



Stepping up to FATCA

Laila Arstall charts Guernsey's path to automatic exchange of information

In 2013, UK Prime Minister David Cameron turned the political spotlight on international tax compliance, with his focus on trade, tax and transparency at the World Economic Forum in Davos. He was riding the current trend towards automatic exchange of information (AEOI), which has been given significant impetus by the global reach of FATCA-based reporting.¹ However, compliance with FATCA, as implemented through US regulations,² engages domestic principles of confidentiality and data protection for jurisdictions such as Guernsey, whose laws acknowledge and safeguard the legitimate interests of the individual to maintain privacy as regards their personal affairs.

Pathway to FATCA

In September 2012, Guernsey, along with the other Crown Dependencies, Jersey and the Isle of Man, announced its intention to negotiate an inter-governmental agreement (IGA) with the US to enable financial institutions based in Guernsey to comply with FATCA in a way that does not engage domestic laws of duty of confidentiality and data protection.

However, Guernsey required prior authorisation from the Crown to enter into an IGA with the US because international agreements are normally the preserve of sovereign states. The need to secure this authorisation gave the UK government leverage to insist that Guernsey (and Jersey and the Isle of Man) first agree to adopt a tax package including AEOI with the UK through a separate IGA, and a disclosure facility for UK tax defaulters with investments in the island.

Milestones on the path to FATCA

The first milestone was the signing of the Guernsey Disclosure Facility (GDF) on 11 March 2013. This is available to UK taxpayers with investments in Guernsey who have irregularities in their UK tax affairs, so they can come forward and clear all of their outstanding UK tax liabilities. The GDF, as with other disclosure facilities, sits alongside the framework for tax investigation, which, in turn, depends upon data gathered from as many sources as possible. This takes us to the next two milestones: the two new IGAs, one with the UK and the other with the US.

- ❶ *Foreign Account Tax Compliance Act (FATCA), brought into US law on 10 March 2010 by the Hiring Incentives to Restore Employment Act*
- ❷ *As published in final form on 17 January 2013*
- ❸ *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the States of Guernsey to Improve International Tax Compliance*

UK-Guernsey IGA

On 22 October 2013, Guernsey signed the UK-Guernsey IGA.³ Jersey and the Isle of Man signed broadly similar agreements, with certain island-specific differences. The data to be reported to the States of Guernsey Income Tax Office (ITO) under the UK-Guernsey IGA relates to a specified person who is identified, pursuant to due diligence procedures (including applicable thresholds) set out in the IGA, as resident in the UK for UK tax purposes in respect of that person's interest in a financial account maintained by a Guernsey-based financial institution. Where the account holder is an entity with one or more controlling persons identified as a specified person resident in the UK for UK tax purposes, the reporting would be in relation to the specified person or persons.

AEOI will be reciprocal: UK-based financial institutions will report the same information on financial accounts held in the UK for Guernsey-resident specified persons. Information will be exchanged between HMRC and the ITO under the UK-Guernsey tax information exchange agreement (TIEA), signed in 2009. Until October 2013, the TIEA only permitted information exchange on request. The amended TIEA will now also facilitate AEOI.

US-Guernsey IGA

The US-Guernsey IGA, signed on 13 December 2013,⁴ defines specified persons to include US citizens, and not just residents. As with the UK-Guernsey IGA, data to be reported will be exchanged with the US Internal Revenue Service (IRS), under the US-Guernsey TIEA signed in 2002, which has also been amended to permit AEOI, as well as exchange on request.

Draft guidance notes

On 31 January 2014, the three Crown Dependencies jointly issued draft guidance notes on implementation of the IGAs signed by each island with the UK and US. The starting point for the draftsmen of the guidance notes was the draft guidance published by HMRC on 14 August 2013 on the implementation in the UK of the US-UK IGA signed in 2012. The Crown Dependencies' draft guidance notes set out a common approach for compliance with both the US and UK IGAs. Where





applicable, differences between the IGAs are noted. The draft guidance notes, as currently published, are substantially the same for each island, subject to certain island-specific differences. The current draft is regarded as a work in progress and the views of local industry in each island are being sought.

The guidance notes aim to provide practical assistance to both business and staff of each island's tax office when dealing with entities affected by the IGAs and, in time, other bilateral AEOI agreements implementing FATCA-based reporting. The notes assist with particular questions, including 'Am I a financial institution?' and 'Do I maintain financial accounts?'

The draft guidance notes do not include the draft regulations implementing, under domestic law, the IGA obligations for financial institutions based in the islands.

How it works

The GDF

Under the memorandum of understanding, HMRC's obligation is to make available a disclosure facility for UK taxpayers with irregularities in their UK tax affairs from 6 April 2013 to 30 September 2016. Guernsey's obligation is to require financial intermediaries (i.e. locally licensed financial service providers) to contact existing clients who are known to be relevant persons with an interest in relevant property to advise them about the GDF before the end of 2013 and again in the last six months before the facility expires. Guernsey financial intermediaries must also ensure that existing anti-money laundering obligations continue to be observed. It is currently understood that HMRC is considering extending the scope of the disclosure facilities to enable residents in the Crown Dependencies to clear UK tax liabilities.

There are rules governing eligibility to benefit under the favourable terms of the GDF even if the client is a relevant person with an interest in relevant property. Those rules of eligibility turn on whether the client is, or has been, subject to an investigation by HMRC. That is a matter for the client to determine, rather than the Guernsey financial intermediary.

UK-Guernsey IGA

Article 2 of the UK-Guernsey IGA sets out the data a Guernsey-based reporting financial institution would need to file with the ITO. The ITO would then transfer that information to HMRC under new paragraph 5A of the UK-Guernsey TIEA.⁵ The standard level of reporting is required for UK-based accountholders who are taxed in the UK on an arising basis on their worldwide income and gains, and an alternative reporting regime is available for UK-resident non-doms, who are taxed in the UK on a remittance basis.⁶

US-Guernsey IGA

Unlike the UK-Guernsey IGA, the US-Guernsey IGA does not contain an alternative reporting regime.⁷ Moreover, all reporting Guernsey financial institutions and any entity that is a registered deemed-compliant entity, as defined under the US-Guernsey IGA, must be registered on the IRS FATCA portal and obtain a global intermediary identification number (GIIN). There is no current requirement to register with the ITO under either the UK-Guernsey IGA or the US-Guernsey IGA, or with HMRC under the UK-Guernsey IGA. However, a form of registration may be required to access each tax office's electronic reporting systems.⁸

4 Agreement between the Government of the States of Guernsey and the United States of America to Improve International Tax Compliance and to Implement FATCA

5 For a detailed account of the information to be filed and associated deadlines, refer to Table 1, which can be accessed online at www.step.org/deadlines-reporting-under-us-guernsey-iga

6 Annex IV to the UK-Guernsey IGA

7 For a detailed account of the information to be filed and associated deadlines, refer to Table 2, which can be accessed online at www.step.org/deadlines-reporting-under-us-guernsey-iga

8 Guernsey is consulting with local industry on this and HMRC will require reporting through its Government Gateway system

9 Approved by the States of Deliberation (Guernsey's parliament) on 11 December 2013

UK-Guernsey IGA's alternative reporting regime

Individuals who are tax-resident but not also domiciled in the UK 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 UK-source income and gains, and worldwide income and gains that are remitted to the UK during the relevant period. Under the UK-Guernsey IGA, eligible individuals who have completed the election and annual self-certification process are subject to the alternative reporting regime, under which the Guernsey reporting financial institution will report gross payments and movements of assets from a UK source or from an undetermined jurisdiction to the reportable account in Guernsey. It will also report gross payments from the reportable account in Guernsey to the UK or undetermined jurisdiction. This is in place of account balances under the standard reporting regime.

The words 'unknown ultimate destination' were inserted so that correspondent bank transfers through the UK can be ignored. This means, if a sterling payment is made from the reportable account in Guernsey to an account in France, but goes via the UK because it is a sterling payment, the Guernsey reporting financial institution can ignore the intermediate transfer into the UK received by the correspondent bank.

Future developments

The GDF and the two IGAs are not the end of the story in terms of tax compliance and reporting for Guernsey-based financial service providers. Irrespective of what is going on with FATCA, the OECD, in close co-operation with the EU, launched on 13 February 2014 a new single global standard, referred to as the Model Competent Authority Agreement (CAA), to be supported by a Common Reporting and Due Diligence Standard (CRS).

Under the CAA and CRS, jurisdictions will be required to obtain financial information from their financial institutions, which they automatically exchange with other jurisdictions annually. The CRS will set out reporting and due diligence rules and the CAA will contain rules on AEOI.

The new standard is designed to be broad in scope, across three dimensions:

- The financial information to be reported with respect to reportable accounts includes all types of investment income but also account balances and sales proceeds from financial assets.
- The financial institutions required to report under the CRS not only include banks and custodians but also other financial institutions, such as brokers, certain collective investment vehicles and certain insurance companies.
- Reportable accounts include accounts held by individuals and entities (including trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals who ultimately control these entities.

The CAA and CRS are likely to be implemented through the platform of the OECD *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, and therefore Guernsey's request to the UK to extend the Convention to Guernsey (subject to permitted reservations)⁹ is a further illustration of Guernsey's commitment to tackling tax evasion and encouraging AEOI as the new global standard. From Guernsey's perspective, this would be a significant step towards creating a global level playing field in tax information exchange. ■



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