States of Guernsey
Revenue Service

Bulletin 2021/6

Additional Compliance Measures in relation to FATCA and the CRS – Directions, Appointment of Inspectors and Freezing Orders

This Bulletin is issued under the provisions of Regulation 10 of The Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014 and the provisions of Regulation 12 of The Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) Regulations, 2015.

1. Legislative & Regulatory Changes

At the States of Deliberation meeting on the 15 July 2021, the Income Tax (Guernsey) (Amendment) Ordinance, 2021, ("the Ordinance") was approved. In relation to CRS & FATCA, the Ordinance made a number of amendments to the Income Tax (Guernsey) Law, 1975, as amended ("the Law") set out in Bulletin 2021/5.

This Bulletin provides further information on the legislation and regulatory changes that enable the Revenue Service to implement additional compliance measures as follows, to:

- give directions to a relevant institution which are necessary or desirable for the purposes of securing compliance with the international tax provisions;
- appoint or require the relevant institution to appoint independent inspectors to investigate a relevant institution which is reasonably suspected of having contravened the international tax provisions; and
- require Financial Institutions to report all account holders where they have been unable to obtain valid self-certification for the purposes of CRS and/or FATCA due diligence procedures, to then enable the Revenue Service to make relevant enquiries and, if necessary, serve a notice on the Financial Institution to require them to freeze the account, until such time as the Account Holder provides valid self-certification.

As detailed in the Policy Letter (Billet d'État XXIV, December 2019), these additional compliance measures have been introduced for what is anticipated to be limited circumstances where the Revenue Service has identified that a Financial Institution has potential significant failings in meeting its CRS and/or FATCA obligations.

2. Disclosure or Discovery of Non-Compliance

When a Financial Institution discovers any issues relating to their compliance with the FATCA and/or CRS reporting obligations, the Financial Institution must provide full details of any unresolved non-compliance issue, following its discovery. The Financial Institution is expected to provide a report within an acceptable short period of time of the action(s) being taken and the timescale to rectify or remediate the issue. Where possible the Revenue Service will seek to address the contravention, errors or low risk failings by a remediation plan agreed with the Financial Institution.

Whether and how to implement these additional compliance measures detailed above depends on the factors and severity of risk of each case of non-compliance. The factors that will be considered as part of the Revenue Service's decision making process, to then determine whether to require the Financial Institution to provide further relevant information, give directions, appoint an inspector and/or, where relevant, make a freezing order restricting withdrawals (noting that this last measure is limited to non-compliance with the requirements of self-certification of financial accounts), are:

- whether the non-compliance issue is of a significant seriousness and risk to the completeness and/or accuracy of the information being reported (including whether the issue appears to be isolated or systemic);
- the length of time the Account Holder(s) of the affected account(s) has been non-compliant;
- the time required to remedy the identified deficiencies (for example, obtaining valid self-certification of the affected financial accounts);
- the volumes, size, scale, capacity to remediate;
- whether there have been other compliance deficiencies;
- whether corrections are required to previous reporting years;
- the number of reporting jurisdiction(s) affected;
- whether the issue was discovered and reported by the Financial Institution; and
- whether the non-compliance issue impacts, or has the potential to impact, the effective compliance by Guernsey against the requirements of the standard assessed by international authorities e.g. OECD, MoneyVal, etc

For the avoidance of doubt, the above list is intended to provide an indication of the factors that will be taken into account as part of the decision process and is not an exhaustive list of the factors that the Revenue Service will consider when reviewing areas of non-compliance that have either been reported by the Financial Institution or have been discovered by the Revenue Service as a result of its compliance monitoring activities.

3. Directions to Secure Compliance (Section 171D of the Law)

If a decision is made that, owing to the seriousness or risk presented by a matter, the Revenue Service need to provide specific directions to a Financial Institution (in accordance with section 171D of the Law), the following will apply:

- the directions will be made in a written notice to the Financial Institution;
- the directions notice will clearly set out what the Financial Institution is required to do (or not to do, as the case may be); and
- where necessary, will detail the timeframe for completion of the directions (noting that a notice of directions that does not specify a timescale for which it applies, remains in force until it is rescinded by the Revenue Service).

4. Appointment of an Inspector (Section 171E of the Law)

If the Revenue Service is of the opinion that the potential seriousness and/or risks posed by the reported or discovered non-compliance are of a significant nature then the Revenue Service will instruct the Financial Institution to appoint an independent external compliance professional, knowledgeable with CRS & FATCA requirements ("an inspector") at their expense. Potential circumstances which could necessitate an appointment are any of the following:

- concerns regarding the scope and extent of the non-compliance issue(s);
- concerns regarding the actions required to remediate the non-compliance issue;
- the urgency to remediate; and
- concerns regarding the validity of any required correction reports.

The inspector will then oversee scoping the full extent of the non-compliance, remediation of the significant failings and will then be required to report to the Revenue Service detailing the full extent of the failings, the measures introduced to address the failings and to give assurances regarding appropriate controls and framework (including training and development of the reporting frameworks) that have been put in place to correct the non-compliance issues(s) and to mitigate the risk of further occurrences of incomplete or inaccurate reporting.

In the event that the Revenue Service determines it necessary or desirable for an inspector to be appointed, the following will apply:

- the notice issued in accordance with section 171E of the Law, will be issued in writing;
- the notice will set out the form of the report as well as the scope of the inspector's engagement (for example, detailing whether it is necessary for the full scope of non-compliance to be ascertained by the inspector, an outline of expected remedial action to be implemented, such as correction reports to be filed for earlier years and whether the report is required to summarise the remediation activities implemented etc.); and
- in most cases where an inspector is to be appointed the Revenue Service will require the Financial Institution to propose the appointment of an inspector. When doing so, the Financial Institution will be required to submit details of:

    - the proposed business entity and name(s) of the inspector the Financial Institution intends to appoint;
    - a short professional biography of the proposed inspector detailing their qualifications and experience in respect of the CRS and/or FATCA (and where the proposed inspector is a body corporate this information should be provided for each officer who will be discharging the duties of the inspector); and
    - details of the resources the proposed inspector intends to deploy in order to perform his or her functions.

The Revenue Service will then review the information provided in respect of the proposed inspector and then respond to the Financial Institution.

Examples of scenarios where the Revenue Service may require the appointment of an inspector are:

- the risks exposed are, or have the potential to be, reputationally damaging to Guernsey;
- the Financial Institution has insufficient numbers or skilled personnel to conduct the required remediation;
- the non-compliance factors suggest potential other deficiencies requiring investigation;
- there are factors that necessitate independent scrutiny and research, e.g. conflicted involvement in the non-compliance issue; or
- a weakness to recognise responsibility and react promptly.

5. Informing the Revenue Service of a Failure to Obtain a Valid Self-Certification and Freezing Orders (section 171F of the Law)

5.1 Informing the Revenue Service of a Failure to Obtain a Valid Self-Certification (New Accounts)

- For the purposes of FATCA a New Account is an account opened on or after 1 July 2014.
- For the purposes of the CRS a New Account is an account opened on or after 1 January 2016.

As detailed in Circular 2017/6 it is expected that Financial Institutions will maintain account opening processes that facilitate the collection of a self-certification at the time of the account opening.

Although the Bulletin was in respect of the CRS, the account opening processes for FATCA are expected to include an identical requirement to collect the self-certification at the point of the account opening.

It is recognised that the validation of self-certifications may not always be possible on "day-one" of the account opening, as often the validation is a back-office function, therefore, it is accepted that the validation of self-certification of a new account must be completed within 90-days of the account being opened.

Furthermore, there are some limited, rare, circumstances where it may not be possible to obtain self-certifications on "day-one" of the account opening, for example, where an insurance contract has been assigned from one person to another or in the case where an investor acquires shares in an investment trust on the secondary market. In these limited circumstances it is expected that a self-certification will be obtained as quickly as possible, and in any case, will be obtained and validated within 90-days of the account being opened.

Where a Financial Institution finds itself in the position that it has been unable to have validated a self-certification for a New Account within 90-days of the account being opened (which would include a failure of the reasonableness test), section 171F of the Law requires the Financial Institution to report the account to the Revenue Service "immediately", which the Revenue Service will accept as being by the close of business on day 91 of the account being opened.

The exception being, where the day 91 reporting deadline falls in January of any year, the Revenue Service will accept the report being made on or before 31 January in that year.

5.2 Informing the Revenue Service of a reasonableness test failure, which has not been able to be remediated, relating to Pre-existing Accounts

The requirement to report pre-existing accounts where a valid self-certification has not been obtained includes circumstances where a Financial Institution has been required to obtain a self-certification (for example, in the CRS, where the residence test is permitted but there has been a change in circumstances) and where the Financial Institution has been obliged to obtain a self-certification (for example, in the CRS, where a "hold mail" instruction was discovered and the Financial Institution sought to resolve this by requiring a self-certification but has not been able to do so – leading to the account potentially being reported as undocumented).

The Revenue Service recognises that whilst the due diligence activities required for pre-existing accounts took place a number of years ago, it remains possible that "change of circumstance" triggers will continue to occur on such accounts and, furthermore, it is also evident that for some pre-existing accounts Financial Institutions have been seeking to obtain self-certifications for some time with the Account Holder continuing to fail to comply (potentially leading to a scenario where the account is reported as undocumented).

As such, there will continue to be cases of pre-existing accounts that will require to be reported under section 171F of the Law.

Where those trigger events occur after 1 January 2022, then the requirement to report the account will occur immediately after the expiry of the period permitted to obtain the self-certification (for example, in the residence address scenario above, the self-certification must be obtained by the later of the last day of the relevant calendar year (when the change in circumstance occurred) or 90-days following the discovery of the change in circumstances). Appreciating that where the timeframe would result in reporting in January in the following year, the Revenue Service will accept that a Reporting Financial Institution has met its reporting obligations if the report is submitted on or before 31 January in that year.

Where the requirement or authorisation to obtain a self-certification of a pre-existing account occurred or was used prior to 1 January 2022 and a valid self-certification has continued to be unable to be obtained (which could have led to the account being reported annually as undocumented and for the purpose of this Bulletin are referred to as "legacy cases") there is a requirement for each of those accounts to be reported, under the provisions of section 171F of the Law.

The Revenue Service acknowledges that for some Financial Institutions there may be several legacy case accounts to report and strictly they would be required to be reported on 1 January 2022, however, the Revenue Service is prepared to accept that a report of these legacy cases can be deferred and a Financial Institution will continue to be considered to have complied with their obligation under section 171F of the Law for so long as a report of all of the affected legacy cases (pre-existing accounts) is submitted to the Revenue Service on or before 31 March 2022.

Example Scenario

Example 1 - Background

- Financial Account opened on 31 March 2014, (a Pre-existing Individual Account), which is reported on a calendar year basis.
- The balance and value of the account throughout the reporting years 2016 to 2020 has remained £500,000 (a Lower Value Account).
- The Residence Address test was able to be relied on for reporting 2016 to 2021 data.

Example 1a – Trigger event occurred between 1 January 2022 and 2 October 2022 inclusive

- On 31 January 2022 the Reporting Financial Institution receives an instruction to change the address for the Account Holder to another jurisdiction, causing the Reporting Financial Institution to have reason to know that the original Documentary Evidence (relied on to meet the Residence Address test) is unreliable.
- The Reporting Financial Institution will have until 31 December 2022 to obtain and validate a self-certification and new Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder.
- If the self-certification cannot be obtained by 31 December 2022, the Reporting Financial Institution must apply the Electronic Record Search AND must also make a report under section 171F of the Law to the Revenue Service **on or before 31 January 2023**.

Example 1b – Trigger event occurred from 3 October 2022 to 31 December 2022

- On 30 November 2022 the Reporting Financial Institution receives an instruction to change the address for the Account Holder to another jurisdiction, causing the Reporting Financial Institution to have reason to know that the original Documentary Evidence (relied on to meet the Residence Address test) is unreliable.
- The Reporting Financial Institution will have until 28 February 2023 (being 90-days from the date of discovery) to obtain and validate a self-certification and new Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder.
- If the self-certification cannot be obtained by 28 February 2023, the Reporting Financial Institution must apply the Electronic Record Search AND must also make a report under section 171F of the Law to the Revenue Service **on or before 1 March 2023**.

In summary:

- for pre-existing accounts where the trigger event occurred prior to 1 January 2022 and the self-certification remains unresolved a report will be required to be submitted to the Revenue Service on or before **31 March 2022**; and
- for pre-existing accounts where the trigger event occurred on or after 1 January 2022 and the self-certification remains unresolved either the later of the end of the calendar year or 90-days from the date of discovery, a report will be required to be submitted to the Revenue Service on or before 31 January in the following year or on or before the 91st day of discovery, whichever is the later.

5.3 Form and manner of reporting self-certification failings to the Revenue Service

In order to report the information Financial Institutions are required to use the secure IGOR messaging portal to submit the following information in respect of each account that is required to be reported (for example, where a Residence Address has been submitted and relied on but a change of circumstances has arisen):

- Name of the Reporting Financial Institution which is maintaining the non-compliant account
- Reporting Financial Institution IGOR reference.
- Account number (or functional equivalent).
- Name of the non-compliant Account Holder/controlling person.
- Date of birth of the non-compliant Account Holder/controlling person.
- Address of the non-compliant Account Holder/controlling person.
- The date the account was opened.
- Details of whether the account is being reported because either:
    - [New Account] No self-certification has been obtained and validated within 90-days of the account being opened*; A trigger event has caused the need to review the indicia/self-certification, which has now failed the "reasonableness test", and it has not been possible to remediate the position within the permitted timeframe; or
    - [Pre-existing account] The requirement or authorisation to require the Account Holder/controlling person to provide a self-certification has not resulted in the successful acquisition of a valid self-certification
- The date of the last correspondence/contact with the non-compliant Account Holder/controlling person where the Financial Institution requested the self-certification (or relevant validation information)

For the avoidance of doubt, the expectation is that Financial Institutions will maintain account opening processes that facilitate the collection of a self-certification at the time of the account opening. The Standard for Automatic Exchange of Information in Tax Matters, Implementation Handbook, FAQ 22 states that there are a limited number of instances where, due to the specificities of a business sector, it may not always be possible to obtain a self-certification on day one of the account opening. In view of this it will necessary for the Revenue Service to carry out compliance enquiries in cases which appear not to meet these expectations.

5.4 Notices requiring additional information and Freezing Orders (section 171F of the Law)

Bulletin 2021/5 outlined an example where a relevant institution has been unable to obtain a valid self-certification and described the legislative measure that could be applied to restrict transactions, with the Account Holder, on the affected account, pending receipt of a full and accurate self-certification (from all Account Holders/controlling persons).

The ability for the Revenue Service to make a freezing order is just one of the options available under the new provisions of Part XIVB of the Law and it is not necessarily the case that the reporting of an account where it has not been possible to obtain a valid self-certification will of itself result in a freezing order being issued to the Financial Institution.

The information required in the report made under section 171F of the Law will provide the Revenue Service with an insight into the characteristics of the non-compliant Account Holders/controlling persons and the possible risks they pose to the accuracy of the FATCA/CRS reporting.

On receipt of these reports it is possible that the Revenue Service may require the Financial Institution to provide additional information (in respect of some or all of the reported accounts, depending on the potential risk they pose), such information being required under section 171F(3)(a) of the Law.

Furthermore, the Revenue Service will seek to work with the Financial Institution to assist them in seeking to resolve accounts with non-compliant Account Holders/controlling persons, which may include requiring the Financial Institution to further review their due diligence records or make further inquiries, again in accordance with the provisions of section 171F(3) of the Law.

6. Application

The Revenue Service recognises the potential impact, on the Reporting Financial Institution, of having to implement the necessary measures in order to comply with a freezing order issued in accordance with section 171F(3)(b) of the Law and will, therefore, carefully consider the facts and circumstances on a case by case basis (including details provided by the Reporting Financial Institution of the steps they propose to take to transition the Account Holder into a position of complying with their obligations to provide a valid self-certification and the timescale for doing so).

It is expected that these measures will only be necessary to apply in the most serious cases (for example, where despite the best efforts of the Reporting Financial Institution the Account Holder/controlling person is continuing to fail to comply or where the Reporting Financial Institution has not made sufficient effort to obtain a valid self-certification).

7. Implementation

Whilst the provisions of sections 171D, 171E and 171F of the Law came into effect from 15 July 2021, the Revenue Service appreciated that additional time was required to further communicate the practical application of these provisions (as set out in this Bulletin). In view of this the Revenue Service will, in practice, apply these provisions with effect from the beginning of January 2022.

This will mean that, for example, an account opened on 6 October 2021 where it was not possible for the Financial Institution to have validated the self-certification by the close of business on 4 January 2022 (day 90), then the account should be reported to the Revenue Service by the close of business on 5 January 2022, however, as this is a reporting date falling in January, the Revenue Service has agreed that in all circumstances where a reporting obligation falls in January of any year, the Financial Institution will be considered to have complied with their reporting obligations if the report is submitted on or before **31 January 2022** (see the timelines summary below).

For pre-existing accounts where the trigger event occurred prior to 1 January 2022 and there remains an invalid or absent self-certification the account must be reported on or before **31 March 2022**.

For pre-existing accounts where the trigger event occurred on or after 1 January 2022 the account must be reported on or before the later of 31 January 2023 or the 91st day following the discovery of the trigger event (and this principle applies to each subsequent year).

8. Right of Appeal

Section 171G of the Law provides the specific rights of appeal against a decision of the Revenue Service to give a direction, appoint an inspector, impose a requirement to provide further information or documents, or make a freezing order.

A Financial Institution wishing to make an appeal against any of these decisions must do so by giving the Revenue Service notice, in writing, within 30-days of the date of the Revenue Service's decision, stating the grounds of the appeal.

In the case of an appeal against the Revenue Service's decision to serve a notice giving directions to a non-compliant institution (section 171D of the Law) or a requirement to appoint independent inspectors (section 171E of the Law) the sole grounds of appeal are:

- The Financial Institution on which the notice or decision was served:
    - is not a relevant institution within the meaning of the Law,
    - is in compliance with the international tax provisions, or
    - is in compliance with the relevant directions given by the Revenue Service, or
- The decision (made by the Revenue Service) is unreasonable as a matter of law, having regard to all facts and circumstances of the case.

In the case of an appeal against the Revenue Service's decision to require additional information or documents, to make a further review or inquiry (section 171F(3)(a) of the Law) or to make a freezing order (section 171F(3)(b) of the Law), the sole grounds of appeal are:

- that the decision is unreasonable as a matter of law, having regard to all facts and circumstances of the case.

In accordance with the Law appeals are to be notified to the Revenue Service. In practical terms the Revenue Service attempts to resolve a dispute, if this is possible, within the provisions of the Law, and only refers matters to the Guernsey Tax Tribunal if agreement cannot be reached.

9. Information

Please note that the above is a precis of the approved changes and further guidance in respect of the practical application but at all times the provisions of the Law continue to take precedence. Financial institutions are encouraged to view the Policy Letter and updated Legislation published on the Revenue Service CRS & FATCA webpages, links to which are included below:

The Income Tax (Guernsey) Law, 1975, as amended

The Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) (Amendment) Regulations, 2021

The Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) (Amendment) Regulations, 2021

www.gov.gg/crs

www.gov.gg/fatca

10. Summary of Implementation Timeline

The provisions of sections 171D, 171E, 171F and 171G of the Law came into effect from 15 July 2021, however, the practical application of sections 171D, 171E and 171F will be enforced by the Revenue Service with effect from 1 January 2022.

New Accounts	**Report Required**
First reporting date for New Accounts that have an invalid or absent self-certification (unless the reporting deadline (day 91) falls after 31 January 2022 – in which case see below)	31 January 2022
Subsequent reporting date for any absent or invalid self-certification or due to a change in circumstances / trigger event	91-days after account opening or a change in circumstances/trigger event (whichever applicable).
Pre-existing Accounts	**Report Required**
First reporting date pre-existing accounts where the trigger event occurred prior to 1 January 2022 and the self-certification remains unresolved).	31 March 2022
Pre-existing accounts where the trigger event occurred on or after 1 January 2022 and the self-certification remains unresolved either the later of the end of the calendar year or 90-days from the date of discovery.	On or before 31 January in the following year or on or before the ninety first day of discovery (whichever is the later)

11. Frequently Asked Questions

FAQ 1 - Is there further guidance that can be provided in the context of failure of the reasonableness test?

Yes, the following documents provide further information:

- The Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition - Commentary on Section IV, Reasonableness of Self Certifications Page 133.
- The Standard for Automatic Exchange of Financial Account Information in Tax Matters, Implementation Handbook FAQ 7 & FAQ 13.
- Section 9 (Information) of this Bulletin includes links to the sources of information.

FAQ 2 - Does this apply to entity accounts as well as individuals?

The requirements set out in the Income Tax Law (and summarised in this Bulletin) apply equally to Individual Accounts and Entity Accounts.

FAQ 3 - If a self-certification is subsequently remediated does an FI need to inform the Revenue Service?

The financial institution should inform the Revenue Service using the Excel Self-Certification Report template, (See FAQ 5) which includes a data field to inform the Guernsey Revenue Service when a self-certificate has been remediated.

FAQ 4 - What about cases where a self-certification was thought to be incorrect or unreliable but is subsequently (after 90 days) valid?

If the self-certification has been previously reported then the FI should update the Excel Self-Certification Report template as remediated.

FAQ 5 - Is there a template for Reporting?

An Excel Self-Certification Report template will be disseminated to all IGOR contacts shortly via the IGOR messaging service to the points of contact.

Financial Institutions can utilise the Self-Certification Report to capture and report the required information as outlined within section 5.3 and submit securely via the IGOR messaging portal to the Guernsey Revenue Service.

The expectation is that Self-Certification Report will be submitted in a timely manner to the Revenue Service in accordance with those timelines outlined within section 10 above (Summary of Implementation Timeline).

If you require further information regarding this Bulletin, please forward a message via the IGOR message facility or an email to AEOI@gov.gg

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17 December 2021