



FATCA: A Portfolio Manager's Guide to Navigating Uncharted Waters

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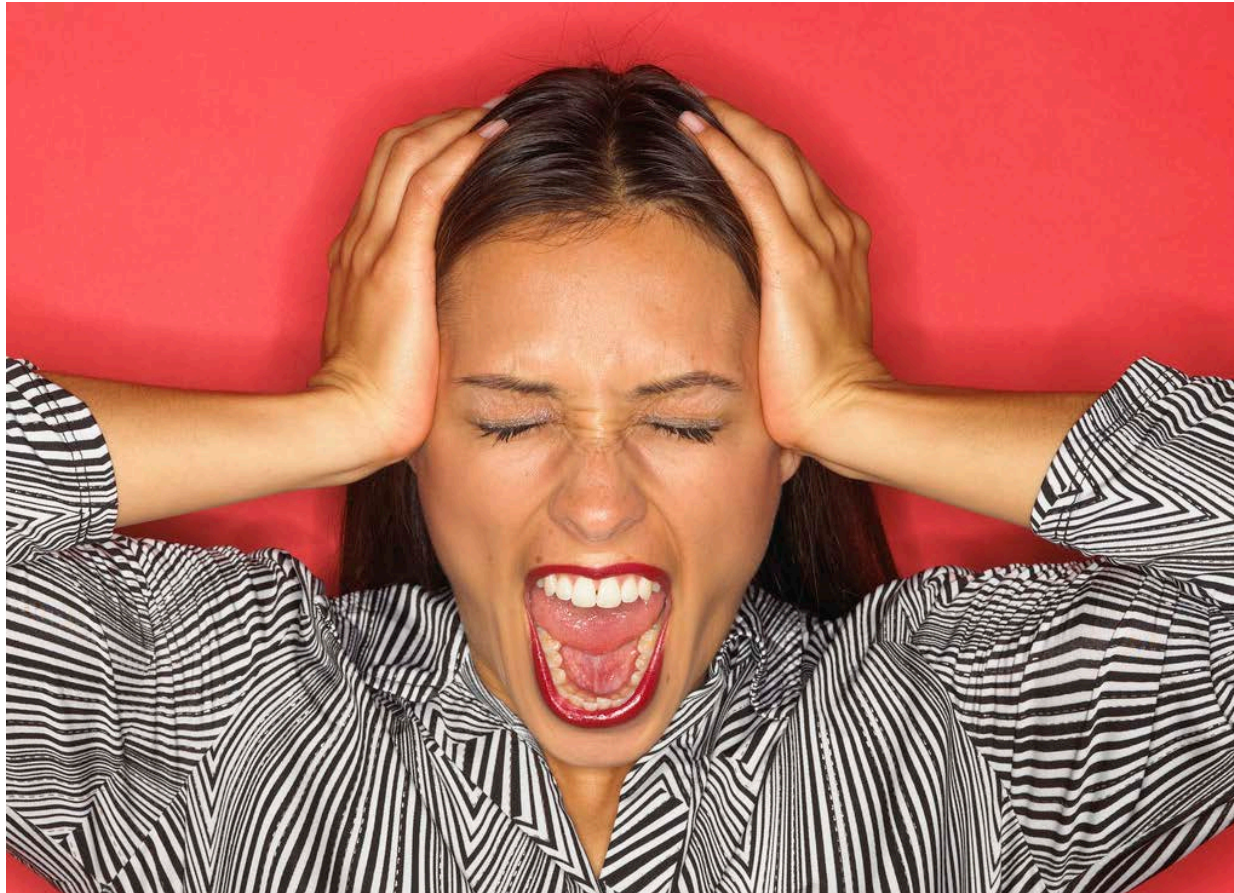


Compliance Officers' Network Meeting
Portfolio Management Association of Canada
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Agenda

- 1) How did we get here?
- 2) What are the most pressing FATCA compliance issues for Portfolio Managers and how do you address them?
 - Registration
 - Reporting
 - Managing ambiguity, duplication and uncertainty
- 3) Practical US Compliance Insights
- 4) Questions

“Figuring out FATCA is stressful”



How did we get here?

- The *Foreign Account Tax Compliance Act* (“**FATCA**”) was enacted in March 2010 and is designed to police offshore investments, accounts and trust interests held by certain U.S. persons.
- The Internal Revenue Service (the “**IRS**”) issued final regulations in January 2013, and additional final and temporary regulations in February 2014, which generally impose obligations on foreign financial institutions (“**FFIs**”) to aid the IRS in monitoring U.S. accounts.

How did we get here?

- The U.S. entered into an intergovernmental agreement with Canada (the “**IGA**”) in February 2014, which provides qualifying FFIs with alternative approaches to complying with FATCA.
- The Canada Revenue Agency (the “**CRA**”) issued guidance on compliance with the IGA and new Part XVIII of the *Income Tax Act* (Canada) (the “**Tax Act**”) on June 20, 2014 (the “**CRA Guide**”).
- FATCA became effective (following multiple extensions) on July 1, 2014.

FATCA: Consequences of Non-Compliance to Canadian Portfolio Managers

- FFIs that fail to comply with FATCA generally will be subject to a 30% withholding tax on “withholdable payments” made to them.
- **“Withholdable payments”** include:
 - Payments of U.S.-source interest, dividends, rents, salaries and other similar payments made on or after July 1, 2014.
 - Gross proceeds from the disposition of property on or after January 1, 2017 that can produce U.S.-source dividends or interest.

FATCA: Consequences of Non-Compliance to Canadian Portfolio Managers

- To avoid withholding, an FFI will be required to provide withholding agents with a withholding certificate that includes its “Global Intermediary Identification Number” (“**GIIN**”). Withholding agents will be required to verify the GIIN of an FFI against a list of GIINs to be published electronically, and updated monthly, by the IRS.

The screenshot shows the IRS website's FATCA Foreign Financial Institution (FFI) List Search and Download Tool. The page is titled "FATCA Foreign Financial Institution (FFI) List Search and Download Tool" and includes a search bar, navigation tabs, and a search form. The search form has fields for "GIIN", "Financial Institution Name", and "Country of FFI or Branch". A dropdown menu for "Country of FFI or Branch" is open, showing a list of countries including Afghanistan, Albania, Algeria, American Samoa, and Andorra. The page also features a "Search/Download FFI List" section and a "Related Links" section.

What are the most pressing FATCA compliance issues facing Portfolio Managers and how do you address them?



FATCA Registration

Do Portfolio Managers need to register with the IRS?

- “Reporting Canadian Financial Institution”

- “Financial Institution”

- “Investment Entity”

- ... *any Entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:*

- i. trading in money market instruments; foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;*

- ii. individual or collective portfolio management; or*

- iii. otherwise investing, administering, or managing funds or money on behalf of other persons. [emphasis added]*

FATCA Registration

Do Portfolio Managers need to register with the IRS?

- Portfolio managers are “investment entities”.
- Unless an exception applies, portfolio managers will be required to register with the IRS as a “registered deemed-compliant FFI” and obtain a GIIN.

FATCA Registration – Exceptions

Do Portfolio Managers need to register with the IRS?

- “Non-Reporting Canadian Financial Institutions”
 - Annex II of the IGA
 - Financial Institutions with a Local Client Base
 - Sponsored Investment Entities
 - Deemed compliant FFIs and “exempt beneficial owners” under the U.S. Treasury Regulations **in effect on the date the IGA was signed**

FATCA Registration – New U.S. Regulations

Do Portfolio Managers need to register with the IRS?

- On February 20, 2014, new U.S. Treasury Regulations were introduced, effective March 6, 2014, which included a new deemed-compliant FFI category of particular relevance to investment managers.
- An FFI will be treated as a “certified deemed-compliant FFI” under the new Regulations if:
 - the FFI is an FFI solely by virtue of being an “investment entity” (*i.e.*, it is not also a bank or insurance company and does not hold, as a substantial portion of its business, financial assets for the account of others); and
 - the FFI does not maintain “**financial accounts.**”

FATCA Registration – New U.S. Regulations

Do Portfolio Managers need to register with the IRS?

- Under the U.S. Treasury Regulations, equity and debt interests in an “investment entity” (including a portfolio manager) are only treated as “financial accounts” if:
 - i. the value of the interest is determined, directly or indirectly, primarily by reference to assets that give rise, or could give rise, to withholdable payments (e.g., an interest in an investment fund), or
 - ii. the interest is issued with a principal purpose of avoiding the FATCA reporting or withholding requirements.

FATCA Registration – New U.S. Regulations

Do Portfolio Managers need to register with the IRS?

- On this basis, under the U.S. Treasury Regulations, FFIs that do not maintain financial accounts would be treated as certified deemed-compliant FFIs.
 - Such FFIs would not be required to register with the IRS or obtain a GIIN.
 - Instead, such FFIs would be required to certify to any withholding agent on IRS Form W-8BEN-E that they qualify as certified deemed-compliant FFIs.

FATCA Registration – Legislative Gap

Do Portfolio Managers need to register with the IRS?

- Because the IGA was entered into before the changes to the U.S. Regulations that now treat certain portfolio managers as deemed compliant FFIs, even if a portfolio manager is a deemed-compliant FFI, it may **not** be a Non-Reporting Canadian Financial Institution
- The CRA Guide states that Reporting Canadian Financial Institutions must provide the CRA with a GIIN, so unless the CRA changes its guidance, portfolio managers may be required to obtain a GIIN to comply with the Canadian rules, even if not required under the U.S. rules
- If an FFI does not maintain U.S. Reportable Accounts or make payments to a non-participating financial institution, it may not be required to file a “nil” Part XVIII Information Return

FATCA – Current IRS Model 1 IGA

- Exception for investment advisors in Annex II to the IRS Model 1 IGA:
Investment Advisors and Investment Managers. An Investment Entity established in [FATCA Partner] that is a Financial Institution solely because it (1) renders investment advice to, and acts on behalf of, or (2) manages portfolios for, and acts on behalf of, a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a Financial Institution other than a Nonparticipating Financial Institution.
- The foregoing exception has been included in more than 20 IGAs executed between the U.S. and other nations subsequent to the execution of the IGA with Canada.

FATCA Reporting

What are the reporting requirements under the IGA?

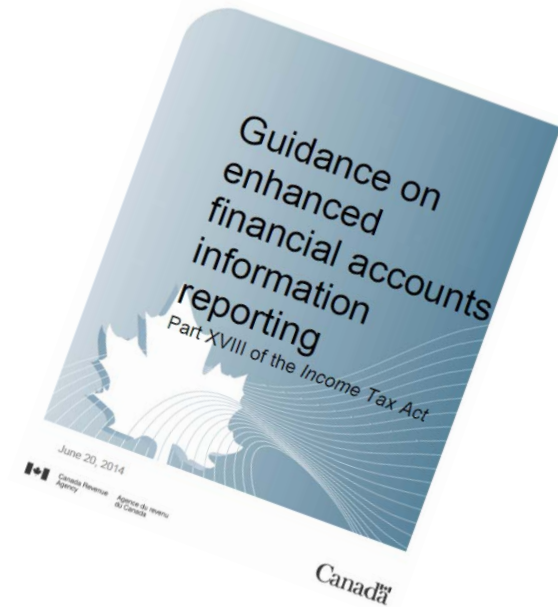
- Article 2 of the IGA
- Custodial Accounts vs. non-custodial portfolio management accounts



FATCA – Separately Managed Accounts

Who bears the due diligence and reporting requirements in respect of separately managed accounts?

- Custodian vs. portfolio manager
- Sections 6.16 and 6.17 of the CRA Guide
- Practical alternatives



FATCA – US Compliance Insights

Registration Timing

- FFIs covered by the IGA do not have to provide withholding agents with a GIIN with respect to payments made before January 1, 2015. Such FFIs should register and obtain a GIIN by the middle of December 2014 to ensure inclusion on the January 2015 IRS GIIN list.

Risks of Registration

- FATCA is not designed to enforce U.S. income tax compliance by non-U.S. entities
- Currently, approximately 100,000 FATCA registrations

Light Enforcement

- The IRS has stated that it plans to enforce FATCA lightly during the 2014 and 2015 calendar years, provided subject entities make a good faith effort to comply.

Questions?



Cautionary Note

The foregoing commentary is summary in nature and does not address all of the issues and considerations that may be relevant under any particular set of circumstances.

The statements and material presented herein do not represent legal or tax advice.

No transactions should be executed on the basis of the foregoing statements and commentary.

Formal legal, tax, and accounting advice should be obtained prior to making any investment or executing any transaction.

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