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The Common Reporting Standard and Jersey Funds

BY NANCY CHIEN, 23 AUGUST 2016
PRESENTATION TO THE JERSEY FUNDS ASSOCIATION



Our locations

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We are a leading award-winning firm providing offshore legal advice from our offices in Jersey, Guernsey, London, Mauritius, BVI and Singapore.



Overview of CRS

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What is CRS?

- Result of the drive by the OECD to develop a global standard for the automatic exchange of financial account information, following the approach taken to implement US FATCA
- Financial Institutions are required to report financial information to their local tax authority who will in turn exchange this information with the tax authority where the reportable person is tax resident
- Competent Authority Agreements (based on Model 1A IGA), CRS commentary and handbook
- Currently, 101 jurisdictions have committed; 55 committed to exchange information in 2017
- UK FATCA for Crown Dependencies will fall away

Countries committed to CRS

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EARLY ADOPTERS OF CRS (FIRST REPORT TO MADE IN 2017)*

Anguilla	Germany	Mexico
Argentina	Gibraltar	Montserrat
Barbados	Greece	Netherlands
Belgium	Greenland	Nice
Bermuda	Guernsey	Norway
British Virgin Islands	Hungary	Poland
Bulgaria	Iceland	Portugal
Cayman Islands	India	Romania
Columbia	Ireland	San Marino
Croatia	Isle of Man	Seychelles
Curaçao	Italy	Slovak Republic
Cyprus	Jersey	Slovenia
Czech Republic	Korea	South Africa
Denmark	Latvia	Spain
Estonia	Liechtenstein	Sweden
Faroe Islands	Lithuania	Trinidad & Tobago
Finland	Luxembourg	Turks & Caicos islands
France	Malta	United Kingdom

* As at 18 August 2016 (This list can be obtained from <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm>)

Countries committed to CRS

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PARTICIPATING JURISDICTIONS WHICH HAVE COMMITTED TO COMMENCE REPORTING IN 2018*

Albania	Dominica	Panama
Andorra	Ghana	Qatar
Antigua & Barbuda	Grenada	Russia
Aruba	Hong Kong (China)	Saint Kitts & Nevis
Australia	Indonesia	Samoa
Austria	Israel	Saint Lucia
The Bahamas	Japan	Saint Vincent & the Grenadines
Bahrain	Kuwait	Saudi Arabia
Belize	Lebanon	Singapore
Brazil	Marshall islands	Saint Maarten
Brunei Darussalam	Macao (China)	Switzerland
Canada	Malaysia	Turkey
Chile	Mauritius	United Arab Emirates
China	Monaco	Uruguay
Cook Islands	Nauru	Vanuatu
Costa Rica	New Zealand	

*As 18 August 2016 (This list can be obtained from <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2018.htm>)

Countries not committed to CRS

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- United States
- Nigeria
- Vietnam
- Thailand
- Indonesia
- Any other country not listed

The requirements

- Same process as FATCA, i.e. classification, due diligence, verification, reporting

Classification

- **Financial institutions:**
 - (i) custodial institutions (custodial banks, brokers) and central securities depositories;
 - (ii) depository institutions (savings banks, commercial banks);
 - (iii) investment entities; and
 - (iv) specified insurance companies (most life insurance companies).
- Generally, tax residence determines the jurisdiction in which a FI is based

The requirements

Investment Entity definition

CRS definition differs from IGA definition

- IGA definition:

An Investment Entity means any entity that conducts as a business, or is managed by an entity that conducts as a business, one or more of the following activities or operations for or on behalf of a customer: trading in money market instruments, foreign currency etc, individual or collective portfolio management or otherwise investing, administering, or managing funds, money or financial assets on behalf of other persons

- CRS definition:

(a) An entity that primarily conducts as a business one or more of the following

activities or operations for or on behalf of a customer: trading in money market

instruments etc, individual and collective portfolio management; or otherwise

investing, administering, or managing Financial Assets or money on behalf of other persons; or

(b) the gross income of which is primarily attributable to investing, reinvesting, or trading in Financial

Assets, if the Entity is managed by another Entity that is a Depository Institution, a Custodial

Institution, a Specified Insurance Company or an Investment Entity described in (a) above.

The requirements

Non-reporting Financial Institutions

	FATCA	CRS
• Sponsored investment entities & sponsored closely held investment vehicle	✓	✗
• Qualified Collective Investment Vehicles	✓	✓ (Exempt Collective investment vehicle)
• Restricted Funds	✓	✗
• Trustee documented trust	✓	✓
• Investment advisors & investment managers	✓	✗

- Re-classification may be required for CRS purposes

The requirements

Qualified Collective Investment Vehicle (FATCA)

Exempt Collective Investment Vehicle (CRS)

An Investment Entity that:

An investment entity that:

- a) Is regulated in Jersey and every other country in which it operates; and
- b) All of the investors are limited to:
 - i. equity investors
 - ii. direct debt investors with interest greater than USD50,000; and
 - iii. any other financial account holders, who is a:
 - participating foreign financial institution
 - registered deemed compliant foreign financial institution
 - registered deemed compliant foreign financial institution
 - persons not being specified persons
 - Exempt Beneficial Owners
 - non-reporting foreign FIs

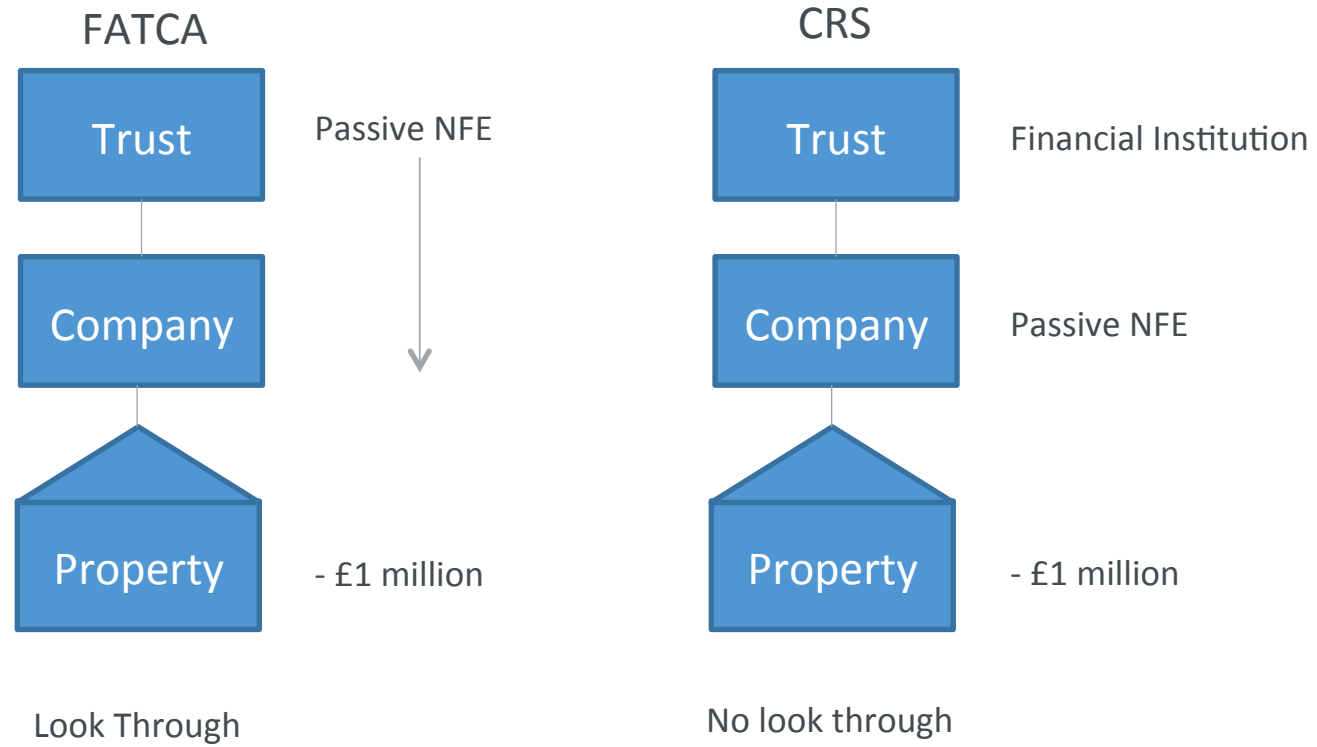
- a) Is regulated as a CIV (under the Collective Investment Funds (Jersey) Law 1988); and
- b) Has all of its interests held by or through individuals or entities that are not Reportable Persons, except a passive NFE with controlling persons who are Reportable Persons

Note: "Reportable Persons" does not include:

- a) A corporation the stock of which is regularly traded on one or more established services markets
- b) A Financial Institution

The requirements

Classification of property funds



Due Diligence

- Identification of Financial Accounts
 - (a) Depository accounts
 - (b) Custodial accounts
 - (c) Equity interest
 - partnership = capital or profits interests in the partnership
 - trust – interests held by the settlor, beneficiary or any person exceeding ultimate effective control over the trust
 - (d) Insurance contract or cash value insurance contract
 - (e) Annuity contract

The requirements

Due diligence process

	FATCA	CRS
Process	Separate procedures for pre-existing and new accounts and for individuals and entities.	Modelled on IGA but with these differences: <ul style="list-style-type: none">• Lower value individual accounts – residence address can be used• Place of birth and nationality not included• Can use new account holder procedure for pre-existing account• Can apply high value pre-existing account procedure to low value accounts• Concept of "undocumented account"
De minimis limits	\$50,000 (individual)/ \$250,000 (entity)	No de minimis, except for pre-existing entities with value lower than \$250,000
Pre-existing entity accounts	If initially de minimis, only become in scope once value exceeds \$1 million	If initially below de minimis, come into scope if exceed \$250,000 at year end

Verification

- Financial institutions must obtain valid self-certification on "day 1" of the account opening process, in any event no later than 90 days after that account has been opened
- If account holder fails to respond, FI must report account as undocumented until such time as a valid certificate is received
- Disproportionate number of undocumented accounts may subject FI to compliance review from Comptroller once regime has been developed

The requirements

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Reporting

- Name and address
- Jurisdiction of residence
- Tax identification number
- Date of birth (and place of birth)
- Account number
- Name and identifying number of the reporting FI
- Account balance as at end of calendar year or if account was closed during such year, the closure of the account
- No need for passport and citizenship information

Differences between FATCA and CRS

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Differences between FACTA and CRS

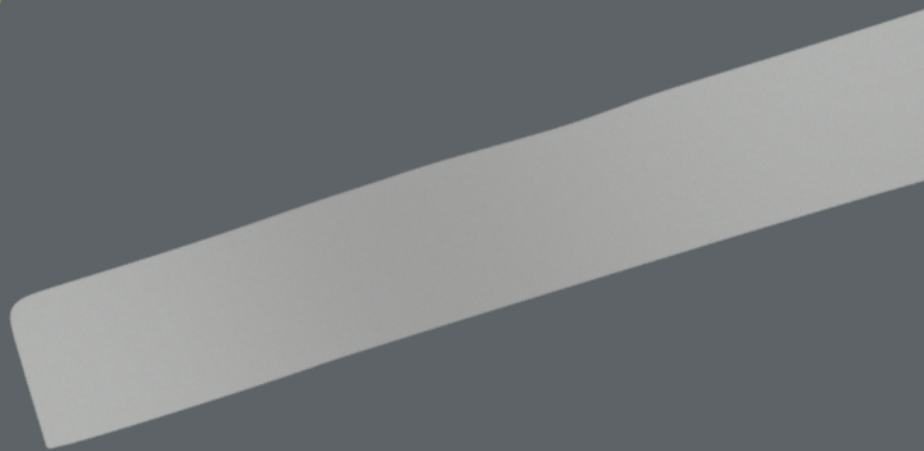
Topic	FATCA	CRS
Definition of investment entity	Use "managed by" test	More than 50% of income generated from Financial Assets
Debt or Equity Interest in an Investment Entity	Excludes as a Financial Account interests held by an entity that is regularly traded on an established securities market	Interests held by entity that is regularly traded on an established securities market are not excluded.
Pre-existing Account	Does not allow FIs to treat a New Account opened by an Account Holder of a Pre-existing Account as a Pre-existing Account.	FIs can treat a New Account opened by an Account Holder of a Pre-existing Account as a Pre-existing Account
Definition of Passive NFE	Investment Entities in non-participating jurisdictions are treated as Non-Participating Jurisdictions	Captures Investment Entities not resident in Participating Jurisdictions

Differences between FACTA and CRS

Topic	FATCA	CRS
Threshold for Pre-existing Individual Accounts	\$50,000 de minimis	No de minimis
Hold mail or in-care of addresses as indicia	Not indicia	Procedures followed to rectify the situation. If no further information, account reported as undocumented account
Self-certification	Date of birth not relevant	Date of birth relevant
Account closure	Need to report account closure and balance	Only need to report account closure
Verbal self-certification	Not available	Possible, eg voice recording, digital footprint

Jersey position

03



Taxation (Implementation) (International Tax Compliance) (Common Reporting Standard) (Jersey) Regulations 2015*

- Interaction between CRS and FATCA
- Procedures for identifying, reviewing and reporting reportable accounts
- Timeline for reporting
- Third party service providers
- Penalties

* For further details, please see my briefing note, a copy of which can be obtained from the Bedell Cristin

website: www.bedellcristin.com

Jersey guidance notes*

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The following FATCA positions can be maintained provided their application does not "*frustrate the purpose*" of CRS:

- Section 3.2 – resident for tax purposes
- Section 3.9 – investment entity
- Section 3.12 – nominee companies
- Sections 7.1, 7.2 and 7.3 – treatment of Jersey trusts
- Section 7.8 – which among other things refers to the position of a settlor who is specifically excluded from the trust
- Section 7.13 – employee benefit trusts
- Section 19.4 – multiple financial institutions – duplicate reporting
- Appendix 4 – which among other things indicates that a beneficiary of a pension scheme will not be treated as a financial account until a benefit payment is made

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Legal considerations

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Review of Fund Documentation

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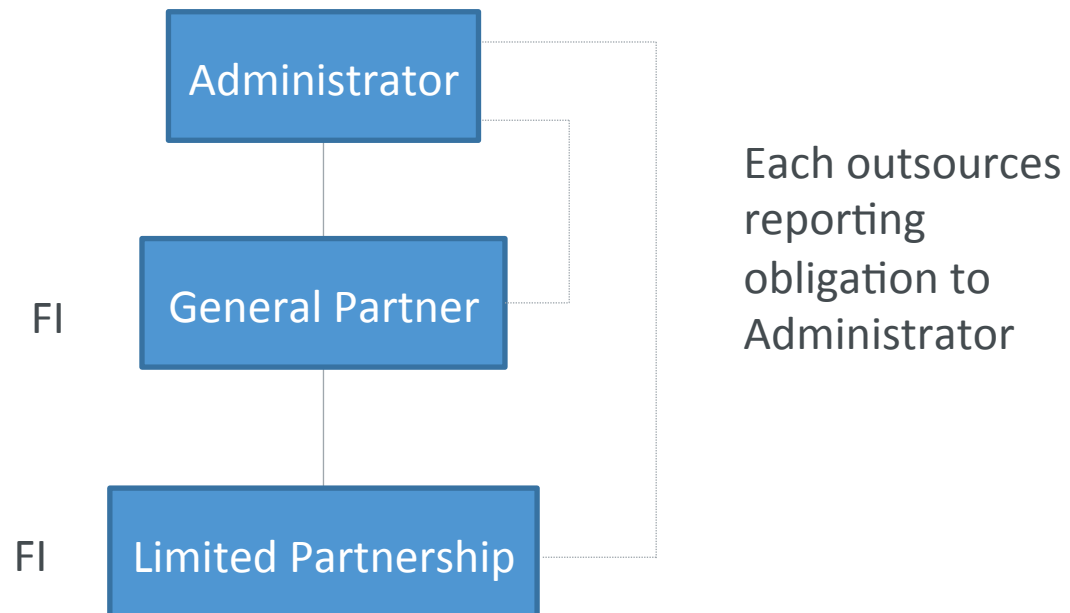
- Provide power for the fund to redeem units, withhold dividends or other distributions where investors do not provide the requisite due diligence
- Include in the prospectus a comprehensive risk warning in relation to FATCA/CRS
 - in particular, power to remove a non-compliant investor or withholding tax that might be suffered for US FATCA
- Exculpation of directors/general partner and the fund from liability arising from FATCA/CRS

Review of Fund Documentation

- Subscription documents to include:
 - obligation on the investors to provide relevant information and comply with due diligence requests
 - an acknowledgement that the fund will disclose information to the Comptroller of Taxes
 - an acknowledgement that investors will not have any claim against the fund for damages or liability arising as a result of actions taken by the fund to comply with its FATCA/CRS obligations
 - some funds seek indemnities for costs, liabilities arising as a result of non-compliance with FATCA, whether by investors or 3rd parties

Other legal considerations

- Third party service provider agreements
 - relevant for partnership structures, joint trusteeship structures or administration only structures



Other legal considerations

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- Terms of business
 - are your compliance costs covered?
 - consider whether the reporting obligations are mandatory especially where trustee can choose classification of entity
- Data protection issues
 - can these be covered adequately under the terms of business?
 - be careful about supplying information to other financial institutions

Thank you

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