

## Irish Revenue issues updated FATCA guidance

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On 7 February 2014, Irish Revenue published updated draft [Guidance Notes on the Implementation of FATCA in Ireland](#) ("draft Irish Guidance Notes" or "updated draft Guidance") (dated 16 January 2014) on the Department of Finance website. The updated draft Guidance was issued in connection with the terms of the intergovernmental agreement that [Ireland entered into with the United States on 21 December 2012](#) ("Irish IGA") which provides for the automatic reporting and exchange of information on an annual basis in relation to accounts held in Irish Financial Institutions by U.S. persons, and the reciprocal exchange of information regarding U.S. financial accounts held by Irish residents. The updated draft Guidance issued this month supersedes the previous draft Guidance Notes issued in May 2013.

Provided Irish resident financial institutions (including subsidiaries and branches of non-resident financial institutions that are located in Ireland) comply with Irish Regulations, when effective, they will not be subject to FATCA withholding tax under the US Internal Revenue Code.

This tax alert identifies certain additions and key changes from the previous draft Irish Guidance issued by Revenue in May 2013. Revenue will accept observations and comments on this updated FATCA Guidance draft document up to Friday the 21st May 2014.

### Key Changes from the Previous Draft Irish Guidance

#### 1. Revised timeline for implementation

The updated draft Guidance incorporates the changes announced in [IRS Notice 2013-43](#) in July 2013, which revised the timeline for implementation of the FATCA requirements, generally delaying the implementation of FATCA by six months. As a result, the implementation dates contained in the updated draft Guidance have been re-aligned with the implementation dates contained in the final U.S. Treasury Regulations and Model IGAs. The revised dates will also carry forward to the Irish Regulations.



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## 2. Definition of Financial Institution

The definition of Financial Institution in the updated draft Guidance broadly remains the same in that Financial Institutions are defined as comprising custodial institutions, depository institutions, investment entities, and specified insurance companies. There is one significant new addition to the guidance on investment entities. Revenue will not regard an entity, carrying on activities within the investment entity definition, as an investment entity if its gross income over the previous three calendar years from these activities is less than 50 per cent of its total gross income.

While the updated draft Guidance does not contain any other major departures from the previous definition of Financial Institution, the updated draft Guidance provides further clarification as to what type(s) of entities may fall within the definition of a Financial Institution. These clarifications include:

- ▶ Custodial Institutions
  - ▶ Insurance brokers should not fall within the definition of a custodial institution because they do not generally hold assets on behalf of clients.
  
- ▶ Depository Institutions
  - ▶ Entities that issue payment cards that can be pre-loaded with more than \$50,000 will be considered depository institutions.
  - ▶ Entities that accept deposits solely as collateral or security will *not* be depository institutions.
  - ▶ Entities instructing agents to transmit funds (but not financing the transfers) should not be considered to be engaged in banking or similar business, as this is not seen as accepting deposits.
  
- ▶ Investment Entities
  - ▶ When an investment fund is closed but recovery actions are being pursued, the fund will *not* be an investment entity.
  - ▶ A trust will be an investment entity where the trust or trustee engages another financial institution to manage the trust or financial assets on its behalf.
  
- ▶ Specified Insurance Companies
  - ▶ Both draft Guidance Notes provide that a holding company of a Specified Insurance Company would be an FI; but the updated draft Guidance provides that the holding company will only be a Specified Insurance Company if it issues or is obligated to make payments with respect to cash value insurance contracts (which the updated Guidance states would be unlikely).
  - ▶ Insurance brokers should *not* be classified as a Specified Insurance Company.
  - ▶ The I-E tax regime for domestic life companies has been designated as a withholding regime. This should mean that domestic life companies should be able to scope out all of their back books relating to individuals if the life company is not licensed to sell in the US and is not registered with the SEC.

Unlike the UK Regulations and Guidance, the Irish Regulations and updated draft Irish Guidance do not specifically include any holding companies or treasury companies within the scope of a Financial Institution.

The draft Guidance Notes make mention of securitisation vehicles and imply that at least some securitisation vehicles will be FIs (presumably as Investment Entities).

### **3. Financial Accounts**

The definition of Financial Account remains essentially the same under the updated draft Guidance and includes: depository accounts, custodial accounts, cash value insurance contracts, annuity contracts, and equity and debt interests in an investment entity. The updated draft Guidance clarifies that:

- ▶ The definition of Financial Account does not include shareholdings on an issuer's share register or debenture/loan stock holdings (including shareholdings which have been the subject of an acquisition, as a result of which the original share register no longer exists). However, shareholdings and loan/debenture stock holdings can be "financial instruments/contracts" and are reportable if held in a custodial account.
- ▶ Where an FI is acting as an executing broker, and simply executing trading transactions, or receiving and transmitting such instructions to another executing broker, the FI will not be required to treat the facilities established for purposes of executing a trading transaction or receiving and transmitting such instructions, as a financial account. The FI acting as custodian will be responsible for performing due diligence procedures and reporting when necessary.

### **4. Reporting responsibilities**

The updated draft Guidance provides more detail concerning where reporting responsibilities lie when certain securities settlement systems are involved.

Reporting responsibility where securities are held in a Central Securities Depository:

- ▶ Members of CREST securities settlement system operated by Euroclear Ireland & Ireland Limited (EUI), or the financial institution that can access EUI on their behalf, are responsible for reporting in respect of the securities held by means of EUI. EUI is not required to undertake any reporting in respect of the securities, though EUI may report on behalf of its members as a third-party service provider, in which case the obligations still remain the responsibility of the Financial Institutions.

Specific examples on how reporting within sponsoring groups may work are provided.

In the event financial accounts are acquired pursuant to a merger, FATCA status of accounts can be relied upon for six months provided the predecessor has met its due diligence requirements. Special rules apply to the documentation of new accounts on a merger of Investment Entities. Where both funds are sponsored Irish funds with the same Irish sponsor, no new accounts are created. Where both funds are not with the same sponsor, but are fully complaint financial institutions, the surviving fund may use the same account classification as the merging fund until there is a change of circumstance, otherwise the surviving fund will need to undertake account identification procedures on the new accounts.

## 5. Reporting

Irish Financial Institutions must submit the required reports on account holders to Irish Revenue on or before 30 June each year. The updated draft Guidance now specifies that the first year in respect of which any information may be reportable is 2014, instead of 2013 in the previous draft Guidance. It also confirms that Irish Financial Institutions with no reportable accounts will still be required to submit a nil return to Revenue.

The updated draft Guidance provides clarifications with respect to reporting on accounts closed during the calendar year. The updated draft Guidance specifies that for accounts closed during the calendar year, the account balance or value to be reported is the balance or value of the account on the day the account is closed. This is now consistent with the IGA (Article 2.2(4)). The previous draft Guidance provided that where an account is closed during the year, the account balance or value to be reported is the highest amount of the account balance or value in the year of closure.

Irish Revenue has not yet finalised the format or manner in which the returns should be submitted to it.

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