UK Crown Dependencies issue draft FATCA guidance notes

Executive summary

On 31 January, 2014 Jersey, Guernsey and the Isle of Man (being the UK Crown Dependencies) jointly issued draft guidance notes on the implementation of their Intergovernmental Agreements (IGAs) with the US and the UK. The guidance notes are open to consultation and comments are sought by 14 March, with a further version to be published by 31 March. In issuing the guidance notes jointly, it is clear that consistency in approach is intended and this should be welcomed by businesses operating across the islands.

The version issued by the Guernsey authorities includes a number of Guernsey specific references but remains essentially the same as the Jersey and Isle of Man guidance notes. Importantly it includes reference to when an entity is treated as resident in Guernsey for tax purposes and so within the scope of the IGAs, as this is different to definition of tax residence in Jersey and the Isle of Man. This is included to deal with the domestic technical position on definition of residence but is an important distinction between the jurisdictions.

Whilst the draft guidance notes, do and should continue to, take a broadly consistent approach between the three islands, when they are released in March they will include jurisdiction-specific issues. It is important therefore that reference is made to the guidance notes released at the end of March when considering the impact on your business.

Overview

In order to improve tax transparency and combat tax evasion, the UK entered into IGAs with its Crown Dependencies in October 2013. These IGAs are based on the US-UK IGA so as to reduce the compliance burden and provide consistency. As the IGAs are all very similar, the draft guidance for implementation has been released jointly by the three Crown Dependencies.
The draft guidance notes cover both the UK and US IGAs, with the intention of creating a consistent approach wherever possible. They are broadly based on the draft UK guidance notes but with additional guidance in areas of particular interest to Crown Dependencies (such as trusts).

The definitions, due diligence procedures and most of the reporting requirements are essentially the same under both IGAs but there are a few important differences.

Key differences between UK and US IGAs

1. Reporting timetable
Under the UK IGA, reporting a financial institution to the local tax authority for 2014 and 2015 is required by 30 June 2016. Under the US IGA, reporting for 2014 is required by 30 June 2015.

2. Alternative reporting regime for UK resident non-domiciled persons
The UK has a beneficial regime for UK resident non-domiciled individuals who can elect to be taxed on a remittance basis. Full reporting under the UK IGA would provide information relating to offshore accounts that may not be relevant to the UK tax position of these individuals. An Alternative Reporting Regime (ARR) was included in Annex IV of the UK IGAs. The ARR only applies to Crown Dependency Reporting financial Institutions (CDRFIs) and is elective for both the financial institution and the individual.

The wording in Annex IV on the information to be reported under the alternative regime is not clear, particularly the reference to ultimate destination and originating source, but the draft guidance notes provide some useful clarity.

Definition of “regularly traded on an established securities market”

The definition of regularly traded on an established securities market is different in the two IGAs. If these definitions continue to be applied, an interest in a listed entity may be reportable under one IGA but not the other. This adds complexity to the process and will require separate analysis to determine whether an interest in a listed entity is excluded from the reporting requirements under each IGA.

3. Sponsored Investment Entity (SIE) regime
Annex II of the US IGA includes a global SIE regime, permitting the sponsoring and sponsored entities to be located in different jurisdictions. The UK IGA includes a domestic only SIE regime which requires the sponsoring and sponsored entities to be in the same jurisdiction. As a result multijurisdictional groups that can benefit from the reduced administrative burden of the SIE under the US IGA will not be able to do so to the same extent under the UK IGA. This could result in entities having to undertake the full due diligence and reporting obligations under the UK IGA creating an additional administration burden. This may create particular difficulties where that entity does not have the information required to comply with its obligations. It will not however result in additional registration obligations as there is no registration requirement under the UK IGA.

Some points of interest in the draft guidance notes

Note that the following points are from the draft guidance notes and hence subject to change.

- The definition of investment entity includes both the definition under the US FATCA Regulations and the definition in the IGAs. Financial institutions therefore have a choice of definition. This adds further complexity to the process of classifying entities as consideration will need to be given to whether falling within one definition or the other affects the classification.

- In order to avoid duplicate reporting in some circumstances, a CDRFI may decide not to report provided it has actual and
documented knowledge that another Financial Institution has reported. This might apply, for example, where there are multi-jurisdictional trustees. The responsibility for reporting however remains with the CDRFI. In practice, the CDRFI will need to obtain documentation from the other Reporting Financial Institution proving that the reporting has been undertaken and would be advised to satisfy themselves that the reporting is correct. Unless the CDRFI is comfortable that they can rely on that other party to undertake the reporting correctly, the work required to ensure that the reporting requirements have been satisfied may be as onerous as the CDRFI undertaking the reporting itself.

- A pragmatic position has been taken in respect of trusts that qualify under the Trustee Documented Trust (TDT) regime. Underlying trust companies of those trusts are also treated as falling within the TDT regime and do not need to register in their own right as a Financial Institution. They may however choose to register in certain circumstances, for example where they are required by a US withholding agent to certify their FATCA status. In that situation it may be easier for the underlying company to obtain its own global intermediary identification number (GIIN) if it is a Financial Institution than try to explain how it qualifies under the TDT regime.

- The reporting requirement for beneficiaries has been extended to include benefits received by them, such as the use of assets owned by the trust or provision of interest free loans from the trust, as well as distributions.

- The guidance notes permit the use of net asset value accounting for assets when determining the equity value of trusts. This is a significant simplification and removes the need for an actuarial valuation which can be expensive.

- Where a reporting financial institution has identified no reportable accounts, a nil return is not required. This is different to the position taken by HMRC in respect of their IGAs as financial institutions are required to submit nil returns in those circumstances. Institutions with activities in the UK and Crown Dependencies may therefore have to modify their systems to file nil returns in the UK but not in the Crown Dependencies.

**Conclusion**

While the guidance notes helpfully set out the governments' interpretation of aspects of the IGAs, it does not provide all of the answers for every type of business affected by the IGAs. Some elements allow entities to make a choice, for example the definition of investment entity, the ARR in the UK IGA and applying the de minimis threshold for pre-existing individual accounts. In addition there are areas where interpretation will still be required, such as the meaning of regularly traded on an established securities market. The issues are complex, so businesses are still advised to seek professional advice on how the IGAs will affect them, what they will need to do to comply and how they can reduce their risk.

**Next steps**

The guidance notes are a work in progress and comments are sought by 14 March 2014. Interested parties should review the guidance notes, particularly those areas that are relevant to their business, and consider whether to respond to the consultation. Responses can be made directly to the relevant governments with details to be found on their websites. Alternatively EY can help you either by feeding comments into the consultation process or assisting you in submitting your comments.
The focus in recent months has been primarily on the technical aspects of FATCA and the IGAs. The signing of the IGAs in December 2013 and recent publication of the guidance notes provides some certainty on how the Crown Dependency governments intend for these agreements to be implemented. This, combined with imminent deadlines, means that businesses should now be focussing on the practical aspects of implementation.

FATCA implementation programs that are already in place or underway should be reviewed to ensure that they are fully compliant with the US and UK IGAs. Consideration should also be given to whether applying any part of the guidance notes could change the processes to reduce the implementation burden. Although the guidance notes are subject to change following the consultation period, it is not anticipated that this should result in any fundamental changes and so the current draft can be used as a basis for starting or continuing with implementation although this will need to be confirmed when the final guidance notes are issued.
Should you have any queries or comments, or would like assistance with submitting comments on the consultation or with developing your implementation program, please contact your usual EY contact or:

**EMEIA Tax Lead**
Julian Skingley  
+44 20 7951 7911  
jskingley@uk.ey.com

**Jersey**
Wendy Martin  
+44 15 3428 8298  
wmartin1@uk.ey.com

**Guernsey**
David White  
+44 14 8171 7445  
dwhite1@uk.ey.com

**UK Banking**
James Guthrie  
+44 20 7951 4366  
jguthrie@uk.ey.com

**UK Insurance**
Peter Frost  
+44 20 7951 5517  
pfrost@uk.ey.com

**UK Asset Management**
Stuart Chalcraft  
+44 20 7951 1190  
schalcraft@uk.ey.com

© 2014 Ernst & Young LLP. Published in the UK.  
All Rights Reserved.

ED None  
1374553 (UK)08/13. Creative Services Group.

In line with EY’s commitment to minimise its impact on the environment, this document has been printed on paper with a high recycled content.

Information in this publication is intended to provide only a general outline of the subjects covered. It should neither be regarded as comprehensive nor sufficient for making decisions, nor should it be used in place of professional advice. Ernst & Young LLP accepts no responsibility for any loss arising from any action taken or not taken by anyone using this material.