
Global IRW Newsbrief

Information reporting and withholding (IRW)

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HM Treasury and HMRC release details outlining the implementation of FATCA in the UK

Yesterday, 18th December, HM Treasury and HMRC released the draft *International Tax Compliance (United States of America) Regulations 2013* (“UK Draft Regulations”) to implement the UK-US IGA and simultaneously released *draft guidance notes* and a *summary of responses to the consultation* which sought views on how the Government intends to legislate to deliver the commitments made in the UK-US IGA.

The UK Draft Regulations give more clarity in respect of the legislation "*Draft Clauses & Explanatory Notes for the Finance Bill 2013*" published on the 11th December and what financial institutions within the UK will need to do to identify and report ‘specified US persons’ from 1st January 2014. However, a number of areas of significant uncertainty remain and that will continue to be the case at least until the final US FATCA regulations and details of any registration process a financial institution is required to undertake are available.

HMRC recognises that there are gaps in both the legislation and guidance and have undertaken to publish further details around issues such as the registration process, reporting format and transmission of data, as soon as such details are available. HMRC has also requested further comments on the legislation published on the 11th December, the UK Draft Regulations and the draft guidance by the 13th February 2013.

This Newsbrief identifies key elements of the UK Draft Regulations, with further analysis of the draft guidance notes and a summary of responses to the consultation to follow in the future Newsbrief.

Background

On 12th September, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America signed an *Agreement to Improve International Tax Compliance and to Implement FATCA (the “UK-US IGA”)*. On 18th September, HMRC issued a consultative document to seek comments to enable legislation to be drafted which could be operated in the most

efficient way by affected businesses. On 11th December, HMRC published legislation as part of the "*Draft Clauses & Explanatory Notes for the Finance Bill 2013*".

See Global IRW Newsbriefs: *United States and United Kingdom Sign First Bilateral FATCA Intergovernmental Agreement* for more information on the UK-US IGA, and *HMRC guidelines on new UK-US FATCA agreement provide insights and invite comments* for more information on the consultation document.

Key elements of the UK Draft Regulations

1. Definition of a reporting Financial Institution

The UK Draft Regulations follow the UK-US IGA definitions of a UK reporting financial institution ("UKFI") with further refinement in respect of the definition of a depository institution. The UK Draft Regulations defines an entity that accepts deposits in the ordinary course of a banking or similar business as undertaking a regulated activity for the purposes of the Financial Services and Markets Act 2000 or a person meeting certain descriptions contained in the regulation of the Electronic Money Issuers Regulations 2011(b) which is generally Electronic Money Issuers as defined, excluding Central banks, and local government bodies.

***PwC Observation:** It should be noted that the definition of banking or similar business is narrower than that contained within the proposed US FATCA Regulations. The proposed US FATCA Regulations define an entity as considered to be engaged in a banking or similar business if, in the ordinary course of its business with customers, the entity engages in one or more of the following: accepting deposits of funds, making personal, mortgage, industrial, or other loans, purchasing, selling, discounting, or negotiating accounts receivable, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness, issuing letters of credit and negotiating drafts drawn thereunder, providing trust or fiduciary services, financing foreign exchange transactions, entering into, purchases, or disposes of finance leases or leased assets; or providing charge and credit card services.*

2. Reportable Accounts

The UK Draft Regulations set out the various exceptions in respect of accounts not required to be reviewed, identified or reported in accordance with the UK-US IGA. The election to forego the use of these exceptions set out in the proposed US FATCA Regulations is currently included by way of a placeholder in the Draft UK Regulations. The term pre-existing account is replaced by "31 December 2013" account and the aggregation and currency conversion provisions of the UK-US IGA apply.

***PwC Observation:** The ability of a UK FI to elect to forego the exceptions in respect of accounts not required to be reviewed, identified or reported has been the subject of considerable debate in the UK. This debate is due to potential conflicts of such an election with Data Protection legislation. It appears that the potential conflict has yet to be resolved and hence the need to bracket this section of the regulation.*

UK FIs should also pay careful attention to the rules that determine the way in which accounts must be aggregated for the application of various due diligence

thresholds. These rules require the aggregation of the UK FI's, or related entities, accounts to the extent that computerised systems link the accounts by reference to a data element. Accordingly, there is a potential requirement for aggregation to apply to accounts maintained by related entities outside the UK.

3. Collective Investment Vehicles

One of the difficulties in applying the UK-US IGA to the Funds sector results from the increased number of entities which are classified as “Financial Institutions” under the UK-US IGA as a consequence of the inclusion of the “Investment Entity” definition. This creates a risk of duplicative reporting under the UK-US IGA for the investors in the funds. The UK Draft Regulations address this by clarifying that the statutory obligations generally fall on the fund vehicle (provided it represents a “collective investment scheme” under FSMA 2000), unless the fund vehicle is not a “person” or is constituted as a “trust”.

***PwC observation:** Where a fund vehicle constitutes a person for these purposes, the treatment under the UK Draft Regulations should be consistent with that which applies under the proposed US FATCA regulations. For those collective investment schemes that are not persons or are constituted as trusts, the incidence of the statutory reporting obligation under the UK Draft Regulations would appear to differ from that under the proposed US FATCA regulations. This therefore raises the question as to what is meant by “person” in this context - for example, would a UK limited partnership be considered a person?*

The UK Draft Regulations do not include any centralised compliance option for fund managers. This was widely lobbied for by the Funds industry as a way of simplifying the overall compliance burden for fund managers who act for a large number of different funds.

4. Trusts / Trustees

Under the UK Draft Regulations trustees are only classified as reporting financial institutions if they are “independent legal professionals” or a “trust or company service provider” as defined by the UK Money Laundering Regulations 2007. In these circumstances, the only reportable accounts for the Trustees will be the property which is subject to the trust. That property is treated as a custodial account which is maintained by the Trustee on behalf of the trust. In relation to the trust property, the UK Draft Regulations state that no-one else is a reporting financial institution.

***PwC observation:** Under the UK Draft Regulations, Trustees which are subject to the Money Laundering Regulations 2007, will be responsible for reporting in respect of all property (including non-financial assets) held on behalf of a trust under the custodial account reporting provisions. Where those assets are held through other financial institutions (e.g. a custodian) the UK Draft Regulations indicate that there is no reporting requirement for any other financial institution in respect of this property.*

5. UK Representatives

The UK Draft Regulations set out the position for the UK branches of non-resident reporting financial institutions. Where such financial institutions have a 'UK representative' of the institution, that representative will be obliged to fulfil the obligations of the non-resident institution. Further clarity is also provided in relation to the residency of partnerships, where the control and management of the partnerships 'as a financial institution' takes place in the UK.

***PwC Observation:** The UK Draft Regulations seek to align the residence of a UK FI with existing definitions of permanent establishment under UK Corporate tax law. In circumstances where tax law does not apply a control and management test of this type, the residence of the FI would be different. Where related Partnerships are located in separate jurisdictions the residence of each FI will need to be clearly understood.*

6. Identification obligations for reportable accounts

The UK Draft Regulations follow the identification provisions of the UK-US IGA. To the extent that any self-certification is required as a consequence of the due diligence process, a UK FI can either require such evidence as the UK FI considers reasonable in support of the self-certification, or apply the documentary evidence provisions of the proposed US FATCA regulations.

***PwC Observation:** The detailed requirements of a self certification process are one of the key considerations of the draft guidance notes and will be subject to discussion in a forthcoming Newsbrief. The ability to apply the documentary evidence provisions of the proposed US FATCA regulations potentially allows a UK FI to rely on documentation previously obtained from an account holder to establish the account holder's status as foreign (non-US).*

7. Reporting obligations

The general reporting requirements in the UK Draft Regulations follow the requirements set out in the UK-US IGA with the inclusion of the requirement that where, during the calendar year in question, the UK FI maintains no reportable accounts the return must state that fact. The due date for reporting is suggested as 31 May indicating that there is further discussion to be had in respect of this deadline. The concerns around the account balance at account closure have been resolved by determining the value to be as at the date of receipt of the account holder's instructions to close the account. The UK Draft Regulations include the requirement to report the UK FIs treaty identification number.

***PwC Observation:** HMRC have stated that they are open to discussion in respect of the reporting timetable and UK FIs should consider how a 31st May deadline would fit with other reporting regimes and any potential future FATCA style agreements with other territories. The requirement to file a nil return is expected to enable HMRC to track UK FIs' compliance. The absence of any details in respect of the method of transmission and the format of the data to be transmitted is an area of considerable uncertainty in the UK Draft Regulations and HMRC have stated that these are areas of*

ongoing discussion. It is not yet clear how a UK FI will be required to obtain a treaty identification number.

8. Reporting of 'Payments' to NPFIs

The UK Draft Regulations include the requirement set out in the UK-US IGA for a UK FI to establish and maintain arrangements that are designed to identify payments which are made to a non-participating financial institution in the calendar year 2015 or 2016, whether the payment is made to a non-participating financial institution as an account holder or otherwise. The UK Draft Regulations exclude from the definition of a payment any consideration given by the UK FI for the provision of goods or non-financial services to it.

***PwC Observation:** The exclusion of consideration given for the provision of goods or non-financial services from the definition of payment for this purpose is a welcome reduction in the scope of reporting. The term non-financial service has yet to be defined in the proposed US FATCA Regulations and the UK Draft Regulations. However, the requirement to report payments made to a non-participating financial institution as an account holder or otherwise remains a significant challenge and appears to be broader than the reporting required in respect of payments to NPFIs under the Model II intergovernmental agreement. The Draft UK Regulations introduce the requirement for a UK FI to track the date of receipt of the instructions to close an account.*

9. Penalties

The UK Draft Regulations provide details in respect of the penalties for failure to comply, reporting inaccurate information and failing to report or inaccurately reporting payments to non-participating financial institutions. The penalty for failing to comply with any obligation under the draft regulation (excluding obligations to report payments to NPFIs) is £300, the penalty for reporting inaccurate information is not to exceed £3,000 and the penalties for a failure to report or accurately report payments to non-participating financial institutions are £300 for each failure. The liability for penalties under the UK Draft Regulations is limited to £3000, per calendar year.

***PwC Observation:** The penalty regime set out in the UK Draft Regulations is consistent with the penalty regime for similar UK tax law and is unlikely to act as a major incentive for compliance in itself. The main incentive for compliance remains the threat of 30% withholding applied to any UK FI excluded under the terms of the UK-US IGA.*

Some actions to think about

It is important for stakeholders to analyse the impact of the UK Draft Regulations and to consider what further comments they wish to make by the **13th February 2013** as HMRC recognise that there are gaps in the legislation. Key areas for review and comment in the UK Draft Regulations are the treatment of Collective Investment Schemes and Trusts, the potential requirement to aggregate accounts across related entities where possible, the process of self certification and the requirement to report payments to a non-participating financial institution as an account holder or otherwise.

The areas where the UK Draft Regulations have yet to provide any insight are primarily around any registration process, the method of transmission of data, the format of data to be reported, some insurance-specific aspects, the compliance regime and any consideration of the Responsible Officer regime as set out in the proposed US FATCA Regulations.

Further details are provided in the guidance notes and summary of responses to the consultation in respect of some but not all of these issues and will be covered in future Newsbriefs. With little more than twelve months to go live, stakeholders need to clearly understand how to manage the implementation in view of the ongoing uncertainty so that costs and disruption to operations and customers are kept to a minimum.

For more information, please do not hesitate to contact:

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Solicitation.

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