

The Foreign Account Tax Compliance Act (FATCA) is a complex reporting and withholding regime enacted by the U.S. government in March 2010. It is expected to become operational on July 1, 2014.

FATCA was designed to combat tax evasion by U.S. taxpayers holding assets through non-U.S. financial institutions. Under FATCA, non-U.S. financial institutions around the world, including Canadian financial institutions (Canadian FIs), could be subject to a 30% withholding tax on certain U.S. source payments (including interest and dividends) made to/paid by the non-U.S. financial institution, unless certain account verification, due diligence, registration and reporting requirements are complied with.

Intergovernmental Agreement

An intergovernmental agreement (IGA) is an agreement between the U.S. government and the government of another country pertaining to the implementation of FATCA. An IGA is intended to facilitate the effective and efficient implementation of FATCA by: (i) addressing the domestic legal impediments to compliance with FATCA (such as privacy laws); and (ii) reducing compliance burdens on the financial institutions in the jurisdiction entering into the IGA with the United States.

There are two types of IGAs known as “Model 1” and “Model 2”. The primary distinction between them is that a Model 1 IGA requires financial institutions in the partner jurisdiction to report the required FATCA-related information to their own government, whereas a Model 2 IGA requires the financial institution to report such information directly to the IRS.

Canada–United States IGA

On February 5, 2014, the Canadian government announced that it had entered into a Model 1 IGA with the U.S. government (the Canada–United States IGA).

Key Features

- Canadian FIs subject to FATCA will be required to provide relevant information on reportable U.S. accounts to the Canada Revenue Agency (CRA), which will then share such information with the U.S. Internal Revenue Services (IRS) in accordance with the provisions of the Canada–United States tax treaty.
- The Canada–United States IGA imposes certain due diligence and documentation requirements on Canadian FIs for the purposes of identifying accounts held directly or indirectly by certain “U.S. persons” (as defined in the Canada–United States IGA).
- Canadian FIs that are not exempt from FATCA reporting requirements must register with the IRS to obtain a Global Intermediary Identification Number (GIIN) to comply with the Canada–United States IGA.
- The Canada–United States IGA exempts certain Canadian entities and financial accounts from FATCA registration and reporting obligations.
- Withholding tax will only apply to a Canadian FI if it is in significant and long-term non-compliance with the requirements of the Canada–United States IGA. Withholding tax will not apply to clients of the Canadian FI provided the Canadian FI properly reports those accounts, when required.
- Rather than being subject to FATCA directly, Canadian FIs will be subject to Canadian legislation implementing the IGA (the Canadian Legislation) that will be administered by CRA.
- The Canadian Legislation, which includes amendments to the *Income Tax Act* (Canada), received first reading in the House of Commons on March 28, 2014 but as of the date hereof has not yet been enacted. It is expected that the Canada–United States IGA will take effect on July 1, 2014.

Canadian FIs Subject to FATCA

The definition of Canadian FI is very broad and would generally include dealers, portfolio managers, investment fund managers and investment vehicles, such as prospectus and non-prospectus investment funds and private equity

funds. Although there is some discrepancy between FATCA, the Canada–United States IGA and the Canadian Legislation regarding the scope of entities subject to the FATCA requirements, unless and until further guidance become available from the Ministry of Finance, each of the above-noted entities will need to determine whether and in what way the Canadian Legislation applies to them in order to avoid non-compliance with any applicable FATCA requirements.

Compliance

The first step is for Canadian FIs to classify themselves as either reporting or non-reporting Canadian FIs based on the provisions of the Canada–United States IGA and the Canadian Legislation. Reporting Canadian FIs are generally required to register with the IRS via its *FATCA Registration Website* (the FATCA website). Canadian FIs will then need to comply with the account due diligence, registration and reporting requirements set out in the Canada–United States IGA.

Registration

Canadian FIs may register online on the [FATCA website](#). An investment fund manager may register as a “sponsoring entity” of one or more funds that it manages and obtain a GIIN that it can use for the funds until the IRS publishes further guidance on how to register its sponsored funds.

Global Intermediary Identification Number

Once a Canadian FI has successfully registered on the FATCA website, it will be assigned a unique GIIN which the Canadian FI can provide to withholding agents to indicate that it is registered with the IRS and that there is therefore no need to withhold 30% under FATCA. Beginning on June 2, 2014, the IRS will publish a monthly list of registered and approved foreign financial institutions and their GIINs (the FFI List).

Canadian FIs on the FFI List

The IRS is expected to publish a second FFI list on July 1, 2014 (the effective date of FATCA), for which the deadline for registration is June 3, 2014. However, a Canadian FI is not required to provide a GIIN to withholding agents prior to January 1, 2015 and therefore has additional time to register on the FATCA website to obtain a GIIN. The IRS will publish an updated FFI list at the beginning of each month. Canadian FIs that are required to register are advised to do so no later than October of 2014 to ensure that they are issued a GIIN and included on an FFI list prior to January 1, 2015.

Key Dates

- The client on-boarding process, including account opening documents, will need to address all applicable FATCA requirements by July 1, 2014.
- Canadian FIs that are required to register should ensure that they register on the FATCA website and obtain a GIIN no later than October 2014 to ensure that registration is completed prior to the end of 2014.
- Beginning on January 1, 2015, U.S. payors making certain payments to non-compliant Canadian FIs will be required to withhold 30%.

Potential Consequences of Non-Compliance

The Canadian Legislation contains certain penalties for non-compliance. In addition, under the IGA, a Canadian FI that is in significant and long-term non-compliance with its obligations under the IGA and the Canadian Legislation, may be treated as a non-participating financial institution under FATCA and subject to the 30% withholding tax on U.S. source payments.

Next Steps

Further guidance. CRA is expected to publish further guidance on the application of the Canada–United States IGA to Canadian FIs along with the final Canadian Legislation in the near future.

FATCA classification. Canadian FIs will need to determine how they are classified for FATCA purposes to determine whether registration and reporting is required.

IRS registration. Canadian FIs that are subject to the FATCA registration requirements, will need to register on the IRS online portal and obtain a GIIN.

FATCA compliance. Canadian FIs subject to FATCA should ensure that they have policies and procedures to address the registration, due diligence, account opening and reporting requirements that will be imposed by the Canadian Legislation.

Assistance with FATCA Compliance Strategy

An effective FATCA compliance strategy involves coordination with fund administrators, custodians and tax advisors.

If any of the above suggests that FATCA may apply to your organization, [we would be pleased to answer any questions you may have](#) and assist you with coordinating your FATCA compliance strategy – including with the FATCA registration process, and with the classification of your organization and any related entities.

AUM Law primarily serves the asset management sector, with specific expertise in the regulatory and investment fund space. We strive to provide the most practical, forward-thinking advice and services, using a business model geared to efficiency, responsiveness and client service excellence. We are pleased to send you this summary of recent developments that may affect your business.



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