

# Guernsey introduces new compliance measures for CRS and FATCA reporting

**Briefing Summary:** On 14 September 2021 the Revenue Service published Bulletin 2021/5 which covers enhanced compliance strategies introduced by a new law that came into force in July earlier this year. This briefing note provides a summary of those strategies and will be of interest to those operating in the finance industry and compliance sector.

**Service Area:** Taxation and Economic Substance Requirements, Trusts and Private Wealth, Private Client

**Location:** Guernsey

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## Background

On 15 July 2021 the States of Deliberation (Guernsey's parliament) approved the Income Tax (Guernsey) (Amendment) Ordinance, 2021 (the "**Ordinance**") which makes a number of important amendments to Guernsey's Income Tax Law. One of the key purposes of the amendments is to follow through on Guernsey's commitment to have in place measures that enable the Island's authorities to demonstrate that it has a robust and effective compliance framework underpinning its regime of automatic exchange of information for tax purposes ("**AEOI**") based on the OECD's common reporting standard ("**CRS**") and the US' Foreign Account Taxes Compliance Act ("**FATCA**"), both as implemented in Guernsey.

## Background to introduction to enhanced compliance framework

AEOI has been implemented in Guernsey in a phased approach, starting first with FATCA and then with CRS. The enhanced compliance measures introduced by the Ordinance apply to both CRS, as well as FATCA, obligations. In the early years, the emphasis was on providing education and establishing a robust IT system to enable financial institutions to submit financial data in the format specified by the OECD and the US. The implementation of AEOI was overseen by Guernsey's Revenue Service, which also deals with the ongoing administration of CRS and FATCA. The next phase saw an increase in monitoring and compliance activities, with a focus on financial institutions that failed to file AEOI reports by the designated deadlines.

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Now that Guernsey is into its fifth annual cycle of receiving and submitting data under AEOI, it is moving to the next phase of the implementation process by enhancing the Revenue Service's ability to monitor and audit compliance within the finance industry. This has necessitated the creation of additional powers for the Director of the Revenue Service, as well as the introduction of certain additional obligations for financial institutions. The intention is to bring these changes into effect in a manner that balances the requirement to have in place a robust system to monitor and enforce compliance whilst limiting, insofar as is possible, the extent of any additional compliance burdens on Guernsey financial institutions. In essence, the changes ensure that the Revenue Service has the power to conduct compliance reviews and take appropriate action in cases of non-compliance in an environment where stakeholders are now familiar with the requirements of AEOI and have already put in place systems and procedures that can readily be adapted to meet evolving demands at operational level.

## Legislative Changes

The changes introduced fall under the following headings:

- Extending the registration requirements on IGOR
- Facilitating on-site inspections by the Revenue Service
- Enabling the Revenue Service to issue directions and appoint inspectors
- Dealing with recalcitrant account holders
- Increasing penalties for non-compliance

### Extending the registration requirements on IGOR

Up until now, only financial institutions that have CRS and or FATCA reporting obligations were required to register on the Revenue Service's online reporting system, the Information Gateway Online Reporter ("**IGOR**"). This obligation is now extended to all financial institutions, whether they have a reporting obligation or not.

The registration obligation will be extended to include a declaration of the institution's classification as a Reporting Financial Institution, Non-Reporting Financial Institution, Participating Jurisdiction Financial Institution or Non-Participating Financial Institution, as well as the category, class or description of such institution into which it falls under CRS or FATCA regulations. Where such classification/category is not applicable, the financial institution is required to confirm that it is not an institution within any of those classifications/categories.

Financial institutions will also be required each calendar year by the end of February to submit an annual validation in which the institution confirms that the information provided on registration and thereafter as concerns classification and category of the institution, remains complete and correct. Alternatively, the institution must provide amended information. In addition, if there is any change to the registered information, a financial institution is required to inform the Revenue Service of the change as soon as practicable after becoming aware of it and in any event within 14 days of such change.

By extending and enhancing the registration process the Revenue Service will be able to factor into their risk parameters those entities which meet the criteria to be regarded as financial institutions but have not registered as such either because they have been correctly classified as non-reporting financial institutions or because they have simply failed to engage with the reporting system, the so-called "**Ghost FIs**". Going forward, the Revenue Service will be able to focus resources on identifying such Ghost FIs and assessing associated risks. Whilst the additional registration process should not pose an additional compliance burden on financial institutions insofar as they would have had to make such determinations at the time FATCA and CRS were introduced and should have kept records of those determinations, it is nonetheless recognised that there will be now be an additional requirement for more information than is currently being provided to the Revenue Service.

The extension of the registration requirements is stated in the Ordinance as not coming into effect until 1 July 2021 or such later date as later specified by regulation. It is understood that Revenue Service is currently updating its IGOR system and the intention is for the enhanced registration process to commence no earlier than 2022, with the deadline for registration being 28 February 2022. Further information is to be provided in December 2021 regarding the requirements of the extended registration process.

## Facilitating on-site inspections by the Revenue Service

The Revenue Service's approach to AEOI compliance is essentially risk-based. IGOR's software is currently being developed to further enhance the Revenue Service's ability to review and analyse CRS reports in order to identify and profile potential risks. Whilst the Revenue Service already has a broad suite of information gathering powers contained in Part VI A of the Income Tax Law, these powers lend themselves to the traditional methods that the Revenue Service has used to date when making enquiries, for example by calling for records and information and then, if necessary, requesting further explanations in respect of identified concerns.

Whilst it is understood that this method of desk-based compliance checks will continue to be deployed, the amendments introduced by the Ordinance now enable the Revenue Service to conduct on-site visits at the business premises of financial institutions in order to review relevant records in situ and discuss any immediately identified concerns.

Whilst the Revenue Service has been conducting CRS and FATCA compliance activities, including site visits, for almost a year, to date those site visits have taken place with the prior consent of the relevant financial institution. The amendments provide a legislative basis for the Revenue Service to carry out such site visits with 7 days' written notice (unless approval has been granted by the Bailiff for a shorter notice period). In practice, the Revenue Service anticipates that they would provide longer notice, allowing time for the relevant financial institution to prepare and provide information and documents, including responses to a questionnaire to be sent in advance of the visit itself.

The approach to AEOI on-site visits replicates the framework introduced as part of the compliance strategy underpinning Guernsey's economic substance regime that was introduced with effect from 2019. The same safeguards and restrictions applicable to on-site visits for economic substance purposes apply in the case of on-site visits for CRS/FATCA purposes. In both cases the Revenue Service may not inspect items which are subject to legal professional privilege.

## Enabling the Revenue Service to give directions and appoint independent inspectors

As a result of the compliance reviews that the Revenue Service will be carrying out, it is possible that the Revenue Service will discover cases where there are serious failings in compliance, for example in carrying out the relevant customer due diligence or account classification requirements under the CRS or FATCA. The Director of the Revenue Service will be able to issue directions to a non-compliant institution for the purposes of securing compliance. Where the financial institution has or is reasonably suspected of having contravened AEOI obligations, the Director of the Revenue Service will also have power to appoint one or more inspectors for the purposes of investigating and securing compliance.

The power to appoint inspectors is anticipated to be deployed in limited circumstances where the Revenue Service has identified potential significant failings on the part of the relevant financial institution. The task of the inspector would be to investigate and oversee the remediation of any significant failings and to report to the Revenue Service. The relevant institution being investigated and their key personnel and advisers are obliged to cooperate with the inspector by providing documents, explanations and assistance.

Crucially, the costs, fees and expenses of an investigation and report by an inspector will be met by the relevant institution which is being investigated.

Whilst the Revenue Service has been allocated additional human resources to perform compliance reviews in respect of AEOI, the new powers introduced by the Ordinance are more akin to a regulatory role than those that have traditionally been undertaken by the Revenue Service to date.

## Dealing with recalcitrant account holders

Both the CRS and FATCA regimes require Guernsey financial institutions to undertake due diligence procedures that are designed to determine whether the holder of a financial account is a reportable person, being a person who is tax resident in a foreign jurisdiction with which Guernsey has agreed to exchange information under AEOI agreements through their respective competent tax authorities. Obtaining an accurate and complete self-certification from the account holder is a critical component for ensuring that CRS and FATCA are correctly applied in order to determine reporting obligations in respect of the relevant account. Where the financial institution has been unable to obtain a valid self-certification under the CRS/FATCA regime, or having obtained a self-certification, has reasonable grounds to suspect that the self-certification is or has subsequently become incorrect or unreliable, the financial institution must immediately notify the Revenue Service. On receipt of notification the Revenue Service has power to require the institution to provide further information and documents or to make further enquiries. Where appropriate, the Revenue Service may make a freezing order prohibiting the institution from making any transfer, withdrawal or payment from, or otherwise dealing with, the account, except under the authority of, and in accordance with, the prior written permission of the Director of the Revenue Service. Any interest or increment accruing to the frozen account will also be frozen and will be added to the account on its release.

The introduction of this additional power is intended to support financial institutions and their efforts to obtain full and accurate self-certifications from account holders, by virtue of the threat to stop transactions on the account in the event of non-compliance. It is understood that the notification obligation will be enforced from January 2022 and further information regarding how notice can be given and what information will be required by the Revenue Service, will be published in December 2021. In practice, this means that, in order to avoid triggering a notification requirement leading potentially to a freezing order, financial institutions have until the end of this year to remediate any oversights in due diligence documentation. The next few months also present an opportunity for institutions to check that they have accurately transposed data collected from account holders into CRS and FATCA reports, so that it is consistent with AML/KYC and self-certifications provided by clients.

## Increased penalties for non-compliance

As part of the new compliance measures, new regulations have been brought into effect to apply enhanced sanctions for failure to comply with CRS and FATCA obligations. The new regulations are:

- The Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) (Amendment) Regulations, 2021; and
- The Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) (Amendment) Regulations, 2021,
- (together, the "**Regulations**").

The Regulations came into operation on 29 April 2021 and have the effect of increasing daily penalties for failure to submit either a CRS or FATCA report by the due deadline. They also introduce a new basis for calculating penalties in the case of failure due to negligence or fraud. The increased daily penalty of up to £1,000 per day will apply where there has been 30 days of continual failure, following the imposition of an initial penalty of £300 and daily penalties of £50, to submit a report by the reporting deadline (set at 30 June of each year).

Where CRS or FATCA reports have been found to be incorrect or incomplete owing to negligence or fraud, a penalty calculated by reference to the value of the account(s) affected may be applied.

In the case of negligence, the maximum penalty will be 0.5% of the balance or value of the account(s) to which the failure refers. However, if a complete and accurate return has been delivered before the Director institutes an enquiry into potential non-compliance, then no penalty will be payable. In the case of fraud, the maximum penalty will be 1% of the balance or value of the account(s) to which the failure relates.

## Comment

The latest changes to Guernsey's tax law facilitate greater monitoring by the Revenue Service at industry and institutional levels and provide the legal basis for targeted compliance measures to be taken by the Revenue Service. In the run up to the introduction of these changes, the Revenue Service published Bulletin 2021.3 which included details of the CRS and FATCA Compliance Assurance Statements that form part of the AEOI annual reporting procedures. This was followed by the publication in July this year of CRS and FATCA Compliance Information, setting out compliance pointers to be taken into account by financial institutions when attending to AEOI obligations. With the advanced notice through these recent publications and given that Guernsey's financial institutions have now had over 5 years to become accustom to the AEOI requirements of CRS and FATCA, it is anticipated that any additional compliance burden on Guernsey's financial institutions will have limited impact for those who are already engaged with AEOI and have in place appropriate policies and operational procedures that can be readily adapted to meet new requirements. Certainly, the exchange of information based on accurate data is in stakeholders' interests and ultimately assists with Guernsey retaining its well-deserved reputation as a centre of excellence in the world of offshore financial services.

## Links to Further Resources

- The Income Tax (Guernsey) (Amendment) Ordinance, 2021
- The Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) (Amendment) Regulations, 2021
- The Income Tax (Approved International Agreements) (Implementation) (United Kingdom & United States of America) (Amendment) Regulations, 2021
- Compliance and Assurance Statement Bulletin 2021.3
- CRS and FATCA Compliance Information

- CRS and FATCA Bulletin 2021/5

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