REVISED GUIDANCE ON THE APPLICATION OF THE AGREEMENTS ENTERED INTO BETWEEN JERSEY AND EACH EU MEMBER STATE IN SUPPORT OF THE EU DIRECTIVE ON THE TAXATION OF SAVINGS INCOME

FOREWORD

In May 2005 Guidance was issued on the application of the agreements entered into between Jersey and each EU Member State in support of the EU Directive on the Taxation of Savings Income. That guidance was based on the decision of the Government of Jersey to give assistance to the Member States by the application of a retention tax to eligible interest payments made by Jersey paying agents to individuals resident in the Member States, to be enforced by the Taxation (Agreements with European Member States) (Jersey) Regulations 2005.

Paragraph 22 of the Guidance issued stated that it was open to the Island at any time to elect to apply the automatic exchange of information provisions in the same manner as is provided for in Chapter II of the Directive.

The States of Jersey have made Regulations - (Taxation(Agreements with European Union Member States)(Amendment No 2) (Jersey) Regulations 2014) - that provide that in respect of interest payments made on or after 1st January 2015 the automatic exchange of information will apply and the previous retention tax and revenue sharing arrangements will no longer apply.

This Guidance revises the previous Guidance so that it applies to the automatic exchange of information. The previous Guidance continues to apply in respect of interest payments made prior to the 1st January 2015 which are subject to the retention tax, unless a paying agent has taken advantage of the provision in the 2014 Regulations whereby a Jersey paying agent may elect voluntarily to opt for automatic exchange of information rather than apply the retention tax.

For interest payments made in 2014 that are subject to the retention tax the reporting arrangements that have applied since July 2005 will continue to apply. The retention tax at the rate of 35% will need to be paid to the Comptroller of Taxes by the end of March 2015. For those paying agents that opt voluntarily to change to automatic exchange of information during 2014 there will be a need to provide the Comptroller with the retention tax proceeds for the part of 2014 so covered, and actual information for the remainder of the year, again before the end of March 2015.

Where interest payments that are made after the 1st January 2015 cover a period prior to that date there should be no apportionment. All of the interest payment

will be subject to the automatic disclosure of information. Similarly, where the voluntary disclosure option is exercised prior to the 1st January 2015, any interest payments made following the date when that option is exercised will be the subject of automatic disclosure and no apportionment should apply if the interest payments cover a period prior to the changeover date.

The EU have proposed amendments to the EU Directive on the Taxation of Savings Income to extend reporting obligations to eligible interest payments made to companies and trusts as well as to individuals. However the decision has now been made to repeal this Directive and merge it and the proposed amendments with the Directive on Administrative Cooperation which will cover the new international Common Reporting Standard on automatic exchange of information. This Directive will not apply to Jersey directly because Jersey is not part of the EU and is not bound to adopt such EU Directives.

It may be that, as with the Directive on the Taxation of Savings Income, the EU will ask Jersey, together with the other Crown Dependencies, to provide support by voluntarily entering into an agreement, either with each individual Member State or with the EU as a whole, which will mirror the Directive on Administrative Cooperation. However, as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, to which the Crown Dependencies and Member States are a party, provides a legal basis for automatic exchange of information in accordance with the Common Reporting Standard, it may be that this can be relied upon and there will be no call for a separate agreement with the EU or the individual Member States.

Whichever route is followed, what is now clear is that the threat has been removed that financial institutions would be faced with the need to make two returns to EU Member States, one for the Directive on the Taxation of Savings Income and another for the Common Reporting Standard.

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BACKGROUND

1. The European Union on the 3rd June 2003 formally adopted Council Directive 2003/48/EC on the Taxation of Savings Income in the form of interest payments. The preamble to that Directive states that its ultimate aim is to enable savings income in the form of interest payments made in one EU Member State to beneficial owners who are individuals resident in another EU Member State to be made subject to effective taxation in accordance with the laws of the latter Member State.

2. The EU Member States were concerned that so long as the United States of America, Switzerland, Andorra, Liechtenstein, Monaco, San Marino and the relevant dependent or associated territories of the EU Member States did not all apply measures equal to, or the same as, those provided for by the Directive, capital flight towards these countries or territories could imperil the attainment of the Directive's objectives. For this reason the European Union sought to conclude agreements with the countries and territories concerned that provide for the objectives of the Directive to be met within those countries and territories from the same date as within the EU Member States.

3. The Directive allowed three Member States (Austria, Belgium anf Luxembourg) to adopt a withholding tax for a transitional period whilst the other twenty-two Member States adopted automatic exchange of information. The same option was extended to the non-EU jurisdictions referred to in paragraph 2 above, including the Crown Dependencies of Guernsey, the Isle of Man and Jersey. One of the Member States – Belgium –

has already opted to change to the automatic exchange of information and the other two have indicated their intention to follow suit

4. The Crown Dependencies worked extremely closely together in reaching agreement with the EU Member States and this cooperation was reflected in the strength of their representations during the negotiations. The negotiations with the EU High Level Group on Taxation and the EU Presidency also enabled the Crown Dependencies to better establish their international personality in negotiating and concluding such agreements.

5. The outcome of the initial negotiations was two Model Agreements, one between each of the Crown Dependencies and those EU Member States that have opted for automatic exchange of information and the other between each of the Crown Dependencies and the three EU Member States that opted for a withholding tax.. These two Model Agreements were approved by each of the Crown Dependencies legislatures and have been the basis for the individual Agreements ("the Agreements") signed between each of the Crown Dependencies and each of the EU Member States and the specific insular legislation required to bring the Agreements into effect.

6. The text of the Agreements follows that of the EU Directive in large part but with appropriate adaptations and the inclusion of additional safeguards in the provisions in the Agreements for the suspension or termination of the Agreements if certain events come to pass. In addition, to distinguish the Island from the EU Member States, to reflect the fact that the Island is not a part of the European Union and is not subject to the EU Directive, the term "retention tax" was used rather than "withholding tax".

WHAT IS THE PURPOSE OF THE GUIDANCE NOTES. .

7. The Guidance is intended simply to offer practical assistance to those who are subject to the Agreements. The Guidance is not a legal document and does not replace the need to obtain proper legal advice. The Notes will be taken fully into account by the Comptroller of Taxes who will have responsibility for administering the Regulations required to bring the Agreements into effect.

8. The Notes are intended to help the reader answer for themselves questions such as whether they are a paying agent, whether they are a person to whom interest payments are made, and whether the interest payments made or received are subject to the automatic disclosure of information. Primarily the Guidance Notes are aimed at those who are considered to be paying agents within the Island and have responsibility for sending to the Comptroller of Taxes information on eligible interest payments made to individuals resident in an EU Member State. The Notes are not cast in stone and can be expected to be amended and added to in the light of experience.

9. The Guidance Notes should have relevance for banks, registrars, custodians and other financial institutions that make interest payments, or distributions from certain collective investment schemes, to individuals in the EU Member States. They may also be of interest to financial dealers and securities houses which purchase money debts or units in collective investment schemes from individuals subject to the reporting obligations, businesses which redeem money debts or units in collective investment schemes held by individuals and stockbrokers and others who act for individuals in the sale of such investments. They may also be relevant for those (such as accountants,

solicitors or nominee companies) who hold or administer money debts and investments in collective investment schemes on behalf of individuals.

GENERAL GUIDANCE

10. In approaching the implementation of the Agreements it should be noted that the Island has agreed to assist the European Union in ensuring that individuals resident in the EU Member States do not escape from a liability to tax, in circumstances where such a liability properly arises in the EU Member States, by moving their funds to the Island. In deciding on whether the reporting obligations should be applied to interest payments made to an individual resident in an EU Member State it is appropriate that regard is had for the tax status of the individual, if it is known to the paying agent.

WHO IS TO BE SUBJECT TO THE REPORTING OBLIGATIONS?

11. An individual beneficial owner resident in an EU Member State who receives a savings income payment (hereinafter referred to as an "interest payment" but see paragraph 54 for a definition of the savings income that is subject to the reporting obligations) made by a paying agent established in the Island, will potentially be liable to the automatic exchange of information.

12. An individual will not be deemed to be the beneficial owner when he or she

(a) acts as a paying agent (see paragraphs 24-32);

(b) acts on behalf of –

- a legal person;

- an entity which is taxed on its profits under the general arrangements for business taxation;

- a UCITS authorised in accordance with EU Directive 2009/65 or an equivalent undertaking for collective investment established in the Island (see paragraphs 58-74);
- an entity to which reference is made in Article 7(2) of the Agreements.

(c) acts on behalf of another individual who is the beneficial owner and discloses to the paying agent the identity of that beneficial owner.

If a paying agent holds information which gives him reason to believe that the individual he pays interest to does not receive the interest payment for his own benefit, because he is acting on behalf of another individual, the agent should take the same reasonable steps to establish who the beneficial owner of the payment is as would be the practice in complying with anti-money laundering and terrorist financing requirements.

13. The automatic exchange of information will <u>not</u> apply to payments to residents outside the EU, residents of the dependent or associated territories[i1] of the Member States, which will include residents of the Bailiwick of Guernsey, the Isle of Man and Jersey and residents of Switzerland and the other named third countries (Andorra, Liechtenstein, Monaco and San Marino).

14. Where an interest payment is credited to a joint account and where one of the joint account holders is a resident of an EU Member State the latter will

[1] Gibraltar is within the EU for EUSD and the Directive therefore applies fully. Gibraltar however is not a separate Member State and therefore Jersey does not have a separate EUSD agreement with Gibraltar. It was agreed in 2005 that Gibraltar and the UK would be treated together. Accordingly information regarding interest payments made to Gibraltar residents should be included by the paying agents in the UK field and are not separately identified.

normally be subject to reporting obligations. These obligations may be applied on the basis that interest is allocated equally among the members of the joint account. However, alternative arrangements at the discretion of the paying agent may well be appropriate. What should be kept in mind is the extent to which a joint account holder who is resident in an EU Member State has the benefit of the interest payments credited to the account.

15. There may be other such complications. Another example is where an individual receives an interest payment for a period of which part is spent as resident outside the EU and part is spent as resident inside the EU. If it is possible to separately allocate a portion of the interest received for that part of the year during which the person was resident outside the EU, that portion of the interest payment need not be subject to the reporting obligations. .

16. In deciding to whom the reporting obligations will need to be applied the focus should be on the ultimate aim of the Agreements which is to enable savings income in the form of interest payments made in the Island to beneficial owners who are individuals resident in an EU Member State to be made subject to effective taxation in accordance with the laws of the latter Member State. The emphasis should be on individuals, and also on those individuals who are not only resident in an EU Member State but are persons subject to effective taxation in accordance with the laws of the EU Member State. It is therefore consistent with the aims of the Agreements into which the Island has entered that the reporting obligations will not apply to interest payments made to –

- a legal person;

- an entity which is taxed under the general arrangements for business taxation;

- a trust (but see paragraph 26 for the position of trustees)

- an unincorporated association or society;

- an individual where the interest payment arises from negotiable securities issued before 1st March 2001 (see paragraphs 49-53);

- an individual where it is known to the paying agent that the individual benefits in their Member State of residence from an exemption from income tax; or where because of non-remittance of interest to an individual's Member State of residence no liability to income tax arises in that country of residence.

17. For the purposes of the implementation of the Agreements domestic partnerships, foreign partnerships and limited partnerships or equivalent entities are considered to be entities which are taxed under the general arrangements for business taxation.

18. The sixth bullet point in paragraph 16 above leaves open the question how the paying agent is expected to know that an individual benefits from exemption from income tax etc. For some existing customers, the paying agent may have an understanding of and/or documentary evidence confirming the customers tax status. Reliance on self-certification by a customer also may be appropriate, where the paying agent has no contrary evidence and where the assertion is consistent with the paying agent's understanding of the customer's circumstances. In other cases the customer may have in their possession documentation from a tax authority or other source which would assist in confirming their tax status or they might be asked to provide a letter confirming that status endorsed by a professional third party such as a lawyer or accountant. The ultimate responsibility will rest with the paying agent. It will be for the paying agent to decide whether

they have sufficient information in order for them to know that no tax liability arises but, unless evidence exists to the contrary, those able to take advantage of the sixth bullet point in paragraph 16 may be considered to have arranged their affairs in a tax efficient manner.

19. Another guiding principle in the application of the Agreements will be the wish to avoid unnecessary bureaucracy and cost to those who are required to implement the Agreements.

20. These Guidance Notes will not cover every case where the reporting obligations should not apply and it is important to again emphasise that this guidance is not in the form of legal advice.

WHAT WILL NEED TO BE REPORTED

21. The paying agent will need to communicate the following information to the Comptroller of Taxes -

(a) the identity and residence of the beneficial owner established in accordance with Article 6 of the Agreements (see paragraphs 33-42):

(b) the name and address of the paying agent;

(c) the account number of the beneficial owner or, where there is none, identification of the debt claim giving rise to the interest payment;

(d) information concerning the interest payments specified in Article 4(1) of the Agreements. However, the minimum amount of information concerning interest payments to be reported by the paying agent may

be restricted to the total amount of interest or income and to the total amount of the proceeds from sale, redemption or refund.

22. The communication of this information to the Comptroller of Taxes should be automatic and should be conveyed (preferably electronically) in the required format (note: the format is set out in an appendix attached to this Guidance), at least once a year within three months following the end of the tax year for all interest payments within the scope of the Agreements made during that year.

WHEN WILL THE REPORTING OF INFORMATION BE DUE?

23. Paying agents will be required to report information to the Comptroller of Taxes, at least once a year, within three months following the end of the tax year so that the Comptroller can send the information to the Competent Authority of each Member State within six months following the end of the tax year.

WHO WILL BE REQUIRED TO REPORT THE INFORMATION?

24. The responsibility for reporting the information rests with the paying agent. There are circumstances where a paying agent may be called upon to make a judgement on the reporting obligation (for example in respect of joint accounts where one or more of the account holders is resident in an EU Member State and one or more of the others are resident in a jurisdiction outside the EU – see para. 14 for the treatment of joint accounts). It will be for the paying agents to determine what information/evidence they use in making that judgement. All that is expected of paying agents is that they take what are perceived to be reasonable measures to determine the obligation to report. To distinguish between those who make a genuine

mistake and those who deliberately evade their obligations the Taxation (Savings Income) (Jersey) Regulations 2005 state that only a person who knowingly fails to comply with any requirement imposed by those Regulations shall be guilty of an offence.

25. A paying agent is a person who is established in the Island (i.e. has a place of business or is resident in the Island) who makes interest payments in the course of his business or profession and makes those payments for the immediate and absolute benefit of a beneficial owner who is a resident of an EU Member State.

26. **The position of Trustees (other than trustees of unit trusts who are covered by paras 58-74 which deal with the position of collective investment undertakings): p**ayment made by a professional trustee will not be subject to the reporting obligations unless –

- the beneficiary of the trust concerned has an absolute entitlement to receive the savings income; and

- the beneficiary is an individual resident in an EU Member State; and

- the savings income is that covered by the Agreements.

If it cannot be said for certain that a payment made out of the assets of the trust represents an interest payment it may be assumed that the condition of the third bullet point above is not met.(Note: Trustees or Executors who in this respect are not acting in a business or professional capacity are not paying agents).

27. Any distribution by trustees of a discretionary trust or under any trust arrangement where the beneficiary has no absolute entitlement to

such income is out the scope of the Agreements and therefore does not lead to a reporting obligation. Distributions so made are not interest payments; they are payments from a trust the source of which is the trustees exercising their power of apportionment. Therefore, a trustee of a discretionary trust will not be a paying agent as that term is defined for the purposes of the Agreements. When a payment of interest is made by a financial institution to a trustee of a discretionary trust that financial institution will not be considered a paying agent for the purposes of the Agreements in respect of those payments.

28. In the absence of any evidence to the contrary, an individual trustee resident in an EU Member State may be considered to be a professional trustee for the purposes of paragraph 26, and their paying agents' obligations, if any, can be left to be determined by their Member State of residence; and where there are a number of trustees some of whom are and some of whom are not resident in an EU Member State the body of trustees can be considered to be out of scope for the purposes of the Agreements.

29. The following are further examples of circumstances in which a person would **not** be a paying agent, although this list is not exhaustive –

- a bank which passively makes a payment, for example, by processing a cheque or arranging for the electronic transfer of funds on behalf of one of its customers, or receives payments credited to a customer's account;

- a person who only makes payments other than interest payments, for example, pension, annuity and rental income payments;

- a person not in business who makes interest payments, for example on a personal loan to an individual resident in an EU Member State (i.e. the individual is not borrowing the money for a business purpose);

- a person who does not make interest payments in the course of a business or profession;

- the payments made are not interest payments;

- the person to whom the payments are made is not a person subject to the reporting obligations; that is, the person is not an individual resident in an EU Member State.

30. A paying agent is someone who makes an interest payment for the immediate and absolute benefit of an eligible beneficial owner. This means that, if a payment is made through an intermediary or a number of intermediaries the paying agent with responsibility for reporting will be whoever is the last person who makes the interest payment to the beneficial owner. A person is not a paying agent, therefore, if the interest payment subject to the reporting obligations is made to another person who is a paying agent. The relevant paying agent is always the one that is the "last link in the payment chain" before the individual resident in the EU Member State who is in receipt of an interest payment. Where the last link in the payment chain is outside the Island no reporting obligation arises in the Island. Whether any reporting then occurs will depend on whether the last link in the payment chain is within the scope of the EU Directive or the supporting agreements with the named third countries and the dependent and associated territories of an EU Member State.

31. The Agreements state that "Any entity established in a contracting party to which interest is paid or for which interest is secured for the benefit of a

beneficial owner shall also be considered a paying agent upon such payment or securing of such payment". However this provision does not apply to the following entities which are specifically excluded from the definition of paying agent in this instance -

(a) it is a legal person;

(b) its profits are taxed under the general arrangements for business taxation; or

(c) it is an UCITS recognised in accordance with EU Directive 2009/65 or an equivalent undertaking for collective investment established in the Island.

All partnerships operating in the Island are considered to be covered by (b) – see paragraph 17. For the definition of an equivalent undertaking for collective investment, see paragraph 61 below. Other investment vehicles can be assumed to be covered by either (a) or (b).

32. The Agreements also provide that "An economic operator paying interest to, or securing interest for, such an entity established in the other contracting party which is considered a paying agent [under the above paragraph] shall communicate the name and address of the entity and the total amount of interest paid to, or secured for, the entity to the competent authority of its contracting party of establishment, which will pass this information on to the competent authority of the contracting party where the entity is established". However, the implementation of this provision will not be insisted upon where the administrative burden that this would impose would be disproportionate to the value of the information to be provided.

HOW IS THE IDENTITY AND RESIDENCE OF A BENEFICIAL OWNER TO BE ESTABLISHED?

33. The identification rules to be applied should mirror the "know your customer" ("KYC") rules that already are required to be complied with under the Island's anti-money laundering legislation ("AML"). Paying agents therefore should be able to cater for the reporting requirements through their existing KYC systems.

34. The Agreements provide for the application of different requirements depending on whether the contractual relations between the paying agent and the individual commenced before or on and after the 1st January 2004. However, in both cases the requirements will not exceed what is already necessary under AML rules. In most cases it should be clear whether contractual relations exist, and if so when they began. However there will be occasions when it is less clear. It will be for the paying agent to exercise reasonable judgement but, as guidance, pre-1st January 2004 contractual relations can be considered to continue to apply after that date where –

- the underlying contractual basis for the pre-1st January 2004 relationship continues;

- the pre-1st January 2004 customer takes advantage of a new product or service from the same paying agent;

- a business is acquired or merged with another business;

- a pre-1st January 2004 relationship is transferred from one group entity to another.

35. For contractual relations entered into before 1st January 2004 a paying agent can establish the identity of the beneficial owner, consisting of his name and address, by using the information already at his disposal and in accordance with the KYC requirements for anti-money laundering.

36. For contractual relations entered into, or transactions carried out in the absence of contractual relations, on or after 1st January 2004, the paying agent must establish the identity of the beneficial owner by obtaining his name and address (and as in pre-1st January 2004 contractual relations this can be achieved using information held under existing KYC requirements for AML) and also, if there is one, a tax identification number ("TIN") allocated by the EU Member State of residence for tax purposes. The TIN should be established from the passport or the official identity card presented by the beneficial owner. If the TIN is not mentioned on the passport, on the official identity card or any other documentary proof of identity presented by the beneficial owner, the identity can be supplemented by obtaining their date and place of birth from their passport or official identification card.

37. In practice what this means is that if the copy of the passport or identity card or other documentary proof of identity that is held for AML purposes includes a TIN that information will in consequence be available to the paying agent and should be held on file. There will be no need to ask for a TIN if it does not appear on such documents. Instead the identity should be supplemented by a reference to the person's date and place of birth obtained from the passport, official identity card or other documentary proof of identity which should already be held to meet AML requirements.

38. The place of residence of the beneficial owner is to be established on the basis of minimum standards which will vary according to when relations between the paying agent and the recipient of the interest are entered into.

In general the residence of the beneficial owner will be established by using the information at the disposal of the paying agent arising from the AML requirements with which the paying agent has to comply. Again, as with the establishment of the identity of the beneficial owner, where contractual relations are entered into, or transactions are carried out in the absence of contractual relations, on or after the 1st January, 2004, residence is expected to be established on the basis of the address mentioned on the passport, on the official identity card or, if necessary, on the basis of any other documentary proof of identity presented by the beneficial owner.

39. For those individuals where the "on or after the 1 January 2004" rule applies, and who present a passport or official identity card issued by an EU Member State and who declare themselves to be resident in a jurisdiction other than an EU Member State, residence needs to be established by means of a certificate confirming the jurisdiction of tax residence (see paragraph 40 for an indication of what form that certificate can take) which the individual has received or obtained from a competent authority in the jurisdiction concerned. Failing the presentation of such evidence of residence the EU Member State which issued the passport or official identity document should be considered to be the country of tax residence.

40. The documents which can provide independent confirmation of tax residence and which will be considered sufficient evidence of residence for tax purposes may vary according to the jurisdiction concerned. In general the official documentation that is presently obtained to give proof of address for AML purposes would be considered sufficient to satisfy the requirements referred to in paragraph 39. There would therefore be no standard certificate. It will be left to the paying agents to exercise judgement as to whether the documentation in their possession is sufficient.

41. When an individual moves during the year there may be more than one country of residence and address for the same retention tax period. The relevant country of residence and address is that at the time the interest payment is made (see paragraph 15 for guidance on the position of an individual who receives an interest payment for a period of which part is spent resident outside the EU and part is spent resident inside the EU).

42. Using existing data to determine whether an individual is resident in an EU Member State and therefore liable to the reporting obligations is not considered to breach the data protection principle that data should be used for the purpose intended. However, when a new account is opened it is recommended that the customer should be informed of the purpose for which the information on his identity and residence will be used by the paying agent.

WHAT SAVINGS INCOME IS NOT COVERED BY THE REQUIREMENTS?

43. In general, a payment is not an interest payment if:

- it is not interest, or is not derived from interest;
- it is not related to a debt claim;
- the debt claim does not arise from a transaction for the lending of money;
- it is lottery, gaming or betting winnings.

44. More specifically the following are not regarded as interest payments;

- dividends paid on the ordinary or preference shares of companies;

- any other distributions of business or company profits – including distributions made by partnerships .

- distributions out of the assets of a trust other than where a relevant beneficiary has an absolute entitlement to interest payments as defined for the purposes of the Agreements (for example, through a Life Interest Trust) – see also paragraph 26 above;

- employment income and occupational pensions;

- personal pensions, annuities, and payouts from insurance policies;

- returns deriving from derivatives contracts;

- manufactured payments arising during stock loans or under sales and repurchase agreements (including where the underlying security is a money debt).

- trading profits (including the trading profits of a company or partnership);

- rents;

- capital gains (including, without limitation, equalisation payments);

- distributions and other payments derived from investment funds which are not within the scope of the Agreements (see paragraphs 58-74);

45. Most if not all structured products are considered to be covered by "returns deriving from derivatives contracts", and therefore structured products generically can be expected to be out of scope of the reporting obligations. However, this may not apply if the marketing/prospectus literature refers specifically to the return as "interest".

46. A distribution of income made by a collective investment fund or the proceeds of sale, refund or redemption of units in a collective investment fund is not an interest payment where its investment in debt claims, directly or indirectly, does not exceed 15% of its assets.

47. The sale or redemption proceeds of units in a collective investment fund will not be an interest payment subject to retention tax if the fund has invested 25% or less of its assets in debt claims.

48. Examples of instruments which are <u>not</u> debt claims include –

- ordinary or preference shares in companies;

- insurance policies;

- shares in open ended investment companies and units in unit trusts – but there are separate rules which apply to interest payments arising from investments in collective investment schemes which mean that these are reportable in some circumstances (see paragraphs 58-74);

- debts which do not arise from a transaction for the lending of money (for instance where there is a late payment and compensation interest is paid);

- certain debt securities which already existed before the 1st March 2001 – "grand-fathered bonds" (see paragraphs 49-53);

- partnership capital;

- early repayment of loans.

"**GRAND-FATHERED BONDS"**

49. Certain negotiable debt securities were not treated as money debts if they met certain conditions, for the duration of a transitional period which ended no later than 31 December 2010. These securities ("grand-fathered bonds") did not then count as money debts for all purposes of the Agreements: interest, premiums and discounts derived from these bonds are not savings income; and investment in these bonds does not count when deciding whether the thresholds which determine whether income from certain collective investment funds is savings income have been passed.

50. A security was a grand-fathered bond if:-

- it was first issued before the 1st March 2001 or the prospectus was first approved by the appropriate regulatory authority before that date, and

- no further issue was made on or after the 1st March 2002.

51. If the bond is a government bond and a further issue is made on or after the 1st March 2002, the whole of the issue (whether made before, on or after 1 March 2002) was not a grand-fathered bond. The whole issue of the bond was then treated as a money debt. On 1st March 2002 the UK Treasury issued additional gilt-edged stock in order to ensure that the transitional protection would not apply to any gilt-edged stocks then in issue. All gilt-

edged stock therefore are treated as money debts and no gilt edged security will be a grand-fathered bond.

52. If the bond was issued by another type of issuer (e.g. a commercial company) and a further issue was made on or after 1st March 2002, only the part of the issue made on or after the 1st March 2002 was not a grand-fathered bond. This part of the bond issue is treated as a money debt; the rest of the issue (made before 1st March 2002) is not a money debt. A paying agent may not always be able to distinguish between a pre 1st March 2001 and a post 1st March 2002 issue. In such cases, if the original 1st March 2001 issue has been tapped the paying agent may presume that the bond can be treated as a pre 1st March 2001 issue.

53. The transitional period whereby certain negotiable debt securities were not treated as money debts ended on 31 December 2010. Thereafter any security that had been a 'grandfathered bond' was a money debt and as such all the normal rules of reporting apply to it and interest, premiums and discounts derived from it. In addition after that date these bonds counted when deciding whether the thresholds have been passed which determine whether distributions and proceeds of sales/redemptions of certain collective investment funds are savings income.

WHAT SAVINGS INCOME IS COVERED BY THE REQUIREMENTS?

54. There are four main categories of savings income that will be treated as interest payments to which the reporting obligations will apply. Broadly these are –

- interest paid out on debt claims or credited to accounts;

- interest rolled up and paid out when a debt claim is repaid or sold;

- distributions made by unit trusts and other collective investment funds which have the requisite proportion of their investments in debt claims (see also paragraph 46);

- accumulated income relating to units of a collective investment fund which has invested over 25% of its assets in debt claims when the units are redeemed or sold (see also paragraph 47).

WHAT AMOUNT OF SAVINGS INCOME IS SUBJECT TO THE REPORTING OBLIGATIONS?

55. The following information should be reported –

(a) interest payments made or credited to an account, relating to debt claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and, in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures;
[NB – penalty charges for late payment shall not be regarded as interest payments.]

(b) interest accrued or capitalised at the sale, refund or redemption of the debt claims referred to in (a) above

(c) income deriving from interest payments directly, distributed by undertakings for collective investment where those undertakings are within scope (note: the position regarding these undertakings is dealt with more fully in paragraphs 58-74).

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(d) income realised upon the sale, refund or redemption of shares or units in undertakings for collective investment, where those undertakings are within scope, if they invest directly or indirectly, via other undertakings for collective investment more than 40% of the assets in debt claims as referred to in (a) above

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56. In connection with sub-paragraphs (c) and (d) of paragraph 55 the option is available of excluding any income or proceeds, as applicable, from undertakings for collective investment established in the Island where the investment and debt claims of the type referred to in (a) above held by such entities, directly or indirectly, does not exceed 15% of their assets. This minimum threshold option will be exercised.

57. In the case of life interest and similar trusts (see paragraph 26) it will be acceptable, subject to the trustees' power to allocate trust expenses between capital and income, to offset a just, reasonable and proportionate element of the income expenses first against investment income for each period prior to accounting to the Life Tenant. Trustees therefore will have discretion to decide whether to apply the reporting obligations to the relevant savings income gross or net of a set fee for the services rendered on the understanding that where a net payment is made only a just, reasonable and proportionate element of the overall trust fee should be applied against the savings income identified.

THE POSITION OF COLLECTIVE INVESTMENT UNDERTAKINGS

58. **Exclusion from the definition of paying agent:** the Agreements provide that certain types of entity established in a contracted party to which interest is

paid or for which interest is secured for the benefit of the beneficial owner shall not be considered the paying agent upon such payment or securing of such payment (see paragraph 31 above). This includes an entity that is a UCITS recognised in accordance with EU Directive 2009/65 or is an equivalent undertaking for collective investment established in the Island.

59. There may be certain circumstances where a UCITS or an equivalent undertaking is the last link in the chain in the payment of eligible interest (see paragraph 55) in which case such an undertaking might be a paying agent as defined for the purposes of the Agreements (see paragraph 25). However, where eligible interest payments received from a UCITS or equivalent undertaking that is within the scope of the retention tax are made by a bank (but see paragraph 29 for when a bank would not be the paying agent), registrar, custodian or other financial institution and not by the collective investment undertaking itself the latter will not be the last link in the chain and will not be called upon to retain tax.

60. **What is meant by <u>established</u> in the island when applied to collective investment undertakings (see also paragraphs 31 & 58 above)? i**t is not intended that "established in the Island should restrict the exclusion of a collective investment undertaking from being a paying agent to collective investment undertakings formed in the Island. Collective investment undertakings formed elsewhere that are being "administered" in the Island would also be covered; that is, the word "established" in the Agreements should, where it refers to an undertaking for collective investment, be read as including "administered".

61. **What is an "equivalent" undertaking?** The position on collective investment undertakings established in the Island is complicated by the fact that the Directive refers to a UCITS which is an undertaking for collective investment in transferable securities authorised in accordance with the UCITS Directive

on the Co-ordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment and Transferable Securities. The recitals to the Agreements confirm that the Island has legislation that is equivalent in its effect to the Directive . The equivalent legislation in the Island is that governing "recognised" funds and other retail funds that are regulated effectively to the same standard as "recognised" funds. This is what is to be interpreted as an "equivalent" undertaking.

62. In respect of a retail fund which is marketed in Europe but which is not a recognised fund there can be a further test to apply in determining whether such a collective investment undertaking established in the Island should be considered within the scope of the Agreements. Attention should be first focussed on the equivalent legislation in the Island and then (if the collective investment undertaking is within that legislation) the focus moves to determining whether the collective investment undertaking would be considered (by the law, regulation or practice of any EU Member State or competent regulatory body in any such Member State) to be outside of the scope of the EU Directive. The Agreements will not be applicable to a collective investment undertaking established (as defined in paragraph 60) unless the collective undertaking concerned would be regarded as within the EU Directive in each and every Member State.

63. **What is a collective investment undertaking?** A non-EU fund, which will include a fund which is not an equivalent fund established in the Islands, should only be regarded as an undertaking for collective investment if the following features are present:

- the fund is operated by way of business;

- investments in the funds are pooled;

- investors are not involved in its day to day management; and

- the fund is open ended (i.e. its capital varies with investments and withdrawals by investors like that of an authorised unit trust or an authorised open ended investment company) not closed ended (i.e. its capital is fixed like that of an investment trust).

Paying agents resident in the island making relevant payments, including for example in a nominee capacity, in respect of a collective investment undertaking established in an EU Member State, one of the named third countries or one of the relevant dependent or associated territories, may apply the 'home country rule'. That is, the paying agents may determine whether the undertaking is within or without the scope of the Agreements according to the treatment of the undertaking in the jurisdiction in which it is established.

64. **What is meant by a payment of interest?** In considering what is meant by a payment of interest reference should be made to paragraphs 55 to 57 above. With specific reference to collective investment undertakings a payment of interest for the purposes of the Agreements will include –

- income deriving from interest payments directly, distributed by

  (i) a UCITS authorised in accordance with EU Directive 2009/65; or

  (ii) an equivalent undertaking for collective investment established in the Island; or

  (iii) entities which qualify for the option under Article 7(3) of the Agreements; or

(iv) other undertakings for collective investment established outside the territory to which the Treaty establishing the European Community applies by virtue of Article 299 thereof and outside the Islands;

- income realised upon the sale, refund or redemption of shares or units in the following undertakings and entities if they invest directly or indirectly via other undertakings for collective investment or entities referred to below more than 25% of their assets in debt claims as defined for the purposes of the Agreements –

  (i) UCITS authorised in accordance with EU Directive 2009/65; or

  (ii) an equivalent undertaking for collective investment established in the Islands; or

  (iii) entities which qualify for the option under Article 7(3) of the Agreements; or

  (iv) other undertakings for collective investment established outside the territory to which the treaty establishing the European Community applies by virtue of Article 299 thereof and outside the Islands.

  However the option exists of including the income above in the definition of interest only to the extent that such income corresponds to gains directly or indirectly deriving through interest payments within the meaning of paragraphs (1)(a) and (b) of Article 8 of the Agreements. This option is exercised at the discretion of the fund manager.

65. In respect of the bullet points in paragraph 64 above the option is available of excluding any income or proceeds, as applicable, from undertakings for collective investments established in the Island where the investment and debt claims of the type referred to in paragraph 55 (a) held by such entities, directly or indirectly, does not exceed 15% of their assets. As already stated in paragraph 56 above this minimum option threshold will be exercised.

66. The Agreements state that –

- when a paying agent has no information concerning the proportion of the income which derives from interest payments, the total amount of the income shall be considered an interest payment;

- when a paying agent has no information concerning the percentage of the assets invested in debt claims or in shares or units as defined above, that percentage shall be considered to be above 25%. Where the paying agent cannot determine the amount of income realised by the beneficial owner, the income shall be deemed to correspond to the proceeds of the sale, refund or redemption of the shares or units.

67. However, where insufficient information is available to enable judgement to be exercised, it is to be expected that the paying agent in exercising that judgement will give the greater weight to the interests of the beneficial owner. Thus, if a paying agent has made proper enquiries and there remains an element of doubt as to whether the reporting obligations should be applied, it is reasonable to presume that an obligation does not arise.

68. The Island Authorities will not exercise the option of requiring paying agents to annualise interest and treating such annualised interest as an

interest payment (even if no sale, redemption or refund occurs during that period).

69. In determining whether a funds investment in debt claims exceeds 15%, or 25% of its total assets, attention should be focused on the fund's investment policy as set down in its rules or constitution unless the actual composition of the fund's total assets is less than 15% or 25%, measured at the time the last debt claim investment was acquired. Cash awaiting investment should be ignored for these purposes.

70. Where a fund operates equalisation arrangements, the capital element paid on the first distribution following a subscription will not be treated as an interest payment, subject to the discretion of the fund management or the paying agent.

71. In the case of an umbrella fund the 15% and 25% percentages referred to above can be applied to either the fund as a whole or to its constituent sub-funds, at the discretion of the paying agent or the fund, as long as this is applied consistently year on year.

72. In practice it is probable that for some collective investment undertakings there will be occasion when the percentages referred to above fluctuate one side or the other of the 15% and 25% thresholds. This may be dealt with by focusing on what can be considered the normal course of events. Thus if at one point in time, the percentages suggest the application of the reporting obligation but this is not the norm, and the investment policy set down in the fund's rules or constitution is such that the reporting obligation would not ordinarily apply, it will be acceptable for the paying agent to decide that the obligation should not be applied. A similar approach applies to the sale of units of a collective investment scheme.

73. In computing the 15% and 25% thresholds, provision can also be made for set off of borrowing against debt claims. Bonds and other negotiable debt securities falling within paragraphs 49-53 which are not regarded as debt claims also can be excluded from the assets of collective investment schemes for the purposes of calculating the amount of debt securities owned by that fund (for the purpose of the 15% and 25% threshold).

74. Some general points regarding Funds

- it will be for the paying agent to determine whether or not interest purchased should be deducted but this should be done on a consistent basis;
- it will be for the paying agent to determine the taxable element on redemption but this should be done on a consistent basis;

- interest does not include discounts arising in the secondary markets as opposed to original issue discount;

- limited partnerships are not included in the definition of undertakings for collective investment;

- the return on capital introduced by way of loan is not regarded as interest.

CONCLUSION

75. This guidance does not cover every aspect of the arrangements being entered into through the Agreements. In some cases this is because the Agreements are considered to be sufficiently clear in themselves. In other cases it is because it is considered any issues arising would need to be dealt with on a case-by-case basis.

76. Any queries concerning these guidance notes should be directed to the Chief Minister's Dept (Telephone number: 440414; Email: c.powell@gov.je) Cyril Le Marquand House)

October 2014

APPENDIX

REPORTING FORMAT

Transfer of files

To use our specifically developed application which processes files created by the paying agent; with an option to specify which of the recognised formats the file is in - please go to 'do it online'.

The following submission options are offered:-

1. Use the Excel template for EUSD disclosures, go to the business to business website EUSD section.

Business to business website

2. Use the application on the business to business website to send by email to the European union savings directive contact e-mail.

3. Use the EXE to create a return, on either CD or Floppy and post to this office.

File specification

One header line with sender's information, then multiple lines for each client / account / currency.

Each record (Line) should be terminated by CR/LF and each field should be separated by commas with the data ringed by double quotes.

All fields must be present and if no data the comma separators must be present to maintain the offsets.

The first line of file must be the header line, as follows:

Description	Format	Presents
Date of submission	YYYYMMDD or DDMMYYYY	mandatory
Paying agent tax ref	AA99999A	mandatory
Company Name	maximum 90 characters	mandatory
Address line 1	maximum 50 characters	mandatory
Address line 2	maximum 50 characters	mandatory
Address line 3	maximum 50 characters	optional
Address line 4	maximum 50 characters	optional

Address line 5	maximum 50 characters	optional
Post code	maximum 10 characters	mandatory
Period	YYYY	mandatory

Client records - 1 Line per client per currency:

Description	**Format**	**Presents**
Member country	2 Character OECD code	mandatory
Title	maximum 40 characters	optional
Name 1	maximum 50 characters	mandatory
Name 2	maximum 50 characters	mandatory
Address line 1	maximum 50 characters	mandatory
Address line 2	maximum 50 characters	optional
Address line 3	maximum 50 characters	optional
Address line 4	maximum 50 characters	optional
Address line 5	maximum 50 characters	optional
Post code	maximum 10 characters	optional
Account No. or Identifier	maximum 34 characters	mandatory
Date of birth *	DDMMYYYY or YYYYMMDD	
Place of birth *	No maximum length	* at least 1 of the 3
TIN (Tp Id No) *	Maximum 40 characters	
Currency code	ISO 3 digit	mandatory
Interest amount	11 pre decimal point 2 post	mandatory

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