

Guernsey issues amended legislation and updated draft guidance notes on FATCA based reporting

Service area / [Trusts and Private Wealth](#)

Location / [Guernsey](#)

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On 31 March 2015 amendments were made to the Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014 (the "2014 Regulations") which brought FATCA-based reporting into force under Guernsey law.

FATCA-based reporting is implemented in Guernsey pursuant to the UK-Guernsey IGA, signed on 22 October 2013 and the US-Guernsey IGA, signed on 13 December 2013 (together the "IGAs"). On 30 April 2015 the States of Guernsey Income Tax ("ITO") published updated draft Guidance Notes relating to the implementation of FATCA-based reporting in Guernsey. The changes to domestic law and further clarification in draft Guidance have been made in response to specific questions and comments received from industry in the lead up to the deadline of 30 June 2015 for filing reports in Guernsey under the US-Guernsey IGA. The changes are also relevant to reports made under the UK-Guernsey IGA, the first of which is due to be filed in June 2016 in relation to the 2014-2015 reporting period. This briefing note provides a summary of some of the key changes to the domestic legislation and guidance published by the ITO.

Summary of key changes and clarifications

Changes to domestic regulations

- reversing the automatic application of the de minimis thresholds below which Financial Accounts do not need to be reviewed, identified or reported. Now an election is required for Reporting Guernsey Financial Institutions ("RGFIs") to apply the de minimis thresholds;
- introducing the requirement that a Sponsoring Entity must agree to perform and actually perform the obligations imposed on its Sponsored Entity, in order for the Sponsored Entity itself to discharge its obligation to comply with the FATCA-based reporting.

Clarifications in revised draft guidance notes

- clarifying the treatment of loans made to, or by, the trustees of a trust;
- explaining how to determine the value or balance of an Equity Interest in a trust attributable to a beneficiary as at 30 June 2014 based on distributions made to that beneficiary during 1 July 2013 to 30 June 2014;
- clarifying where interests that are traded on an established securities market relate to a "widely held company" for the purposes of the US-Guernsey IGA;
- clarifying when Nil Returns are required from RGFIs;
- clarifying the procedure for election by RGFIs offering to report on the basis of the Alternative Reporting Regime for Resident Non-Domiciled individuals under the UK-Guernsey IGA; and
- tidying up drafting and making consequential amendments arising from the reversal of the de minimis provisions.

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This briefing will be of direct interest to Guernsey resident financial institutions, as well as non-resident financial institutions that have a permanent establishment located in Guernsey through which they conduct the business of a financial institution, for the purposes of compliance with the IGAs. The changes are also informed by the publication on 21 July 2014 by the OECD of their commentary on the Common Reporting Standard ("CRS"). Guernsey, along with 57 other jurisdictions, formally committed to exchange information starting in 2017 in respect of accounts open at the end of 2015, and new accounts open from 2016. A further 35 jurisdictions have committed to implementing the CRS by 2018. It is anticipated that more countries will commit to the CRS over time.

Amendments to domestic legislation

The Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2015 (the "Amending Regulations") amend the 2014 Regulations which brought into effect under Guernsey's domestic law from 30 June 2014 the obligations for RGFI's arising under the IGAs. Under these obligations RGFI's must apply due diligence procedures to Financial Accounts maintained by them and, where identified pursuant to those procedures, report certain data in relation to Financial Accounts that are held by Specified Persons. In addition, for the purposes of the US-Guernsey IGA only, RGFI's are also required to report payments made to Non-Participating Financial Institutions. In essence, the Amending Regulations make two substantive changes to the obligations of RGFI's. These changes, which are explained in more detail below, are brought into effect on 31 March 2015, although the Amending Regulations will be formally laid before the States of Deliberation of Guernsey (Guernsey's parliament) on 24 June 2015.

Application of de minimis thresholds

The 2014 Regulations originally followed the provisions of the IGAs so that the de minimis threshold exemptions, below which value Financial Accounts maintained by Financial Institutions do not need to be reviewed, identified and reported, applied automatically for RGFI's subject to an election to disapply the de minimis exemption. This was the approach adopted by Jersey, but not by the Isle of Man or the UK, where the position is essentially reversed so that all Financial Accounts would need to be reviewed, identified and potentially reported upon unless the Financial Institution had elected to apply the de minimis thresholds.

During the ITO's consultation with industry, some Financial Institutions observed that it would be less burdensome for them to review all accounts, rather than applying different due diligence procedures depending on the varying value of the Financial Accounts maintained. However, a concern was raised that if a RGFI were to elect to review and potentially report on all Financial Accounts maintained by them, in the absence of a legally enforceable obligation to do so, the RGFI could be criticised for acting in its own interests to the detriment of accountholders who would prefer their accounts below the de minimis threshold to remain outside the reporting regime.

It was also observed that, except in the case of Pre-Existing Entity Accounts below US\$250,000 (or the local currency equivalent), the due diligence procedures to be applied under the CRS do not incorporate the de minimis thresholds under the IGAs.

As a result of the changes brought into effect by the Amending Regulations, all Financial Accounts are to be reviewed in accordance with the due diligence procedures, unless the RGFI elects to apply the de minimis thresholds. An election can be made to apply to all Financial Accounts or to a clearly identifiable group of accounts, such as accounts held by a line of business or by reference to the location of where the account is maintained. No submission to the Director of Income Tax is required in order to notify him of the application of the de minimis threshold. A RGFI would record the election, if made, and retain this record amongst its evidence of the steps taken regarding due diligence procedures applied by the RGFI for the relevant year. The exact format of the written election can be determined by the RGFI. It should be noted that on 21 May 2015, HMRC published updated guidance for UK-based reporting financial institutions to the effect that an election to apply the de minimis thresholds under the UK's regime of FATCA-based reporting is to be made as part of the registration procedures of HMRC's online reporting system known as the Government Gateway.

Sponsoring investment entity regime

In the context of the Sponsored Investment Entity Regime, a Financial Institution that authorises another entity to fulfil its registration, due diligence and reporting obligations on its behalf would, where available, expect to be free of having to discharge those obligations itself. The amendments effected by the Amending Regulations provide that, as long as the Sponsoring Entity agrees to perform and actually performs those obligations, the Sponsored Entity would be regarded as a deemed compliant financial institution and therefore a Non-Reporting Guernsey Financial Institution. As long as the Sponsored Entity remains a Non-Reporting Financial Institution, it will not be subject to the obligations that apply to a RGFI. The corollary of this principle reflects the intention of the US and the UK that, in practice under both IGAs, the Sponsored Entity will remain liable for any failure on the part of its Sponsoring Entity to fulfil its FATCA-related duties.

Clarifications in revised draft guidance notes

Guidance Notes 7.7 and 7.8 – Trusts as Investment Entities

Guidance Note 7.7 has been amended to include references to Debt Interests, as well as Equity Interests, being Financial Accounts in a trust which is classified as an Investment Entity. Therefore, RGFI's will need to review lenders to whom money is owed by the trustees of a trust as well as holders of Equity Interests in the trust, in order to identify Reportable Accounts.

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Additional text in Guidance Note 7.8 also clarifies the position where a loan by the trustees of a trust to a beneficiary is written off. A distribution will arise at the time the loan is written off, and this in turn will result in the beneficiary having an Equity Interest in the trust in the amount written off. The Equity Interest would need to be reviewed and reported if the beneficiary concerned is identified as a Specified Person for the purposes of the IGAs.

Other amendments to Guidance Note 7.7 include the deletion of the words “or benefit” to be consistent with previous amendments made to draft Guidance to the effect that an Equity Interest is attributable to a discretionary beneficiary who is in receipt of a distribution during the relevant reporting period.

In the case of a pre-existing account (i.e. an account that was maintained by the RGFI as of 30 June 2014), the amount of distributions (directly or indirectly) made to a discretionary beneficiary during the period 1 July 2013 to 30 June 2014 should form the basis of determining the value or balance of an Equity Interest attributable to that beneficiary as at 30 June 2014. This value or balance would then be used to determine whether the account is below the de minimis threshold (where elected to apply). The value is also used to determine whether the pre-existing account is a Lower Value Account or a High Value Account for the purposes of deciding whether to apply the standard due diligence review based on electronic records or whether an enhanced review is required based on paper records and actual knowledge known to the relevant relationship manager for the account.

[Guidance Note 12.10 – Debt or Equity Interests regularly traded as an established Securities Market and the US-Guernsey IGA](#)

Equity or Debt Interests of an Investment Entity that are “regularly traded” on “an established securities market” are not Financial Accounts for the purposes of the IGAs. Guidance Note 12.10 sets out what is meant by “regularly traded” and “an established securities market” for the purposes of the US-Guernsey IGA. The test for “regularly traded” requires there to be a meaningful volume of trading with respect to the interests on an on-going basis. Applying these tests, Guidance Note 12.10 said that it may be considered that where interests are traded on an established securities market and relate to a “widely held company”, there can be a presumption that a meaningful volume of trading has occurred, unless this presumption is rebutted by evidence to the contrary. The amendment to this Guidance Note goes on to explain that a company may be viewed to be “widely held” if the company is ultimately owned by or on behalf of 25 or more unconnected natural persons, and no majority (greater than 50%) interest in the company is ultimately owned by or on behalf of five or fewer natural persons and natural persons connected with them.

Additional text also says that in determining ultimate ownership in these circumstances, it is necessary to look at any entity (including a corporate) shareholder to identify the beneficial ownership of such shares. However, if it is reasonable to assume from information that the Financial Institution holds for regulatory or customer relationship purposes, or from publically available information, that the entity (including a corporate) shareholder is itself widely held or holds such shares for a wide group of beneficial owners, no further investigation is required. This additional clarification would assist where shares are held in a company by one or two investors that hold those shares for a wide group of unconnected beneficial owners, for example by the trustees of a large pension fund.

[Guidance Note 19.3 – Nil Returns by RGFI](#)

RGFIs that have registered on Guernsey’s online reporting system, the Information Gateway Online Reporting System known as “IGOR”, are required to submit Nil Returns on an annual basis where there are no UK or US Reportable Accounts for the specified year. Nil Returns will be made by ticking a box entry on IGOR.

Financial Institutions which do not have US or UK Reportable Accounts are not obliged to register on IGOR for the purposes of reporting under the IGAs and will not be required to file a Nil Return.

If a RGFI permanently changes its customer base so that it has no US or UK Reportable Accounts maintained in Guernsey, the Financial Institution will be able to de-register itself from IGOR. Further information on the practicalities of using IGOR are to be issued by the ITO in due course.

[Guidance Note Appendix 3B – Election by RGFI to offer ARR](#)

The Alternative Reporting Regime (“ARR”) is relevant to the UK-Guernsey IGA only and is available only to UK resident non-domiciled individuals (“RND”) that have claimed, and are entitled to file tax returns in the UK on, the remittance basis of tax. The ARR, where available, requires both the RGFI and the RND to make certain elections and the RND is required, in addition, to provide a self-certification in relation to his or her tax status.

Appendix 3B of the Guidance Notes has been amended so that it is clear that the election to provide ARR by the RGFI to its clients does not need to be filed with the ITO. The election must be in writing and, if made, must be retained in the RGFI’s records.

[Drafting and Consequential Amendments](#)

There are a number of changes that have been made to the Guidance Notes to reflect drafting changes for consistency with the IGAs and consequential amendments following the requirement to elect to apply the de minimis threshold (reversing the previous position under the 2014 Regulations). The latest version of the draft Guidance Notes is the 4th iteration since they were first published on 31 January 2014, and will continue to be the subject of on-going discussions between the ITO and members of the finance industry.

Continued

Further reading

The following links will take you to useful reference documentation:

[Latest draft guidance notes published 30 April 2015](#)

[The Income Tax \(Approved International Agreements\) \(Implementation\) \(United Kingdom and United States of America\) Regulations, 2015 effective 31 March 2015](#)

[Carey Olsen bulletin March 2015: Listed Guernsey and Jersey funds – FATCA reporting deadlines are looming. Are you ready?](#)

[Carey Olsen bulletin November 2014: Guernsey issues bulletin to update draft guidance notes on FATCA based reporting](#)

[Carey Olsen bulletin September 2014: Guernsey issues regulations to implement FATCA based reporting](#)

[Carey Olsen bulletin February 2014: Guernsey and Jersey issue draft guidance notes for FATCA based reporting](#)

[Carey Olsen bulletin August 2013: FATCA based reporting for Guernsey](#)

[Carey Olsen bulletin May 2013: Guernsey's journey towards FATCA based reporting](#)

[Carey Olsen bulletin March 2013: FATCA based reporting and IGAs for Guernsey](#)

[Carey Olsen bulletin October 2012: FATCA IGAs for Crown Dependencies](#)



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