Proposed amendments to the Income Tax Act: reportable and notifiable transactions

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In the Government of Canada's Budget 2021, proposed amendments to the *Income Tax Act* (the Act) were announced which will significantly expand the mandatory disclosure rules. This will require taxpayers, advisors (including accountants and lawyers), promoters, and certain other parties to disclose information to the Canada Revenue Agency (CRA) on tax planning and transactions that the CRA deems aggressive. The draft amendments would:

1. expand the Act's **reportable transaction rules**;
2. add a requirement to report **notifiable transactions**;
3. significantly reduce the reporting deadline;
4. add a requirement for certain corporations to report uncertain tax treatments;
5. extend the normal reassessment period in non-compliance situations; and
6. add new related penalties.

Where a filing requirement arises under either the proposed expanded reportable transaction rules or new notifiable transaction rules, reporting is generally required within **45 days** after the reporting person enters, or becomes contractually obliged to enter, into the transaction. A corporation reporting under the proposals for the uncertain tax treatment rules must file an information return before the income tax filing deadline for the year.

Following the initial consultation period, a slightly revised version of the draft legislation was released in August 2022. The revisions included:

1. increasing the reassessment period for mutual fund trusts and corporations other than Canadian Controlled Private Corporations (CCPC) to four years after the day on which the relevant information return is filed, as opposed to three;
2. delaying the application of the new rules to 2023;
3. excluding the application of the reportable and notifiable transaction rules to those individuals who only provide clerical or secretarial services;
4. narrowing the hallmarks of reportable transactions (described further below);
5. clarifying that normal commercial transactions will not be reportable; and

6. clarifying that where an employer or partnership files a required information return with respect to a notifiable transaction, each employee or partner will be deemed to have made the filing.

A description of the proposed rules follows.

Reportable transactions

The current reportable transaction rules were introduced in 2010 by section 237.3 of the Act, and required that a transaction be reported following a two-part test. First, the transaction had to be an 'avoidance transaction' as the term was defined in the General Anti-Avoidance Rule (generally any transaction resulting directly, or indirectly, in a tax benefit *unless* the transaction was primarily undertaken or arranged for other valid purposes). Second, the transaction had to meet two of the following three hallmarks:

1. **Fee hallmark:** applies where a fee related to an avoidance transaction is:
    i. based on the amount of tax benefit,
    ii. contingent on obtaining a tax benefit, or
    iii. based on the number of persons involved in a transaction.
2. **Confidential protection hallmark:** applies where an advisor requires or obtains confidential protection that would prohibit the disclosure of the avoidance transaction's relevant details to any person or the CRA.
3. **Contractual protection hallmark:** applies where the avoidance transaction includes insurance or other protection against a failure to achieve a tax benefit or provides for the payment/reimbursement of any expense arising from a dispute over the transaction's tax benefit.

Under the proposed new rules, the definition of avoidance transaction will be extended to include any transaction where it is reasonably considered that **obtaining a tax benefit is one of the main purposes** for the transaction.

Further, the new rules reduce the number of hallmarks triggering reporting to just one, and restrict the 'confidential protection' hallmark to those where the protection specifically relates to the tax treatment of the avoidance transaction or series. In addition, for the 'contractual protection' hallmark, the protection must be offered to a broad class of persons and cannot be for a tax treatment with respect to the avoidance transaction.

These rules apply broadly to include each person providing any assistance or advice in creating, developing, planning, organizing, or implementing the transaction or series.

Notifiable transactions

The new notifiable transaction rules mimic several of the concepts within the reportable transaction rules. A notifiable transaction is defined to be any transaction that is the same, or substantially similar to, a designated transaction or series. A transaction or series will be 'substantially similar' to a designated transaction or series if:

- the transaction or series leads to the same or similar "tax consequences", and
- it is either factually similar or based on the same or similar tax strategy.

The designated transactions will be set by the Minister of National Revenue. A sample of six notifiable transactions has already been released with the draft legislations and include transactions manipulating the status of a CCPC. While sample transactions have been released, there is no certainty what the final list of designated transactions will be. For a summary of these sample notifiable transactions, please see the Department of Finance Canada Backgrounder.

Continued consultation

Despite the revised draft proposals announced in August, public consultation on the rules continued until September 30, 2022.

We will continue to provide updates on the current status of the proposed rules. If you have questions as to how they may apply to you or your business, please reach out to your BLG lawyer, the authors of this piece or any member of BLG's Tax Group.

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