

FATCA-based reporting update for Guernsey

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On Wednesday 7 August 2013 the International Tax Compliance (United States of America) Regulations 2013 ("UK Regulations") were laid before the UK House of Commons and will come into force on 1 September 2013. The UK Regulations implement obligations under English law arising on UK-based financial institutions pursuant to the intergovernmental agreement ("IGA") between the US and the UK signed on 12 September 2012 ("US-UK IGA") regarding the US Foreign Account Tax Compliance Act ("FATCA").

Guernsey intends to comply with FATCA through its own IGA with the US ("US-Guernsey IGA") but as at the date of this client briefing this has yet to be signed between the two governments. The impact of FATCA-based reporting for Guernsey is still far from clear as implementation details continue to be discussed at governmental level.

This client briefing is the latest issue in our series of briefing notes on FATCA-based reporting. By monitoring developments, Carey Olsen is able to gain an insight into the issues which could be relevant for Guernsey-based financial institutions as they prepare for FATCA-based reporting.

UK regulations

The US-UK IGA is intended to reduce some of the administrative burdens on UK financial institutions when complying with their obligations under FATCA as set out in the final regulations issued by the US Treasury Department and the Internal Revenue Service ("IRS") on 17 January 2013 ("US Regulations"). The US-UK IGA provides a mechanism for UK financial institutions to comply with their obligations without breaching local data protection and confidentiality laws.

The UK Regulations will come into force in the UK on 1 September 2013. Under these regulations, UK financial institutions will be required to file their first report relating to 2014 by 31 May 2015. Reporting will continue annually thereafter. Reports filed with HM Revenue and Customs ("HMRC") will then be passed automatically on to the IRS.

The UK Regulations set out how the US-UK IGA is to be implemented in the UK. The UK Regulations:

- define the scope of reporting financial institutions;
- define the scope of reportable accounts;
- set out identification and due diligence obligations;
- set out reporting obligations, with modifications for calendar years 2014 - 2016;
- specify identification and disclosure obligations regarding payments to non-participating financial institutions in 2015 and 2016;
- specify penalties for failure to comply (providing a defence of reasonable excuse); and
- set out procedural and enforcement mechanisms.

The intention is that the UK Regulations will be supplemented by guidance notes issued by HMRC, the current version of which was updated 14 August 2013 in response to feedback received. It is anticipated that Guernsey would follow a similar approach with domestic laws to implement FATCA-based reporting in Guernsey, together with guidance notes to assist with interpretation and implementation for the local finance industry.

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Amendment of Annex II of the US-UK IGA

The US-UK IGA was amended following an Exchange of Notes between the US and the UK on 3 and 7 June 2013. As a result of the amendments, Annex II of the US-UK IGA was revised to widen the range of institutions and products falling outside the scope of FATCA obligations and to provide further detail on the categories of institutions which will be regarded as non-reporting UK financial institutions that are to be treated as deemed-compliant for FATCA purposes.

Of particular interest to the fiduciary sector is the category of "Trustee-Documented Trusts" introduced under the revised Annex II. A Trustee-Documented Trust will be regarded as a non reporting UK Financial Institution and as such, will be treated as a deemed-compliant foreign financial institution for the purposes of FATCA. A trust established in the UK will be a Trustee-Documented Trust if the trustee is any of the following:

- a reporting US Financial Institution;
- a reporting UK Financial Institution; or
- a participating Foreign Financial Institution

and the trustee reports all information required to be reported with respect to the reportable accounts of the trust.

The same revised terms under Annex II are also available for all reporting foreign financial institutions based in jurisdictions which have signed up an IGA with the US based on the Model 1 template IGA. The proposed US-Guernsey IGA is based on the Model 1 template IGA (reciprocal version) and on this basis, it is anticipated that the category of Trustee-Documented Trusts would be available to trusts established under the laws of Guernsey, where the trustee is a reporting financial institution. As a result, the trust itself would be regarded as deemed compliant and will not be required to register with the IRS as a financial institution in its own right, even though the trustee would need to register itself as a financial institution.

Extension of time lines for FATCA obligations announced by the US

On 12 July 2013 the US Treasury and the IRS issued Notice 2013-43 ("Notice"). This Notice announced a delay in the commencement of FATCA under US law, with the effect that there will be no reporting with regard to 2013 and all current deadlines for undertaking due diligence procedures are to be pushed back by 6 months. Accordingly, under the present timeframe the effective start date for certain FATCA obligations, whether under the US Regulations or pursuant to an IGA, is currently 1 July 2014. The IRS aim to publish by 2 June 2014 the first list of foreign financial institutions which have registered through the IRS registration portal (now due to be open from 19 August 2013). To ensure inclusion on this list, registration should be finalised by 25 April 2014. This list is due to be updated on a monthly basis thereafter. Once registration has been finalised the financial institution will be issued with a Global Intermediary Identification Number ("GIIN") by the IRS. GIINs will now only be issued from 2014.

Reporting foreign financial institutions based in a country that has signed a Model 1 template IGA will have a little more flexibility. While they will be able to register and obtain a GIIN from 1 January 2014 like other foreign financial institutions, they will have additional time beyond 1 July 2014 to the end of that year to register and obtain a GIIN should they choose to delay registration. However, in order to avoid US withholding tax on withholdable payments made to them from 1 January 2015, such financial institutions must register and obtain their GIIN by 31 December 2014.

IGAs signed up but not brought into effect

The Notice also referred to the treatment of financial institutions operating in jurisdictions that have signed up an IGA to implement FATCA but have not yet brought into effect the obligations under that IGA under local domestic legislation. According to the Notice, the US will publish a list of such jurisdictions and they will be treated as if their IGAs were in effect on the basis that the jurisdiction will bring in domestic law within a reasonable period of time. This will enable a financial institution based in such jurisdiction to register as a registered deemed compliant foreign financial institution. Accordingly, Guernsey financial institutions should be able to benefit from this treatment under the Notice in the (possibly unlikely) event that the US Guernsey IGA is signed up but not yet brought into effect under local domestic law.

Impact of developments on Guernsey-based financial institutions

On 29 May 2013 the Chief Minister of Guernsey made a statement to the States of Deliberation (Guernsey's parliamentary assembly) that the States of Guernsey was at that stage engaged in final negotiations with the US to conclude the US-Guernsey IGA. It was anticipated by US officials that the US-Guernsey IGA would be ready to sign in June 2013 but this has not yet occurred. Once signed, the IGA will be subject to ratification by Guernsey's parliament and implementation be through Guernsey's domestic legislative procedure.

The proposed US-Guernsey IGA includes a "most favoured nation" clause, which would enable Guernsey to benefit from more favourable terms that may be subsequently offered by the US to other US FATCA partner jurisdictions. Accordingly, it is anticipated that Guernsey would also benefit from such a provision. With regard to registration of financial institutions, the Chief Minister said at the May meeting of the States of Deliberation:

"I think it is also important to communicate that registration for FATCA Model 1 Intergovernmental Agreement for Foreign Financial Institutions is not required until 01/01/2015 under US Regulations - a detail which will be of great interest to our finance industry".

This is therefore consistent with the approach announced by the US in July.

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UK-Guernsey IGA

On 15 March 2013, Guernsey's Chief Minister announced that Guernsey was in the process of negotiating the terms of a tax package that included an agreement on the reporting to the UK of tax information along FATCA principles through an IGA, with alternative arrangements for UK resident but non-domiciled individuals ("UK-Guernsey IGA"). The proposed UK-Guernsey IGA is based on a model agreement the details of which are currently being negotiated between the UK and the Crown Dependencies ("CDs") and Overseas Territories ("OTs").

On 26 June 2013 HMRC released a draft model agreement and discussion document regarding the implementation in the UK of IGAs with the CDs/OTs. The model agreement as published does not currently include annexures which specify non-reporting financial institutions and products in the UK or in the CDs/OTs (proposed Annexes II and III), nor details of the proposed alternative reporting regime for certain UK reportable accounts (proposed Annex IV). Annexes II, III and IV are still the subject of ongoing detailed discussion at governmental level. The draft model agreement published on 26 June 2013 is therefore incomplete.

Revised timeline for UK-CDs/OTs IGAs

Following the announcement by the US of a delay of 6 months before the commencement of the US FATCA obligations under the Notice and the passing of the UK Regulations to implement the US-UK IGA in the UK, HMRC confirmed that the revised timeline for UK financial institutions to comply with FATCA would also apply for the purposes of the UK IGAs with the CDs/OTs.

This means that obligations on UK financial institutions under the proposed draft UK IGA with the CDs/OTs will currently commence on 1 July 2014. Only accounts in existence on or after this date will be subject to reporting and 2014 will be the first year that reporting covers.

It is anticipated that the same timelines may apply in Guernsey for reporting by Guernsey-based financial institutions under the proposed UK-Guernsey IGA. However, it is not clear at this stage when the first of those reports will be due for filing. For UK financial institutions we know that this date has now been set at 31 May 2015. When referring to the UK-Guernsey IGA and the US-Guernsey IGA, the Chief Minister said to the States of Deliberation on 26 March 2013:

"To be clear these information exchange arrangements will not come into effect until at the earliest 2016 and 2015 respectively."

Next steps

On 29 May 2013 the Chief Minister said:

"Subject to final negotiations being concluded as per the timings I have just outlined, I intend to present to the States a report requesting its approval and agreement to these international agreements at the September States meeting." The stated intention is to publish both the UK-Guernsey IGA and the US-Guernsey IGA concurrently "to provide for a streamlined consultation and implementation process".

The September States meeting is due to be held on 25 September, for which the billet (similar in function to a White Paper before the UK Parliament) was published on 16 August. Item 2 of the Billet d'État XVIII 2013 is entitled "Policy Council – Greater Autonomy in the Legislative Process and International Affairs." Amongst the various issues considered by the Policy Council in the report is reliance by Guernsey as one of the Crown Dependencies on the UK Government to negotiate its own treaties. It is anticipated that the US-Guernsey IGA will be concluded pursuant to the process referred to as 'entrustment' given to Guernsey by the Ministry of Justice, which is the UK Government Department responsible for managing the relationship with the Crown Dependencies.

Paragraph 63 of the Policy Council's report says:

"The process of entering into agreement through entrustment can also be problematic. Whilst the use of entrustment does not require direct ratification, it still requires the Crown Dependencies to obtain express approval from the UK Government before any agreement can be concluded. This means that the UK Government can seek to curtail the ability of the government of Guernsey to enter into an agreement. This situation occurred when the Crown Dependencies sought to conclude an intergovernmental agreement with the US in relation to the Foreign Accounting Tax Compliance Act ("FATCA"). The UK was only willing to consent to the entrustment for an agreement with the US if a similar automatic exchange agreement was entered into with the UK. In the economic interests of the Island, a suitable agreement has been negotiated by the Policy Council and will be considered by the States. Questions have also been raised on the ability to terminate agreements under entrustment." (emphasis added)

Given recent developments and, in particular, the above commentary in the September billet, Guernsey-based financial institutions will have to wait a little longer before the US-Guernsey IGA and the UK-Guernsey IGA are released by the States of Guernsey for public review. In the meantime, we will continue to monitor events and alert our clients of important developments as they arise.

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