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New AEoI Guidance

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Introduction

On 19 September 2015, HMRC released an informal consultation on the guidance notes for automatic exchange of financial account information (AEoI guidance). These guidance notes are designed to assist Financial Institutions with their implementation of the Common Reporting Standard (CRS) and the Directive on Administrative Cooperation (DAC) and also highlights differences in the approach between the DAC, FATCA and the Crown Dependencies and Overseas Territories (CDOT) reporting regimes. HMRC has made it clear that it welcomes comments on these guidance notes, and therefore further amendments are to be expected, although the frequency of these updates is unclear.

It is worth noting that, on the same day, HMRC also released an updated version of their guidance for the FATCA and the CDOT regimes, by integrating the updates into the new AEoI guidance. A table of destinations of which parts of the guidance notes can now be found in the new AEoI guidance is available at the end of the guidance notes. There are "updated" FATCA and CDOT guidance notes which are the previous guidance not incorporated into the AEoI guidance.

Before going into detail of the CRS and DAC implementation rules, HMRC clarified two points:

Legislation governing the UK Financial Institution's obligations

HMRC reminds industry that the DAC implements the CRS in Europe and therefore it is the DAC which governs the obligations imposed on Reporting Financial Institutions in the UK. However, the OECD Commentaries on the Model Competent Authority Agreement and CRS would apply as a primary source of interpretation for the DAC. The new guidance is secondary to the OECD Commentary which deals with any UK specific areas where the CRS allows for a degree of optionality.

HMRC clarifies that going forward all the UK's obligations in the AEoI areas will be under the CRS or the DAC. This guidance states that the CDOT regimes "will be relatively short-lived" but does not confirm whether there will be duplicate reporting or not.

Wider approach: information to be gathered and retained on all Account Holders

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HMRC reiterated their view that Industry can use the wider approach and confirms that the 2015 Statutory Instrument permits Financial Institutions to gather information on the tax residency of Account Holders irrespective of whether or not that Account Holder is a Reportable Person and to retain that information for 6 years. Further, HMRC have considered that the 2015 Statutory Instrument provides the necessary data protection cover for Financial Institutions to comply with those obligations. This is designed to remove any doubt around the use of the wider approach in the UK.

A few additional points should be noted as regard the rules implementing the DAC and the CRS:

Managed Investment Entities

The 2015 Statutory Instrument on AEoI amended the definition of UK Financial Institutions by removing the Relevant Holding Company and Treasury Centre definition which could have had a number of practical implications for industry. HMRC addressed most of these concerns in the May 2015 update on Holding Companies and Treasury Centres.

However, there was still ambiguity in the industry (especially for groups owned by Private Equity Funds) as to whether a Holding Company was an Investment Entity or not. This guidance clarifies that an entity is not regarded as managed by a Financial Institution (such as a Private Equity Fund) if that Financial Institution does not have discretionary authority to manage the entity's assets either in whole or in part. This clarifies that ownership of an entity is not the same as control of the assets and may result in a reduction in the number of Financial Institutions in the UK.

TIN not required for domestic Account Holders

It is noted that TIN and date of birth are not required to be collected where it has been established that the Account Holder is only a UK Tax resident. In such circumstance only the name, the residence address and the jurisdiction of tax residence has to be collected.

Self-certification at account opening

The guidance clarifies that HMRC expect a self-certification can be collected at the time of account opening. It is only in exceptional circumstances, where obtaining a self-certification is not possible or practical on 'day one' of the account opening process, that the Financial Institution has 90 days to obtain the self-certification. The question remains now to determine what circumstances would qualify as exceptional? HMRC provide two examples, the case of insurance contracts assigned from one person to another and the case of an investor who acquires shares in an investment trust on the secondary market. Essentially it is expected that the self-certification will be embedded into the application form/process and only complete forms will result in an account being opened.

Clarification of the consequences of not obtaining a completed self-certification would have been welcomed. It is assumed that the account will be reported for the Jurisdictions where indicia have been identified as closure of the account (as

suggested by the CRS) is not always feasible. As a result, it is recommended for the Financial Institutions to provide incentive and ensure controls and procedures are in place to obtain tax residency information prior to divestment from the account (or perhaps crediting of interest on bank accounts). This may require appropriate amendment to terms and conditions.

Limitation to report place of birth

The guidance clarifies that the place of birth is only reportable where the Reporting Financial Institution is:

- currently reporting the place of birth information to HMRC under the EU Savings Directive; and
- if it is available in the electronically searchable data maintained by the Reporting Financial Institution.

This means place of birth will not be reportable for new CRS accounts after the EUSD is repealed, although it will remain reportable for Financial Accounts opened prior to the repeal of the EUSD. Also, thought will have to be given as to where this information is stored when data is extracted for reporting purposes as it may be in the client records for other purposes (such as security) but doesn't need to be extracted for reporting purposes.

Date of birth

Again, there is a similar data extraction for reporting purposes for date of birth as it must be collected for new accounts, but is only reportable for Pre-existing Accounts, i.e. held prior to 1 January 2016.

List of reportable Jurisdiction

The new guidance contains the current list of the Reportable Jurisdictions which mainly includes the EU Member States and Switzerland. This list is relatively small compared to the 60+ jurisdictions which have signed the multilateral competent authority agreement to automatically exchange information.

This means that although the Financial Institution can record the tax residency there should be a means to only extract from the records specific Account Holders, therefore a flag that makes Jurisdictions reportable or not would be a good addition to the IT system if the system has the capability.

CDOT Reporting

It is noted that the expected Tax Identifier Numbers to be reported for individuals in Guernsey, Jersey, Gibraltar and the Isle of Man have been included in the guidance. The guidance is silent on whether one report is required for each year or whether the information can be included in one file. This should be resolved when the CDOT schema becomes available, however, it is not clear when that will be.

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