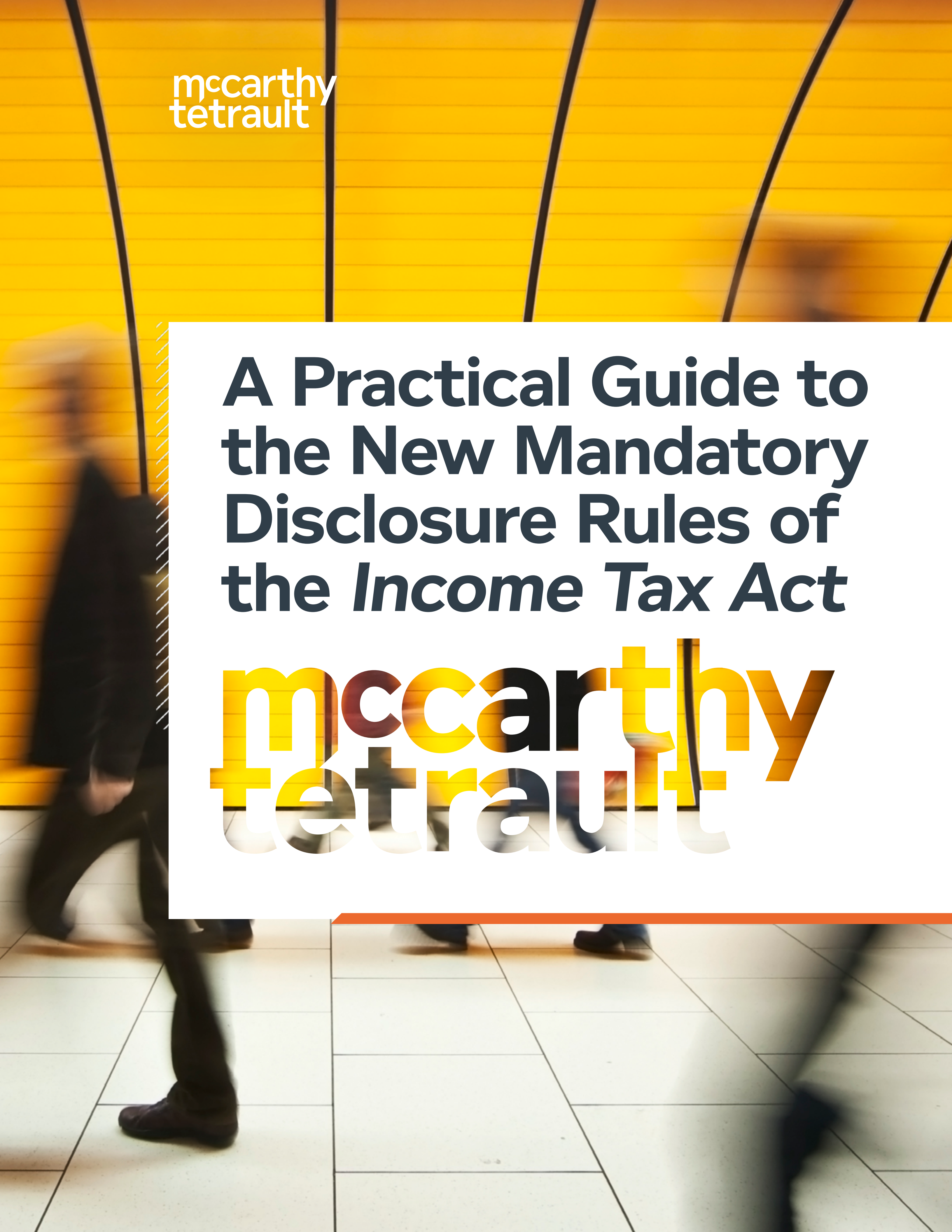

A Practical Guide to the New Mandatory Disclosure Rules of the *Income Tax Act*

This article is for general information only and is not intended to provide legal advice. For further information, please speak to one of our contacts. The information described herein is current as of September 12, 2023.

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A Practical Guide to the New Mandatory Disclosure Rules of the *Income Tax Act*

On June 22, 2023, the new mandatory disclosure rules in the *Income Tax Act* (Canada) ("**Act**") took effect. These rules expand the range of transactions that taxpayers, as well as advisors and promotors, must report to the Canada Revenue Agency ("**CRA**"). Failure to report can result in significant penalties as well as the extension of limitation periods. In this guide, we provide a practical summary of the new rules including the kinds of transactions to which they apply, who is required to report, when and how to report, and the potential risks associated with failing to report.

The new mandatory disclosure rules include three general regimes:

1. Reportable transactions
2. Notifiable transactions
3. Uncertain tax treatments

Our guide with respect to each of these regimes is below.

REPORTABLE TRANSACTION RULES

REPORTABLE TRANSACTIONS

WHAT IS A REPORTABLE TRANSACTION?

Reportable transactions are transactions that meet certain conditions and therefore must be reported to the CRA. For transactions entered into on or after June 22, 2023, for there to be a "reportable transaction":[1]

1. there must be an "avoidance transaction";[2] and
2. one of three hallmarks[3] must be satisfied.[4]

Note that each separate transaction that is part of the series of transactions that includes the avoidance transaction is itself a reportable transaction.[5] As a result, if a series of transactions meets the conditions, and any transaction takes place on or after June 22, 2023, there will be a requirement to report.

WHAT IS AN AVOIDANCE TRANSACTION?

A transaction is an avoidance transaction if it may reasonably be considered that one of the main purposes of the transaction, or of a series of transactions of which the transaction is a part, is to obtain a "tax benefit".[6]

Determining whether there is an avoidance transaction requires identifying the tax benefit and considering this tax benefit in light of the purpose(s) of the transaction or series. A transaction will not be a reportable transaction solely because there is a tax benefit or an avoidance transaction. One of the hallmarks must also be present.

WHAT ARE THE HALLMARKS?

In order for an avoidance transaction to be a reportable transaction, one of the following three hallmarks must exist in respect of the transaction or series of transactions.

Contingent Fee Hallmark

The contingent fee hallmark is generally met where an "advisor"[7], "promoter"[8], or person that does not deal at arm's length with an advisor or promoter, is entitled to a fee that is:

1. based on the amount of a tax benefit;
2. contingent on achieving a tax benefit; or

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1 Defined in subsection 237.3(1). All section references herein are references to the Act unless otherwise indicated.
2 As defined in subsection 237.3(1).
3 As set out in the definition of "reportable transaction" in subsection 237.3(1).
4 Amendments to the reportable transaction rules in the Act received royal assent on June 22, 2023 ("**Amendments**"). Historically, a transaction was only a reportable transaction if it was an "avoidance transaction" within the meaning of the general anti-avoidance rule (the "**GAAR**") and two of the three hallmarks of the definition of reportable transaction were satisfied.
5 See definition of "reportable transaction" in subsection 237.3(1).
6 As defined in subsection 245(1). This definition is generally limited to tax benefits under the Act. Note that in December 2023, the definition was expanded to include tax attributes that have not yet become relevant to the computation of tax.
7 As defined in subsection 237.3(1).
8 As defined in subsection 237.3(1).

3. attributable to the number of persons who participate in the same or similar transaction or series, or have been provided access to advice or an opinion given by an advisor or promoter regarding the tax consequences from the same or similar transaction or series.

Fees paid to lawyers for tax planning that are not contingent on a tax benefit should generally not trigger the contingent fee hallmark (e.g., standard fee arrangements that are based on hourly rates, the number of transactions undertaken, or other similar criteria that are not linked to a tax benefit).

Confidential Protection Hallmark

The confidential protection hallmark is generally met where (i) an advisor, promoter, or person that does not deal at arm's length with an advisor or promoter, obtains "confidential protection"[9], and (ii) the prohibition on disclosure provided under the confidential protection provides confidentiality in respect of a "tax treatment"[10] in relation to the transaction or series of transactions.

Since the confidential protection must be obtained by an advisor, promoter, or person that does not deal at arm's length with an advisor or promoter, when considering this hallmark, it is important to be mindful of who is obtaining the confidential protection. For example, while a lawyer could be an advisor or promoter, a lawyer should not be considered to obtain confidential protection because legal advice is subject to solicitor-client privilege. Solicitor-client privilege belongs to the client alone, and not the lawyer, such that a lawyer cannot obtain solicitor-client privilege in respect of transactions undertaken by the client.

Contractual Protection Hallmark

The contractual protection hallmark is generally met where the taxpayer, a person who has entered into the avoidance transaction for the benefit of the taxpayer, an advisor, a promoter, or a person that does not deal at arm's length with any of the foregoing, receives "contractual protection"[11] in respect of the avoidance transaction or series.

Contractual protection may include insurance, compensation, an indemnity or a guarantee. However, in order to be considered contractual protection, the protection must generally protect a person against a failure of the transaction or series to achieve any tax benefit or be in respect of a dispute related to a tax benefit.

Contractual protection generally does not include standard professional liability insurance or protection that is integral to an agreement between arm's length persons for the sale or transfer of all or part of a business (in an asset or securities deal) where it is reasonable to consider that the insurance or protection is:

1. intended to ensure that the purchase price paid under the agreement takes into account any liabilities of the business immediately prior to the sale or transfer; and

2. obtained primarily for purposes other than to achieve any tax benefit from the transaction or series.

While the contractual protection hallmark is broadly drafted, it is critical to consider this hallmark from the lens of the tax benefit. For example, it is common for a cross-border offering of notes by a Canadian issuer (i.e., borrower) to contain a withholding tax gross-up and indemnity whereby the borrower is obligated to pay "additional amounts" if required by law to deduct or withhold tax from payments to the non-resident lender. However, where no withholding tax applies at the time the loan is made, this type of standard gross-up and withholding should generally not, in and of itself, trigger the contractual protection hallmark. The purpose of such an indemnity is generally to protect the lender's economic return against a change in law rather than a failure of the transaction to achieve a tax benefit such that the indemnity should not be contractual protection for purposes of the reportable transaction rules. In other circumstances, the purpose of the gross-up and existence of an avoidance transaction as part of the series would need to be considered.

CRA GUIDANCE

The CRA released **guidance** on the mandatory disclosure rules on July 5, 2023 ("**CRA Guidance**") which provides some additional clarity regarding the application of the rules. The CRA Guidance is intended to be an evergreen document. We expect additional examples to be added as the CRA's understanding of the rules continues to evolve.

9 As defined in subsection 237.3(1).

10 As defined in subsection 237.3(1). This includes a treatment that a person uses or plans to use in an income tax return or information return, and includes a decision not to include an amount on such a return.

11 As defined in subsection 237.3(1).

Of note, the CRA Guidance states that contractual protection would not include the following:

1. Standard representations, warranties and guarantees between a vendor and purchaser, as well as traditional representations and warranties insurance policies, that are generally obtained in the ordinary commercial context of mergers and acquisitions transactions to protect a purchaser from pre-sale liabilities (including tax liabilities).

2. Contractual protection in the form of insurance that is integral to an agreement between persons acting at arm's length for the sale of a business where it is reasonable to conclude that the insurance protection is intended to ensure that the purchase price paid under the agreement takes into account any liabilities of the business immediately prior to the sale, and the insurance is obtained primarily for purposes other than to obtain a tax benefit from the transaction or series. Below are a few examples provided by the CRA:[12]

   a. Indemnities related to existing pre-closing tax issues, or the amount of existing tax attributes (tax pools, capital cost allowance, etc.).

   b. Contractual covenants or indemnities obtained by a public company[13] purchaser from the target company and the target company's significant shareholders intended to ensure that the target or the significant shareholders do not take certain steps that may cause the bump denial rules to apply or that the purchaser is indemnified for the additional taxes payable if it loses the availability of the "bump" under paragraph 88(1)(d).

   c. Tax insurance acquired regarding the purchase of taxable Canadian property from a non-resident of Canada so that the parties can complete the transaction without concern for the purchaser withholding an amount in respect of a potential tax liability of the non-resident.

   d. Contractual protection obtained in respect of the calculation of safe income on hand in the context of a pre-sale transaction involving the payment of intercorporate dividends to a holding company to extract safe income from the target company.

3. Standard price adjustment clauses.

12 The CRA Guidance cautions that this carve-out does not extend to other insurance or protections covering specific identified tax risks (i.e., not listed in the CRA Guidance). In these circumstances, it will need to be considered whether there is an avoidance transaction and whether a hallmark is present.

13 It is not clear why this example refers only to public companies or whether the CRA would take a similar view if the purchaser was not a public company.

WHO NEEDS TO REPORT?

Multiple persons may have reporting obligations[14] – it is not just the taxpayer who obtains the tax benefit that is required to report. The following persons must report:

1. The specific person for whom a tax benefit results (or is expected to result based on the person's tax treatment of the reportable transaction) from a reportable transaction or series of transactions that includes the reportable transaction.

2. Persons who have entered into an avoidance transaction that is a reportable transaction for the benefit of a person described in 1. above.

3. Advisors and promoters in certain circumstances. Generally only advisors or promoters who receive contingent fees or are entitled to a fee for providing contractual protection must report. Lawyers who receive standard fees as discussed above should generally not have a reporting obligation.

WHEN DOES A PERSON NEED TO REPORT?

The deadline for filing an information return disclosing a reportable transaction is generally 90 days after the earlier of when a relevant person[15] (i) is contractually obligated to enter into the reportable transaction, or (ii) enters into the reportable transaction. In the case of a series of transactions that straddles June 22, 2023, the CRA Guidance indicates that the 90 day period generally begins to run from the date of the first transaction in the series that occurs on or after June 22, 2023.

WHAT HAPPENS IF A PERSON FAILS TO REPORT?

There are significant consequences for failing to report:

1. **Large penalties:** Failing to report could result in a penalty including a penalty of up to 25% of the tax benefit.[16] See "What happens if a person fails to report?" under "Notifiable Transactions". A person who establishes that they acted with due diligence will not be subject to a penalty.[17]

2. **Extension of limitation periods:** A taxpayer's normal reassessment period in respect of a reportable transaction does not begin to run until the reportable transaction is reported.[18] Simply put, failure to file results in the tax year not going statute barred. There is also no limitation period in respect of the ability of the CRA to impose a penalty for failure to file.[19]

3. **A lower threshold for the application of the GAAR:** Where the reporting requirement has not been satisfied by a person who obtains or is expected to obtain a tax benefit and any person is liable to, and has not paid, a penalty (or interest on the penalty) for not reporting, the GAAR is to be applied without reference to the misuse or abuse test. If the GAAR is amended as proposed,[20] this will effectively mean that the reportable transaction will be subject to the GAAR.

WHAT IS THE RELEVANT PRESCRIBED FORM?

The prescribed form for reporting is **Form RC312** (for 2023 and later tax years). Information reasonably believed to be subject to solicitor-client privilege is not required to be reported.[21]

14 Prior to the Amendments, only one person was required to file in respect of a reportable transaction.
15 I.e., a person described in 1. or 2. under "Who needs to report?".
16 See subsection 237.3(8). Note that this potential penalty does not exclusively apply to the person who received the tax benefit. The Act also establishes "minimum" penalties.
17 Subsection 237.3(11). The wording used for the due diligence defence is parallel to that of the due diligence defence in respect of director liability under the Act.
18 Paragraph 152(4)(b.5).
19 Subsection 237.3(11).
20 See **Legislative Proposals Relating to the *Income Tax Act* and the Income Tax Regulations**, August 4, 2023.
21 Subsection 237.3(17).

NOTIFIABLE TRANSACTION RULES

NOTIFIABLE TRANSACTIONS

New section 237.4 of the Act requires taxpayers (as well as "advisors"[22] and "promoters"[23]) to disclose "notifiable transactions" to the Minister of National Revenue (the "**Minister**"). This new regime is designed to address specific types of transactions that are of interest to the Minister and the Minister of Finance ("**Finance**").

WHAT IS A NOTIFIABLE TRANSACTION?

A "notifiable transaction" is defined as a transaction (or transaction in a series) that is the same or substantially similar to a transaction (or series) that is designated as a notifiable transaction by the Minister.[24] To date, Finance has indicated that the following types of transactions will be designated as notifiable transactions:

1. Manipulating CCPC status to avoid anti-deferral rules applicable to investment income;
2. Straddle loss creation transactions using a partnership;
3. Certain 21-year trust planning;
4. Manipulating bankrupt status for debt forgiveness purposes;
5. Certain transactions avoiding acquisitions of control/attribute trading restrictions; and
6. Certain back-to-back arrangements avoiding the thin capitalization rules or non-resident withholding tax.[25]

According to Finance, this list includes "both transactions that the CRA has found to be abusive, and transactions identified as transactions of interest (*i.e.* where more information is required to determine if a transaction is abusive)."

A transaction (or series of transactions) is considered "substantially similar" to one of the designated notifiable transactions including if it is factually similar or based on the same tax strategy and gives rise to the same or similar tax consequences; however, this definition is not exhaustive. The Act further provides that the phrase "substantially similar" is to be interpreted broadly in favour of disclosure so the reporting requirement is not frustrated by slight variations in facts, tax consequences, or tax strategy.[26]

22 As defined in subsection 237.4(1).
23 As defined in subsection 237.4(1).
24 See definition in subsection 237.4(1).
25 See Department of Finance **Backgrounder: Income Tax Mandatory Disclosure Rules Consultation: Sample Notifiable Transactions**, February 4, 2022.
26 See subsection 237.4(2).

WHO NEEDS TO REPORT?

Subject to an exception, the following persons are required to report a notifiable transaction:

1. Persons for whom a tax benefit results (or is expected to result based on the person's tax treatment of the notifiable transaction) from the notifiable transaction or series that includes the notifiable transaction;
2. Persons who enter into the notifiable transaction for the benefit of a person described in 1. above;
3. Advisors and promoters in respect of the notifiable transaction; and
4. Persons not dealing at arm's length with an advisor or promoter and who are entitled to a fee in respect of the notifiable transaction.

A person who obtains a tax benefit and any other person who enters into the notifiable transaction for the benefit of such a person is not required to report a notifiable transaction if, after exercising a reasonable degree of care, diligence and skill, such person determines that the transaction is not a notifiable transaction. According to the CRA, a person will meet this due diligence requirement by "asking their advisors about potential reporting obligations that might arise from the transactions".[27]

Advisors and promoters in respect of a notifiable transaction (and non-arm's length persons) are only required to report if they know or it is reasonable to expect them to know that the transaction was a notifiable transaction. An advisor does not need to have extensive tax knowledge to meet this criteria. The CRA is of the view that an obligation to report would generally be triggered if the advisor is aware of the purpose and objectives of the transaction while playing a leading role in managing its implementation.[28] It is important to note that information reasonably believed to be subject to solicitor-client privilege does not need to be disclosed.[29] As such, any reporting obligation of an advisor who is a lawyer may be impacted by the extent to which information held by the advisor is subject to solicitor-client privilege.

The reporting obligations for employees and partners in relation to notifiable transactions are considered fulfilled once the information return has been submitted by the employer or partnership. For instance, when a firm of advisors provides services in respect of a notifiable transaction, the individual advisors are not required to report the notifiable transaction if the firm reports the notifiable transaction.[30]

A person who only provided clerical services or secretarial services with respect to the notifiable transaction does not need to report the transaction.

27 See the CRA Guidance.
28 See the CRA Guidance.
29 Subsection 237.4(18).
30 If the firm were to fail to report, each employee or partner who delivered services with respect to the transaction and who has sufficient knowledge of the transaction may be liable.

WHEN TO REPORT?

The deadline for filing an information return disclosing a notifiable transaction is generally 90 days after the earlier of when a relevant person[31] (i) is contractually obligated to enter into the notifiable transaction, or (ii) enters into the notifiable transaction.

HOW TO REPORT?

The reporting of a notifiable transaction must be done by filing out part 3 of **Form RC312**. A brief description of the reasons of disclosure must be provided in writing, which would likely require a description of the transaction or series undertaken. As noted above, information subject to solicitor-client privilege need not be disclosed.[32]

If the notifiable transaction is also a reportable transaction in respect of the same tax benefit, the disclosure of the notifiable transaction is sufficient to satisfy both reporting obligations in the information return.

The legislation provides that when more than one transaction, or all the transactions, in a series of transactions are notifiable transactions subject to a disclosure requirement, a person may report each transaction that is part of the series in the same information return. This cannot be considered as an admission that any transaction is part of the same series of transactions as provided in a relieving provision.[33]

WHAT HAPPENS IF A PERSON FAILS TO REPORT?

The penalties for failing to report a notifiable transaction are the same as the penalties for failing to report a reportable transaction. Specifically, for persons who enter into a reportable or notifiable transaction or who receive a tax benefit from such a transaction:

1. $500 per week for each failure to report a reportable or notifiable transaction, up to the greater of $25,000 and 25% of the tax benefit; or
2. For corporations that have assets with a total carrying value of $50 million or more, $2,000 per week, up to the greater of $100,000 and 25% of the tax benefit.[34]

For advisors and promoters of reportable or notifiable transactions, as well as persons who do not deal at arm's length with them and who are entitled to a fee with respect to a notifiable transaction, a penalty for each failure to report equal to:

1. 100% of the fees charged;
2. $10,000; and
3. $1,000 for each day during which the failure to report continues, up to a maximum of $100,000.

When a person is both a person who enters into a notifiable transaction for the benefit of another person and a person not dealing at arm's length with an advisor or promoter and who is entitled to a fee in respect of the notifiable transaction, it is liable to pay the higher amount of penalty computed as described above.

In addition, as with reportable transactions, a taxpayer's normal reassessment period in respect of a notifiable transaction does not begin to run until the notifiable transaction is reported.[35] This results in the tax year not going statute barred. There is also no limitation period in respect of the ability of the CRA to impose a penalty for failure to file.[36]

31 I.e., a person described in 1. or 2. under "Who needs to report?".
32 Subsection 237.4(18).
33 See subsections 237.4(10) and (16).
34 Determined in accordance with paragraphs 181(3)(a) and (b).
35 Paragraph 152(4)(b.6).
36 Subsection 237.4(11).

UNCERTAIN TAX TREATMENT RULES

UNCERTAIN TAX TREATMENT RULES

WHAT NEEDS TO BE REPORTED?

The third component of the new mandatory disclosure rules is the reporting of uncertain tax treatments ("**UTTs**") by "reporting corporations".[37] Under the UTT rules, a "reporting corporation" is required to report a "reportable UTT".[38] A "reportable UTT" is a tax treatment used, or planned to be used, in the corporation's income tax filings in respect of which uncertainty is reflected in the audited financial statements of the corporation (or a group of which it is a member) for the year. This includes the corporation's decision not to include a particular amount in its tax filings.[39] The CRA has indicated that reporting corporations are expected to disclose reportable UTTs in respect of their partnership interests.[40] In addition, the CRA has stipulated that, to the extent a UTT is later reversed, it need not be reported in the year of reversal.[41]

The CRA has also confirmed that only UTTs relating to provisions of the Act have to be reported. Those relating to other taxes, such as goods and services/harmonized sales tax, provincial taxes or non-Canadian taxes, do not have to be reported under these rules.[42]

WHO NEEDS TO REPORT?

The UTT rules apply to a corporation that is a "reporting corporation".[43]
A "reporting corporation" is defined as a corporation that meets the following requirements:

1. It has (or is a member of a consolidated group that has) audited financial statements for the year prepared in accordance with (i) International Financial Reporting Standards or (ii) other country-specific generally accepted accounting principles ("**GAAP**") relevant for corporations that are listed on a stock exchange outside Canada (e.g., US GAAP);

2. The carrying value of its assets is greater or equal to $50 million at the end of the year;[44] and

3. It is required to file a Canadian income tax return.[45]

Of note, unlike the reportable transaction and notifiable transaction rules, only a reporting corporation (and not its advisors or other third parties) is subject to a reporting requirement under the UTT rules.

WHEN TO REPORT?

A reporting corporation needs to file an information return in prescribed form on or before the corporation's filing due date for the year (i.e., the date on which the corporation's T2 corporate income tax return is due).[46]

37 As defined in subsection 237.5(1).
38 As defined in subsection 237.5(1).
39 See subsection 237.5(1) definition of "tax treatment".
40 See the CRA Guidance.
41 See the CRA Guidance.
42 See the CRA Guidance.
43 As defined in subsection 237.5(1).
44 Determined in accordance with paragraphs 181(3)(a) and (b).
45 Subsection 237.5(1) definition of "reporting corporation".
46 Subsection 237.5(3).

By filing an information return, the corporation does not admit that the tax treatment is not in accordance with the Act or that any transaction is part of a series of transactions (e.g., for purposes of applying the GAAR).[47]

The UTT rules apply to taxation years that begin after 2022. However, the penalty for failing to report does not apply to taxation years that began before June 22, 2023, being the date that the mandatory disclosure rules received royal assent.[48]

WHAT HAPPENS IF A REPORTING CORPORATION FAILS TO REPORT A UTT?

The consequences for failing to report are as follows:

1. **Penalties:** For each failure to report a UTT, the corporation is liable to a penalty of $2,000 per week, up to a maximum of $100,000. A separate penalty may be imposed for each failure to report a UTT.[49]

2. **Extension of limitation periods:** A taxpayer's normal reassessment period in respect of a UTT does not begin to run until the UTT is reported.[50] There is also no limitation period in respect of the ability of the CRA to impose a penalty for failure to file.[51]

If a corporation has exercised due diligence to prevent a failure to file, it may not be liable for a penalty. The wording used for the due diligence defence is parallel to that of the due diligence defence in respect of director liability under the Act. The CRA has pointed out that the interpretation of the due diligence defence under the UTT rules will likely be informed by established case law and guidance on director liability under the Act.[52]

The UTT rules provide that the CRA's audit and inspection powers apply to a corporation that is required to file an UTT information return, even if the corporation's T2 income tax return for the year has not yet been filed.[53] The CRA can verify or ascertain any information in respect of the reportable UTT and also any information relating to any transaction, or series of transactions, to which the reportable UTT relates.

WHAT IS THE RELEVANT PRESCRIBED FORM?

The prescribed form is **Form RC3133**. Required disclosure in respect of a reportable UTT on the Form RC3133 includes, among other things, the legislative sections involved, the amount of the UTT, whether the UTT is temporary/non-temporary, whether tax attributes or a valuation are involved, whether the UTT is international or domestic, as well as a detailing of the relevant facts and tax treatment taken. Any legal or tax planning advice provided by a lawyer in respect of the underlying UTT that is subject to solicitor-client privilege need not be disclosed.

The CRA Guidance stipulates that consolidated reporting is not permitted and each corporation must prepare and submit an information return with its own UTT reporting. Furthermore, the CRA also points out that reporting must be made in Canadian dollars, even if the reporting corporation's books and records are in a functional currency other than Canadian dollars. The CRA has clarified that, if a reportable UTT has already been disclosed to the CRA through official filings (e.g., a notice of objection, an advance income tax ruling, through tax court procedures or a previously-filed Form RC312 or RC 3133), the disclosure requirements can be satisfied by referencing and attaching previously filed documents in the descriptive areas of the Form RC3133 and completing the remaining fields thereon.[54]

47 Subsection 237.5(7).
48 **Budget Implementation Act, 2023, No. 1**.
49 Subsection 237.5(5).
50 Subsection 152(4)(b.7).
51 Subsection 237.5(4).
52 See the CRA Guidance.
53 Subsection 237.5(8).
54 See the CRA Guidance.

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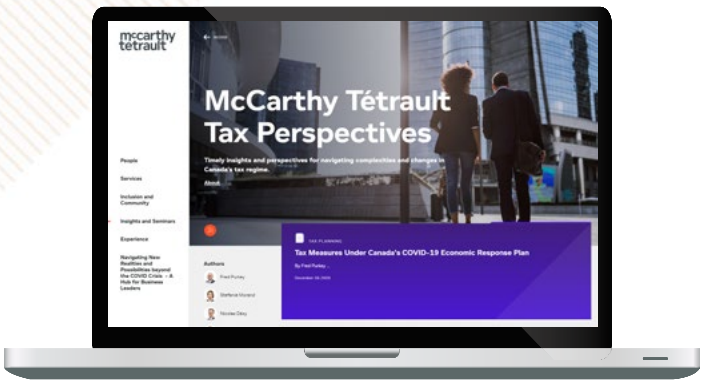

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