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CHILDREN OF FATCA?

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Automatic exchange of financial account information encompasses a number of recent initiatives aimed at preventing tax evasion and protecting the tax systems of the jurisdictions that participate in it. The intention is that tax administrations will be provided with details of financial accounts and assets owned by individuals and entities that are resident for tax purposes in their jurisdiction, but which are held by financial institutions in another jurisdiction.

It affects customers who open certain types of investment such as investment bonds, OEICs or deposit accounts and customers who already hold these investments.

This brief synopsis looks at how these information exchange initiatives – often dubbed as 'Children of FATCA' – impact providers, advisers and customers alike.

AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION

The UK is party to a number of these international agreements and the UK Government has introduced legislation that imposes obligations on the UK financial sector to review and collect details of financial accounts held by persons that are tax resident elsewhere and report this to HMRC for onward transmission under the exchange of information articles in the various treaties and conventions to which the UK is party.

In return, those jurisdictions supply HMRC with similar information on UK tax resident individuals and entities holding financial accounts with their financial institutions.

The UK now has legislation in place for the following four strands of automatic exchange of financial account information:

1. The United States Foreign Account Tax Compliance Act – FATCA;
2. The Crown Dependencies and Overseas Territory Regulations – CDOT;
3. The Common Reporting Standard developed by the OECD – CRS;
4. The EU Directive on Administrative Cooperation in Tax Matters – DAC.

The future expectation is that, with the exception of FATCA, all of the UK's exchange of financial account information obligations will be under the CRS or the DAC. This means that reporting under CDOT will be relatively short-lived. All of these regimes have significant common requirements.

HMRC is responsible for ensuring that UK financial institutions (such as banks and insurance companies) comply with their obligations under the above legislation.

The table below outlines dates by which key events occur for each of the obligations:

	FATCA	CDOT	DAC/CRS
Due diligence procedures apply to pre-existing financial accounts in existence as at:	30 June 2014	30 June 2014	31 December 2015
Self-certification is required by the customer for new financial accounts opened on or after:	1 July 2014	1 July 2014	1 January 2016
The first reporting period ends on:	31 December 2014	31 December 2014	31 December 2016
Financial institutions report information to HMRC for the first reporting period on or before:	31 May 2015	31 May 2016	31 May 2017
HMRC exchanges information with partner jurisdictions for the first reporting period on or before:	30 September 2015	30 September 2016	30 September 2017

Following on from the above, UK financial institutions must report information to HMRC by 31 May each year. If 31 May falls on a weekend or Bank Holiday then the deadline for submitting reportable information to HMRC is the following working day. This deadline enables HMRC to process the information for exchange by the following 30 September for onward transmission.

Not all financial account information is reportable in the first reporting period. Details of what has to be reported can be found in HMRC guidance at: **www.gov.uk/government/uploads/system/uploads/attachment_data/file/461418/Guidance_Notes_for_the_Automatic_Exchange_of_Financial_Account_Information**

Here's a brief summary of the four regimes:

FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

FATCA requires financial institutions outside the US to pass information about their US customers to the Internal Revenue Service.

In September 2012 the UK and the US signed a treaty to implement FATCA in the UK, imposing obligations on UK financial institutions to identify, maintain and report information to HMRC on financial accounts held by US citizens, taxpayers and entities.

Provided these financial institutions comply with the requirements of the legislation they will not be subject to the 30% withholding tax on US source income.

THE CROWN DEPENDENCIES AND OVERSEAS TERRITORIES AGREEMENTS (CDOT)

The Crown Dependencies of Guernsey, the Isle of Man and Jersey and the UK Overseas Territories of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Montserrat and the Turks & Caicos Islands also entered into agreements with the UK to automatically exchange information on financial accounts.

Only the agreements with the three Crown Dependencies (Guernsey, the Isle of Man and Jersey) and with Gibraltar are reciprocal, imposing obligations on UK financial institutions to identify, maintain and report information to HMRC on financial accounts held by individuals and entities resident for tax purposes in those territories.

The agreements with the remaining six overseas territories are non – reciprocal. This means that HMRC will receive information from these territories in respect of UK tax residents, but there is no requirement for due diligence or reporting in the opposite direction.

THE COMMON REPORTING STANDARD (CRS) & THE EU DIRECTIVE ON ADMINISTRATIVE COOPERATION (THE DAC)

The CRS is a G20 initiative developed by the OECD. One of its aims was to maximise efficiency and reduce costs for financial institutions by drawing heavily on the approach taken to implementing FATCA. However, there are some distinct differences between the two, such as:

- FATCA reports on the basis of citizenship as well as tax residence, compared to only tax residence under the CRS; and
- FATCA introduced a 30% withholding tax for non Model I IGA countries, which is not replicated under the CRS.

Following publication of the CRS by the OECD in June 2014 work started on incorporating it into an EU Directive to make automatic exchange of financial account information mandatory between EU member states.

The CRS contains a number of options that are open to jurisdictions to apply if they choose, so the member states came to an agreement on which of those should be incorporated into the DAC and therefore applicable across the EU, along with any points considered necessary to the effective implementation of the CRS.

The regulations that require UK financial institutions to identify, maintain and report information for exchange with these jurisdictions under the CRS and with EU Member States under the DAC, The International Tax Compliance Regulations 2015, came into force on 15 April 2015. These regulations also incorporate the previously separate FATCA provisions.

The Regulations implementing the UK's CDOT agreements will not be incorporated into the International Tax Compliance Regulations 2015 as it is anticipated that they will be repealed once the UK and its Crown Dependencies and Overseas Territories start to exchange information under the CRS.

The basic process is the same for each of the agreements.

FUTURE PROOFING – THE WIDER APPROACH

A so called 'wider approach' has been adopted which is intended to help financial institutions future proof their processes.

Financial institutions are required to identify the territory in which an account holder or a controlling person is resident for income tax or corporation tax purposes, or for the purposes of any other tax of a similar character that has been imposed by that territory, and to maintain and retain this information for a period of time.

The due diligence procedures are designed to identify accounts held by residents of the jurisdictions with which the UK is committed to exchange information.

However, because there is an expectation that more jurisdictions will reach agreement with the UK under the CRS in the future, the regulations applying the due diligence rules have been designed to allow reporting financial institutions to record the territory in which a person is tax resident irrespective of whether that territory is a reportable jurisdiction and maintain information on the tax residence of account holders irrespective of whether or not that account holder is a reportable person for any given reportable period. This already applies for both the FATCA and CDOT regimes.

This wider approach effectively allows financial institutions to future proof their processes so that when a new jurisdiction is added to the list of reportable jurisdictions the work in identifying where existing customers are resident has already been carried out. Financial institutions will only need to revisit the determination of tax residence in those cases where there has been a change of circumstance.

Reducing the number of times that due diligence processes have to be carried out should result in lower costs for the financial institutions in complying with their obligations.

DATA PROTECTION LAW

One of the main concerns of the legislators was to provide financial institutions with the legal cover they require to comply with data protection law.

The regulations therefore impose an obligation on financial institutions to collect this information without any discretion on their part. It is the financial institutions' obligation to identify, maintain and retain the territory in which an account holder is tax resident.

REPORTABLE INFORMATION

Under all of the agreements the following information is required from financial institutions for any person identified as holding reportable accounts:

- Name
- Address
- Taxpayer Identification Number(s) (TIN) or an equivalent
- Jurisdiction(s) to which the information is reportable (i.e. non UK tax residences)
- The account number
- The name and identifying number of the reporting financial institution

- The account balance or value as of the end of the calendar year or other appropriate period.

For the CDOT and the DAC, financial institutions must also report the date of birth of individuals and for the DAC, financial institutions may also be required to report the place of birth of individuals subject to certain requirements.

There are also additional reporting requirements depending on the type of account that is being reported on.

TAXPAYER IDENTIFICATION NUMBER

The taxpayer identification number (TIN) is the unique identifier – a combination of letters and/or numbers - assigned to the Account Holder by the tax administration in the account holder's jurisdiction of tax residence.

If a jurisdiction doesn't issue TINs, or any equivalent level of identification, then the following identifications can be used:

- Social security number
- National insurance number
- Citizen or personal identification code or number
- Resident registration number

Or for entities, a business/company registration code or number can be used.

The TIN must be collected and reported for all new accounts under each regime as applicable. However, for pre-existing accounts the TIN is only reportable to the extent that it is already held in the records maintained by the reporting financial institution or the reporting financial institution is otherwise obliged to collect it.

Where the TIN is not held in respect of pre-existing accounts the reporting financial institution must use reasonable efforts to obtain it by the end of the second calendar year following the year in which the accounts are identified as reportable accounts.

As reportable persons may be tax resident in more than one jurisdiction they may have two or more TINs that the financial institution must report.

The TIN to be reported for FATCA purposes is the US Federal Taxpayer Identification Number.

Under CDOT for Gibraltar, Guernsey and Jersey the identifier to be reported for individuals is the social security number; for the Isle of Man it is the national insurance number.

RELIANCE ON THIRD PARTIES

Reporting financial institutions may use third party service providers to fulfil some or all of their due diligence obligations under FATCA, CDOT and CRS.

For example, where an IFA has the customer relationship for introducing business to a financial institution, such as an investment bond, the IFA is often best placed to obtain the self-certification needed to carry out the due diligence process on the new account. The financial institution may rely on the IFA to obtain the self-certifications on its behalf.

However, the obligations remain the responsibility of the financial institution. Any failure by a third party service provider is treated as failure by the financial institution.

Also, where a third party runs AML/KYC processes the financial institution can rely on the report provided on the basis that the third party has relied on appropriate documentary evidence in producing the report. If the reporting financial institution doesn't hold the original documents or certified copies of them, photocopies will be acceptable provided the financial institution can obtain originals or certified copies if necessary.

SELF-CERTIFICATION

For new accounts the financial institution can rely on a self-certification made by the customer unless it knows or has reason to know that the self-certification is incorrect or unreliable, (the "reasonableness" test), which will be based on the information obtained in connection with the opening of the account, including any documentation obtained in connection with AML/KYC procedures.

Financial institutions aren't permitted to provide customers with tax advice or required to perform a legal analysis to determine the reasonableness of self-certification. Customers should be advised to seek independent tax advice should they be uncertain of their tax residency.

Participating Jurisdictions are however expected to help taxpayers determine and provide them with information with respect to their residence(s) for tax purposes. The OECD is facilitating this process through a centralised dissemination of the information on an Automatic Exchange portal: www.oecd.org/tax/transparency/automatic-exchange-of-information/automaticexchangeofinformationportal/

Financial institutions and Advisers can also direct customers towards this information.

Clients can also be directed to www.gov.uk/government/uploads/system/uploads/attachment_data/file/386413/Automatic_exchange_of_information_-_account_holders.pdf for more information.

Clients may also be looking to their financial adviser for help in dealing with additional questions raised by providers in relation to their tax residency status and in completing any relevant forms.

FUTURE INFORMATION EXCHANGE

The G20 has also committed to transparency of beneficial ownership.

One of the key outcomes of this for the UK will be a new register of trusts. Trustees of express trusts will have to disclose their status, and provide beneficial ownership information of their trusts, when acting in their capacity as a trustee. This is due to be implemented no later than 2017: www.gov.uk/government/publications/uk-g20-beneficial-ownership-implementation-plan

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