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## ARTICLE

# Newest developments on FATCA and CRS compliance

Since our previous bulletin, the Canada Revenue Agency (the CRA) has made further updates to Canada's implementation of the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) compliance regimes.

On July 10, 2020, the CRA released new versions of the FATCA Guidance and CRS Guidance (collectively, the July Guidance). These amendments clarify some of the ambiguities in the FATCA Guidance and CRS Guidance released on April 20, 2020 (collectively, the April Guidance).

This bulletin addresses some of the key developments on FATCA and CRS compliance, including key changes in the July Guidance for Canadian financial institutions (FFIs).

## What You Need to Know

The latest developments on FATCA and CRS compliance include:

- Despite removing the implementation date, the CRA continues to maintain its position that penalties for failing to obtain a valid self-certification will commence on Jan. 1, 2021.
- The FATCA Guidance and CRS Guidance (collectively, the Guidance) provides information for fund managers and dealers in respect of their FATCA and CRS obligations. The July Guidance indicates that this information applies to members of the Investment Industry Regulatory Organization of Canada (IIROC), but non-IIROC members may use the Guidance for arrangements that are analogous to the IIROC arrangements.
- The CRA's website announced changes to the process of amending, cancelling and fixing FATCA and CRS information returns. As a result of this announcement, effective May 2021, FFIs that file multiple returns in satisfaction of their annual reporting obligations must keep track of the slips filed under each return.
- The April Guidance announced that accounts without tax identification numbers (TINs) would only be reportable under the FATCA regime if there were U.S. indicia on file. The July Guidance clarifies that this change is effective beginning with the reporting of the 2020 taxation year.
- The April Guidance changed how FFIs were to deal with an entity account that did not have a valid self-certification. The July Guidance clarifies that these changes are effective for the reporting of the 2020 taxation year.

## FATCA and CRS: Penalties for self-certifications

FFIs that fail to obtain a valid self-certification at account opening, or upon a change of circumstances, may be liable to a penalty of up to \$2,500 for each failure under each of FATCA and CRS. This means an FFI may be liable to a cumulative penalty of \$5,000 for each account for both FATCA and CRS. The penalty for not obtaining a valid self-certification is a one-time penalty and will not be assessed in a subsequent year if the FFI still has not obtained a valid self-certification form from the account-holder.

In the April Guidance, the CRA indicated these penalties will commence on Jan. 1, 2021.

The July Guidance now removes the Jan. 1, 2021 implementation date. Historically, in the absence of a specific effective date in the Guidance, the date of publication (*i.e.*, July 10, 2020) would be the date on which amendments to the Guidance are effective. Nevertheless, the CRA has confirmed that the amendment removing the implementation date is not intended to accelerate the implementation date to July 10, 2020.

## FATCA and CRS: Arrangements between dealers and fund managers

Chapter 5 of the Guidance deals with reporting obligations for arrangements involving multiple financial institutions and outlines the due diligence and reporting obligations of both fund managers and dealers in two contexts: holdings in nominee-name and holdings in client-name. The April Guidance was unclear on whether Chapter 5 only applied to IIROC members.

As a result of this ambiguity, the July Guidance confirms that Chapter 5 relates only to the affairs of IIROC members. However, it also states that non-IIROC members may use Chapter 5 to address arrangements that are analogous to the IIROC arrangements discussed therein.

## FATCA and CRS: Process for amending, cancelling and fixing returns

On July 9, 2020, the CRA website announced two changes for how FFIs amend, cancel and fix their Part XVIII and Part XIX information returns.

In any given reporting year, an FFI may file multiple returns in satisfaction of its reporting obligations. Each original return or fix return is considered its own unique "chain." When an FFI is amending, cancelling or fixing a particular return, it must now target the correct chain that requires the particular amendment, cancellation or fix. As a result, if an FFI has multiple unique chains, it must keep track of the various chains and the slips filed under each chain – this enables the FFI to target the correct chain when making the amendment, cancellation or fix. This applies to both Part XVIII and Part XIX information returns as of May 2021.

The CRA also announced that amended Part XVIII returns must include a slip. This change is also effective May 2021.

## FATCA: Accounts with missing TINs

Historically, any account without a TIN was treated as a reportable account even if there were no U.S. indicia on file.<sup>1</sup> This led to many accounts being reportable simply because they were not documented.

The April Guidance in respect of FATCA indicated that an FFI that opens an account without obtaining a self-certification could rely on indicia to determine whether the account holder was a specified U.S. person and whether the account should be reported. As a result, FFIs were no longer required to report undocumented accounts if there were no U.S. indicia on file.<sup>2</sup>

The April Guidance indicated that the effective date of the amendment was January 1, 2020. It was therefore unclear whether this amendment applied beginning with returns filed in 2020 (for the 2019 taxation year) or returns filed in 2021 (for the 2020 taxation year).

The July Guidance resolves this ambiguity by clearly stating that the amendment is effective beginning with the reporting of the 2020 taxation year.

## FATCA: Entity accounts without valid self-certifications

The April Guidance in respect of FATCA stated that an FFI was required to treat an entity account as reportable, if two conditions were met: (i) the FFI failed to obtain a valid self-certification; and (ii) the FFI was unable to determine whether the entity account holder was a specified U.S. person, an active non-financial foreign entity (NFFE), a FFI or a financial institution in a partner jurisdiction. For the purposes of reporting, the FFI was permitted to categorize the account as one held by a specified U.S. person or a passive NFFE. Effective Jan. 1, 2020, the FFI was required to report the account holder as a specified U.S. person if it believed or information indicated that the entity account holder was a U.S. person.

The April Guidance also indicated that if the entity account holder was treated as a passive NFFE, the FFI was required to identify its controlling persons and report them as specified U.S. persons. Effective Jan. 1, 2020, the FFI was allowed to rely on indicia to determine whether one of the controlling persons was a specified U.S. person and whether the account should be reported.

As a result, the April Guidance indicated that both these changes were effective as of Jan. 1, 2020. This led to ambiguities similar to those discussed above for accounts with missing TINs.

The July Guidance clarifies that the amendments for entity accounts are effective for reporting related to the 2020 taxation year and subsequent taxation years. This makes it clear that reporting completed in 2020 (for the 2019 taxation year) is not subject to these amendments.

For more information on these changes, please contact [Grace Pereira](#) or [Joelle Kabouchi](#).

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<sup>1</sup> U.S. indicia are the following: (i) identification of the account holder as a U.S. resident or a U.S. citizen; (ii) an unambiguous indication of a U.S. place of birth; (iii) a current U.S. mailing or residence address (including a P.O. Box); (iv) a current U.S. telephone number; (v) standing instructions to transfer funds to an account maintained in the U.S. (regardless of who holds the account); (vi) a current effective power of attorney or signatory authority granted to a person with a U.S. address; and (vii) an "in-care-of" address in the U.S. that is the sole address the FFI has on file for the account holder

<sup>2</sup> This treatment for undocumented accounts has always applied under CRS. For purposes of CRS, an account was never reportable simply because of a missing self-certification – such an account was only reportable if there were indicia on file.

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