COLLAS CRILL

CRS reporting in Guernsey: Exemptions for pensions

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The pensions industry makes up a significant part of the island's financial sector, with many experienced providers offering a broad range of products, from domestic occupational pension schemes and personal pension schemes to international pension schemes for non-residents.

What happened on 30 June 2017?

This was an important date for pension providers in Guernsey for two reasons. To begin with, a new regulatory and supervisory set of rules for pension and gratuity schemes was introduced and it was the first reporting deadline under the Organisation for Economic Co-operation and Development's Common Reporting Standard (CRS). This was by no means a coincidence; the two are closely linked – CRS offers certain exemptions for regulated pension and retirement products and, given that Guernsey pension and gratuity schemes are now regulated, they may qualify for an exemption. If a scheme qualifies for an exemption, it is not required to comply with the 'due diligence' and reporting requirements that CRS normally imposes on it. However, many providers do not realise that regulated schemes are not automatically exempted from reporting under CRS – a scheme's regulatory status is only one of a number of criteria that dictates whether a scheme qualifies for one of the exemptions.

The new pension and gratuity scheme rules

On 30 June, the Guernsey Financial Services Commission (GFSC) issued the *Pension Licensees (Conduct of Business) & Domestic and International Pension Scheme and Gratuity Scheme Rules 2017*. The rules apply to all Guernsey fiduciary licensees carrying out pension or gratuity scheme business and the schemes that they form, manage or administer. The introduction of the rules followed an amendment made the same day to the legislation regulating fiduciary licensees (the *Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law 2000* (as amended)) to extend the list of regulated activities covered by the legislation to include the formation, management or administration of pension schemes or gratuity schemes, and the provision of advice in relation to the formation, management or administration of such schemes.

Under the new regime, a fiduciary licensee who wishes to carry out pension or gratuity scheme business must register with the GFSC by 31 July this year. Having done so, he/it must comply with the rules (although a transitional period applies to give licensees the chance to update policies and procedures in line with the new

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regime). Pension and gratuity schemes formed, administered and managed by licensees must then themselves be registered with the GFSC and need to comply with the rules.

The new set of rules is an opportunity for practitioners to keep up to date with recognised best international practice and expectations, improve Guernsey's competitive position, protect consumers more thoroughly from sharp practice and their own inexperience and bring Guernsey pensions under the aegis of certain exemptions applicable to pension schemes under CRS as it applies to Guernsey.

Guernsey's CRS legislation

Guernsey has issued regulations to enshrine CRS in its law. The *Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) Regulations 2015*, which were made under the *Income Tax (Guernsey) Law 1975* (as amended), came into force in Guernsey on 1 December 2015.

The regulations apply to all reporting financial institutions (RFIs) in Guernsey and, subject to certain optional approaches taken locally in accordance with CRS, mirror the reporting requirements set out in CRS. Each RFI must, in respect of the calendar year of 2016 and every following calendar year, comply with the 'due diligence' requirements imposed by, and provide the information required by CRS as it applies in Guernsey, as set out in Schedule 2 to the regulations (General Reporting Requirements), to the Director of Income Tax in Guernsey.

Each RFI must report the details of each reportable person or entity listed as an account holder of a reportable account of that RFI.

Exemptions for pensions - not that simple

The timing of the introduction of the new Guernsey pensions regime was significant as it coincided with the first reporting deadline for the CRS in Guernsey. People expected that, by introducing a regulatory and supervisory regime for pension business and pension schemes in Guernsey, providers would be able to rely on an exemption from the CRS reporting requirements which the regulations make available to regulated pension schemes.

However, the relevant exemptions are not that simple and require detailed analysis to understand their reach and effect.

There are two ways in which pension and other retirement schemes may be exempt:

- When the scheme is a non-reporting financial institution, which may apply to certain domestic and international occupational and personal pension schemes approved by the Director of Income Tax in Guernsey (which is a significant amount of the pension business in Guernsey) or
- When the account in question is a so-called exempt account, which ought to be relevant to those schemes that have not sought "tax approval" in Guernsey but which, nonetheless, are formed, managed or administered by Guernsey licensees

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Both types of exemption are subject to a number of criteria, all of which must be fulfilled in order for the exemption to apply.

Exemption 1: non-reporting financial institutions

An exemption may apply if the pension scheme is a financial institution itself. If a trust is a financial institution it is most likely to be an investment entity but it may be a custodial institution instead. A pension trust scheme may be an investment entity if its gross income comes mainly from investing, reinvesting or trading in financial assets and it is managed by another financial institution (e.g. if one or more of its trustees is a financial institution or the trustee has appointed a discretionary fund manager which is a financial institution in its own right).

Only RFIs are required to report information under the regulations and, rather obviously, non-reporting financial institutions cannot be counted as RFIs. Pension and retirement schemes regulated in Guernsey may be classified as non-reporting financial institutions if they meet the criteria set out in the rules for either a 'Broad Participation Retirement Fund' or a 'Narrow Participation Retirement Fund'. Helpfully, the Director of Income Tax in Guernsey has confirmed, by way of Bulletin 2017/5 which he issued in accordance with the regulations, that a scheme approved under the Income Tax Law that meets ALL of the relevant criteria and complies with any relevant OECD guidance need not be considered a RFI for the purposes of the CRS for the 2016 period and so will not be required to report information in accordance with the CRS.

The types of scheme that may be able to rely on this exemption are:

- Local occupational pension schemes approved under *section 150 Income Tax Law*
  International occupational or personal pension schemes which have opted to seek approval under *section 154A Income Tax Law*
- Retirement annuity contract schemes and retirement annuity trust schemes (including QNUPS) approved under *section 157A Income Tax Law*

The criteria with which these types of approved scheme must comply in order to take advantage of the exemption are as follows.

Broad Participation Retirement Fund

A fund established to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries who are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, as long as the fund:

Does not have a single beneficiary with a right to more than 5% of the fund's assets
Is subject to government regulation and provides information reporting to the tax authorities
Satisfies at least one of the following requirements

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(a) the fund is generally exempt from tax on investment income, or taxation of such income is deferred or taxed at a reduced rate, due to its status as a retirement or pension plan; (b) the fund receives at least 50% of all its contributions (other than transfers of assets from other Broad Participation Retirement Funds, Narrow Participation Retirement Funds, pension funds of government entities, international organisations or central banks and retirement and pension accounts that are excluded accounts) from the sponsoring employers; (c) distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (except rollover distributions to other Broad Participation Retirement Funds, Narrow Participation Retirement Funds, pension funds of government entities, international organisations or central banks and retirement and pension accounts that are Excluded Accounts), or penalties apply to distributions or withdrawals made before such specified events; or (d) contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to the earned income of the employee or may not exceed $50,000 annually, applying certain rules set out in the regulations for account aggregation and currency translation.

Narrow Participation Retirement Fund

A fund established to provide retirement, disability, or death benefits to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that:

- The fund has fewer than 50 participants
- The fund is sponsored by one or more employers that are not investment entities or passive NFEs
- The employee and employer contributions to the fund (other than transfers of assets from retirement and pension accounts that are excluded accounts) are limited by reference to the earned income and compensation of the employee, respectively
- Participants that are not residents of the jurisdiction in which the fund is established are not entitled to more than 20% of the fund's assets
- The fund is subject to government regulation and provides information reporting to the tax authorities

If any of the relevant non-reporting financial institution conditions are not met, the scheme will be a RFI and will need to conduct 'due diligence' and send off reports, as called for by the regulations for the reportable period of 2016.

Exemption 2: excluded accounts

The General Reporting Requirements only apply when an individual or an entity (i.e. a legal person or a legal arrangement, such as a corporation, partnership, trust, or foundation) holds a financial account with a financial institution. The definition of ‘financial account’ in the regulations expressly excludes any account that is an excluded account, the definition of which extends to certain retirement and pension accounts.

A retirement or pension account that satisfies all of the following requirements will be an excluded account:

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- The account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits)
- The account is 'tax-favoured' (i.e. contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate)
- Information reporting is required to the tax authorities with respect to the account
- Withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events
- Either: (i) annual contributions are limited to $50,000 or less or (ii) there is a maximum lifetime contribution limit to the account of US$1 million or less, in each case applying the rules set out in the regulations for account aggregation and currency translation

As there is no annual maximum contribution or lifetime contribution limit under the *Income Tax Law*, schemes approved under *sections 150, 154A and 157A Income Tax Law* will not be excluded accounts (and so would need to fulfil all the criteria for a non-reporting financial institution in order to be exempt).

The availability of exemptions for pension and retirement schemes is no doubt welcome news for scheme providers in Guernsey, who might otherwise have to report on (and give notice of reporting to) countless people. However, people will have to review their schemes on a case-by-case basis to see whether they still qualify for exemptions. They will have to apply the exemption criteria strictly and a scheme that meets some but not all of the criteria will not be exempt, so no scheme will be exempted solely because someone is regulating it.

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