

# THE COMMON REPORTING STANDARD: JERSEY GUIDANCE NOTES UPDATE

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## OCORIAN BRIEFING

March 2016

**Further to our briefing note "The Common Reporting Standard: draft Jersey legislation released" dated November 2015 ("November Briefing Note"), the Chief Minister's Department has published draft guidance notes dated February 2016 ("Guidance Notes") which provide guidance on the implementation of the Common Reporting Standard ("CRS") in Jersey. The Guidance Notes are not intended to replace the OECD commentaries on the CRS and consequently they are not intended to provide a comprehensive set of notes covering every scenario.**

The key areas covered by the Guidance Notes which are of interest are:

- Commentary on certain provisions of the Taxation (Implementation) (International Tax Compliance) (Common Reporting Standard) (Jersey) Regulations 2015 (the "CRS Regulations");
- Comparisons between FATCA and CRS;
- The position taken by Jersey in areas where the CRS provides options for jurisdictions to implement as suited to their domestic circumstances to provide for easier implementation;
- Self-certification; and
- Administrative matters (including anti-avoidance measures and audit procedures).

Other areas covered by the Guidance Notes which we do not address in this briefing include:

- Categories of excluded accounts;
- Categories of non-reporting financial institutions;
- The jurisdictions with which Jersey will exchange information (this was covered in our November Briefing Note);
- The effective dates for the implementation of the CRS (this was also covered in our November Briefing Note);
- Information to be reported to the Taxes Office; and
- Format of reporting.

Unless defined otherwise, the defined terms in this briefing are those used in the CRS and FATCA.

This briefing assumes a working knowledge of CRS and FATCA. For anyone seeking an introduction to these reporting standards, please do not hesitate to contact us.

### **Commentary on certain provisions of the CRS Regulations**

Our November Briefing Note provided the details of the key provisions of the CRS Regulations. The Guidance Notes have not provided any in depth commentary on those provisions. In particular, the CRS Regulations allow Financial Institutions to interpret a word or definition in the CRS in the same way as under FATCA provided that such interpretation "would not frustrate the purpose" of the CRS. Unfortunately, the Guidance Notes have not clarified what "would not frustrate the purpose" means, therefore the burden falls on the Financial Institutions to decide what to do where there are differences between the CRS and FATCA. While it may be desirable to have a degree of flexibility, it is somewhat "grey" as to whether an interpretation that leads to non-reporting might be considered to

be "frustrating the purpose" of the CRS. Bedell has sought clarification on this point.

### Comparisons between FATCA and CRS

This section of the Guidance Notes should provide great relief for many as much of the industry specific guidance which was included in the FATCA guidance notes is stated to apply to the CRS, provided that the purposes of the CRS are not frustrated. The specific areas referred to are:

- Definitions of resident for tax purposes, investment entity and nominee companies;
- Treatment of Jersey trusts;
- Treatment of employee benefit trusts;
- Duplicate reporting where there are multiple financial institutions; and
- Treatment of pension schemes.

The definition of equity or debt interests regularly traded on an established securities market has not been carried through to the CRS which means that listed fund vehicles will now need to review the Account Holders (i.e. the investors) to determine if they are reportable.

### The CRS options

It is stated in the Guidance Notes that the CRS provides options in a number of areas for jurisdictions to tailor their implementation of the standard to suit their domestic circumstances in order to provide for easier implementation. The Jersey position largely mirrors that taken by the UK. A summary of the CRS options and the Jersey position is set out below.

#### Alternative approach to calculating account

**balances:** Jersey Financial Institutions are required to report the account balance as of the end of the calendar year or reporting period, as Jersey does not allow Financial Institutions to provide for the reporting of average balances or value during the calendar year or other reporting period.

**Use of other reporting period:** Jersey requires reporting to be done on a calendar year basis as is done for FATCA.

#### Phasing in the requirement to report gross

**proceeds:** Jersey does not allow Financial Institutions to phase in the reporting of gross proceeds for the sale or redemption of financial assets because Jersey Financial Institutions have already commenced reporting under FATCA from

2016; therefore they should not need additional time to implement systems and procedures for this purpose.

**Filing of nil returns:** Jersey will not require the filing of nil returns in line with the position under FATCA. Allowing third party service providers to fulfil the obligations on behalf of the Financial Institutions: Jersey will allow Financial Institutions to use service providers to fulfil due diligence and reporting obligations. This is consistent with FATCA. However, the concept of a sponsoring entity, which is available under FATCA, is not available under the CRS.

#### Allowing the due diligence procedures for New Accounts to be used for Pre-existing Accounts:

Jersey allows Financial Institutions to apply the due diligence procedures for New Accounts to Pre-existing Accounts in order to streamline their due diligence procedures.

#### Allowing the due diligence procedures for High Value Accounts to be used for Lower Value

**Accounts:** Jersey allows Financial Institutions to apply due diligence procedures for High Value Accounts to Lower Value Accounts.

#### Residence address test for Lower Value Accounts:

Jersey will allow Financial Institutions to determine an Account Holder's residence based on the residence address provided by the Account Holder so long as the address is current and based on documentary evidence.

#### Optional Exclusion from Due Diligence for Pre-existing Entity Accounts of less than \$250,000:

Jersey will allow Financial Institutions to exclude from their due diligence procedures Pre-existing Entity Accounts with an aggregate account balance or value of \$250,000 or less as of a specified date.

The CRS does not allow any de-minimis threshold to be applied in respect of Pre-existing Individual Accounts. However, on the basis that the CRS does not replace US FATCA, the threshold for Pre-existing Individual Accounts can continue to apply under US FATCA.

**Alternative documentation procedure for certain employer-sponsored group insurance contracts or annuity contracts:** Jersey allows Financial Institutions to treat group cash value insurance contracts or annuity contracts issued to an employer or individual employees as not reportable until the date on which an amount is payable to an employee/certificate holder or beneficiary.

**Allowing Financial Institutions to make use of existing standardised industry coding systems for due diligence process:** Jersey allows Financial Institutions to rely on the standard industry code contained in their records for the due diligence process, therefore making it easier to identify types of account holders.

**Currency translation:** Jersey allows Financial Institutions to either report in US dollars or equivalent amounts in other currencies.

**Expanded definition of Pre-existing Account:** Jersey allows Financial Institutions to treat certain New Accounts held by existing customers as a Pre-existing Account for due diligence purposes.

**Expanded definition of Related Entity:** Most funds will likely not qualify as a Related Entity of another fund and will not be able to apply certain flexibilities which are available under FATCA with regard to Related Entities under the CRS. Jersey has expanded the definition of Related Entity in respect of funds in certain circumstances.

**Grandfathering rule for bearer shares issued by Exempt Collective Investment Vehicle:** This option is not considered to be applicable, but if it is, it would be offered.

**Reporting obligation on a beneficiary of a discretionary trust treated as a Passive NFE:** In respect of trusts that are Passive Non-Foreign Entities, Jersey allows Financial Institutions to align the scope of beneficiaries of a trust, who are treated as Controlling Persons of that trust, with the scope of the beneficiaries who are treated as Reportable Persons of a trust that is a Financial Institution. In such cases, a Financial Institution would only need to report discretionary beneficiaries as Controlling Persons in the year they receive distributions from the Passive NFE trust.

**Transitional challenge resulting from staggered adoption of CRS:** Under the CRS, Reporting Financial Institutions must treat an account that is held by an Investment Entity which is not from a Participating Jurisdiction as a Passive NFE and therefore report on the Controlling Persons of such entity who are Reportable Persons. This presents operational difficulties as Financial Institutions will need to manage entity account classifications on a jurisdiction by jurisdiction basis. Jersey allows Financial Institutions to treat any Investment Entity in a Schedule 3 jurisdiction (i.e. jurisdictions which have committed to start exchanging information in 2017) as a Financial Institution and not as a Passive NFE. This means that Financial Institutions will not be required to apply the due diligence procedures for determining Controlling Persons of such Investment Entities or for determining whether such Controlling Persons are Reportable Persons.

### Self-Certification

Where it is not possible for a Financial Institution to obtain a valid self-certification on "day 1" of the account opening process, it is expected that the Financial Institution must obtain a valid certificate as quickly as possible, in any event, no later than 90 days after the account has been opened. If the Account Holder fails to respond, the Financial Institution must report such account as an undocumented account until such time as a valid certificate is received.

Financial Institutions with a disproportionate number of reported undocumented accounts may be subject to a compliance review from the Comptroller of Taxes, once the regime has been developed.

### Prevention of avoidance

The Regulations include an anti-avoidance measure which is aimed at "arrangements" taken by any person to avoid their reporting obligations under the CRS. The Guidance Notes provide that "arrangements" will be interpreted widely. If an "arrangement" were found to exist, the Regulations will apply as if the arrangement had not been entered into.

### Audit procedures

The Comptroller of Taxes will be introducing procedures to audit the effective implementation of the Regulations. Details of these procedures will be published in due course.

### Next steps

Jersey is an early adopter of the CRS. Therefore, the first reporting period for Jersey Financial Institutions has already commenced; the commencement date being 1 January 2016. Jersey Financial Institutions will need to file their first CRS return by 30 June 2017.

The Guidance Notes go some way to identify the key areas of difference between the CRS and FATCA so far as CRS applies in Jersey but they do not identify all such areas. Given that there are differences between CRS and FATCA (some of which are not touched on in the Guidance Notes), Jersey Financial Institutions should review their current systems and procedures and take appropriate advice to ensure that they are adequate for the purposes of the CRS as well as their continuing obligations under US FATCA.

Further, where Financial Institutions use third party service providers, they should have agreements in place to document the relationship. Existing agreements which have been put in place for FATCA may no longer be suitable and should therefore be reviewed, particularly noting that the concept of a sponsoring entity is not available under the CRS as explained above.

We mentioned in our November Briefing Note that the alternative reporting regime which is available under UK FATCA will fall away from 1 January 2016. No transitional guidance has been provided on this issue. However, Financial Institutions which offer the ARR should be mindful that there may be reporting obligations commencing from 1 January 2016 in respect of those persons who have elected to apply the ARR in respect of the 2015 reporting year (which covers the period from 6 April 2015 to 5 April 2016).

## KEY CONTACTS

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