
Global IRW Newsbrief

Information reporting and withholding (IRW)

August 20, 2013

Implementation of the International Tax Compliance (United States of America) Regulations 2013 – Guidance Notes

On August 14, 2013, HM Treasury and HMRC issued updated Guidance Notes (“UK Guidance”) in respect of the *Implementation of The International Tax Compliance (United States of America) Regulations 2013* (“UK Regulations”) laid before the UK House of Commons earlier this month. This version of the guidance supersedes any versions previously published.

The UK Guidance incorporates the changes to Annex II of the *Agreement to Improve International Tax Compliance and to Implement FATCA* (“the Treaty”) which has been updated by mutual agreement between the Competent Authorities of the UK and the US. The revised Annex II results in a wider scope of exempt institutions and products as well as changes in the categories of institutions which will be Non-Reporting UK Financial Institutions that are treated as deemed-compliant under the Treaty.

The UK Guidance also includes the changes announced in Notice 2013-43 (“the Notice”) issued by the Internal Revenue Service (IRS) and the US Department of the Treasury (Treasury) on July 12, 2013 with regard to revised implementation timelines.

This Newsbrief identifies key changes and certain additions from the draft UK Guidance released in May 2013.

Background

The UK Guidance is the latest in a series of publications relating to the joint announcement between the United States, France, Germany, Italy, Spain and the United Kingdom, in February 2012, to intensify their co-operation in combating international tax evasion.

A Reporting UK Financial Institution (“Reporting UK FI”) must apply the UK Regulations by reference to the published UK Guidance. In situations where an element of the US Regulations or a different Intergovernmental Agreement provides a preferred compliance approach, the Reporting UK FI needs to contact HMRC to discuss the proposed approach.

Where the IRS and US Treasury amend the US Regulations to introduce additional or broader exemptions, HMRC will look to incorporate these changes into UK Regulations or UK Guidance as appropriate.

Details of the current UK Regulations and a detailed analysis of the draft UK Guidance can be found at:

- August 7, 2013, HM Treasury and HMRC laid the International Tax Compliance (United States of America) Regulations 2013 before the UK House of Commons *The International Tax Compliance (United States of America) Regulations 2013 effective on September 1, 2013*
- December 8, 2012, HM Treasury and HMRC released the draft International Tax Compliance (United States of America) Regulations 2013 to implement the Agreement to Improve International Tax Compliance and to Implement FATCA *HMRC issues Draft Guidance Notes - Implementation of International Tax Compliance (United States of America) Regulations 2013*

Key changes from the draft UK Guidance

1. Financial Institutions

The UK Guidance introduces the definition of a “related entity group” and follows the excepted inter-affiliate FFI approach under the US Regulations, which were released earlier this year, by excluding an entity that is a member of a related entity group from the definition of a Reporting UK FI if:

- the entity does not maintain Financial Accounts (other than accounts maintained for members of its related entity group)
- the entity does not hold an account with or receive payments from any withholding agent other than a member of its related entity group;
- the entity does not make withholdable payments to any person other than to members of its related entity group that are not limited FIs or limited branches; and
- the entity has not agreed to undertake reporting as a Sponsoring Entity or otherwise act as an agent regarding the Agreement on behalf of any Financial Institution, including a member of its related entity group.

Within the definition of a local client base financial institution, the UK Guidance revises the reporting or taxing regimes applicable to insurance products as:

- Chargeable events reporting regime;
- Income minus Expense Regime (I-E); and
- Basic rate tax deducted from the interest portion of a Purchased Life Annuity

The UK Guidance also includes the definition of a sponsored investment entity as “an entity that has a contractual arrangement for its due diligence and reporting responsibilities to be carried out by a sponsoring entity” and amends the definition of an “investment transaction” to align to the UK Regulations.

A holding company or treasury centre that is formed in connection with any investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets has been added to the UK Guidance in respect of the definition of Holding Companies and Treasury Centres of Financial Groups

The UK Guidance also states that an Investment Trust Company that is in a members voluntary liquidation it will be deemed to meet the regularly traded condition providing no new investments are made.

A Trust is defined as an Investment Entity and therefore a Reporting UK FI where:

- the Trustee is a Financial Institution (“FI”);
- the Trustee (on behalf of the Trust) engages a FI to manage the Trust; or
- the Trustee (on behalf of the Trust) engages a FI to manage the Financial Assets for the Trust.

A Trust that is a charitable organisation will be treated as a Non Reporting UK FI.

In reporting the balance of value in terms a person who is the beneficial owner of a portion or all of a trust, the UK Guidance states that where a specified US person has a mandatory interest in the trust, the net present value of their future interest should be measured on a recognised actuarial basis and where the settlor of the trust is a US person, the total value of the assets of the trust must be consistent with that used by the trustees for valuation purposes and should be based on a recognised accounting standard.

***PwC Observation:** The changes to the UK Guidance align to the changes in definitions included within the UK Regulations as well as clarifying the treatment of specific situations raised by Reporting UK FIs and industry bodies.*

The addition of the related entity group is intended to enable Reporting UK FIs to follow the excepted inter-affiliate FFI rules to reduce the number of entities required to register and obtain a Global Intermediary Identification Number (“GIIN”). However, the condition that the entity does not hold an account with any withholding agent other than a member of its related entity group may limit the use of this exception due to the fact that many entities will have bank accounts with unrelated FIs.

The related entity group rules appear to reflect the expanded affiliated group rules under the US Regulations. While there are requirements in respect of the treatment of related Non-Participating Foreign Financial Institutions (“NPFIs”), it is unclear whether or not the non-compliance of a related entity could affect the compliance of a Reporting UK FI.

The absence of further guidance in respect of what constitutes either “managed”, “customers” and “others” in the context of the investment entity definition means that there is still significant scope for judgment in the application of the definition.

2. Financial Accounts

The UK Guidance clarifies the following is respect of the definition of a financial account:

- in situations where a UK financial institution is acting as an executing broker, and simply executing trading instructions, or receiving and transmitting such instructions to another executing broker, the UK financial institution will not be required to treat the facilities established for the purposes of executing a trading instruction, or receiving and transmitting such instructions, as a financial account;

- credit cards will not be considered to be Depository Accounts where the issuer of the credit card implements policies and procedures (by the later of 30 June 2014 or the date it registers as a Financial Institution) either to prevent a customer deposit in excess of \$50,000 or to ensure that any customer deposit in excess of \$50,000 is refunded to the customer within 60 days; and
- where an estate is established by a Grant of Probate in respect of deceased persons account(s), the Reporting UK FI is required to identify the Controlling Persons of the Estate.

PwC Observation: *The exclusion of broker execution and certain credit card products from the definition of a financial account provides a significant benefit to a number of Reporting UK FIs.*

The UK Guidance requires a Reporting UK FI to treat an estate established by a Grant of Probate as a Passive Non-Financial Foreign Entity. Compliance with the identification requirements in respect of such accounts may prove challenging for many Reporting UK FIs

3. Due Diligence

The UK Guidance has been updated in accordance with the UK Regulations to defer the implementation of FATCA by 6 months in accordance with the revised timelines set out in the Notice. Accordingly, a pre-existing account becomes a financial account maintained as of June 30, 2014 (previously December 31, 2013) and a new account becomes an account opened on or after July 1, 2014 (previously January 1, 2014).

Documentary evidence can be provided in original or certified form and the UK Guidance also addresses the self-certification requirement for Reporting UK FIs to introduce and maintain arrangements to establish the tax residency of all account holders.

The UK Guidance in respect of new entity accounts has been updated to specify that an entity account holder will be treated as a NPFFI, unless a self-certification is obtained and also to remove entity accounts from the requirement to undertake the Relationship Manager enquiry in respect of financial accounts linked by a common data element and held by an individual where the aggregate balance exceeds \$1,000,000.

In the case of a mergers or bulk acquisitions of accounts, the UK Guidance states that HMRC expect a Reporting UK FI will undertake a sample review of the acquired accounts. The UK Guidance also enables a Reporting UK FI to treat accounts acquired in a merger or bulk acquisition that takes place after 30 June 2014 as preexisting accounts for the purposes of applying the identification and documentation procedures.

The UK Guidance introduces the ability for a Reporting UK FI to elect to apply threshold exemptions to either all pre-existing individual accounts or to a clearly identifiable group of accounts, such as by a line of business or by reference to the location where the account is maintained.

Where a Pre-existing Lower Value or High Value Account closes prior to the Reporting UK FI carrying out its due diligence procedures, the UK Guidance clarifies that the account still needs to be reviewed and in cases where the Reporting UK FI is unable to undertake action in relation to any indicia or is unlikely to receive a response to any query made to the Account Holder, the account should be treated as reportable.

In situations where a Reporting UK FI has previously obtained documentation to establish the account holder's status in order to meet its obligations under a Qualified Intermediary, Withholding Partnership or Withholding Trust Agreement, or to fulfill its reporting obligations as a US payor under Chapter 61 of the US Internal Revenue Code, the UK Guidance limits the ability to avoid the electronic or the paper record search to accounts where the Account Holder has received a reportable payment under those regimes.

The circumstances whereby a Reporting UK FI is not required to re-document a pre-existing account holder opening a new account are extended under the UK Guidance to include cases where the appropriate due diligence requirements are in the process of being carried out within time limits set out for the Pre-existing Accounts.

PwC Observation: *The introduction of a requirement to treat certain entities as an NPFFI in the absence of a self-certification introduces an element of the presumption rules included with the US Regulations. It is unclear how a Passive NFFE with undocumented controlling persons will be treated under these rules.*

The details of self-certification remain at the discretion of the Reporting UK FI and the inclusion of a requirement to establish the tax residency of all account holders will allow Reporting UK FIs to develop solutions capable of dealing with similar FATCA like regimes.

The ability to elect to apply thresholds to identifiable group of accounts is a helpful addition to the UK Guidance providing Reporting UK FIs much needed flexibility in their approach to the due diligence.

4. Reporting

The draft UK Guidance included an exception from the requirement to report payments to a NPFFI where the Reporting UK Financial Institution did not hold documentation to identify the payee as a NPFFI, unless the payee was a prima facie FFI. This exception has been removed from the UK Guidance.

The UK Guidance in respect of withholding on US source withholdable payments paid to NPFFIs has been amended to withholding on US source withholdable payments paid to NPFFIs and references to QIs that have elected to assume primary withholding removed.

PwC Observation: *The requirement to report payments to NPFFIs remains a significant concern for Reporting UK FIs. While reporting is not required until 2017 in respect of 2015 and 2016, there remains significant uncertainty about the scope of the reporting.*

The UK Guidance sets out the requirements for reportable accounts and excludes reporting of gross credits in respect of depository and other non-custodial accounts for 2014. This is currently contrary to the UK Regulations which we understand will be updated to align with the US Regulations and UK Guidance.

Some actions to think about

With the updated UK Guidance Reporting UK FIs have a clearer understanding of the areas in which judgment will need to be applied in terms of the compliance approach to be implemented.

It should be noted that the IRS registration portal opened on August 19, 2013 together with a FATCA Registration Online User Guide, Tips for Logging into the FATCA Registration System, Instructions for Form 8957 and Global Intermediary Identification Number (GIIN) Composition. Further details will be added to the UK Regulations and Guidance in respect of the registration process as well as the method of transmission of data and the format of data to be reported which have yet to be defined.

UK resident entities and branches need to ensure that any Reporting UK FIs are correctly identified and become compliant in the most cost effective and least disruptive way possible.

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To view PwC FATCA contacts in each country

<http://www.pwc.com/us/en/financial-services/fatca-contacts.jhtml>

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