

LEGAL UPDATE

5 August 2019

CRS AUDITS BY THE IRAS ARE COMING: ARE YOU READY?

SUMMARY

The Inland Revenue Authority of Singapore (“**IRAS**”) has announced that it will, in the second half of 2019, commence desk-based and on-site reviews on compliance with the common reporting standard (“**CRS**”).

If you are selected for a review, it means that you have been identified by the IRAS as posing a higher risk of non-compliance.

This update highlights potential legal issues that you may encounter in a CRS audit pursuant to the CRS Compliance Guidelines published by the IRAS on 23 July 2019 (“**Guidelines**”).

BACKGROUND

Under the Income Tax (International Tax Compliance Agreements) (Common Reporting Standard) Regulations 2016 (“**Regulations**”), reporting Singaporean financial institutions (“**Reporting SGFIs**”) have certain due diligence and reporting obligations.

The Comptroller of Income Tax (“**Comptroller**”) is required under the CRS to implement a process to review Reporting SGFIs’ compliance with the said obligations.

The Guidelines sets out the process by which the IRAS will perform such reviews on behalf of the Comptroller.

IRAS’ REVIEW METHODOLOGY

The IRAS will be adopting a risk-based approach which focuses on Reporting SGFIs that pose a higher risk of non-compliance with the CRS.

To determine risk, the IRAS will consider, among other things: (i) an SGFI’s business profile and activities; (ii) an SGFI’s track record of compliance with CRS and Foreign Account Tax Compliance Act (FATCA) obligations and other relevant areas of tax or regulatory compliance; and (iii) feedback received from CRS partners.

The IRAS expects Reporting SGFIs to:

- (a) Put in place sufficient and robust internal controls.
 - (b) Maintain sufficient documentation in accordance with the requirements of the CRS in Singapore.
 - (c) Maintain a programme of periodic CRS compliance reviews by independent reviewers.
 - (d) Follow up on any recommendations by IRAS and/or independent reviewers to correct any systemic failures with respect to its systems, policies or procedures.
 - (e) Where CRS functions are outsourced, have oversight and governance of the work performed by the service provider, put in place internal controls to manage the outsourcing risks, and ensure that the SGFI has access to all records, documentary evidence and information that is in the service provider’s possession and control.
- The IRAS has also provided a set of 23 desired outcomes with recommended internal controls for Reporting SGFIs to demonstrate their effective compliance with CRS.
- These outcomes and internal controls apply at the entity, process, and reporting levels.
- The IRAS has also highlighted that it will not hesitate to take deterrent measures against errant Reporting SGFIs.

COMMENTS

The IRAS' review methodology is essentially an internal controls audit, albeit with potential criminal penalties for non-compliance.

Section 105M of the Income Tax Act ("**Act**") sets out the offences and penalties for varying levels of non-compliance with the CRS obligations. The Public Prosecutor's consent is required for any prosecution under section 105M of the Act.

At the lower end of the scale, any person who, without reasonable excuse, fails or neglects to comply with its reporting obligations or any CRS regulation under the Regulations ("**Regulatory Requirement**") the contravention of which is an offence, shall on conviction be liable to a fine not exceeding \$1,000 and, in the case of a continuing offence, to a further fine not exceeding \$50 for every day or part thereof during which the offence continues after conviction.

At the upper end of the scale, non-compliance through the wilful production of false or misleading information may lead to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 2 years or to both.

Internal controls are not infallible. There is always a "control risk" that an error or fraud may occur despite the implementation of internal controls.

An SGFI's main concern would therefore be whether it has in place adequate and sufficient arrangements to: (a) meet its reporting obligations and the Regulatory Requirements; and (b) establish a defence against prosecution.

SGFIs should note that the Guidelines, whilst useful and informative, do not constitute law. Hence a breach of the Guidelines may not necessarily be a breach of the Act and/or the Regulations. Conversely, compliance with the Guidelines also cannot guarantee that a SGFI will not be prosecuted for lapses in its obligations. There is currently no doctrine of substantive legitimate expectations in Singapore that will bind the Comptroller and the Public Prosecutor to any assurances made in the Guidelines.

SGFIs should also note that the Comptroller has the power to request for copies of advice given by independent advisors to an SGFI. Such advice is not protected from disclosure to the IRAS unless it is subject to legal privilege.

To conclude, it is an opportune time for SGFIs to review their CRS compliance frameworks one more time before an audit by the IRAS. Issues discovered during an audit can sometimes be taken out of context. It is therefore crucial that an SGFI identifies any issue(s) as early as possible, and have the appropriate compliance, information technology and legal expertise to give the proper risk classification to any issue(s) found.

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