

## Guernsey issues bulletin to update draft guidance notes on FATCA based reporting

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On 21 November the States of Guernsey Income Tax (“ITO”) published bulletin 2014/1 to update the most recent iteration of the draft Guidance Notes issued jointly by the Crown Dependencies on 28 July 2014 regarding the implementation under domestic law of FATCA-based reporting.

The bulletin provides clarification in response to specific questions and comments received from industry by inserting additional text into existing draft Guidance Notes.

### Guernsey issues bulletin to update draft guidance notes on FATCA based reporting

This briefing note provides a summary of the additional text provided in the bulletin, which covers:

- dual reporting for institutions that are treated as resident in a Crown Dependency and another jurisdiction for FATCA-based reporting;
- the treatment of interests under Employee Benefit Trusts;
- clarification over the meaning of “regularly traded” and “established securities market”, in the context of whether interests in listed vehicles are to be treated as Financial Accounts for the purposes of reporting; and
- format and submission of reports.

Bulletin 2014/1 and the draft Guidance Notes published by the ITO will be of direct interest to Guernsey resident financial institutions as well as non-resident financial institutions that have a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 UK-Guernsey IGA, signed on 22 October 2013; the US-Guernsey IGA, signed on 13 December 2013 (together the “IGAs”); and the OECD’s Common Reporting Standard (“CRS”), to which Guernsey, along with 50 other jurisdictions, signed up on 29 October 2014.

### Bulletin 2014 – [CD] financial institution – updating draft guidance note 3.2.1

The amendment to the current draft Guidance Note 3.2.1 deals with the possibility of dual reporting by a Financial Institution that is tax resident in one of the 3 Crown Dependencies and is also resident for the purposes of reporting in another jurisdiction. The amendment is consistent with existing guidance in draft Guidance Notes 7.3 and 19.4 to the effect that where the Financial Institution has written confirmation that the Reportable Accounts have been reported for FATCA purposes or under an agreement equivalent to the UK-Guernsey IGA in that other jurisdiction, then the Financial Institution does not have to report on those Reportable Accounts to their local tax office.

## Employee benefit trust (“EBTs”) – updating draft guidance note 7.13

The amendment to the current draft Guidance Note 7.13 provides additional clarification on when a Reportable Account arises in an EBT. The additional text says that an unallocated right does not constitute a Financial Account. Instead, where an EBT holds assets (of whatever type) either in the name of an employee, or for the benefit of an identified employee, this will give rise to a Reportable Account.

## Regularly traded on an established securities market – updating draft guidance notes 12.9 and 12.10

Generally, 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. Each IGA defines what is meant by “regularly traded” and “an established securities market” and introduces a series of tests, all of which must be satisfied in order to meet the definitions of those terms under the respective IGA. However, how these tests are applied differs between the UK-Guernsey IGA and the US-Guernsey IGA and the bulletin seeks to provide clarification in both cases. In essence, the tests under the US-Guernsey IGA are materially stricter than the tests under the UK-Guernsey IGA, in that they require evidence of trading of a meaningful volume of trading in those shares and a meaningful value of shares traded on the exchange as a whole, whereas listing on an established securities market would be sufficient under the UK-Guernsey IGA, in practice.

### Draft Guidance Note 12.9 and the UK-Guernsey IGA

In the case of the UK-Guernsey IGA, there are two tests:

#### Test 1

Equity or Debt Interests are “regularly traded” if they are listed or quoted and/or available for trading on an established securities market.

#### Test 2

An “established securities market” means an exchange that is officially recognised and supervised by a governmental authority in which the market is located. The bulletin says that such an exchange can be considered to take its meaning from the list of stock exchanges that are recognised by the Registrar of Companies in Guernsey as set out in the Companies (Recognised Stock Exchanges) Regulations, 2009, which includes the Channel Island Securities Exchange (the “CISE”), which was established in 2013 and is the successor exchange to the Channel Islands Stock Exchange, and any regulated market as defined by the Markets in Financial Instruments Directive 2004/39/EC (MiFID).

However, the bulletin also adds a general anti-avoidance provision to address the perceived risk that an entity could circumvent the appropriate IGA reporting by seeking a listing where there is no intention of interests in the investment vehicle being widely available in practice.

### Draft Guidance Note 12.10 and the US-Guernsey IGA

In the case of the US-Guernsey IGA, the tests are as follows:

#### Test 1

Except in the case where the holder of an interest is directly registered on the books of an Investment Entity after 30 June 2014 (as to which see below), Equity or Debt Interests are “regularly traded” if there is a meaningful volume of trading with respect to the interests on an ongoing basis. Satisfying this test in practice will be a question of fact and degree which would be satisfied where the shares or units are “available for trading and actively marketed for trading”. There is a presumption in favour of what is referred to as a “widely held company”, where that presumption may be rebutted by evidence to the contrary.

#### Holders that are registered on the books after 30 June 2014

An interest is not “regularly traded” if the holder of the interest (other than a Financial Institution acting as an intermediary) is registered on the books of such Financial Institution. This exclusion does not apply to interests registered on the books of the Financial Institution prior to 1 July 2014 and, with respect to interests so registered on or after 1 July 2014, a Financial Institution is not required to apply this exclusion prior to 1 January 2016. The bulletin gives an example of how this exclusion works in practice in the context of a fund that is listed on the London Stock Exchange and how its interests are to be treated under both IGAs.

#### Test 2

Test 2 comprises two further tests (a) and (b), both of which must be satisfied. An “established securities market” means an exchange:

- a. that is officially recognised and supervised by a governmental authority in which the market is located; and
- b. that has a meaningful annual value of shares traded on that exchange.

As with the UK-Guernsey IGA, the bulletin provides that if the exchange is listed in the Companies (Recognised Stock Exchanges) Regulations, 2009 then it will be considered as meeting the requirements of the first limb of this test. The bulletin provides that satisfaction of the second limb of this test “will be determined on a case-by-case basis” and that in most instances meeting that requirement will be “self-evident”. The bulletin goes on to confirm that whilst the CISE may satisfy Test 2(a) it will not satisfy Test 2(b) and will therefore not currently be regarded as an established securities market for the purposes of the US-Guernsey IGA.

Continued

## Form of reporting – updating draft guidance note 19.6

The amendment to the current draft Guidance Note 19.6 provides additional information regarding the format of reports to be filed for the purposes of the US-Guernsey IGA, the UK-Guernsey IGA and the CRS. To comply with the US-Guernsey IGA the format of the return will reflect the US FATCA XML Schema published by the IRS. The return is to be submitted via the ITO's software known as the 'Information Gateway Online Reporter' ("IGOR") for validation and submission to the ITO.

The formats for reporting under the UK IGA and the CRS are still to be finalised. As with reports for the US-Guernsey IGA, returns will need to be filed through IGOR.

## Guidance notes

The latest version of the draft Guidance Notes was issued jointly by Guernsey, the Isle of Man and Jersey on 28 July 2014. It is the third iteration of the draft Guidance Notes, which continue to be the subject of on-going discussions with various parties and members of the finance industry. The text in the bulletin will be incorporated into the next edition of the Guidance Notes to be published in Guernsey. There are still a number of areas on which further Guidance and clarification are needed.

## Further reading

The following links will take you to useful reference documentation:

[Bulletin 2014/1 updating draft guidance notes](#)

[Companies \(Recognised Stock Exchanges\) Regulations, 2009](#)



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