

Since [our last update](#) on the Foreign Account Tax Compliance Act (FATCA) and the related Intergovernmental Agreement between Canada and the United States for the Enhanced Exchange of Tax Information under the Canada–United States Tax Convention dated February 5, 2014 (the IGA), there have been new developments that have begun to affect Canadian financial institutions (Canadian FIs), including investment fund managers (IFMs), portfolio managers (PMs) and exempt market dealers (EMDs).



FATCA and the related IGA are implemented by the *Canada–United States Enhanced Tax Information Agreement Implementation Act*, together with the addition of Part XVIII and other amendments to the *Income Tax Act* (the Tax Act Amendments).

We have identified below three key elements of your compliance strategy that require immediate attention, and have included some frequently asked questions about FATCA as it relates to Canadian FIs.

For more detailed information, please see the [Canada–United States IGA dated February 5, 2014](#) and the [CRA Guidance on the Tax Act Amendments dated June 20, 2014](#).

## Key Elements of Your FATCA Strategy

### Registration

- **When.** Now.
- **Why.** To comply with FATCA and the reporting requirements under the IGA, Canadian FIs must register and obtain a Global Intermediary Identification Number (GIIN) before January 1, 2015. The best practice is to register as soon as possible. Canadian FIs may be penalized for non-compliance.
- **How.** Through the [Internal Revenue Service \(IRS\) portal](#).

### Client Self-Certification

- **When.** Ongoing as of July 1, 2014.
- **Why.** To determine whether clients are U.S. persons for FATCA purposes, Canadian FIs must obtain self-certification from new and existing individual and entity clients.
- **How.** Canadian FIs must create a self-certification for clients with a signed declaration attesting to the correctness and completeness of statements made. Canadian FIs should ask, at a minimum, whether clients (both individuals and entities) are U.S. persons, where they reside for tax purposes and look for other U.S. indicia.

We recommend advising your clients that you are requesting this information for FATCA compliance purposes.

### Reporting

- **When.** Starting in 2015.
- **Why.** Canadian FIs with U.S.-reportable accounts must file a Part XVIII Information Return with the Canada Revenue Agency (the CRA) to comply with the IGA.

- **How.** We currently know that the Part XVIII Information Return will consist of information slips containing detailed information about each reportable account, including the balance of the account. Canadian FIs must also provide a summary to the CRA with an overview of the contents of the information slips.

If a Canadian FI has no reportable accounts, no “nil” reports are required to be filed.

## Who is Subject to FATCA?

Any entity that qualifies as a Canadian FI is subject to FATCA and may have reporting requirements.

### What is a Canadian FI?

A financial institution must be a Canadian FI under the Tax Act Amendments to have reporting requirements under FATCA.

The following two conditions must be met for an entity to be a Canadian FI under the Tax Act Amendments:

- (a) the entity must be a Canadian FI under the IGA; and
- (b) the entity must be a listed financial institution under the Tax Act Amendments.

An entity that is not registered under provincial legislation may still be deemed to be a Canadian FI as described under **Does an OSC non-registrant need to comply with FATCA?** below.

### How does a financial institution determine that it is *Canadian* for FATCA purposes?

A financial institution *resident* in Canada under the Tax Act Amendments is considered a Canadian FI. If the *control and management* of an entity's business takes place in Canada, the entity is resident in Canada. A Canadian FI also includes a branch in Canada of a financial institution that is not resident in Canada.

### What is a listed financial institution?

The definition of listed financial institution is broad and would generally include IFMs, PMs, EMDs and investment vehicles, such as prospectus and non-prospectus investment funds and private equity funds, and may also include non-registered entities.

A listed financial institution can be: (i) any entity *authorized under provincial legislation* to engage in the business of dealing in securities or any other financial instruments, or provide portfolio management, fund administration or fund management services; (ii) any entity that is represented or promoted to the public as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund or venture capital fund; or (iii) an investment vehicle established to invest or trade in financial assets and managed by one of the entities mentioned above.

### Do all Canadian FIs have reporting obligations?

The test for FATCA compliance is a negative test: any Canadian FI that is *not* a non-reporting Canadian FI (an NRCFI) is a reporting Canadian FI. *A reporting Canadian FI will be required to make its first report to the CRA by May 1, 2015.*

### What is an NRCFI and is it exempt from the reporting requirement?

Entities that qualify as NRCFIs are described under Annex II of the IGA, and such entities do *not* have any reporting obligations in relation to financial accounts that they maintain. Any account or product described in Section IV of Annex II of the IGA will not be considered a financial institution, no matter how any such product or account is structured.

The most commonly relied on exemptions for NRCFIs as listed in Annex II of the IGA are as follows:

- **Deemed compliant FIs.** Includes local banks and financial institutions with only low-value accounts (below \$50,000).

- **Exempt beneficial ownership.** Includes entities with exempt beneficial owners like retirement funds, central banks or international organizations.
- **Canadian FIs with a local client base.** Canadian FIs that meet certain criteria, including the requirement that 98% of accounts are held by local Canadian investors, and that no marketing for the institution or its products is done outside of Canada.

### **What is a Canadian FI with a local client base?**

If a Canadian FI operates in Canada only with Canadian accounts and has no intention to solicit business in the United States, it is possible that it will not need to register for a GIIN if it meets certain criteria. To be considered a Canadian FI with a local client base, the FI must meet all of the following criteria:

- the FI must be licensed and regulated under the laws of Canada;
- the FI must have no fixed place of business outside of Canada;
- the FI must not solicit customers outside of Canada;
- the FI is required under Canadian law to identify Canadian resident account holders to perform information reporting (or tax withholding) or is a reporting entity under PCMLTFA and related regulations; and
- at least 98% of the financial accounts by value provided by the FI must be held by residents of Canada (whether or not they are U.S. persons).

Canadian FIs that rely on this exemption must confirm that this status continues to apply on an annual basis.

### **How does FATCA apply to dealers?**

Most dealers will need to register for a GIIN under FATCA, but their obligations to identify and report U.S. accounts will depend on whether or not they are responsible for KYC and AML obligations, depending on their relationship with their clients. In most cases, dealers are considered Canadian FIs, and will have due diligence and reporting requirements connected to the accounts they maintain in addition to their existing requirements under applicable securities laws of the jurisdiction where they are registered.

Agreements between dealers and investment funds should identify the FATCA reporting and compliance responsibilities of each party. In general, the party responsible for collecting KYC and AML information will also conduct the required FATCA self-certification completed by an investor. Existing dealer agreements may need to be updated to reflect appropriate allocation of responsibility for FATCA reporting and compliance requirements.

### **How is reporting done under FATCA?**

FATCA reporting is done by registering for a GIIN through the [IRS website](#). After registration, reporting is done through the CRA.

### **Who needs to register for a GIIN?**

Most IFMs, PMs and EMDs will need to register for a GIIN. Other than a list of specific entities considered NRCFIs (discussed above), most Canadian FIs that are classified as “investment entities” must register for a GIIN and comply with FATCA reporting requirements.

Once a Canadian FI has successfully registered on the IRS website, it will be assigned a unique GIIN, which the Canadian FI can provide to withholding agents and other entities with which it conducts business to indicate that it is registered with the IRS and compliant with FATCA.

An “investment entity” for FATCA purposes is an entity that primarily conducts business by engaging in one or more of the following activities on behalf of a customer or client:

- trading in money market instruments (cheques, bills, certificates of deposit and/or derivatives), foreign exchange, exchange, interest rate and index instruments, transferable securities and commodity futures;
- individual and collective portfolio management (for example, a PM); and
- otherwise investing, administering or managing funds or money on behalf of other persons (for example, an IFM).

As indicated above under **What is a listed financial institution?** a person or entity authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management or investment advising services, will generally be considered to be a Canadian FI and must therefore register for a GIIN.

### **If a manager manages multiple funds, is each fund required to register for a GIIN?**

This depends on a variety of factors, including the structure of the funds, the unique characteristics of the investors in the funds, and the nature and value of the accounts managed. We would be pleased to discuss your organization's structure with you to assist with the classification process.

### **Does an OSC non-registrant need to comply with FATCA?**

Non-registrants may still be required to register for a GIIN and comply with FATCA. This may be surprising to entities that are not considered registrants for securities law purposes, such as private equity funds and mortgage investment corporations.

Non-registrants may be considered as listed financial institutions as this classification includes an entity that is authorized by provincial legislation to provide investment advising or fund management services *even if the entity is not in fact a registered, or otherwise regulated, investment advisor*. In other words, *an entity need not be registered in any way for such an authorization to exist*. While the CRA may issue further guidance on this matter, a prudent approach would be for entities that may be caught under the definition of a listed financial institution (because they may be considered as authorized to provide investment advisory or fund management services under provincial legislation) to register for a GIIN and perform the requisite FATCA due diligence.

## **Determining Reportable Accounts Under FATCA**

### **When is the first annual reporting deadline under FATCA?**

A reporting Canadian FI will be required to make its first report to the CRA by May 1, 2015.

### **How does a Canadian FI determine which accounts are reportable?**

Only accounts with U.S. indicia are reportable. A financial account is U.S.-reportable if it is identified as being held by one or more specified U.S. persons or by a passive non-financial foreign entity (an NFFE) with one or more controlling persons that are specified U.S. persons, as further described below. If a reporting Canadian FI maintains no such accounts, it will in most cases have no reporting obligations. The determination whether an account is reportable is typically obtained through a client self-certification process.

Canadian FIs should complete two key steps: sweep existing accounts for U.S. indicia and ensure that when new accounts are opened, proper steps are taken to determine whether an account holder is a U.S. person. Canadian FIs must ask: (i) whether accounts are for individuals or entities; (ii) whether an account is new or pre-existing (an account is considered new if opened after July 1, 2014); and (iii) whether an account is a low-value or high-value account. For pre-existing accounts, where one or more U.S. indicia is discovered and not addressed through self-certification or documentary evidence, the account may be reportable. The above-noted factors should also be taken into consideration when opening new accounts.

U.S. Indicia, include but are not limited to, the following:

- identification of an account holder as a U.S. citizen or resident;
- U.S. address or phone number;
- U.S. place of birth;
- instructions to transfer funds to the United States; and
- power of attorney or signatory authority granted to a U.S. person.

### **What is an NFFE?**

An NFFE is a non-financial foreign entity. FATCA distinguishes between active and passive NFFEs. An example of an NFFE is a non-U.S. private company that is in the business of investing in securities. In general, an entity is

an active NFFE if it passes *both an income test and an asset test* – if less than 50 percent of its gross income for a calendar year is investment-type income and less than 50 percent of its assets are assets that produce or are held for the production of dividends, interest, rent and royalties (other than those derived in the active conduct of a trade or business), annuities or other passive income.

*Entities that are not active NFFEs may be passive NFFEs, depending on the amount of investment income they receive.* In general, if an entity does not meet the asset test and is not an “Excepted NFFE”, it is a passive NFFE.

### **What is an Excepted NFFE?**

The term Excepted NFFE used in the FATCA context refers to publicly traded companies, affiliates of publicly traded companies, certain entities organized in U.S. territories, active NFFEs, certain non-financial entities (such as holding companies, treasury centers, captive financial companies of a non-financial group, start-up companies, liquidating or bankrupt companies, and not-for-profit organizations).

## **Account Opening Documents**

### **Is there a required form of FATCA self-certification for use as part of the account opening process?**

Self-certification for individuals and investors that are entities for FATCA purposes should be added to all account opening documents. *There is no required form of self-certification*, but the CRA provides examples of questions that FIs may use as part of their diligence process to assist with the identification of U.S. persons. Canadian FIs must collect information or review the information they possess to determine whether an individual or entity is a U.S. person for tax purposes.

Regardless of the form that self-certification takes, *there must be an element allowing the account holder to positively acknowledge by signature or other means that the certification is complete and correct.* A Canadian FI may rely on self-certification provided by an individual or entity if it has no reason to believe that the self-certification is incorrect or unreliable.

### **Can a custodian or a third-party service provider be used to fulfill account opening and/or reporting obligations under FATCA? If so, who will be responsible for errors and omissions?**

Custodians and third-party service providers may fulfill these obligations. Agreements with custodians and other third-party service providers should be amended to reflect the nature of this responsibility, and Canadian FIs should obtain indemnities wherever possible to protect themselves in the event that FATCA reporting and compliance are improperly managed.

### **What is the purpose of Form W8 BEN-E?**

Form W-8BEN-E should be completed by non-U.S. entities who are certifying that they are the non-U.S. beneficial owner of a payment of income for withholding tax purposes. This form also allows an entity to provide its FATCA status when it is an account holder with certain financial institutions. In this regard, a Canadian FI may request that account holders who are entities provide either a W8-BEN-E or a similar form of their own design requesting this information.

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We are pleased to provide you with this bulletin regarding FATCA. Please contact [a member of our Investment Funds Group](#) to request more information. Please contact [communications@aumlaw.com](mailto:communications@aumlaw.com) to unsubscribe.

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