

FATCA-based reporting and IGAs for Guernsey

Service area / [Corporate](#)

Location / [Guernsey](#)

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On Friday, 15 March 2013 Guernsey's Chief Minister, Deputy Peter Harwood, announced that Guernsey was in the process of finalising a draft intergovernmental agreement ("IGA") with the UK to cover a 'tax package' of three initiatives ("UK IGA"). The timing of the announcement comes as Guernsey moves closer to concluding an agreement with the US ("US IGA") regarding the implementation in Guernsey of the US Foreign Account Tax Compliance Act ("FATCA"). The announcement by the Chief Minister also explained that finalised terms and details of the UK IGA will be subject to consultation with industry on implementation issues and that the intention is to publish both the UK IGA and the US IGA concurrently "to provide for a streamlined consultation and implementation process".

UK IGA

Background

With the backdrop of the international financial crisis and worsening public sector finances, the G8 and G20 economies have signalled a growing international consensus towards the use of multi-jurisdictional reporting systems for the automatic exchange of information. One of the main initiatives in this field is the US reporting regime under FATCA and its reliance on non-US financial institutions to report to the US Internal Revenue Service ("IRS") detailed information on certain US account holders and payments made to, and assets held in, certain US accounts. In October 2012, Guernsey announced its intention to comply with FATCA by entering into an IGA with the US. However, to do so would require prior authorisation from the Crown because international agreements are normally the preserve of sovereign states. In common with the other Crown Dependencies of Jersey and the Isle of Man, Guernsey is not a

sovereign state, and would therefore need to secure the approval of the UK Government in order to conclude an IGA with the US. It is in the context of seeking the UK Government's approval to conclude the US IGA that the UK IGA was tabled.

Under the UK's presidency of the G8 during 2013, Prime Minister David Cameron has said that he will prioritise trade, tax and transparency to encourage global economic growth. It is anticipated that entering into the UK IGA will therefore facilitate the entering into of the US IGA in time for Guernsey's financial institutions to meet obligations under FATCA. This in turn will enable Guernsey's finance industry to continue to be open to the US market.

Tax package

The announcement indicates that the agreement will cover a proposed 'tax package' that will reinforce Guernsey's commitment to tax transparency and its status as a leading and respected mainstream international financial centre.

The proposed 'package' is to include:

- an agreement on reporting of tax information along FATCA principles through an IGA, with alternative arrangements for UK resident but non-domiciled individuals;
- an agreement to negotiate revisions to the existing Double Taxation Agreement; and
- an agreement on a disclosure facility.

This section of the briefing covers the three components of the tax package.

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UK IGA Agreement relating to cooperation in tax matters

The announcement states that the UK IGA will include “an agreement in principle to enhanced reporting of tax information along FATCA principles through an intergovernmental agreement, with alternative reporting arrangements for non-domiciled UK tax residents.” This suggests that the UK IGA will follow broadly the same information reporting requirements as that expected to be signed up by Guernsey with the US for the purposes of implementing FATCA, prompting some commentators to refer to the UK IGA initiative under the soubriquet ‘Son of FATCA’.

Details of the proposed UK IGA are not yet available, however we may get a ‘feel’ of what it may contain by looking at the elements of the UK-US IGA signed on 12 September 2012 to implement FATCA in the UK. We could also be guided by the approach of the Memorandum of Understanding entered into between the UK and the Isle of Man on Cooperation in Tax Matters, which was signed in February 2013 (“UK-IoM Agreement”).

Possible Impact of the UK IGA on Guernsey financial institutions Based on the UK-US IGA and the UK-IoM Agreement, and given the growing international consensus towards multi-jurisdictional deals on automatic exchange of information, the obligation to report under the UK IGA will fall on Guernsey’s financial service providers. The financial institutions are likely to have to report detailed information on accounts, property and financial holdings (‘reportable accounts’) in which those who fall within a defined or specified class have an interest. The specified class is likely to include individuals as well as companies, trusts, partnerships and foundations, who are resident in the UK for tax purposes.

We know that the IGA will require information to be reported automatically and exchanged with the UK on a regular basis. This may be on an annual basis, possibly calendar based or to coincide with the start of the UK tax year. At this stage, it is not known what information is to be reported. However, based on the information to be reported to the IRS under Article 2 of the UK-US IGA to implement FATCA in the UK, the requirements could include:

- Name, address, and possibly other identifier such as national insurance number or date of birth of the member of the specified class.
- Account or customer reference number.
- Name and identification reference of the reporting financial institution.
- Account balance or value (including in the case of insurance or annuity contracts, the cash value or surrender value) as at the end of the reporting period.
- For custodial accounts: total gross interest, total gross dividends and total gross other income paid or credited during the reporting period, as well as total gross proceeds from the sale or redemption of property paid or credited to the account.
- For depository accounts: the total gross interest paid or credited during the reporting period

- Any other accounts, total gross paid or credited.

If the terms of the UK IGA are reciprocal (the announcement is silent on this point), then there would be similar reporting obligations on UK based financial institutions to report on persons who are resident in Guernsey for tax purposes and hold interests in relevant property through UK-based financial institutions. It remains to be seen whether the UK IGA is reciprocal in nature and if so, whether equivalent information is to be exchanged on the same basis.

Alternative reporting arrangements for Non-Doms

Individuals who are tax resident in the UK are generally taxable on worldwide income and gains on an arising basis. However, those UK residents who are not also domiciled in the UK (“non-doms”) can, where available, by election and payment of the appropriate remittance basis charge, claim to be taxed in the UK on a remittance basis for the relevant period. As a result, their UK tax liability is limited to any UK source income and gains, and any worldwide income and gains that are remitted to the UK during the relevant period.

No details have yet been released which would indicate how the alternative reporting arrangements for non-doms will work. However, describing the proposals relating to non-doms, Guernsey’s Treasury & Resources Minister, Deputy Gavin St Pier, said:

“Securing a proportionate and workable non-dom reporting regime is clearly pivotal. The arrangements we have negotiated are non-intrusive and respect non-doms’ different status under UK tax laws. We are confident that they will secure Guernsey’s attractiveness for non-dom business, not least as they were devised in close consultation with industry groups and practitioners.” (emphasis added)

It is hoped that the range of reporting and level of details required in order to comply with the UK IGA in respect of non-doms, will indeed reflect the characteristics of the regime highlighted above. Precedent for an alternative treatment of non-doms can be drawn from the approach adopted by both the UK and Guernsey to reporting for the purposes of the EU Savings Directive (“EUSD”), which is based on achieving ‘effective taxation’ in the jurisdiction of residence. However, in the case of the EUSD, the reporting regime currently extends only to payments of interest (as defined under the relevant domestic law implementing the EUSD provisions), whereas reporting to the IRS to comply with FATCA includes details on balances and proceeds of sales or redemptions. Whether the information required to be reported in respect of non-doms under the alternative regime is indeed proportionate, workable, and non-intrusive in practice remains to be seen.

UK-Guernsey Double Taxation Agreement

The UK-Guernsey Double Taxation Agreement 1952 followed the general pattern of double tax arrangements made by the UK at that time, but was subsequently amended in 1994 and again in 2009. The third limb of the tax package indicates a commitment to negotiate further revisions to the existing Double Taxation Agreement.

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From Guernsey's perspective, this is likely to be informed by the experience gained recently when negotiating a network of international taxation agreements. As at 15 February 2013, Guernsey has signed partial DTAs with 11 countries, dealing with such issues as personal tax matters, shipping and aircraft and/or mutual agreement procedures. Comprehensive DTAs dating from the 1950s (with the United Kingdom and Jersey) have been joined more recently by four new comprehensive DTAs with Isle of Man, Malta, Singapore and Qatar. Negotiations over comprehensive DTAs have been completed with each of Hong Kong and Luxembourg. Furthermore, negotiations over a comprehensive DTA are currently progressing, or are anticipated to commence this year with Bahrain, Cyprus, Liechtenstein, Monaco, Seychelles and the United Arab Emirates.

Disclosure facility

No details have emerged as yet on the third limb of the tax package. However, the Treasury & Resources Minister commented that this will be part of a wider agreement between the UK and Guernsey. Deputy Gavin St Pier is quoted in the announcement as saying:

"Given our long-standing commitment to transparency, including our extensive network of tax information exchange agreements and the fact that we already exchange information automatically under the EU Savings Directive, we don't expect the facility to be used much, if at all."

The disclosure facility signed up in February between the UK and Isle of Man under the UK-IoM Agreement could provide us with a 'heads-up' of what this may entail. The Isle of Man disclosure facility runs from 6 April 2013 to 30 September 2016. It allows outstanding UK tax liabilities to be settled in advance of information being automatically exchanged. In addition to providing a financial commitment to pay unpaid tax due, under the facility penalties range from 10%-40% of unpaid UK tax. The facility is open to account holders who, at any time during the period from 6 April 1999 (in the case of individuals) or 1 April 1999 (in the case of legal persons) (the "cut off day") to 31 December 2013, were resident in the UK for UK tax purposes and had a beneficial interest in 'relevant property' in the Isle of Man (widely defined and includes accounts, annuity contracts, trusts, partnerships, companies etc). In return, HMRC will not seek unpaid tax or penalties in respect of the period prior to the cut off day. The disclosure facility is not open to account holders under an ongoing investigation by HMRC as at 6 April 2013. The UK-IoM Agreement requires financial intermediaries in the Isle of Man to contact their clients and make them aware of the facility before the end of 2013, and again during the six months prior to the facility period ending on 30 September 2016.

US IGA for FATCA compliance

In common with financial centres worldwide, Guernsey recognised that the reporting regime developed by the US under the FATCA initiative was a 'game changer' in the field of automatic exchange of information between international taxing and regulatory authorities. The initiative has been

described as a 'lever and a model' for countries who wish to collate equivalent information. The volume and form of information required by the US to comply with FATCA is likely to become part of the international standard and will have a substantial impact on the provision of financial services globally.

On 9 October 2012, the Chief Minister of Guernsey announced the intention to negotiate an IGA with the US which is likely to be similar in form to that signed between the UK and the US on 12 September 2012, due to be brought into force in the UK in this year's Finance Bill. Our previous client briefing set out the purpose of the US IGA and an analysis of what it may contain.

Download: [FATCA Inter-governmental agreements for Crown Dependencies](#)

Latest position

The latest announcement issued by the States of Guernsey confirms that Guernsey is moving towards concluding an IGA with the US on FATCA, presumably under an extension of the existing Letter of Entrustment issued by the UK Government to the States of Guernsey. This is to be welcomed, as once the US IGA is signed up it will need to be ratified by the island's parliament, the States of Deliberation. In Guernsey this would be by Ordinance to bring the IGA into effect as part of Guernsey's domestic law. In the meantime, the FATCA clock is ticking and financial institutions are keenly awaiting certainty in this area. Timing is therefore tight!

Preparation

Whilst we wait for publication of the terms of the proposed UK IGA and the US IGA what can financial institutions in Guernsey do now to meet future reporting obligations? Many institutions are already well advanced with their preparation for FATCA compliance. Here is a checklist of suggestions:

- Review information systems to ensure specific types of data can be retrieved and processed in the format required to comply with obligations under the IGAs once known.
- Review information held and identify areas that require updating and / or completion (remediation).
- Review terms of business and client agreements relating to the requesting of information from existing clients and related parties and the disclosure of that information to third parties.
- Review terms governing the structure and constituent entities currently administered or managed by the financial institution in relation to requests for and disclosure of information.
- Review pro forma terms of business, letters of engagement, administration service and management agreements to ensure the financial institution is able to request information, hold it in a format which can be accessed by affiliated service providers within the same group (if appropriate) and disclose it to relevant authorities.

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- Review consent clauses, exonerations, indemnities and termination provisions regarding the need to receive accurate, full and up-to-date information for the purposes of processing that information in compliance with tax and regulatory obligations imposed by relevant authorities.

In order to meet the forthcoming challenges, financial institutions should aim to be in a position to call for information at appropriate intervals, on an ongoing basis from relevant parties, who are likely to include persons not party to the contractual arrangements entered between the institution and its client or customer. In practice, and subject to the terms of the IGAs, this is likely to involve, for example, requesting a statement of tax residence from relevant parties and in the case of non-doms, this should include confirmation of their tax status. When making a payment to a non-dom under the alternative reporting arrangements, it might be helpful for a financial institution to get prior confirmation from the recipient's tax adviser that the payment does not constitute a remittance. In the case of the US IGA, the information required may have to be fairly lengthy in order to check for US indicia. Updated information and confirmations should be provided annually in time for the start of each new reporting period.

Concluding comments

In January 2011 the International Monetary Fund ("IMF") released its report on Guernsey as part of its financial stability assessment programme. The IMF concluded that Guernsey has met or exceeded the internationally accepted regulatory standards as endorsed by the G20. In July 2011 Guernsey moved towards automatic exchange of information under the EUSD. As at February 2013, Guernsey had signed up a total of 40 Tax Information Exchange Agreements - including 16 with the governments of G20 members.

Whilst the scope of agreeing with either the UK or the US specific provisions that are in Guernsey's interest may be limited, it is hoped that the IGAs to be concluded with both the UK and the US will include measures that enable financial institutions in Guernsey to meet UK and US expectations for the reporting of information in an efficient and practical manner, bearing in mind the importance of maintaining proportionality and respect for the legitimate concerns of individuals to maintain confidentiality over their private affairs.



FIND US

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272

E guernsey@careyolsen.com



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