

Reproduced with permission from Daily Tax Report, 95 DTR GG-1, 5/18/15. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Financial Institutions

Tough Issues Raised by U.S. Split From U.K., Canada on Opening Accounts Under FATCA

Differences in how new accounts are treated by the U.S., the U.K. and Canada under the Foreign Account Tax Compliance Act are raising tough questions for banks across many jurisdictions, practitioners told Bloomberg BNA.

“This is not an insignificant issue,” said Alan Granwell, of counsel with Sharp Partners P.A. in Washington. “People are opening accounts all the time. Banks could take different positions and there could be a competitive advantage or disadvantage. It’s overwhelming.”

At issue is the flexibility banks have to open new accounts under FATCA, which requires foreign banks to report U.S.-owned accounts to the IRS or face, in some cases, a 30 percent withholding tax on their U.S.-source income.

Guidance Split. Both the U.K. and Canada have issued guidance saying that under intergovernmental agreements (IGAs) with the U.S., banks can open new accounts even if they can’t get taxpayers to certify whether they are U.S. tax residents upfront—as long as they treat the accounts as reportable. The U.S., on the other hand, has issued guidance specifically saying that if banks can’t get the certifications, they can’t open the accounts at all or have to close them.

Practitioners took differing positions on whether banks in the U.K. and Canada are barred from opening the accounts if potential account holders won’t cooperate on self-certifications. But they all agreed that the different government stances aren’t fun for foreign financial institutions trying to make decisions as to what to do when new customers come in the door, and that tax authorities need to reach an agreement on the issue.

‘Terrible Spot.’ “It’s a difficult issue and it puts banks in a terrible spot,” said Michael Plowgian, a principal in the international tax group of KPMG LLP’s Washington National Tax practice. “I think all of the governments want to get this issue resolved and find a practical answer.”

Jonathan Jackel, a partner with Burt, Staples & Maner LLP in Washington, said the IGAs clearly say banks face the duty of getting the certifications in advance.

“The language is pretty clear that the self-certification must be obtained on the account opening,” he said. “The documentation must be obtained immedi-

ately. If banks want to treat the account as a non-U.S. account, their duty is to establish that the owner of the account is not a U.S. person.”

Other experts, however, said the IGAs don’t specifically say that if banks can’t get potential new account holders to be forthcoming about their status, the accounts can’t be opened at all.

Certifications Tough to Get. “To me the IGA is not clear about what happens if you can’t get the self-certification,” said John Harrington, a partner with Dentons. He said guidance issued by the U.S. in February, in the form of a frequently asked question (FAQ) “doesn’t have the force of law. Banks should be able to follow the law in their own country. Telling someone they can’t have a bank account is a pretty harsh approach.”

“This is not an insignificant issue. People are opening accounts all the time. Banks could take different positions and there could be a competitive advantage or disadvantage.”

ALAN GRANWELL
SHARP PARTNERS P.A.

That FAQ spells out that “If the FFI cannot obtain a self-certification at account opening, it cannot open the account”—language that isn’t in the IGAs themselves. Practitioners said the FAQ was issued after the U.K. and Canada issued guidance on the IGA taking a differing stance.

Harrington said banks that have tried and failed to get the certification shouldn’t be left up the creek. “What happens if, after repeated requests, you just can’t get it?” he said. “At some point you can’t compel someone to give you that information.”

Plowgian said banks have noted “a very high error rate” when customers fill out forms that determine their status. “It’s something that is causing difficulty,” he said. “Getting valid and complete certifications has certainly been a challenge.”

Even treating the account as reportable—which both the U.K. and Canada have agreed to do—is “punitive,” Harrington said. “The appropriate approach would be to follow the rules of the foreign country. That’s more reasonable than the approach in the FAQ.”

Treasury Position. A Treasury Department official, asked about the issue at a conference in April, said the U.S. intends to stand by its position. It has “never been the intention of the United States” to allow banks to open new accounts without the self-certification, said Elena Virgadamo, an attorney-adviser in Treasury’s Office of International Tax Counsel.

“If we did that, we would have had information,” she said. “It would just be bad tax administration.”

Joel Swearingen, an associate with Squire Patton Boggs US LLP, said he can see the U.S. government’s point, even though he believes the stance taken by the U.K. and Canada is “a reasonable interpretation.”

The U.S. appears to be worried that the position of the two countries could create an “adverse incentive” for compliance, Swearingen said, noting a potential that new account holders will fabricate the information initially given if they realize that later on the account will just be reported, not closed. “The question is going to be, who’s right?” he said.

Competitive Disadvantage? Several practitioners said the issue could have negative consequences for banks trying to compete in global markets.

“This could have very serious competitive repercussions,” said Susan Grbic, a tax partner at WeiserMazars LLP in New York. “It could drive people who might not be willing to certify to institutions that might not require them to certify.” The position taken in the FAQ was “surprising to a lot of people,” she said.

Grbic said she agrees that the IGAs leave room for banks to open accounts, and said the U.S. shouldn’t be dictating to other countries how they should be interpreting the agreements. “Are we really in a position to tell a bank in another jurisdiction that they can’t open an account?” she said. “It puts banks at a competitive disadvantage because they have to turn business away.”

Grbic said she supports the stance taken by the U.K. and Canada, adding that having to report the accounts to the U.S. is a significant consequence in itself.

Denise Hintzke, global tax leader for the Foreign Account Tax Compliance Initiative at Deloitte Tax LLP, said there could be significant risks for banks with clients whose businesses cross jurisdictions, such as a U.S.-based client with operations in the U.S. and Canada. “I’d still be careful,” she said.

Risks Across Jurisdictions. “I look at the language in the IGA and the U.S. rules and it’s pretty clear that you need the documentation. I would be hesitant to take that risk,” she said, particularly because Canada has a much more restrictive definition of what constitutes a financial institution than the U.S. does. “There are different interpretations of what’s an FFI, what’s a reportable account” and that could lead to complications, Hintzke said.

Force of Law in Canada? Two Canadian practitioners said the Canadian IGA is viewed as having the force of law in that country.

“For Canadian purposes, the law is the IGA,” said Carmela Pallotto, a partner in the financial services practice at KPMG Canada. “And there’s nothing in that Canadian law that says you should not open an account.”

Both Pallotto and Russell W. Crawford, also a partner with KPMG Canada, said that under the position taken

in Canada’s guidance on the IGA, the U.S. will still be getting a significant amount of information on account holders. “If we can’t determine self-certification, the U.S. is going to have that person reported to them,” Pallotto said.

Both practitioners said obtaining certifications is a difficult process that often leaves potential account holders confused and intimidated. “The definition of who is a U.S. person is a very technical term under the laws of both countries,” Crawford said. Pallotto said the average person isn’t going to understand those terms, and “they may not be equipped to answer the questions they’re getting. There’s going to be a lot of follow-up.”

Different Certification Procedures. Added to that, they said, is that the process of getting certifications isn’t standardized across all banks. Some may be asking new customers questions as part of the account opening procedures, while others may be using separate forms that can be used by the Internal Revenue Service. “There are a lot of complications,” said Crawford, who is the national service line leader for KPMG Canada’s U.S. corporate tax services practice.

“Banks should be able to follow the law in their own country. Telling someone they can’t have a bank account is a pretty harsh approach.”

JOHN HARRINGTON
DENTONS PARTNER

Pallotto said there is only one instance where banks have to close accounts under the IGA, and that is for smaller local banks that aren’t supposed to have any U.S. clients. If they discover they do have a U.S. account holder, that account must be closed. That likely won’t happen often, she said.

Future Implications. Experts said it is too soon to tell how big the problem may become, but said taxing authorities are likely looking closely at the question.

“I think it may come down to what is the practical impact,” KPMG’s Plowgian said. “If it’s the case where there are not really a lot of accounts where this is an issue, it may turn out to be forgotten. If not, the U.S. is put in the pretty difficult position of determining whether this is significant noncompliance.”

The Securities Industry and Financial Markets Association has urged the competent authorities of the three governments involved to iron out the differences on the self-certification issue—an idea welcomed by many interviewed by Bloomberg BNA.

Sharp Partners’ Granwell said banks need answers soon.

“Every account holder has to be identified,” he said. “This is not some small problem. Every financial institution in the world is going to have to deal with this. If you’re a bank, you need to have some certainty.”

BY ALISON BENNETT

To contact the reporter on this story: Alison Bennett in Washington at abennett@bna.com

To contact the editor responsible for this story: Cheryl Saenz at csaenz@bna.com