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ARTICLE

Latest developments on FATCA and CRS compliance

As discussed in our previous bulletins, the implementation of FATCA and CRS have fundamentally changed the compliance environment for Canadian financial institutions (FFIs) as they are expansively defined for purposes of Parts XVIII and XIX of the *Income Tax Act* (Canada) (ITA). On April 20, 2020, the Canada Revenue Agency (CRA) released long awaited amendments to both its CRS Guidance and its FATCA Guidance (collectively, the Guidance), which provide increased clarity on due diligence obligations and the associated penalties for non-compliance. In addition, on April 15, 2020, the CRA announced relief for FATCA and CRS information return filers amid the COVID-19 pandemic. This bulletin addresses both the April 15 and April 20 changes.

What you need to know

- FFIs can defer the filing of information returns under Part XVIII and Part XIX of the ITA until September 1, 2020 without the imposition of interest or penalties;
- The CRA has not removed the 90-day provision for validating self-certifications;
- FFIs must obtain self-certifications on or after January 1, 2021 on a new account opening or when there has been a change in circumstances;
- Starting in 2021, FFIs that fail to obtain a self-certification may be liable to a penalty up to $2,500 for each failure under FATCA and CRS. These penalties will not apply to financial accounts opened before January 1, 2021;
- A $100 fine is now applicable for each failure by a financial institution to file a timely return under Part XIX and XVIII of the ITA. The penalty will also be imposed if the person required to provide the information has failed to provide any required information;
- A self-certification is not invalid simply because of a missing TIN. Canadian TINs should be reported on self-certifications;
- With respect to FATCA, the absence of a U.S. TIN will not result in the IRS concluding that there is significant non-compliance on the part of the FFI;
- The Guidance clarifies that the penalties that apply to individual account holders for failing to provide a foreign taxpayer identification number (TIN) or U.S. TIN extend to entity account holders. The penalty under CRS is $500 and the penalty under FATCA is $100; and
- The Guidance clarifies the treatment of reportable persons who are discretionary beneficiaries of trusts.

Latest developments

COVID-19 updates (April 15, 2020)

On April 15, 2020, in an effort to reduce the burdens felt by FFIs in the current climate, the CRA announced that FFIs could defer the filing of information returns under Part XVIII and Part XIX of the ITA from May 1, 2020 until September 1, 2020 without the imposition of interest or penalties. The April 15 announcement also included some other welcome news, which has also made its way into the newly released FATCA Guidance: no penalty will apply for failure to obtain a self-certification on financial accounts opened before January 1, 2021.

Updates to the FATCA and CRS guidance (April 20, 2020)

Updates abandoned by the CRA

Some of the most welcomed updates contained in the latest Guidance relate to the abandonment of proposed amendments to the Guidance that were released for comment by the CRA at the end of 2019. In particular, the CRA had proposed reducing the 90-days to obtain a valid self-certification from account-holders under the Guidance to 30 days. This proposed amendment was intended to align the due diligence requirements under the FATCA and CRS regimes since the 90-day provision or "grace period" for validating self-certifications was not provided for under the CRS. Fortunately, in response to concerns expressed by industry groups and associations that reducing the number of days to obtain a valid self-certification would place FFIs at a competitive disadvantage with their international counterparts, the CRA has abandoned this proposed amendment. The 90-day provision continues to apply in respect of both FATCA and CRS.

Self-certifications

Perhaps the most significant update to the Guidance surrounds the new obligation for FFIs to obtain self-certifications on or after January 1, 2021 on a new account opening or when there has been a change in circumstances. In the draft Guidance released for comment late last year, this new self-certification requirement was to become effective January 1, 2020. It should be welcome news for FFIs struggling with new ways of operating in light of COVID-19 that this new standard has been delayed for another year.

Starting in 2021, FFIs that fail to obtain a valid self-certification may be liable to a penalty up to $2,500 for each failure under FATCA and CRS. In other words, an FFI may be liable to a cumulative penalty of $5,000 for each account. These penalties will not apply to financial accounts opened before January 1, 2021.

In accordance with the latest Guidance, a self-certification will be considered "valid" if it is signed (or otherwise positively affirmed) by the account holder, it is dated, and it contains the account holder's:

- Name
- Residence address
- Jurisdiction of residence for tax purposes
- Foreign TIN with respect to each reportable jurisdiction (if the account holder is a reportable person)
- Canadian TIN (if applicable)

- The date of birth requirement has been removed from the above list of requirements.

Penalty for late, or not, filing

The Guidance now imposes a $100 fine for each failure by a financial institution to file a timely return under Part XIX and XVIII of the ITA. The penalty will also be imposed if the person required to provide the information has failed to provide any of the required information. However, as mentioned above, filers may defer filing until September 1, 2020 as part of the CRA's COVID-19 response.

Passive NFFEs and Passive NFEs

The Guidance now clarifies the treatment of reportable persons who are discretionary beneficiaries of trusts that are passive non-financial foreign entities (NFFEs) under FATCA or passive non-financial entities (NFEs) under CRS. According to the Guidance, provided that the appropriate notification procedures are put in place by the FFI, such persons are not required to be reported to the CRA as "controlling persons" until the beneficiaries receive a distribution from the trust or intend to exercise vested rights in the trust property.

The Guidance also clarifies that where the control or ownership of a passive NFFE/NFE is a trust, and the trust directly or indirectly owns or controls 25 per cent or more of the passive NFFE/NFE, the FFI is required to report all natural persons who control the trust and who are reportable persons. Where a corporation controls or owns the passive NFFE/NFE, and the corporation directly or indirectly owns or controls 25% or more of the passive NFFE/NFE, the FFI is required to report all of the natural persons who directly or indirectly own or control 25 per cent or more of the corporation and who are reportable persons.

Obtaining TINs

The Guidance also clarifies that a self-certification is not invalid simply because of a missing TIN. A TIN may be collected through other means. However, when the account holder is a reportable person under either FATCA or CRS, the FFI must use reasonable efforts to obtain the TIN in order to report it on the Part XVIII/Part XIX Information Return. Some account holders may have a Canadian TIN, in which case, the Canadian TIN should be reported on the self-certification.

With respect to FATCA, the Guidance now indicates that the absence of a U.S. TIN will not result in the IRS concluding that there is significant non-compliance on the part of the FFI. Instead, the IRS will consult with the CRA so they can take into account valid reasons why U.S. TINs could not be obtained and the efforts made to collect them by the FFI.

Penalties for failure to provide a foreign or U.S. TIN

The FATCA Guidance clarifies that an account holder that does not provide a U.S. TIN on request in connection with a new individual account or an entity account that is required to be reported may be liable to a penalty of $100. The previous version of the FATCA Guidance only included this penalty for pre-existing individual accounts. It is important to note, however, subsection 162(6) of the ITA has always indicated penalties apply in each of these circumstances.

The CRS Guidance now clarifies that an account holder that does not provide a foreign TIN on request in connection with an entity account that is required to be reported may be liable to a penalty of $500. Previously, the CRS Guidance had only included a penalty for new and pre-existing individual accounts. However, subsection 281(3) of the ITA has always indicated penalties apply in each of these circumstances.

Updates to the CRS Guidance

Organisation for Economic Co-operation and Development (OECD) Risk Analysis (CBI/RBI regime)

Throughout the new CRS Guidance, reference is made to the OECD's risk analysis on the citizenship and residence by investment (CBI/RBI) scheme. FFIs are expected to adjust their due diligence procedures to take into account the OECD risk analysis to determine if the account holder is claiming to be a resident of a potential high risk CBI/RBI scheme.

Entity Account Classification

The CRS Guidance provides clarification on how FFIs must treat accounts where no self-certification is provided. Where an FFI fails to obtain a valid self-certification and is unable to determine whether the entity account holder is a reportable person, it must treat the account as a reportable account for each reportable jurisdiction in which the account holder appears to be a resident. If it is believed or information indicates that the entity account holder is not a reportable person, and the FFI is unable to determine whether the entity account holder is an active NFE or an FFI, other than a professionally managed investment entity resident in a non-participating jurisdiction, the FFI must treat the account holder as a passive NFE. In such circumstances, the FFI must rely on the indicia that it has in its records in order to determine whether one of the controlling persons is a reportable person and whether the account should be reported. If the FFI has no such indicia in its records and has no reason to know that the controlling person is a reportable person, then the account is not required to be reported and no further action is required.

Updates to the FATCA Guidance

Entity Account Classification

The FATCA Guidance has been amended to specifically note that if an FFI fails to obtain a valid self-certification and is unable to determine whether the entity account holder is a specified U.S. person (which includes a U.S. citizen and a U.S. resident), an active NFFE, an FFI, or other partner jurisdiction financial institution, it must treat the account as a U.S. reportable account. For purposes of reporting, if it is believed or information indicates that the entity account holder is a specified U.S. person, the FFI can report the account holder as a specified U.S. person. If it is believed or information indicates that the entity account holder is not a U.S. person, the FFI can treat the account holder as a passive NFFE.

Classification of NFFEs

If the entity account holder is treated as a passive NFFE, the FFI can rely on the indicia that it has in its records in order to determine whether one of the controlling persons is a specified U.S. person and whether the account should be reported. If the FFI has no such indicia in its records and has no reason to know that the controlling person is a specified U.S. person, then the account is not required to be reported and no further action is required until there is a change in circumstances that results in one or more indicia with respect to the controlling person.

For more information on these changes, please do not hesitate to reach out to the individuals named below.

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