to look back at unreported accounts from previous years, said Scott Michel, at Caplin & Drysdale LLP in Washington.

Consequently, as India and the Treasury tweak the fine print of the IGA for "India-specific issues," these institutions in India are already preparing for FATCA. However, it will take some time for U.S. authorities to gear up their FATCA enforcement structure in India, Michel said.

### Among Biggest Jurisdictions for Hiding Money

Michel and his Caplin & Drysdale colleague H. David Rosenbloom, who will be speaking on U.S. global offshore enforcement developments in Mumbai on Oct. 13, said India is one of the biggest jurisdictions where Americans have been caught hiding money.

Rosenbloom said FATCA is definitely going to be part of U.S. enforcement, but there aren't yet any consequences of FATCA other than that the IGAs signed so far worldwide have rooted out people who have come forward to make voluntary disclosures.

"The actual operation is coming in the future," Rosenbloom said.

Meanwhile, "In terms of practical consequences, there are things going on right now that are a lot more important, particularly in the Department of Justice, civil and criminal audits and investigations, and various U.S. tax treaties around the world," he said.

For example, on Sept. 15 the DOJ's program targeted at Swiss banks and Switzerland produced a first wave of submissions of information on U.S.-held accounts.

"What the DOJ does with that information is going to be interesting," he said.

### **Stemmed From HSBC Case**

About 100 so-called category 2 Swiss banks entered the Justice Department's program under which they got reduced penalties in exchange for supplying substantial information on how they helped U.S. clients hide money from the IRS.

About a dozen category 1 banks, including HSBC, weren't eligible for the program, because they were already under U.S. investigation.

The category 2 banks, among other things, had to list every U.S. account that left their bank and moved elsewhere after August 2008, the identity of the bank that received the funds, amount of the transfers and dates on which they occurred. These departing accounts are known as "leavers."

India was among the countries that leavers went to. In addition, in 2011, the IRS's investigation into HSBC led it to seek information on HSBC India accounts of U.S. residents. That inquiry "started to pry the lid off of the whole Indian subset of the notion of Americans maintaining unreported foreign assets," Michel said.

Said Rosenbloom, "Switzerland is much more front and center [of the DOJ program] but India is definitely on the radar screen because there have been rumblings of certain financial institutions that set up units to take money from Indian Americans."

"I think the IRS and the Justice Department have concluded that there is a fairly significant pocket of American citizens and green card holders with a material amount of assets held in India and that has not been reported," Michel said.

### **No 'Autopilot' FATCA Reporting**

As is in other jurisdictions worldwide, financial institutions and other entities in India will have to set up due diligence procedures to avoid future accusations that they failed to properly comply with FATCA.

That means bank officials in India will have to make certifications on their FATCA compliance to the IRS under penalties of perjury, and banks will need internal audit groups as well as outside Big Four-type

consultants to monitor and audit their FATCA compliance.

“It’s not just setting up this reporting regime and then letting it run on autopilot,” Michel said.

Some local and regional Indian banks may have to play “catch up” to implement the information technology necessary for FATCA compliance, he said.

Practitioners have said countries’ domestic implementation and enforcement of their FATCA IGAs could create an extra layer of compliance issues for institutions.

Michel said that, in Caplin & Drysdale’s experience with Indian tax authorities, “The assumption in India, more often than not, is that if you have a tax issue you are going to end up in court.”

“To the extent that India involves itself in auditing FATCA compliance and regulating it, I think you’ll see some transference into the FATCA world of whatever culture there is to tax administration in India,” he said.

### **Back Door Enforcement**

Under Switzerland’s tax treaty with the U.S., banks aren’t allowed to name leaver account holders in their reports to the U.S., but the U.S. has a much “more robust” information exchange arrangement under its tax treaty with India.

So once the DOJ obtains “raw data” from Switzerland, it “will be able to go through the back door in India and figure out who made that transfer, where the money came from and then be able to ascertain whether those individuals have properly reported their Indian accounts and assets,” Michel said.

And although FATCA is technically not retroactive, “it will enhance the IRS’s ability not only to get obvious reporting information for the current year but also to look back whether someone previously had an account,” he said.

In 2015, if the IRS gets information from India that a U.S. individual had an unreported account in 2014, it can send a “soft enquiry” letter notifying the U.S. taxpayer of that information, and asking if that person has such an account, when it was opened and how long the person has had it.

“When a U.S. taxpayer gets that kind of a notification from the IRS in a situation where there is a material amount of retrospective noncompliance, you’re sort of off to the races. If you answer ‘yes,’ you confess, and if you answer ‘no,’ you’re lying, and that’s a crime.”

“So, I wouldn’t take much comfort in the nonretroactivity aspect of FATCA,” Michel said.

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