FATCA – Secondary Market (consolidation of guidance)

Bulletin 2015/7

It has been brought to the Director's attention that some Guernsey Financial Institutions are unclear with respect to how the Guidance Notes for the Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014 will apply, in the context of the US Intergovernmental Agreement, when their shares are traded on the secondary market.

The purpose of this Bulletin is intended to assist such Financial Institutions by drawing together relevant sections from Guidance already published for ease of reference, as follows:

When secondary market traded shares are treated as new Financial Accounts

Section 12.10 provides guidance relating to debt and equity interests which are regularly traded on an established securities market – for the purposes of the US Agreement and provides a summary comparison between the UK and US Agreements:

For example, applying 12.9 and 12.10 to a Guernsey fund which is listed on the London Stock Exchange, in respect of which there is meaningful trading:-

- *For the purposes of the UK agreement (see section 12.9), because the interest is listed on an established securities market, the "regularly traded" exemption should apply and no interests in the fund should be treated as financial accounts.*

- *For the purposes of the US agreement :-*

    - *Where the holder of the interest is a Financial Institution acting as intermediary (e.g. a nominee or other platform), then the "regularly traded" exemption should apply and the fund should not need to report on this financial account. The Financial Institution acting as intermediary may need to report on the ultimate beneficial owner under its own FATCA obligations.*

    - *Where the holder of the interest is an individual investing directly into the fund in their own name, or an entity other than a financial institution, then for accounts registered prior to 1 July 2014 the "regularly traded" exemption should apply and the fund should not need to report on this financial account.*

        - *Where the holder of the interest is an individual investing directly into the fund in their own name, or an entity other than a financial institution, then for accounts registered on or after 1 July 2014, the "regularly traded" exemption does not apply and the fund will need to comply with the US Agreement obligations in respect of these financial accounts. However, they will not be treated as Financial Accounts until the 1 January 2016, and therefore reporting will not be required until 30 June 2017 (in respect of the 2016 period). From 1*

January 2016 there will be an obligation for the fund to obtain the requisite information in respect of these new interests, treating them as a "New Account". The Fund would then have to establish the account holder's status as if the account were any other type of New Account in accordance with section 16 of these guidance notes. For practical reasons, it is anticipated funds will seek to gather this information prior to 1 January 2016.

It is, therefore, a natural consequence of the provisions of the US Agreement that, for example, all shareholdings in a Guernsey Investment Company purchased by an individual or an entity other than a Financial Institution on the secondary market on or after 1 July 2014 are to be treated as a "new account" and the guidance provided in sections 16 (Individual New Accounts) and 18 (New Entity Accounts) of the Guidance Notes will apply.

Obligations where secondary market traded shares are new Financial Accounts

In particular, section 16.5 details:

16.5. Identification of New Individual Accounts

For accounts that are not exempt, and for accounts that previously qualified for the threshold exemption, but now have a balance or value above the threshold, the Financial Institution can carry out the following procedures to determine the account holder's status.

- *Obtain a self-certification (See Section 14.8) that allows the Financial Institution to determine where the account holder is tax resident;* ***and***

- *Confirm the reasonableness of this self-certification based on the information the Financial Institution obtains in connection with the opening of the account, including any documentation obtained for AML/KYC procedures.*

For the purpose of the US Agreement a US citizen is considered to be resident in the US for tax purposes even where they are also tax resident in another country.

In the absence of a valid self-certification being provided by the account holder, the account would become reportable.

It is expected that a self-certification will be requested as part of the account opening procedure for new customers. It is not mandatory that the self-certification must be obtained before the account can be opened, however the Financial Institution should request and obtain the self-certification within a reasonable period (90 days or a reasonable length of time determined by the circumstances; for instance, in recognition that certain Financial Institutions had not changed their take-on procedures in time of the commencement of the Guernsey Regulations on 30 June 2014, a lenient approach will be taken by the Director for the 2014 Reports).

If for some reason the Financial Institution is unable to obtain a valid self-certification on opening of the account by the time that the account would need to be reported (e.g. new take-on procedures for New Accounts in accordance with the Guernsey regulations were not in place at the time of the account was opened and the account holder has not subsequently provided a self-certification despite being requested to do so by the Financial Institution) then the account should be treated as reportable from the date it is opened under both the US and UK Agreements. As the account is reportable if a self-certification has not been obtained, reporting it is compliant with data protection law. However if the Financial Institution subsequently receives a self-certification that shows the account was NOT reportable they are entitled to make a 'correction' to their report.

Note: This is a different treatment to the reporting of a pre-existing account where if indicia are found the account is not treated as reportable until 90 days after the account holder has been asked for a self-certification."

This guidance indicates that the Director recognises in some situations, such as where shares are traded on the secondary market, it may not be possible for the Financial Institution to obtain the relevant self-certification documentation at the time the account was opened (i.e. the date the shares were acquired). Therefore the guidance provides a practical solution by requiring the Financial Institution to request the relevant documentation from the Account Holder within 90 days of the account being opened.

The second element of the self-certification is that the Financial Institution must confirm the reasonableness of self-certification obtained from the Account Holder. It is recognised that in the context of shares acquired directly by the Account Holder or through an entity other than a financial institution acting as intermediary, on the secondary market that the AML/KYC procedures referenced in the US Agreement are not necessarily carried out by the Guernsey Financial Institution whose shares have been acquired but by its designated administrator in Guernsey who is responsible for the application of AML/CFT measures to the Financial Institution's investors.

The extent to which a Guernsey Financial Institution, whose shares have been acquired on the secondary market, will have to consider the reasonableness of the self-certification will, therefore, depend on the CDD records the Guernsey Financial Institution or its designated administrator in Guernsey holds or has access to, where CDD measures have been outsourced to another party to perform as part of the documentation obtained during the account opening procedures (this would include, for example, any documents received from a Registrar or Broker).

This is in accordance with section 16.8 of the Guidance Notes, which states:

16.8. Reliance on Self-certification and Documentary evidence

Where information already held by a Financial Institution conflicts with any statements or self-certification, or the Financial Institution has reason to know that the self-certification or other documentary evidence is incorrect, it may not rely on that evidence or self-certification.

A Financial Institution will be considered to have reason to know that a self-certification or other documentation associated with an account is unreliable or incorrect if, based on the relevant facts; a reasonably prudent person would know this to be the case.

For the avoidance of doubt, although sections 16.5 and 16.8 reference the position for an Individual New Account, the same analysis of the US Agreement applies to a New Entity Account.

Compatibility with guidance concerning the Common Reporting Standard ("CRS")

As Guernsey Financial Institutions will be aware, the Director published a consultation document on 25 September 2015 enclosing a copy of the draft Regulations which are intended to implement the CRS. Included within the Regulations are the due diligence requirements required for the CRS.

Whilst it is recognised that there are significant similarities between the US Agreement and the CRS, there are some fundamental differences (of which some relate to the basis of determining residence for tax purposes, the multilateral context of the CRS, etc), therefore, it is not possible for the Director to confirm that the above Guidance issued for the US Agreement apply directly, in totality, to the operation of the CRS.

The Director does, however, intend to provide separate guidance, in due course, in respect of areas of the CRS where it is considered clarification of the CRS (including the commentaries) is required to put the matter in the domestic context.

30 November 2015