"new" Canadian treaty eligibility forms – implication for cross border derivatives agreements

It is common practice for parties to an ISDA Master Agreement (an "**ISDA Master**") that do not reside in the same jurisdiction to provide certain tax representations relating to their eligibility to claim the benefits afforded by an applicable income tax treaty. A party to an ISDA Master that is resident in the United States for tax purposes will also typically require the relevant counterparty to execute and deliver certain Internal Revenue Service Forms, including Form W-8BEN, to substantiate any eligibility of the counterparty to claim the benefits afforded by a particular tax treaty.

Prompted by recent changes to the *Canada-United States Income Tax Convention*,[1] such as the addition of the new, bilateral "limitation on benefits" clause, the Canada Revenue Agency (the "**CRA**") has released a new set of declaration forms that, in concept, are similar to Form W-8BEN. The stated purpose of the new declaration forms is to help Canadian residents determine whether it is appropriate to apply a reduced rate of withholding tax to payments made to non-residents.

the Forms

Forms NR301, NR302 and NR303 (the "**Forms**")[2] are declarations that are designed to be used by conventional non-resident taxpayers (e.g., corporations, individuals), partnerships with non-resident partners, and hybrid entities, respectively, to substantiate eligibility to claim the benefits afforded by a particular tax treaty.

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[1] *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital*, (26 September 1980), as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007.

[2] Accessible at http://www.cra-arc.gc.ca/E/pbg/tf/nr301/nr301-10e.pdf, http://www.cra-arc.gc.ca/E/pbg/tf/nr302/nr302-10e.pdf and http://www.cra-arc.gc.ca/E/pbg/tf/nr303/nr303-10e.pdf

Draft versions of the Forms were initially released in June 2009 and the CRA sought public comments on the Forms until September 30, 2009. Some of the concerns raised during the public consultation period were addressed in the recently released versions of the Forms and supplementary information thereto. However, other concerns, such as whether a payer may accept a duly completed Form without undertaking additional due diligence with respect to the accuracy of the statements made in the Form, do not appear to have been fully addressed.

While the Forms are not prescribed forms, and Canadian resident taxpayers are not required by statute to obtain a completed Form or equivalent information before applying a reduced rate of withholding tax on amounts paid or credited to non-residents, it is likely that, as a practical matter, the CRA will request such Forms or equivalent information during an audit of a taxpayer's cross-border tax affairs. Canadian resident parties that are negotiating the terms of the Schedule to an ISDA Master should now consider whether it is necessary to expressly provide that a non-resident counterparty shall be required to deliver a properly executed Form, together with all required supporting documentation and worksheets.

For additional information on the Forms, including the information requested in the Forms, the CRA's position as to when the Forms should be filed, and a discussion of the reasons for filing the Forms, please see "CRA Releases "New" Treaty Eligibility Forms – Are there New Compliance Obligations to be Met Before Applying a Treaty Reduced Rate of Withholding Tax?".

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a cautionary note