



House of Commons  
Select Committee on  
Statutory Instruments

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**Third Report  
of Session 2013–14**

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**Drawing special attention to:**

*International Tax Compliance (United States of America) Regulations 2013  
(S.I. 2013/1962)*

*Ordered by The House of Commons  
to be printed 6 November 2013*

## Current membership

Mr George Mudie MP (*Labour, Leeds East*) (Chairman)  
Mr Robert Buckland MP (*Conservative, South Swindon*)  
Michael Ellis MP (*Conservative, Northampton North*)  
John Hemming MP (*Liberal Democrat, Birmingham, Yardley*)  
Mr Ian Liddell-Grainger MP (*Conservative, Bridgwater and West Somerset*)  
Toby Perkins MP (*Labour, Chesterfield*)

## Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151, available on the Internet via [www.parliament.uk/scsi](http://www.parliament.uk/scsi).

The Select Committee on Statutory Instruments (SCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. It carries out the same duties as the Joint Committee on Statutory Instruments in respect of those instruments laid before and subject to proceedings in the House of Commons only.

The role of the SCSI, whose membership is drawn from the House of Commons, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of the House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. or on any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

## Publications

The reports of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee are available on the Internet from [www.parliament.uk/scsi](http://www.parliament.uk/scsi).

## Committee staff

The current staff of the Committee are Sarah Petit (*Clerk*) and Liz Booth (*Committee Assistant*).  
Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg.

## Contacts

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## Instrument reported

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At the Committee's meeting on 6 November 2013 it scrutinised a number of instruments. It was agreed that the special attention of the House of Commons should be drawn to one of those considered in accordance with Standing Orders. The Instrument and the ground for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

### S.I. 2013/1962: Reported for doubtful *vires*

*International Tax Compliance (United States of America) Regulations 2013 (S.I. 2013/1962)*

1.1 The Committee draws the special attention of the House to these Regulations on the ground that there are doubts whether they are *intra vires*.

1.2 The Regulations give effect to the agreement reached between Her Majesty's Government and the Government of the United States of America to improve international tax compliance and to implement FATCA (a term referred to in the Explanatory Note to the Regulations as covering "the provisions commonly known as the Foreign Account Tax Compliance Act in the enactment of the United States of America called the Hiring Incentives to Restore Employment Act"), signed on 12th September 2012.

1.3 Paragraph 3 of the Explanatory Memorandum laid before the House of Commons to accompany the Regulations explains that since the UK and the US signed the Agreement, the US's domestic legislation has been the subject of some revisions, the overall effect of which will be to make the requirements less burdensome. The memorandum records that "the US Treasury has advised HMRC that it is content if the UK does not wholly implement the Agreement, but does so only to the extent that implementation mirrors US FATCA law with the revisions referred to above"; it adds that "as a result, the Agreement has not been formally amended but the Regulations (including regulation 2(3)) reflect the extent to which implementation is required, and ensure that unnecessary administrative burdens are not imposed on UK business."

1.4 Section 222 of the Finance Act 2013, under which the Regulations are made, allows HM Treasury to make regulations giving effect to the tax compliance agreement signed on 12 September 2012 and "any agreement modifying or supplementing that agreement". On the basis of the explanation in the Explanatory Memorandum, it seemed to the Committee that the Regulations give effect to the agreement not as it has been modified, but as it is proposed to be modified at some future point (with regulation 2(3) providing for the agreement "to be treated as if the following amendments were made"). The Committee therefore asked HM Treasury to identify the *vires* for regulation 2(3).

1.5 In a memorandum printed in the Appendix, Her Majesty's Revenue and Customs assert that "the power in section 222(1)(a) of the Finance Act 2013 ... permits giving effect to the agreement only in relation to a narrower class of accounts, as compared to the class to which the unmodified agreement would extend". The Department adds that "it would be a disproportionate and unreasonable use of the power to give effect to the agreement in relation to the full range of accounts, and for the full period, envisaged by the agreement".

The Committee acknowledges the policy that underlies the latter part of the Department's argument, but finds nothing in the enabling powers to suggest that HM Treasury is given a discretion to choose to implement only selected parts of the agreement during the period before any modifications take effect. In the Committee's view, section 222 simply allows effect to be given to the agreement as a whole as it stands at any given time.

**1.6 The Committee therefore reports the Regulations to the House on the grounds that there is doubt whether, given the inclusion of regulation 2(3), they are *intra vires*.**

## Instruments not reported

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The Committee has considered the instruments set out in the Annex to this Report, none of which were required to be reported.

- *denotes written evidence has been submitted but not printed*

## Annex

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### Instruments requiring affirmative approval

- S.I. 2013/1897** Value Added Tax (Education) Order 2013
- S.I. 2013/2721** Tobacco Products (Descriptions of Products) (Amendment) Order 2013

### Draft instruments requiring affirmative approval

- Draft S.I.** Double Taxation Relief and International Tax Enforcement (Albania) Order 2013
- Draft S.I.** Double Taxation Relief and International Tax Enforcement (Brunei Darussalam) Order 2013
- Draft S.I.** Double Taxation Relief and International Tax Enforcement (India) Order 2013
- Draft S.I.** Double Taxation Relief and International Tax Enforcement (Norway) Order 2013
- Draft S.I.** Double Taxation Relief and International Tax Enforcement (Panama) Order 2013
- Draft S.I.** Double Taxation Relief and International Tax Enforcement (Spain) Order 2013
- Draft S.I.** Double Taxation Relief (China) Order 2013
- Draft S.I.** Double Taxation Relief (Netherlands) Order 2013
- Draft S.I.** International Tax Enforcement (Marshall Islands) Order 2013
- Draft S.I.** Unauthorised Unit Trusts (Tax) Regulations 2013
- Draft S.I.** Excepted Vehicles (Amendment of Schedule 1 to the Hydrocarbon Oil Duties Act 1979) Order 2013
- Draft S.I.** Additionally-developed Oil Fields Order 2013

<b>Draft S.I.</b>	Caribbean Development Bank (Eighth Replenishment of the Unified Special Development Fund) Order 2013
<b>Draft S.I.</b>	Double Taxation Relief and International Tax Enforcement (Isle of Man) Order 2013
<b>Draft S.I.</b>	International Tax Enforcement (Guernsey) Order 2013
<b>Draft S.I.</b>	International Tax Enforcement (Jersey) Order 2013

### Instruments subject to annulment

<b>S.I. 2013/1618</b>	Penalties, Offshore Income etc. (Designation of Territories) (Amendment) Order 2013
<b>S.I. 2013/1716</b>	Climate Change Levy (General) (Amendment No. 2) Regulations 2013
<b>S.I. 2013/1740</b>	Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Amendment) Regulations 2013
<b>S.I. 2013/1741</b>	Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Notification) Regulations 2013
<b>S.I. 2013/1742</b>	Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2013
<b>S.I. 2013/1743</b>	Individual Savings Account (Amendment No. 3) Regulations 2013
<b>S.I. 2013/1762</b>	Capital Allowances (Environmentally Beneficial Plant and Machinery) (Amendment) Order 2013
<b>S.I. 2013/1763</b>	Capital Allowances (Energy-saving Plant and Machinery) (Amendment) Order 2013
<b>S.I. 2013/1770</b>	Offshore Funds (Tax) (Amendment No. 3) Regulations 2013
<b>S.I. 2013/1772</b>	Authorised Investment Funds (Tax) (Amendment) Regulations 2013
<b>S.I. 2013/1810</b>	Temporary Non-Residence (Miscellaneous Amendments) Regulations 2013
<b>S.I. 2013/1811</b>	Data-gathering Powers (Relevant Data) (Amendment) Regulations 2013
<b>S.I. 2013/1818</b>	Registered Pension Schemes (Authorised Payments) (Amendment) Regulations 2013
<b>S.I. 2013/1819</b>	Gaming Duty (Amendment) Regulations 2013
○ <b>S.I. 2013/1820</b>	Life Insurance Qualifying Policies (Statement and Reporting Requirements) Regulations 2013

<b>S.I. 2013/1831</b>	Cultural Test (Television Programmes) Regulations 2013
<b>S.I. 2013/1843</b>	Exchange Gains and Losses (Bringing into Account Gains or Losses) (Amendment) Regulations 2013
<b>S.I. 2013/1844</b>	Annual Tax on Enveloped Dwellings (Returns) Regulations 2013
<b>S.I. 2013/2241</b>	Value Added Tax (Amendment) (No. 2) Regulations 2013
<b>S.I. 2013/2242</b>	BRB (Residuary) Limited (Tax Consequences) Order 2013
<b>S.I. 2013/2244</b>	Insurance Companies (Amendment to Schedule 17 to the Finance Act 2012 (Transitional Provision)) Regulations 2013
<b>S.I. 2013/2245</b>	Tonnage Tax (Training Requirement) (Amendment) (No. 2) Regulations 2013
<b>S.I. 2013/2571</b>	Annual Tax on Enveloped Dwellings Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2013
<b>S.I. 2013/2592</b>	Tax Avoidance Schemes (Information) (Amendment, etc) Regulations 2013
<b>S.I. 2013/2595</b>	Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2013

# Appendix

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## S.I. 2013/1962: memorandum from HM Revenue and Customs

### *International Tax Compliance (United States of America) Regulations 2013 (S.I. 2013/1962)*

1. In its letter to HM Treasury dated 23 October 2013, the Joint Committee has requested a memorandum to be submitted on the following point-

*“Having regard to the explanation given in paragraph 3 of the Explanatory Memorandum laid with the Regulations, identify the vires for regulation 2(3).”*

2. HMRC consider that regulation 2(3) is made under the power given by section 222(1)(a) of the Finance Act 2013, that is, regulation 2(3) is made-

*“for, or in connection with, giving effect to or enabling effect to be given to—*

*(a) the agreement reached between the Government of the United Kingdom and the Government of the United States of America to improve international tax compliance and to implement FATCA, signed on 12 September 2012.”*

3. The Regulations require financial institutions resident in the United Kingdom (“UK FIs”) to report information to HMRC about certain accounts they maintain for US taxpayers, and to undertake due diligence procedures in identifying those accounts. The provisions relating to due diligence procedures (see regulation 6, paragraph (3) onwards) require UK FIs to apply the procedures prescribed in the 12 September 2012 agreement (“the agreement”) as they apply to different types of account.

4. Regulation 2(3) modifies the effect of the agreement in that it requires UK FIs to provide information to HMRC about a smaller class of accounts than is envisaged by the agreement; and also requires financial institutions to first provide information about those accounts in respect of a calendar year that is later than that envisaged by the agreement. Regulation 2(3) also makes incidental time-related adjustments to the due diligence procedures set out in the agreement that are consequent on those other changes.

5. In the view of HMRC, the power in section 222(1)(a) of the Finance Act 2013 to make regulations in connection with giving effect to the agreement permits giving effect to the agreement only in relation to a narrower class of accounts, as compared to the class to which the unmodified agreement would extend; and so as to require such information to be provided for the first time in respect of a calendar year later than that envisaged by the unmodified agreement. HMRC considers that in all the circumstances (described below) it would be a disproportionate and

unreasonable use of the power to give effect to the agreement in relation to the full range of accounts, and for the full period, envisaged by the agreement.

6. The agreement is a reciprocal agreement between the Governments of the United Kingdom and the United States of America (“US”) under which each party supplies, in relation to accounts within its jurisdiction, information to the other party about accounts held by the other’s taxpayers. The intention was that the information to be supplied by the UK would mirror the information that would be required, in respect of the calendar year 2013 and onwards, from all financial institutions (including those not resident in the US) under US domestic law, and that the rigorous due diligence procedures required by US law would apply to such institutions.

7. That law, the Foreign Account Tax Compliance Act (“FATCA”), which became effective in the US in January 2013, did not create a legal obligation recognised in UK law for UK FIs. UK data protection law therefore made it impossible for such institutions to comply with the US requirements, with the result that a US resident financial institution (“US FI”) making a payment to a UK FI would have to apply withholding tax to that payment under US law. The effect of the agreement, and an underlying purpose of the UK in entering into it, is that withholding tax will not be applied by a US FI to payments made to a UK FI that provides to HMRC, in response to legal obligations created by these Regulations, information substantially similar to that which would otherwise have been required by the US under its domestic FATCA law.

8. Accordingly, under the agreement-

(1) any financial accounts that are still maintained by a financial institution (that is, are not closed accounts) where the account holder is a specified person (broadly, a US taxpayer) on 31 December 2013 are (subject to other conditions being met) capable of being “reportable accounts” for the purposes of the agreement;

(2) the UK is obliged to obtain information about reportable accounts and pass that information to the US, in respect of the calendar year 2013 and all subsequent calendar years;

(3) the UK is obliged to ensure that a UK FI applies due diligence when identifying whether any accounts maintained by it on or after 31 December 2013 are maintained for US taxpayers;

(4) accounts maintained on 31 December 2013 are referred to as “pre-existing accounts” and accounts opened on or after 1 January 2014 are referred to as “new accounts”;

(5) the UK is obliged to ensure that UK FIs complete the due diligence procedures for pre-existing accounts by 31 December 2015, unless the value of those accounts on 31 December 2013 exceeds a specified threshold, in which case those due diligence procedures must have been applied by 31 December 2014;

(6) the detail of the due diligence procedures that the UK is obliged to impose differs for pre-existing accounts and new accounts;

(7) that detail also depends, in the case of pre-existing accounts, on the value of the account as at 31 December 2013, and whether it increases in value, as measured every 31 December in following years, above a specified threshold.

9. In July 2013 US law changed so that-

(1) “reportable accounts” are those maintained on or after 30 June 2014 (instead of 31 December 2013);

(2) the first calendar year of reporting is 2014 (instead of 2013);

(3) financial institutions have to apply due diligence to identify accounts that are maintained by them for a US taxpayer on or after 30 June 2014 (rather than 31 December 2013);

(4) pre-existing and new accounts are defined according to whether they were maintained on 30 June 2014 or on or after 1 July 2014 (instead of 31 December 2013 and 1 January 2014 respectively);

(5) in relation to accounts maintained on 30 June 2014 (rather than 31 December 2013), due diligence procedures do not need to be completed until, depending on the value of those accounts, either 30 June 2015 (instead of 31 December 2014) or 30 June 2016 (instead of 31 December 2013);

(6) the detail of due diligence procedures differs according to whether an account was already maintained on 30 June 2014 (rather than 31 December 2013) or was opened on or after 1 July 2014 (rather than 1 January 2014);

(7) that detail also depends, in the case of pre-existing accounts, on the value of the account as at 30 June 2014 (rather than 31 December 2013), and whether it increases in value on 31 December 2015 (rather than 2014) and every 31 December thereafter.

10. The US announced the above changes by Notice 2013/43, dated 12 July 2012 (titled “*Revised Timeline and Other Guidance Regarding the Implementation of FATCA*”). The background to the Notice was that in following months the US expected to conclude a number of agreements with other States (that is, agreements similar to the agreement concluded with the UK). Those other agreements would be unlikely to be concluded and implemented in time for financial institutions within the

jurisdictions of those other States to have their systems ready to provide information about the calendar year 2013, and in relation to accounts open on or after 31 December 2013. Consequently, in order (as the Notice stated) “*to allow for a more orderly implementation of FATCA*” (whose timelines would otherwise be inconsistent with arrangements concluded at the international level), the US had decided to delay the effect of its domestic legislation.

11. Shortly after publication of Notice 2013/43 the US Treasury advised HMRC that there was no objection to the UK providing the US with information, under the agreement, by reference to the revised timeframe referred to in the Notice (that is, in relation to a narrower class of accounts than those covered by the agreement, commencing in a later calendar year than that specified in the agreement, and with corresponding adjustments to the due diligence timeframe provided for in the agreement). In consequence, US FIs will not be required under US law to apply withholding tax to payments made to UK FIs who provide information to HMRC according to the revised timeline: the original timeline (which is reflected in the agreement) is now irrelevant to the application of withholding tax.

12. In the circumstances HMRC considered that it would be a disproportionate and unreasonable use of the power to require UK FIs to provide to HMRC financial information about their customers in relation to whom the US had already stated that it had no interest, and accordingly which is not required to prevent the application of US withholding tax under FATCA to payments made to UK FIs. HMRC accordingly drafted regulation 2(3) to ensure that UK FIs were not required to supply information to that extent to HMRC, and to make the consequential modifications to the timing provisions relating to due diligence, as compared with those in the agreement. In the view of HMRC the Regulations were made properly in connection with giving effect to the agreement.

**HM Revenue and Customs**  
**29 October 2013**