



## Intergovernmental Agreement and FATCA

On February 5, Canada and the United States signed an intergovernmental agreement (IGA) to implement the US Foreign Account Tax Compliance Act (FATCA). The IGA came as a surprise to Canadians who were hopeful that FATCA would not come to fruition because it had generated significant controversy in Canada. The Canadian government must enact legislation for the IGA to come into force, and it appears that the IGA will be ratified because Canadian government officials have indicated that they engaged in lengthy negotiations with the US government to address their concerns before signing the IGA. However, some commentators think that Canada's current draft legislation for implementation must be amended before the United States will view it as validly implementing the IGA; presumably, the US government will address this issue with the Canadian government if it believes the legislation is inadequate.

In the absence of an IGA, a foreign financial institution (a term defined in the US Treasury regulations to include certain private trusts) must enter into an agreement directly with the IRS; for such an institution, the IGA represents relief. The IGA also alleviates the concern of a Canadian financial institution that FATCA reporting obligations potentially require it to violate Canadian privacy laws by compelling it to report directly to the IRS information on account holders who are US citizens: the IGA arranges for the financial institution to provide the information to the CRA, which in turn provides the information to the IRS under the exchange-of-information article of the Canada-US treaty. The IGA also includes a reciprocal provision that requires the US government to provide the CRA with certain information about accounts that Canadian residents hold at US financial institutions; the IGA is thus not a one-way information exchange.

The IGA provides some good news for individuals, too, because it lists at length Canadian registered accounts that are exempt from the new FATCA reporting requirements, including an RRSP, a RRIF, an RPP, a TFSA, an RESP, a DPSP, and an RDSP. The IGA also excludes accounts held at certain smaller deposit-taking institutions, such as credit unions with less than \$175 million in assets, which may result in an increase in the number of accounts held at those institutions. However, a simple chequing and savings account (with a balance equal to or exceeding \$50,000) and an investment or securities account are subject to the new reporting requirements. The IGA thus excludes from FATCA's reach a significant number of accounts at Canadian financial institutions, but completely avoiding FATCA may be difficult.

For a US citizen who resides in Canada and has not complied with his US income tax obligations, now is the time to act. Under the IGA, a Canadian financial institution, whose due diligence unambiguously indicates that an account holder has a US place of birth, must treat the individual's non-exempt accounts as reportable under FATCA unless it obtains or has the following records: (1) self-certification that the account holder is neither a US citizen nor a resident for tax purposes (perhaps on IRS form W-8, "Certificate of Foreign Status," or another similar agreed form); (2) a non-US passport or other government issued identification that evidences that the account holder has non-US citizenship or nationality; and (3) a copy of the account holder's certificate of loss of nationality (CLN) in the United States or a reasonable explanation of (a) why the account holder does not have a CLN despite relinquishing US citizenship, or (b) why the account holder did not obtain US citizenship at birth. What constitutes a "reasonable explanation" for items 3(a) and (b) is unclear. As a result of FATCA's start date in Canada, discussed below, an individual who believes that he may have relinquished his US citizenship in a prior year may want to consider applying for a retroactive CLN, but that option should be carefully considered: its denial may be problematic, and the grant of a retroactive CLN may trigger US expatriation tax in that prior year of relinquishment.

Under the IGA, a Canadian financial institution must begin due diligence procedures starting on July 1, 2014 and report information to the CRA beginning in 2015. The first exchange of information between the CRA and the IRS must occur no later than in 2015. Thus, the IRS will soon start to receive information from the CRA regarding US citizens who hold accounts at Canadian financial institutions. For many of the US citizens who live in Canada and have yet to comply with

their US income tax obligations through the IRS's streamlined filing compliance procedure for non-resident non-filer US taxpayers, time is running out: they may be ineligible for that streamlined procedure if the IRS obtains information about them through FATCA.

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