Cayman Islands Bankers' Association

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BEPS new on the agenda for the OECD

'The process will change the world over time'

James J Tobin, Global Director International Tax, Ernst & Young

From left: *James J Tobin, Global Director International Tax, Ernst & Young; Dax Basdeo, Chief Officer Ministry of Financial Services; Gonzalo Jalles, CEO of Cayman Finance and Tim Ridley, former CIMA Chairman*

Attendees at Cayman Finance's recent International Tax Initiatives Seminar, held on 23rd January, heard that there is a new action plan outlined by the OECD targeting multinational organisations and that this action plan, known as BEPS (base erosion and profit shifting) would have implications for Cayman's financial services industry in the months and years ahead.

James J Tobin, Global Director, International Tax, with Ernst & Young and former Cayman Islands Monetary Authority Chairman Tim Ridley gave an overview of the 15 point action plan that the OECD had devised following the organisation's decision to focus on the issue.

Tobin said BEPS was "the next big thing" that will result in big changes to the international tax landscape and while some of the action points would not affect Cayman, many of them would.

Shifting income

BEPS was instigated by the G20 and is aimed at resolving governments' concerns about the potential for multi-national corporations to reduce their tax liabilities through shifting of their income to no or low tax jurisdictions.

The OECD itself did not have the power to change the law so it would be a long process before any changes would filter to individual governments, Tobin said, but the action plan had target dates for each item, either September 2014 or September 2015.

"The process will change the world over time," he said.

The 15 point action plan was outlined as follows:

1. Address the tax challenges of the digital economy

2. Neutralise the effects of hybrid mismatch arrangements.

3. Strengthen CFC rules.

4. Limit base erosion via interest deductions and other financial payments.

5.Counter harmful tax practices more effectively, taking into account transparency and substance.

6. Prevent treaty abuse

7. Prevent the artificial avoidance of PE status.

8. 9. 10. Assure that transfer pricing outcomes are in line with value creation.

11. Establish methodologies to collect and analyse data on BEPS and the actions to address .

12. Require taxpayers to disclose their aggressive tax planning arrangements.

13. Re-examine transfer pricing documentation.

14. Make dispute resolution mechanisms more effective.

15. Develop a multilateral instrument.

Ridley said that key business streams to be affected in the Cayman Islands were hedge funds, including private equity and venture capital funds, the most dominant driver of business currently in Cayman and hopefully for the foreseeable future.

Tobin added that the reputational risk that's perceived in being a tax haven in this current tax debate is of concern to US multinationals such as Starbucks.

Concern about reputation is on the top of the agenda of executive education in the US, he said.

Ridley said: "If you thought FATCA was bad put BEPS next on your list." However he also added that the process would take a good deal of time to take effect, stating that the more countries get involved with differing agendas the slower the OECD's progress will be, especially if China and India become involved.

FATCA: implementation status and outstanding issues

With regard to the implementation of the Foreign Account Tax Compliance Act (FATCA), Martin Livingston, Partner at Maples and Calder, reminded the audience of the time line for registration.

Foreign Institutions (known as FIs) will have to register with the IRS under FATCA by 25th April 2014 to make the list of registrants to be issued on 1st July 2014.

FIs in a jurisdiction with a Model 1 Agreement signed with the US authorities (such as the Cayman Islands) have until the end of the year to register, although the registration process will be shut by 22nd December 2014. FIs were urged to register before then to make the 1st January 2015 deadline.

FIs in the Cayman Islands between 25th April and the end of the year will have to self-certify to withholding agents in the United States that they are currently contemplating registration under a Model 1 IGA, he said.

Livingston explained that enabling legislation was needed to put into effect the IGA.

Adopting that law will be effected in part by introducing it into the Tax Information Au-

Martin Livingston, Partner at Maples and Calder

thority law so that it deals with the concept of the automatic exchange of information. The TIA law only deals with the concept of "on request" so that new concept will be added in, he said.

The secondary legislation to be introduced will be the "nuts and bolts" for service providers because that will deal with the regulations and guidance notes.

Such legislation is being drafted by the Government with the assistance of a FATCA Working Group from industry that comprises of representatives from the Cayman Islands Bankers' Association, Cayman Finance, the Cayman Islands Society of Professional Accountants and the Cayman Islands Compliance Association.

The working group will be setting up sub - committees either based upon topic or by industry and other representatives from other professional associations will also get the chance to have their say in the drafting process.

Livingston said certain issues were still outstanding with the IRS and included issues such as classification of entities such as holding companies and treasury centres, which were defined under the US Regulations but not under the IGA.

He also said that while there was pressure from some advisors to rush to register, it might be advisable to wait and see because of these final outstanding queries.

The FATCA registration process

Foreign Financial Institutions (FFIs) will have to get to grips with the FATCA registration process over the next few months, so Christopher Larkin, Senior Manager with Ernst & Young gave a timely walk through the IRS registration portal for the seminar audience.

To assist with registration, the IRS has produced a user guide that is user-friendly, Larkin explained, and even though it was over 100 pages long, entities only needed to focus on the parts of the guide that related specifically to them.

The four parts to FATCA registration are as follows:

- **Account creation**
- **Registration**
- **Submission**
- **Approval**

Account creation

The entity needs to select the FI type and Larkin advised that the Lead FFI needs to set up an account first. Ensure the challenge questions and answers are recorded and ensure that they are available to other users, he advised. The registrant will then create an access code which also must be recorded, he said. A FATCA ID code will then be issued. A new FATCA ID and access code will need to be created for each legal entity.

Registration

Part 1 needs to be completed by all registrants, part 2 by lead FIs only, Part 3 only by QI, WP or WT registrants and Part 4 by all registrants.

Registrants will be given links to the user guide to assist them and to a FAQ section. Registrants will need to have the relevant information to hand when registering, such as the country of residence for tax purposes of the FI, its mailing address and whether it has a withholding agreement already in place with the IRS. They will also have to state whether the FI is a tax resident of the US or whether it maintains a branch in the US.

Questions also arise about the Reporting Officer (RO) for the FI. Larkin said that anyone could be an RO but that it ought to be someone authorized to say that due diligence had been undertaken and that it was accurate and correct, such as a CCO.

Submission

Registrants ought to be aware that any information entered before 1st January 2014 will not have registered with the IRS and that information will have to be re-submitted. A FATCA file would need to be maintained to show compliance with regard to possible future auditing purposes.

Approval

A notice of acceptance should be received by the registrant and a GIIN (Global Intermediary Identification Number) will be then issued.

The GIIN will be comprised of 6 alpha/numerics (to identify the lead FI) followed by five alpha/numerics (to identify the Expanded Affiliated Group member) followed by two letters (representing the FI type) and finally three numbers (to represent the country). Cayman's number is 136.