Guernsey's new pensions regulatory framework and information reporting regime

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In June 2017 Guernsey announced plans to introduce a new regulatory framework for the provision of pensions and pension services. At the same time, Guernsey introduced legislative changes to enable non-domestic pension schemes to seek approval under the tax law, with a view to providing information reporting to the local tax authority as an approved scheme. One of the motivations behind these changes was to enable eligible pensions to meet the requirements of the OECD's Common Reporting Standard ("**CRS**") to enable such schemes to fall outside the scope of CRS reporting.

This briefing identifies some of the key changes introduced by Guernsey with effect from 30 June 2017 and will be of direct interest to financial institutions that provide pension related services which are established in, or operate from, Guernsey, as well as employers and members of such schemes.

Capitalised terms used in this client briefing derive their meaning from the CRS and supporting guidance.

Pension schemes - the issue

Prior to the changes it was understood that most Guernsey pensions would be within scope of reporting under the CRS. This was so unless they could meet the specific criteria of a Broad Participation Retirement Fund or Narrow Participation Retirement Fund, which are regarded as Non-Reporting Financial Institutions. Alternatively, if a member's interest in a pension meets the criteria to be an Excluded Account, this would also be out of scope for CRS reporting.

The criteria to be met to qualify as a Broad or Narrow Participation Retirement Fund or an Excluded Account are set out in the boxes below.

Prior to the changes, most Guernsey pensions would not have met the criteria to be regarded as a Non-Reporting Financial Institution or an Excluded Account. This is due to the requirement of the CRS, which is common to each of these categories, that the pension fund must be both regulated and provide information reporting to the local tax authority, in addition to meeting certain other criteria.

However, Guernsey is now introducing regulatory oversight for eligible pension schemes, which may enable such schemes to meet the requirement to be regulated and provide information reporting to the Income Tax Office ("**ITO**"). If they are also able to meet the rest of the applicable criteria, they would qualify as Broad Participation Retirement Funds or Narrow Participation Retirement Funds and therefore be Non-Reporting Financial Institutions. Alternatively, member's interests in such schemes could be classified as Excluded Accounts if they also meet the applicable conditions for that classification. If successful in meeting all the relevant criteria, pension providers may prefer to comply with local regulatory and tax reporting obligations rather than comply with CRS reporting obligations. Either way, reporting of information will be required for such schemes.

The approach under CRS differs from that under the US IGA, where certain pension funds, such as section 150 approved occupational schemes, are expressly referred to as exempt from reporting for the purposes of the US IGA. This is not the case under CRS.

Regulatory oversight

As a first preliminary step towards implementing these proposals, the Fiduciaries Law, under which trust service

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providers are currently regulated, has been amended with effect from 30 June 2017[1] so that the formation, management or administration of pension schemes or gratuity schemes (as defined) is now expressly regulated. Those who provide these services by way of business will need to be licensed to do so by, or obtain an exemption from, the Guernsey Financial Services Commission ("**GFSC**"). The GFSC will have supervisory oversight of these regulated service providers.

As a second preliminary step, the GFSC issued scheme rules[2] effective from 30 June 2017 which were amended with effect from 29 August 2017 (the "**Rules**") as part of a more comprehensive framework for providers of pension schemes and related services. These steps pave the way for all eligible pension schemes provided from Guernsey to comply with new government regulation, in order to meet one of the criteria required to be regarded as either a Broad or Narrow Participation Retirement Fund. It also means that the scope of the Guernsey Financial Services Ombudsman, which handles complaints in respect of services provided by regulated entities, will be extended to providers of formation, management and administration services for pension schemes and gratuity schemes.

The States of Deliberation (Guernsey's parliament) also directed that further legislation should be considered over the next year to create the necessary legal foundation for the development of the new regulatory framework for pension schemes and their providers.

Gratuity schemes

The changes to the Fiduciaries Law apply not only to pension schemes but also to, what are termed gratuity schemes. These are defined as schemes established in connection with the carrying on of business or the exercise of functions which have as their sole or main purpose the provision of a lump sum or other payments for employees (or their spouses, children, dependants or other persons) on the occurrence of an event or circumstance, including the expiration of their term of service.

The GFSC has clarified that for purposes of the Rules schemes shall only be regarded as gratuity schemes if the lump sums or other benefits are provided as retirement benefits or end of service benefits[3].

Gratuity schemes therefore include so-called "end-of-service" schemes which are not necessarily established to provide retirement, disability or death benefits but can include these events as triggering a pay-out. Depending upon the terms of the gratuity scheme and the circumstances in which payments are made to members, it is unlikely that such schemes on their own without further benefit restrictions would be outside the scope of CRS reporting, even though they and their providers may be subject to government regulation under the new framework. To be outside the scope of CRS reporting such schemes would have to fulfil the criteria in order to qualify either as Narrow or Broad Participation Retirement Fund.

Information reporting

In addition to introducing regulatory supervision of pension providers, Guernsey's Income Tax Law was also amended with effect from 30 June 2017[4] to provide the option for all pension schemes to seek approval under the Income Tax (Guernsey) Law, 1975 (as amended) (the "**ITL**"). As a condition of being granted and maintaining approval, the Director of Income Tax (the "**Director**") will require the reporting of information in respect of the pension scheme concerned both at the time of the application and then at intervals thereafter.

Specifically, this will enable schemes that currently do not file information with the ITO (for example section 40(o) and 40(ee) exempt schemes) because they do not require income tax relief for their members who are not resident in Guernsey for tax purposes, to submit reports that are consistent with fulfilling the conditions to continue to be exempt from Guernsey income tax on income from such schemes.

As a result of these changes, pension schemes that seek approval will be required to provide annual reporting to the ITL. If they also fulfil the other criteria required in order to be regarded as a Broad or Narrow Participation Retirement Fund, they would be outside the scope of CRS reporting. Thus, section 150 and 157A approved schemes for resident members and section 40(o) and 40(ee) exempt schemes for non-resident members will all be in a position (should they so wish) to meet both the regulatory and the reporting criteria as part of the conditions for being regarded as Non-Reporting Financial Institutions. These two criteria are elements that require structural changes to Guernsey's supervisory and income tax regime and those changes are now being implemented.

CRS reports due 2017

The deadline for submitting CRS reports, which cover the first reporting period of 2016, has now expired. Reports in respect of 2016 Reportable Accounts should have been filed by the deadline of 30 June 2017, although the ITO announced that penalties and compliance actions will not be applied until after 31 July 2017.

Following the publication of Bulletin 2017/5 by the ITO on 16 June 2017, the ITO have confirmed that schemes approved under section 150, section 157A and new section 154(A) ITL (which permits section 40(o) and 40(ee) pensions to apply for approval) that also meet the rest of the conditions to be regarded as a Broad Participation Retirement Fund or a Narrow Participation Retirement Fund, would not be considered as Reporting Guernsey Financial Institutions for the purposes of CRS for the reporting period 2016. Such approved schemes would therefore be out of scope for CRS reporting even before the GFSC's new regulatory framework for pension schemes and their providers is fully in place and before details of what information is to be provided and how often, are published by the ITO.

1 *The Regulation of Fiduciaries, Administrators, Businesses and Company Directors, etc (Bailiwick of Guernsey) (Pensions Amendment) Regulations 2017*

2 *The Pension Licensees (Conduct Of Business) & Domestic And International Pension Scheme And Gratuity Scheme Rules (No. 2) 2017*

3 *gfsc.gg/industry-sectors/pensions/faqs*

4 *Income Tax (Pension Amendments) (Guernsey) Ordinance, 2017*

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Excluded accounts

Bulletin 2017/5 also confirms that even if a pension were to meet the regulatory and reporting criteria pursuant to the new framework to be overseen by the GFSC and the ITO, pensions would not be able to qualify as Excluded Accounts. This is because in order to be an Excluded Account, contributions should be limited either to an annual maximum of US$50,000 or to a lifetime maximum of US$1million. The ITO are of the view that the OECD would expect these limits to be prescribed in law, rather than be incorporated into the terms of the pension or arise as a matter of fact in practice (e.g. because the pension scheme in which the member's account arises may be closed to additional contributions going forward).

Accordingly, for the time being, interests in pensions that do not qualify as Broad or Narrow Retirement Funds cannot seek classification as Excluded Accounts as an alternative approach to falling outside the scope of CRS reporting.

Next steps

The new pensions supervision and information reporting regime is in its early stages of development. Industry is to be consulted over the next year on the preparation of a Policy Letter setting out further details of the new regulatory framework and any further legislative changes that may be required in order to implement the regime. In addition, the ITO have indicated that supplementary bulletins will be issued dealing with the treatment of Guernsey pensions as the regulation of pensions and their providers in Guernsey evolves over time.

Where reporting is required

In the meantime, it is anticipated that guidance published by the ITO will be revised in due course to clarify reporting requirements for those pension schemes which are within scope of the CRS.

Criteria to be met to qualify as a Broad or Narrow Participation Retirement Fund or an Excluded Account

Types of pensions	Purpose	Criteria
Criteria for a broad participation retirement fund	The fund must be established to provide retirement, disability or death benefits or any combination of these, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered.	• No individual beneficiary must have a right to more than 5% of the fund's assets; • the fund must be subject to government regulation and provide information to the tax authorities; and • the fund must satisfy at least one of the four following requirements: a. the fund is exempt from tax on investment income or taxation of such income is deferred or taxed at a reduced rate, due to its status as a retirement or pension plan; b. at least 50% the fund's total contributions come from sponsoring employer(s); c. pay outs from the fund can only be made on retirement, disability or death otherwise penalties apply; or d. contributions by employees are limited by reference to their earned income and may not exceed US$50,000 annually.
Criteria for a narrow participation retirement fund	The fund must be established to provide retirement, disability or death benefits or any combination of these, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered.	• The fund has fewer than 50 participants; • the fund is sponsored by employer(s) that are not Investment Entities or Passive NFEs; • the employee and employer contributions are limited by reference to earned income and compensation of the employee, respectively; • not more that 20% of the fund's assets are payable to non-resident participants; and • the fund is subject to government regulations and provides information to the tax authorities.

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Accounts	Purpose	Criteria
Excluded account	There are 7 types of Excluded Accounts, one of which is a non-retirement tax-favoured account.	In order to qualify as a non-retirement tax-favoured account so as to be an Excluded Account the following criteria must be satisfied: • the account is subject to government regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits including disability or death benefits; • the account is tax-favoured (i.e. contributions that would otherwise be subject to tax are deductible or excluded from the gross income of the accountholder or are taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate); • information is to be reported to the tax authorities with respect to the account; • pay outs are made on reaching a specified retirement age, disability or death, otherwise penalties apply; and • either: a. annual contributions are limited to a maximum of US$50,000; or b. there is a maximum lifetime contribution limit of US$1,000,000.

Please note

One condition that is common to all three classifications is that the fund or account is subject to government regulation and undertakes information reporting. CRS commentary states that information reporting may vary among jurisdictions. While one jurisdiction could require that a fund reports annual information about its beneficiaries, another jurisdiction could require that the fund provides monthly information about contributions and associated tax relief, and annual information about its beneficiaries and total contributions from sponsoring employers. CRS guidance goes on to state that, whilst the fact that a fund provides information reporting to tax authorities in the jurisdiction in which the fund is established or operates is determinative of whether that fund satisfies the information reporting requirement, the timing and manner of such reporting is not.

Further reading

The following links will take you to useful reference documentation:

- CRS and related Documentation published by the States of Guernsey Income Tax
- No. 34 - The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) (Pensions Amendment) Regulations, 2017
- Income Tax (Pension Amendments) (Guernsey) Ordinance, 2017
- Common Reporting Standard and US IGA ("FATCA") Reporting Status for Pension Schemes for Reporting Period 2016 Bulletin 2017/5
- Guernsey Financial Services Commission website

Carey Olsen briefings:

- Guernsey issues guidance on classification of investment entities for the Common Reporting Standard
- Common Reporting Standard
- Guernsey issues regulations to implement the Common Reporting Standard

Continued

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