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Guernsey CRS Reporting on Protectors

JUNE 2017

In the last few weeks, as the first reporting deadline gets closer, we have been seeing a number of Guernsey trustees seeking advice on their obligations under the Organisation for Economic Cooperation and Development (OECD) Common Reporting Standard (CRS) to report on protectors of trusts administered and managed by them.

Concerns have arisen where a protector who is to be reported on has questioned the trustee's decision to report on them, citing reasons such as breach of data protection obligations or duties of confidentiality, or the protector's lack of economic interest in the trust or their limited powers.

This is a complex subject and still relatively new, with Guernsey being an early adopter of the CRS and reporting starting on 30 June 2017. One of the issues with "going first" is that there are no examples of how tax authorities or courts will treat breaches of the reporting requirements, particularly in circumstances where an individual challenges the reporting institution's decision to report on them.

Guernsey law position

Guernsey has enacted its own legislation which gives effect to the CRS under domestic law. The Guernsey reporting regime reflects the CRS and requires reporting on protectors of trusts, irrespective of their level of control over the trust or economic interest in the trust.

In addition, in accordance with the Guernsey legislation and supporting guidance, Guernsey reporting institutions are required to take into account, and the Guernsey authorities are likely to follow, the position adopted by the OECD in respect of protectors, which also requires them to be reported on.

The Guernsey legislation and guidance (as with the CRS and guidance issued by the OECD) does not include any definition of "protector" and does not take into account the facts that protectors do not usually have any economic interest in the trust and have varying levels of control. This leaves room for debate as to the appropriateness of reporting on protectors and whether the CRS was really intended to extend to all types of protectors (when its forerunner, FATCA, did not).

This issue is not unique to Guernsey and will be faced by other jurisdictions with sophisticated trust industries. The Society of Trust and Estate Practitioners (STEP) has already raised the concerns with the OECD but, to date, to no avail.

Consequences of a breach

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A breach of the reporting requirements under the Guernsey CRS legislation (for example, failing to report on a reportable person) without "reasonable excuse" is a criminal offence punishable by imprisonment and/or a fine.

Failing to report or reporting incorrectly or incompletely may also carry with it an additional civil penalty (a fine) and fraudulent or dishonest reporting may carry with it criminal penalties (imprisonment and/or a fine).

The risks for trustees in getting it wrong and not reporting in accordance with their obligations are therefore potentially severe and, except potentially in extreme circumstances, unlikely to be risks most trustees are willing to take.

Unless and until the OECD changes its position in respect of protectors and/or the Guernsey legislation (and supporting guidance) is revised, our advice is that the prudent approach is to report on all protectors (and protector committee members).

Any action other than following the Guernsey CRS legislation and guidance, and the guidance issued by the OECD, to the letter will carry some risk. It may be the case that for some trust relationships, depending on factors such as the commercial value of the relationship and a very persuasive argument not to report, trust companies will be willing to accept the risks and test a particular course of action, although we would strongly urge any trustee considering not reporting to take legal advice first.

It is possible that, if there is enough resistance from within the industry and Guernsey trustees find that they are losing business as a result of reporting on all protectors, the Director of Income Tax in Guernsey may provide further guidance on the obligation to report on protectors, although there is a risk that such guidance reinforces the OECD's position.

It is our hope that, following the first reporting by the early adopters (and perhaps further pressure from STEP and other interested parties), when perhaps a case can be made that reporting on all protectors is disproportionate to achieving the objectives behind the CRS, the OECD will review its own position and issue further guidance.

We would be happy to provide advice where trustees require specific guidance on particular cases.

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