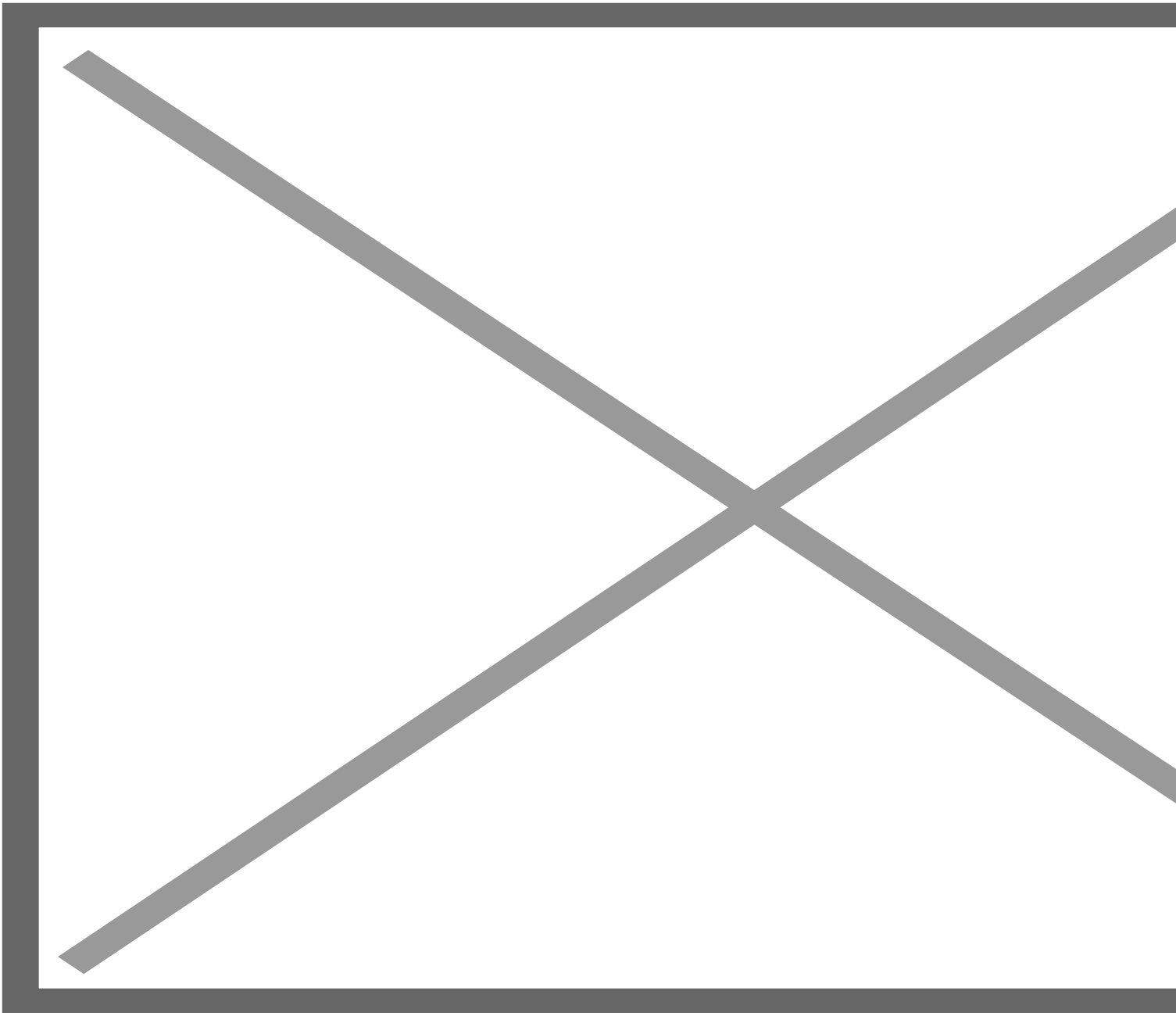
Action required

General Features



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Richard Wild explains why advisers may have to send HMRC-branded correspondence to their clients, and how this might be achieved

Key Points

What is the issue?

Regulations have recently been passed requiring certain businesses to write to their clients with HMRC branded wording and enclosures. This is to notify clients that HMRC will be receiving information on overseas financial accounts, and recommending action if individuals are unsure whether their tax affairs are complete or not up to date.

What does it mean to me?

If you are affected by these measures you will need to provide the notification to certain individuals who were clients as at 30 September 2016, before the notification deadline of 31 August 2017. This could be a costly and sensitive exercise, and you will need to know to what extent you have an obligation to provide the notification, and how to do this.

What can I take away?

This article aims to provide guidance on whether you are affected by these measures, and practical tips on how to comply if you are.

Significant changes to HMRC powers and sanctions around tax evasion, particularly anything offshore, have been introduced or are in the pipeline. This, together with the imminence of exchange of information under the OECD Common Reporting Standard, is again changing the tax landscape. In preparation for this many firms offering financial or legal services, including tax services, will be required to write to their clients to alert them of the developments and advising them to come forward if they have undisclosed tax liabilities.

Members may recall the furore surrounding Finance (No 2) Act 2015 section 50, which gave the Treasury the power to impose obligations on tax advisers and other persons to send such a communication to their clients. That measure was not consulted upon by HMRC or HM Treasury. It appeared ‘out of the blue’ as clause 46 in the draft Finance Bill and, notwithstanding representations by the CIOT and other professional bodies, it was enacted as section 50 without amendment. The statutory instrument (SI) that crystallises that obligation, the International Tax Compliance (Client Notification) Regulations 2016, came into force on 30 September 2016.

Members have until 31 August 2017 to comply with these requirements. The rules are complex and burdensome on agents, and the purpose of this article is to help members remain compliant by explaining the obligation. Members should:

1. determine whether the provisions apply to them;
2. if so, determine their ‘specified clients’ to whom a notification has to be made; and
3. decide how to send the notification and the full wording of the covering letter/email.

What if I don’t comply?

Let’s deal with this issue up front. From a client care perspective, failure to send this letter out could result in clients failing to correct their tax position, generating a new failure to correct penalty. This could in turn lead to trouble for you, their adviser.

An adviser who fails to comply with the requirements could be liable to a penalty of £3,000. No penalty will apply if an agent has a 'reasonable excuse' for non-compliance. The penalty must be notified by HMRC within 12 months from 1 September 2017. To minimise any risk of penalty, advisers are advised to keep a record of why and to whom they sent a letter and when.

While some members might think that a £3,000 penalty sounds like a reasonable alternative to the costs of complying with these requirements, that's not an acceptable approach. One of the fundamental principles of CIOT and ATT membership is that 'a member is required to comply with relevant laws and regulations' (see paragraph 2.1 of Professional Rules and Practice Guidelines 2011, available on our websites). Deliberate non-compliance would therefore be a breach of these fundamental principles.

The CIOT opposed the introduction of the measure, when it first came to our attention in the Finance Bill 2015. Once enacted, we made representations to HMRC to seek to mitigate the cost and impact on our members.

Does it apply to me?

The obligations apply to 'Specified Financial Institutions' (SFI) and 'Specified Relevant Persons' (SRP). In this article I concentrate on SRPs, as this is most relevant to CIOT and ATT members. However, groups or clients that include financial institutions, such as banks and investment managers, should consider the different SFI obligations. Helpfully, the definition of SFIs has been qualified so it excludes most charities that might otherwise have been caught, but may include some trusts, who may wish to be alerted about this.

For simplicity, in the remainder of this article I will continue to use the term SRP rather than agent/adviser etc, although it should be noted that the definition of SRPs goes well beyond the traditional tax adviser.

What's an SRP?

You will be an SRP if:

1. You are a relevant person under Finance (No 2) Act 2015 section 50(5), that is you are a tax adviser (as defined in Finance Act 2014 section 272(5)) or any other person who in the course of business provides advice to another person about that person's financial or legal affairs, or provides other financial or legal services to another person; AND
2. In the year to 30 September 2016, you:

    (a) provided 'offshore advice or services' (see below), in the course of business, which is not solely the preparation and delivery of the client's tax return as required under TMA 1970 section 8; OR
    (b) referred an individual to a connected person, for example a subsidiary, outside the UK for the provision of advice or services relating to the individual's personal tax affairs.

'Offshore advice or services' means advice or services relating to, in general terms, offshore sources of self-employment, employment, savings and investment income, together with assets and income within the charge to Capital Gains Tax. Specifically, this is any of the following that are situated in, or arise from, the United States, or a participating jurisdiction (having agreed to adopt CRS, and is one of the 93 signatories to Schedule 1 to the International Tax Compliance Regulations 2015):

- A financial account;
- A source of relevant foreign income;
- A source of employment income; or

- An asset.

The above are further defined in the legislation.

The terms ‘connected’ and ‘control’ are used several times and take their meaning from Corporation Tax Act 2010 sections 1122 and 1124 respectively.

Exceptions from SRP status

There are two main exceptions to the above:

- First, if the offshore advice and services (or referral) are only provided to your own employees and officers (including the partners of a partnership), or to those of a connected person, you are not an SRP.
- Secondly, offshore advice or services are excluded if those services only comprise completing and submitting a tax return. So, an agent who does not provide any advice will not be an SRP and will not need to make any notifications.

I am an SRP – what do I need to do?

First you will need to identify your specified clients that you need to send the notification to.

Clients as at 30 September 2016

SRPs first need to identify all their current clients that were individuals as at 30 September 2016. The SRP may want to simply send a notification to all such clients, as this could reduce the risk of a client in default being unaware of the new worldwide disclosure facility and so reduce penalties.

However, the SRP can send notifications to a subset of this group. SRPs can exclude clients where there was no reasonable expectation of providing further advice or services to the individual at that date, and clients where they hold insufficient information to be able to contact them. Advisers should not exclude clients just because a disclosure (such as under the Liechtenstein Disclosure Facility) is ongoing.

Residence status of the individual

The notification obligation does not apply for a client if the SRP believes that the individual was not UK resident for income tax purposes for 2015/16, and will not be resident for 2016/17. In many cases the SRP won’t know the client’s residence status for 2015/16 until that year’s tax return has been completed, possibly in January 2017, let alone for 2016/17, so a sensible approach should be taken here.

Which approach to adopt

The client list can then be refined further. SRPs can adopt either the specific approach, or the general approach.

Specific approach

The specific approach is designed to target notifications only to specific clients. This includes any clients that, in the year to 30 September 2016, the SRP has:

- provided with overseas advice or services (or referred to an overseas connected party to provide such services) relating to their personal tax affairs; or
- referred to a connected person outside of the UK for the provision of any advice or services – even if no such services were provided to the client by the SRP or the overseas entity.

Clients can be excluded under the specific approach if the adviser has prepared and submitted a personal tax return (or expects to do so) for the individual client, disclosing the effect of the offshore advice or services (whether performed by the adviser or through referral to a connected person).

This relaxation is not as helpful as it first seems. Only the client can say for certain if the return reflects the advice or services provided, and the services or advice may have no UK tax consequences, so would not have been reflected in a UK return. As a result, care should be taken when using this filter.

Determining whether overseas advice or services have been given to a client can often only be done by examination of the client's files, which could be extremely time-consuming. Following representations about the large volume of files that may need to be reviewed, HMRC introduced the general approach. HMRC's guidance, which goes well beyond the legislation, states that: 'The tax return must reflect the advice or services in such a way that a reasonable person could see that it has been provided. If they have provided the client with overseas advice or services, but the return shows no income or assets overseas, for example, this [is] unlikely to be reflective of that underlying advice.'

General approach

Under the general approach the SRP must identify all individuals to whom they have provided any advice or services relating to their personal tax affairs in the year to 30 September 2016.

The SRP may then choose to exclude clients for whom the adviser has prepared and delivered a personal tax return under TMA 1970 s 8 (or expects to do so) in respect of the tax year to which the advice or services relate.

This may sound easier to comply with than the specific approach filter, but still seems to require the member to check through cases to ensure no advice was given in the period for a tax year for which the agent is not submitting a return.

Businesses, or divisions of the business, that reasonably believe that they will not have provided clients with any advice or services about their personal tax affairs in the year to 30 September 2016 can choose to exempt clients or groups of clients. This will be helpful to firms that may be able to leave out clients of certain departments.

Notification method

Notifications can be made in paper (i.e. hard copy) form, and can be given by hand or by post. Alternatively, the notification can be sent by email, but only where advice and services are mainly provided to the client by email and it is reasonable to believe that they would read the notification if it were sent by email. HMRC's guidance suggests that marketing emails (where the sender does not have evidence that the client habitually reads the content) are not sufficient to establish reasonable belief that the notification will be read.

Notification content

Notification comprises two elements:

First, an HMRC branded document, which is reproduced in full in the Regulations and can be found at IEIM608040. This cannot be amended or annotated in any way.

Secondly, there is some standard wording, which must be included in the SRP's covering letter or email that accompanies the HMRC branded document. Again, this is set out in the Regulations in Schedule 3, Part 2, paragraph 3. The covering message must also include the name of the client.

HMRC's guidance, but not the legislation, says that the covering letter should be in the form of a letter from the business under its branding, and if appropriate should be in the same format as normal correspondence with the customer. There is no restriction on the remaining contents of the covering letter or email. SRPs may wish to explain to their clients that this notification is a legal requirement and that they are not implying that their clients have undisclosed income or gains. Further, you may wish to advise clients to ask you to deal with the disclosure, or recommend them to a tax investigations expert, rather than using HMRC's online facility, as suggested in HMRC's branded document. The notification can be sent with other correspondence to that client.

Connected parties

UK SRPs that are connected only need to send one notification between them, although they can each send one.

HMRC cannot compel an overseas entity to comply with the rules, but a UK SRP that controls an overseas person, such as a subsidiary, must take all such steps as are reasonably open to it to ensure that the overseas person makes a relevant notification by 31 August 2017.

Where can I get more help?

This article can only cover the main elements of the requirements, and I would recommend that you review the statutory instrument as well as HMRC's full guidance, which is contained within the International Exchange of Information Manual at IEIM600000.

The CIOT held a webinar on 1 December 2016 to discuss the notification requirement and practical tips on compliance (if you received and read this magazine promptly you may be just in time to participate!). However, the recording can still be viewed. Further details can be found at tax.org.uk or att.org.uk.

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