

FATCA Alert

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Irish Revenue releases updated Guidance Notes on the Implementation of FATCA in Ireland

A further significant FATCA milestone was reached on 1 October 2014, when Irish Revenue published the first non-draft edition of their Guidance Notes on the Implementation of FATCA in Ireland ("Guidance Notes"), superseding the last draft version of 16 January 2014. The notes are available at:

<http://www.revenue.ie/en/business/aeoi/index.html>

Notwithstanding that the "draft" designation has been removed, the Guidance is expected to be amended further from time to time, as additional queries and clarifications will inevitably arise from ongoing implementation. This would mirror the approach adopted by HMRC in the UK, where full updates of the initial Guidance from August 2013 were published in February and August 2014.

Current status of FATCA obligations

FATCA came into effect on 1 July 2014, with due diligence required on new financial accounts from that date onwards. The first annual report to Revenue under FATCA, in relation to 2014, is due to be submitted by 30 June 2015. In addition, financial institutions are beginning to deal with the mandatory due diligence on financial accounts maintained at 30 June 2014 ("pre-existing accounts"). This due diligence must be completed by 30 June 2015 for high value individual accounts and by 30 June 2016 for all others.



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The Guidance Notes

This tax alert discusses the most significant changes in the new Guidance Notes from the last draft released in January 2014.

Two New Categories of Financial Institutions

Consistent with changes in the Regulations finalised in late June, the Guidance includes comment on two new categories of Financial Institution: **Relevant Holding Company** and **Relevant Treasury Company**. Also covered for this purpose is the definition of a Financial Group, which is a group of entities that includes at least one Custodial Institution, Depository Institution, Investment Entity, or Specified Insurance Company.

The Guidance does not modify in any way the impact of the Regulations in relation to these new types of FI. In summary, Relevant Holding Companies and Relevant Treasury Companies that are members of a Financial Group or provide services to, or are related to, an Investment Entity, will be Financial Institutions within scope of FATCA (with limited exceptions in the case of Relevant Holding Companies).

The addition of these two categories brings the definition of a Financial Institution in Ireland in line with major jurisdictions such as the US and UK. However it now differs in this respect from many other IGA jurisdictions that have not expanded their categories of Financial Institution as yet.

Investment Managers and Advisers

Similar to the updates in the US regulations and UK Guidance notes, Investment Managers and Investment Advisers now receive beneficial treatment under the Guidance Notes. Where they manage or administer customers' funds they will be a Deemed Compliant Financial Institution on condition that the customer's assets are deposited in the customer's name with another Financial Institution. Investment Advisers that solely render investment advice and do not manage or administer customers' funds or maintain financial accounts are likely to be treated as a Non-Financial Foreign Entity.

Placing Agents

The Guidance Notes confirm that where a placing agent holds shares/cash as a nominee for an underlying investor for a short period (2 - 3 days), such accounts will not be considered Financial Accounts subject to various conditions.

Debt or Equity Interests in Investment Vehicles - "Regularly Traded" Condition

Generally, a debt/equity interest in an Investment Entity will be considered a Financial Account except for a debt/equity interest that is "regularly traded on an established securities market". In the last draft Guidance Notes, it was stated that where a debt/equity was listed on a recognised stock exchange, it would be considered "regularly traded" and there would be no need to check annually if any transactions were undertaken. (No concession would be made however where the securities were listed solely to avoid FATCA reporting.)

The updated Guidance Notes tighten the conditions to be met to be considered as "regularly traded" and state that should the debt/equity be "listed solely for regulatory or similar purposes where there is clearly no intention to trade", the debt/equity would not be considered "regularly traded" and therefore should be considered a Financial Account.

Securitisation Vehicles

The Guidance includes commentary on the "Limited Life Debt Investment Entity" category of Deemed Compliant Financial Institution, encompassing the definition of this category as expanded in the US Treasury Regulations in early 2014. Notwithstanding this expansion, many Irish securitisation vehicles may find difficulty in meeting clearly all conditions to fall within this category.

Additional Comments on Funds as Investment Entities

The section discussing Investment Entities has been expanded providing further comment on a number of topics including the following:

- ▶ Confirmation that an umbrella fund and its sub-funds may register and report at either the umbrella fund level or at the sub-fund level.
- ▶ Investment Limited Partnerships and Common Contractual Funds should be regarded as Investment Entities.

Transfer Agents in respect of Irish Funds

Transfer Agents that are appointed as a FATCA service provider for multiple Irish collective investment schemes are no longer required to obtain due diligence documentation for multiple accounts that are held by the same investor relating to Irish funds. Care should be exercised by transfer agents who act on behalf of both Irish and non-Irish funds, as Irish Revenue would not be in a position to grant concessions in relation to FATCA compliance obligations of non-Irish funds.

Reporting Process

A number of practical areas in terms of reporting of information to Revenue have been clarified, including:

- ▶ The Guidance Notes provide a link to the IRS schema which identifies the format of the return. No specific FATCA registration with Irish Revenue is required. All filings can be carried out via the company's Revenue Online Service (ROS) upload facility using existing tax reference numbers.
- ▶ The Draft Guidance Notes suggested that in cases of difficulty with information quality, the IRS would contact the Reporting Financial Institution directly for clarification. The Guidance Notes now provide that this will not be the case and that contact will be from Irish Revenue, if required.

Validity of Documentation

The Guidance now helpfully states that all documentary evidence, including self-certifications, will remain valid until a change in the Account Holder's status arising from a change in circumstances or knowledge.

Controlling Persons of a Passive Non-Financial Foreign Entity

It is confirmed that the identification of Controlling Persons of a Passive NFFE must be carried out through the Anti-Money Laundering process required under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

Responsible Officers in Ireland

The updated Guidance Notes also provide clarity on the obligations of FATCA Responsible Officers in Ireland. The US regulations, applicable for non-IGA country Financial Institutions, lay out certain requirements for Responsible Officers that include making periodic certifications to the IRS. The Guidance notes clarify that in Ireland and other Model 1 IGA jurisdictions, the Responsible Officer is only used for the purpose of registering with the IRS to obtain a Global Intermediary Identification Number and to authorise one or more Points of Contact. In Ireland the "Responsible Officer" will not have the same obligations as a Responsible Officer described in the US Regulations.

Other Updates

Finally, a number of other updates have been included in the Guidance Notes. These include:

- ▶ A description of what Revenue consider to be "Passive Income" for the purposes of assessing status as an Active or Passive NFFE.
- ▶ The concept of Direct Reporting NFFE, previously seen in the US regulations has been included. This permits controlling persons of Passive NFFE's to report their details directly to the IRS rather than to the relevant Financial Institution.
- ▶ Details of the information to be reported for Cash Value Insurance contracts have been clarified. The account value to be reported is the policy's surrender value, while for 2015 onwards, part surrenders taken during the year must also be reported.
- ▶ Credit card accounts will not be considered as Financial Accounts if the customer is prevented from holding a credit balance of more than \$50,000 other than on a short-term temporary basis.

Looking forward

Following the entry into force, on 1 July 2014, of the first FATCA obligations (new account due diligence), it was important that Revenue would reflect the wide range of developments and issues since the turn of the year, in an update to the Guidance. As stated above, it is to be expected that further clarifications and fact patterns will have to be covered in future updates to the Guidance, especially as new issues are identified in implementation of reporting and pre-existing customer due diligence obligations.

Ireland is expected to sign up to the first OECD Common Reporting Standard (CRS) agreements with a number of other early adopter countries in a matter of weeks, with those obligations set to commence on 1 January 2016. With this in mind, it is even more important that financial institutions digest fully Irish Revenue's FATCA Guidance and move rapidly to complete implementation of the remaining FATCA obligations.

EY FATCA Support for Financial Institutions

1. Legal entity analysis for FATCA classification.
2. Registration services.
3. Preparation and review of business requirements documents, procedures and IT process documentation to ensure FATCA compliance.
4. Assistance with pre-existing customer due diligence.
5. Assistance with building and testing reporting processes to ensure reporting is ready to be submitted by June 2015.
6. FATCA self-certification/Form W-8BEN-E preparation.
7. FATCA vs CRS comparison gap analysis and program coordination tools.
8. Training for internal stakeholders and/or relationship managers on how to answer FATCA queries and eLearning modules for continued training.

Please get in touch with EY's FATCA contacts (see page 1) or your usual EY contact for any further information or assistance.

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