

CRS-related Frequently Asked Questions

(June 2016)

SECTION I: GENERAL REPORTING REQUIREMENTS

1. Reporting balance or value

What balance or value of an Equity Interest should be reported where the value is not otherwise frequently determined by the Financial Institution (for example it is not routinely recalculated to report to the customer)?

The Standard defines the account balance or value in the case of an Equity interest as the value calculated by the Financial Institution for the purpose that requires the most frequent determination of value (Commentary to Section 1, A(4)). What this value is will depend on the particular facts. Depending on the circumstances it could, for example, be the value of the interest upon acquisition if the Financial Institution has not otherwise recalculated the balance or value for other reasons.

2. Aggregation and excluded accounts

Are Excluded Accounts required to be included when applying the aggregation rules?

No. The aggregation rules refer to the aggregation of Financial Accounts (Section VII, C). The definition of Financial Accounts specifically excludes Excluded Accounts (Section VIII, C(1)).

3. Account Holder Information

How does a Reporting Financial Institution report an individual that does not have both a first and last name?

The CRS schema requires the completion of the data elements for first name and last name. If an individual's legal name is a mononym or single name, the first name data element should be completed as "NFN" (No First Name) and the last name field should be completed with the account holder's mononym.

4. Reporting of sales proceeds credited or paid with respect to the Custodial Account

Subparagraph A(5)(b) of Section I provides that, in case of a Custodial Account, the total gross proceeds from the sale or redemption of Financial Assets paid or credited to the account are to be reported.

Is reporting of these gross proceeds also required when they are paid or credited with respect to the Custodial Account?

Yes, as is the case for the income items set out in subparagraph A(5)(a) of Section I, reporting of gross proceeds from the sale or redemption of Financial Assets held in a Custodial Account under subparagraph A(5)(b) of Section I is required both in case these gross proceeds are paid or credited to the account and in case they are paid or credited with respect to such account.

In the case that Financial Assets are held in a Custodial Account, any income, and gross proceeds from the sale or redemption of such Financial Assets are reportable by the Custodial Institution maintaining such Custodial Account, regardless of the account to which such amounts are paid or credited.

5. Requirement to collect TINs

Paragraph 30 of the Commentary on Section I provides that a TIN is not required to be reported with respect to a Reportable Account held by a Reportable Person with respect to whom a TIN has not been issued. Should a Financial Institution request a Reportable Person to obtain and provide a TIN, in case such Reportable Person is or may be eligible to obtain a TIN (or the functional equivalent) in its jurisdiction of residence, but is not required to obtain a TIN and has not obtained a TIN?

No.

6. Intermittent distributions to discretionary beneficiaries of a trust that is a Reporting Financial Institution

In the case of a trust that is a Financial Institution, an Equity Interest is considered to be held by any person treated as the settlor or beneficiary of all or a portion of the trust. For these purposes, a beneficiary who may receive a discretionary distribution from the trust only will be treated as a beneficiary of the trust if such person receives a distribution in the calendar year or other appropriate reporting period (see Section VIII (C)(4) and related commentary).

If a discretionary beneficiary of a trust that is a Financial Institution receives a distribution from the trust in a given year, but not in a following year, should the absence of a distribution in such following year be treated as an account closure?

No, the absence of a distribution does not constitute an account closure, as long as the beneficiary is not permanently excluded from receiving future distributions from the trust.

7. Reporting Controlling Persons of settlors that are Entities

The Standard provides that where the settlor of a trust is an Entity, Reporting Financial Institutions must also identify the Controlling Person(s) of the settlor and report them as Controlling Person(s). Are the Controlling Persons to be identified and reported only in the year of settlement, or also in subsequent years?

The identification and reporting of Controlling Persons of the settlor is required not only in the year of settlement but also in all subsequent years.

8. Reporting requirements in year of closure of a trust account

What is the financial activity to be reported in case of closure of an account:

a) maintained by a trust that is a Reporting Financial Institution?

b) maintained by a Reporting Financial Institution for a trust that is a Passive NFE?

In both cases the financial activity to be reported includes both the fact of closure of the account and the gross payments made to the Account Holder during the relevant reporting period.

9. Collection of TINs from a Controlling Person that is not a Reportable Jurisdiction Person

Pursuant to Section VIII(D)(8), an Investment Entity described in Section VIII(A)(6)(b) that is not a Participating Jurisdiction Financial Institution is a Passive NFE, and the due diligence procedures in either Section V or Section VI must be applied to the account of the Investment Entity to determine whether its account is a Reportable Account. The account is a Reportable Account if the Passive NFE has one or more Controlling Persons who are Reportable Persons. In the case where a Controlling Person is not a Reportable Jurisdiction Person, is there a requirement to collect the TIN of such Controlling Person?

Subject to provisions in domestic law, in particular with respect to the so-called “wider approach”, as reflected in Annex 5 to the Standard, if a Controlling Person is not a Reportable Jurisdiction Person, the TIN is not required to be collected from such Controlling Person.

SECTIONS II-VII: DUE DILIGENCE REQUIREMENTS

1. Documentary Evidence

Does the Standard require a Reporting Financial Institution to retain a paper copy of the Documentary Evidence collected as part of its due diligence procedures?

No. A Reporting Financial Institution is not required to retain a paper copy of the Documentary Evidence, but may do so (Paragraph 157 to the Commentary on Section VIII). A Reporting Financial institution may retain an original, certified copy, or photocopy of the Documentary Evidence or, instead, a notation of the type of documentation reviewed, the date the documentation was reviewed, and the document's identification number (if any) (for example, a passport number).

2. Residence address test – requirement to manually review Documentary Evidence

Does the requirement in the Standard to confirm the residence address with the Documentary Evidence on file require accounts to be manually reviewed?

The Standard does not require a paper search to examine the Documentary Evidence. Generally, a requirement of the residence address test is that the residence address is based on Documentary Evidence (Section III, B, (1) and the associated Commentary). If a Financial Institution has kept a notation of the Documentary Evidence, as described above, or has policies and procedures in place to ensure that the current residence address is the same as the address on the Documentary Evidence provided, then the Reporting Financial Institution will have satisfied the Documentary Evidence requirement of the residence address test.

3. Residence address test – two residence addresses

Is it possible that after the application of the residence address test it is determined that the Account Holder has two residence addresses?

Yes. Provided all the conditions for applying the residence address test are met (Section III, B, (1), and the associated Commentary), then it would be possible for the residence address test to result in two addresses being found. For example, with respect to a bank account maintained in Country A, a bank could have two addresses meeting the requirements in a case where a resident of Country B is working and living half her time in Country B and Country C. In this case a self-certification could be sought or the account could be reported to all Reportable Jurisdictions where there is a residence address.

4. Reliance on AML/KYC procedures for identifying Controlling Persons

With respect to Pre-existing Entity Accounts with an aggregate account balance or value that does not exceed USD 1,000,000, what is the due diligence and reporting requirement in cases where the Financial Institution holds information on the names of Controlling Persons and no other information as it was not required to collect such information pursuant to applicable AML/KYC procedures?

The Standard provides that for accounts with a balance or value below USD 1 million (after applying the aggregation rules), the Financial Institution may rely on information collected and maintained for regulatory or customer relationship purposes, including AML/KYC procedures to determine whether a Controlling Person is a Reportable Person (Section V, D, (2), c)). Since, in the example given, the Financial Institution does not have and is not required to have any such information on file that indicates the Controlling Person may be a Reportable Person, it cannot document the residence of the Controlling Persons and does not need to report that person as a Controlling Person.

5. Obligations of a Financial Institution to establish tax residency

What are the obligations under the Standard of a Financial Institution to establish the tax residency of its customers in relation to the New Account procedures?

A Financial Institution is not required to provide customers with tax advice or to perform a legal analysis to determine the reasonableness of self-certification. Instead, as provided in the Standard, for New Accounts the Financial Institution may rely on a self-certification made by the customer unless it knows or has reason to know that the self-certification is incorrect or unreliable, (the “reasonableness” test), which will be based on the information obtained in connection with the opening of the account, including any documentation obtained pursuant to AML/KYC procedures. The Standard provides examples of the application of the reasonableness tests (Section IV, A, and the associated Commentary).

The Standard also states that Participating Jurisdictions are expected to help taxpayers determine, and provide them with information with respect to, their residence(s) for tax purposes (Paragraph 6 of the Commentary to Section IV and Paragraph 9 of the Commentary on Section VI). The OECD is facilitating this process through a centralised dissemination of the information (on the Automatic Exchange Portal). Financial Institutions could also direct customers towards this information.

6. The Validation of TINs

With respect to a Taxpayer Identification Number (TIN) provided on a self-certification, when will a Reporting Financial Institution know or have reason to know the self-certification is incorrect or unreliable?

The Standard provides that a Reporting Financial Institution may rely on a self-certification unless it knows or has reason to know that the self-certification is incorrect or unreliable (Section VII, paragraph A and associated Commentary). This includes, among the other information provided on the self-certification, the TIN in relation to a Reportable Jurisdiction. The Standard includes an expectation that Participating Jurisdictions will provide Reporting Financial Institutions with information with respect to the issuance, collection and, to the extent possible, the practical structure and other specifications of TINs (Commentary to Section VIII, paragraph 149). The OECD will be facilitating this process through a centralised dissemination of the information (on the Automatic Exchange Portal).

A Reporting Financial Institution will have reason to know that a self-certification is unreliable or incorrect if the self-certification does not contain a TIN and the information included on the Automatic Exchange Portal indicates that Reportable Jurisdiction issues TINs to all tax residents. The Standard does not require a Reporting Financial Institution to confirm the format and other specifications of a TIN with the information provided on the Automatic Exchange Portal. However Reporting Financial Institutions may nevertheless wish to do so in order to enhance the quality of the information collected and minimise the administrative burden associated with any follow up concerning reporting of an incorrect TIN. In this case, they may also use regional and national websites providing a TIN check module for the purpose of further verifying the accuracy of the TIN provided in the self-certification.

7. Self-Certification – meaning of “positively affirmed”

A requirement for a self-certification to be valid on account opening under the Standard is that it must be signed or positively affirmed by the customer (Paragraph 7 to the Commentary on Section IV). How should “otherwise positively affirmed” be understood?

A self-certification is otherwise positively affirmed if the person making the self-certification provides the Financial Institution with an unambiguous acknowledgement that they agree with the representations made through the self-certification. In all cases, the positive affirmation is expected to be captured by the Financial Institution in a manner such that it can credibly demonstrate that the self-certification was positively affirmed (e.g., voice recording, digital footprint, etc.). The approach taken by the Financial Institution in obtaining the self-certification is expected to be in a manner consistent with the procedures followed by the Financial Institution for the opening of the account. The Financial Institution will need to maintain a record of this process for audit purposes, in addition to the self-certification itself.

8. Verbal self-certification

Does the Standard allow for the gathering of information for a self-certification verbally on account opening under the Standard?

A self-certification may be provided in any manner and in any form (see for example Paragraph 9 to the Commentary on Section IV). Therefore, provided the self-certification contains all the required information (see for example Paragraph 7 to Commentary on Section IV) and the self-certification is signed or positively affirmed by the customer, a Financial Institution may gather verbally the information required to populate or otherwise obtain the self-certification. The approach taken by the Financial Institution in obtaining the self-certification is expected to be in a manner consistent with the procedures followed by the Financial Institution for the opening of the account. The Financial institution will need to maintain a record of this process for audit purposes, in addition to the self-certification itself.

9. Self-certification with yes/no response

Does the Standard allow for a self-certification to solicit a yes/no response to questions about tax residence?

Yes. A self-certification can be completed based on a yes/no response to record the customer's jurisdiction(s) of tax residence, instead of requiring the completion of a blank field. The Standard does not prescribe how information on jurisdiction(s) of tax residence must be collected but provides that the information with respect to tax residence cannot be prepopulated (see paragraphs 7 and 8 to the Commentary on Section IV). For example, in order to complete a self-certification the customer could be asked whether the jurisdiction in which the account is being opened is the sole tax residence of the account holder, with additional questions only being asked if the answer is no.

10. Self-certification provided on the basis of a PoA

Does the Standard allow for a self-certification to be provided by third party on the basis of a power of attorney?

If an Account Holder has provided that another person has legal authority to represent the Account Holder and make decisions on their behalf, such as through a power of attorney, then that other person may also provide a self-certification.

11. Reason to Know

Should a self-certification contain language requiring the Account Holder to update the Reporting Financial Institution if there is a change in the information that affects the Account Holder's status?

Although this is not a requirement under the Standard, a Reporting Financial Institution may want (or may be required to under a particular jurisdiction's domestic law) to include such language in self-certifications collected from its Account Holders as it may reduce the onus on the Reporting Financial Institution in applying the reasonableness test. Pursuant to the reasonableness test, a Reporting Financial Institution may not rely on a self-certification if it knows or has reason to know that the information contained on the self-certification is unreliable or incorrect. Commentary on Section VII paragraph 2-3.

Jurisdictions may also consider including in their domestic law implementing the CRS a requirement on Account Holders to provide a self-certification to the Reporting Financial Institution and to inform the Reporting Financial Institution if there is a change to information contained in the self-certification that affects their status under CRS.

12. New Accounts of Pre-existing Account Holders

With respect to the allowance to treat certain New Accounts of a pre-existing customer as a Pre-existing Account, how broad is the requirement that the opening of the Financial Account does not require the provision of new, additional or amended customer information by the Account Holder other than for purposes of the CRS?

The Commentary provides that a jurisdiction may allow Reporting Financial Institutions to treat a New Account opened by an Account Holder that holds an account with the Reporting Financial Institution (or a Related Entity within the same jurisdiction as the Reporting Financial Institution) as a Pre-existing Account provided that certain conditions are met. Such conditions include that the opening of the Financial Account does not require the provision of new, additional or amended customer information by the Account Holder other than for purposes of the CRS. See Commentary to Section VIII, paragraph 82. This condition should be interpreted to include any instances in which the Account Holder is required to provide the Reporting Financial Institution with new, additional or amended customer information (as a result of a legal, regulatory, contractual, operational or any other requirement) in order to open the account. The rationale for this condition is that such instances provide an opportunity to obtain a self-certification together with new, additional or amended customer information as part of the opening of the account.

13. The relationship manager test

How might the standard of knowledge test applicable to a Relationship Manager contained in the Standard be operationalised in practice?

The standard of knowledge test applicable to a Relationship Manager (for example, Section III, C(4) and the associated Commentary) could be operationalised through regular (e.g. yearly) instructions and training by a Financial Institution to all of its employees that could be considered Relationship Managers according to the Standard (Paragraphs 38 to 42 of the Commentary to Section III, C(4)). This could include the Financial Institution maintaining a record of a response made by each Relationship Manager stating that they are aware of their obligations and the channels to communicate any reason to know that an Account Holder for which they manage the relationship is a Reportable Person. These communications could then be centrally processed by the Financial Institution in the manner required by the Standard.

14. Reliance on Service Providers

Does the Standard provide any restrictions on the use of a service provider to fulfil a Reporting Financial Institution's due diligence and/or reporting requirements under the CRS?

A jurisdiction may allow Reporting Financial Institutions to use service providers to fulfil their reporting and/or due diligence obligations. See Commentary on Section II, paragraph 6. The Standard does not require, for instance, that the service provider be within the same jurisdiction as the Reporting Financial Institution or obtain approval from the relevant jurisdiction to act as a service provider. The Commentary does provide that the Reporting Financial Institution must satisfy the requirements contained in domestic law and will remain responsible for its reporting and due diligence obligations (i.e., the actions of the service provider are imputed to the Reporting Financial Institution). To facilitate effective implementation, the jurisdiction must have access to the relevant records and evidence relied upon by the Reporting Financial Institution and service provider for the performance of the reporting and/or due diligence procedures set out in the CRS. See Commentary on Section IX, paragraphs 7-12.

15. Determination of CRS Status of Entities

Which jurisdiction's rules should apply to determine an Entity's status?

The Commentary provides that an Entity's status as a Financial Institution or nonfinancial entity (NFE) should be resolved under the laws of the Participating Jurisdiction in which the Entity is resident. See Commentary on Section IX, paragraph 2. If an Entity is resident in a jurisdiction that has not implemented the CRS, the rules of the jurisdiction in which the account is maintained determine the Entity's status as a Financial Institution or NFE since there are no other rules available.

When determining an Entity's status as an active or passive NFE, the rules of the jurisdiction in which the account is maintained determine the Entity's status. However, a jurisdiction in which the account is maintained may permit (e.g. in its domestic implementation guidance) an Entity to determine its status as an active or passive NFE under the rules of the jurisdiction in which the Entity is resident provided that the jurisdiction in which the Entity is resident has implemented the CRS.

16. Residence Address Test – Penalty of perjury

The Commentary on Section III defines in what situations the Residence Address Test can be applied. Paragraph 10 refers to a declaration signed under penalty of perjury. What does "penalty of perjury" mean?

"Penalty of perjury" in this context is meant to include all situations where a jurisdiction has included a penalty of a criminal nature for providing a false declaration in its law.

17. Requirement to obtain a TIN in the framework of the curing procedure

Does a Reporting Financial Institution need to ensure that a Tax Identification Number (TIN) is present on the self-certification of an Account Holder, in case such self-certification is obtained as part of the curing procedure foreseen by subparagraph B(6) of Section III and indicates that the Account Holder is a Reportable Person?

In the context of the due diligence procedures for Preexisting Accounts, the Financial Institution is required to use reasonable efforts to obtain a TIN. In case the self-certification is received in the course of the curing procedure, this implies as a minimum that the Financial Institution requests the Account Holder to provide a self-certification which includes a TIN, if applicable. The Financial Institution can rely on such a self-certification, even if it does not contain a TIN of the Account Holder, provided it continues to use reasonable efforts to obtain the TIN.

18. New Entity Accounts – Reliance on publicly available information

Subparagraph A(1)(a) of Section VI provides a Financial Institution needs to obtain a self-certification for the purposes of determining the tax residence of a New Entity Account Holder. Subparagraph A(1)(b) then provides that, if the self-certification indicates that the New Entity Account Holder is resident in a Reportable Jurisdiction, the account is to be considered a Reportable Account, unless the Financial Institution reasonably determines, based on information in its possession or that is publicly available, that the New Entity Account Holder is not a Reportable Person with respect to such Reportable Jurisdiction.

In case a Financial Institution knows, based on information in its possession or that is publicly available, that a New Entity Account Holder is not a Reportable Person, irrespective of its residence (e.g. because it is a corporation that is publicly traded), is the Financial Institution still required to obtain a self-certification from the New Entity Account Holder?

Paragraph 6 of the Commentary on Section VI provides that the steps of subparagraph (A)(1)(a), i.e. obtaining a self-certification, and subparagraph (A)(1)(b), i.e. confirming the status as a Reportable Person, may be taken in either order. Consequently, a Financial Institution may first determine whether a New Entity Account Holder is a Reportable Person. In case it is found that the New Entity Account Holder is not a Reportable Person (e.g. because it is a Financial Institution or a corporation that is publicly traded), the Financial Institution would not be required to obtain a self-certification from such New Entity Account Holder under subparagraph (A)(1)(a).

19. Determination of the threshold for due diligence with respect to Controlling Persons

For the purposes of determining whether a Controlling Person of a Passive NFE is a Reportable Person with respect to a Preexisting Entity Account, a Reporting Financial Institution may, in accordance with subparagraph (D)(2)(c) of Section V, only rely on the information collected and maintained pursuant to AML/KYC Procedures in case the aggregate account balance of such account held by one or more NFEs does not exceed USD 1 million. At what point in time is the USD 1 million threshold for the purpose of determining the due diligence procedure applicable to Controlling Persons of Passive NFEs to be determined?

In line with the general rules applicable to thresholds applied in the framework of the due diligence procedures, as reflected e.g. in paragraph B of Section II and paragraphs A, B and E(2) of Section V, the point in time at which the surpassing of the threshold should be verified is the last day of the calendar year or other appropriate reporting period.

Example:

In case the account balance of the relevant account is USD 900 000 on the date on which the Financial Institution carried out the due diligence, but USD 1 100 000 at year-end, the threshold of USD 1 million has been surpassed for the purpose of the due diligence obligations in that year.

20. Timing of self-certifications

With respect to New Individual and Entity Accounts the Standard provides that the Reporting Financial Institution must obtain a self-certification upon account opening. In such cases, is it expected that Reporting Financial Institutions can only open the account once a valid self-certification is received?

The Standard provides that a Reporting Financial Institution must obtain a self-certification upon account opening (Sections IV(A) and V(D)(2)). Where a self-certification is obtained at account opening but validation of the self-certification cannot be completed because it is a 'day two' process undertaken by a back-office function, the self-certification should be validated within a period of 90 days. There are a limited number of instances, where due to the specificities of a business sector it is not possible to obtain a self-certification on 'day one' of the account opening process, for example where an insurance contract has been assigned from one person to another or in the case where an investor acquires shares in an investment trust on the secondary market. In such circumstances, the self-certification should be both obtained and validated as quickly as feasible, and in any case within a period of 90 days. Given that obtaining a self-certification for New Accounts is a critical aspect of ensuring that the CRS is effective, it is expected that jurisdictions have strong measures in place to ensure that valid self-certifications are always obtained for New Accounts (see examples in paragraph 18 of the Commentary on Section IX). In all cases, Reporting Financial Institutions shall ensure that they have obtained and validated the self-certification in time to be able to meet their due diligence and reporting obligations with respect to the reporting period during which the account was opened.

SECTION VIII: DEFINITIONS

A. REPORTING FINANCIAL INSTITUTIONS

1. Entities and Cash Pooling Activities

What is the CRS status of an Entity that regularly manages working capital by pooling the cash balances, including both positive and deficit cash balances, (i.e., cash pooling) of one or more Related Entities that are primarily engaged in a business other than that of a Financial Institution and does not provide such cash pooling services to any Entity that is not a Related Entity?

To determine the CRS status of an Entity that engages in cash pooling it is necessary to consider whether the Entity is a Financial Institution, or more specifically a Depository Institution or an Investment Entity, or an NFE. The Standard defines a Depository Institution as an Entity that accepts deposits in the ordinary course of a banking or similar business. See Section VIII, subparagraph (A)(5) and Commentary on Section VIII, paragraph 12-14. For purposes of determining whether an Entity is a Depository Institution, an Entity that engages in cash pooling exclusively on behalf of one or more Related Entities will not be engaged in a banking or similar business by virtue of such activity.

If the Entity is not a Depository Institution, the Entity may still be a Financial Institution if it meets the definition of an Investment Entity as set forth in Section VIII, subparagraph (A)(6), except such section specifically provides that an Investment Entity does not include an Entity that is an Active NFE because it meets any of the criteria in subparagraph (D)(9)(d) through (g).

An Active NFE described in Section VIII, subparagraph (D)(9)(g) includes an NFE that primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution. See Section VIII, subparagraph (D)(9)(g). Since cash pooling is typically performed to reduce external debt and increase the available liquidity on behalf of Related Entities, cash pooling will be considered a financing transaction for purposes of the Active NFE definition. Therefore, an Entity that engages in cash pooling on behalf of one or more Related Entities that are not Financial Institutions and does not provide such cash pooling services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution, will have the CRS status of Active NFE.

2. Holding Company or Treasury Centre of Financial Group

In what circumstances, if any, will a holding company or treasury centre of a financial group have the status of Financial Institution under CRS?

A holding company or treasury centre of a financial group will have the status of a Financial Institution if it meets the definition of Financial Institution provided in Section VIII, paragraph A. Thus, whether a holding company or treasury centre has the status of Financial Institution depends of the facts and circumstances, and in particular on whether it engages in the specified activities or operations of a Financial Institution (as defined in Section VIII, paragraph A.) even if those activities or operations are engaged in solely on behalf of Related Entities or its shareholders. An Entity that, for example, enters into foreign exchange hedges on behalf of the Entity's Related Entity financial group to eliminate the foreign exchange risk of such group, will meet the definition of Financial Institution provided that the other requirements of Investment Entity definition are met. A holding company will also meet the definition of Financial Institution, specifically, Investment Entity, if it functions as or hold itself out as an investment fund, private equity fund, venture capital fund, and similar investment vehicles if investors participate (either through debt or equity) in investment schemes through the holding company. See Commentary to Section VIII, paragraph 20.

3. Investment Entity

In what circumstances will an Entity be managed by another Entity that is a Depository Institution, Custodial Institution, a Specified Insurance Company, or an Investment Entity described in Section III, subparagraph A(6)(a)?

The Commentary provides, for purposes of determining whether an Entity is an Investment Entity described in Section VIII, paragraph (A)(6)(b), that an Entity is managed by another Entity if the managing Entity performs, either directly or through a service provider, any of the activities or operations described in paragraph (A)(6)(a) on behalf of the managed Entity. These activities and operations include trading in money market instruments; foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading; individual and collective portfolio management, or otherwise investing, administering, or managing Financial Assets or money on behalf of other persons. Further, the managing Entity must have discretionary authority to manage the Entity's assets (in whole or in part). See Commentary on Section VIII, paragraph 17.

For example, a private trust company that acts as a registered office or registered agent of a trust or performs administrative services unrelated to the Financial Assets or money of the trust, does not conduct the activities and operations described in Section VIII, subparagraph (A)(6)(a) on behalf of the trust and thus the trust is not "managed by" the private trust company within the meaning of Section VIII, paragraph (A)(b)(6).

Also, an Entity that invests all or a portion of its assets in a mutual fund, exchange traded fund, or similar vehicle will not be considered "managed by" the mutual fund, exchange traded fund, or similar vehicle.

In both of these examples, a further determination needs to be made as to whether the Entity is managed by another Entity for the purpose of ascertaining whether the first-mentioned Entity falls within the definition of Investment Entity, as set out in Section VIII, paragraph (A)(6)(b).

4. Indirect Investment in Real Estate

If an Entity's gross income is primarily attributable to indirect investment(s) in real property, will such Entity have the status of Investment Entity?

An Entity the gross income of which is primarily attributable to investing, reinvesting, or trading real property is not an Investment Entity (irrespective of whether it is professionally managed) because real property is not a Financial Asset. See Commentary on Section VIII, paragraph 17. If, instead, an Entity is holding an interest in another Entity that directly holds real property, the interest held by the first-mentioned Entity is a Financial Asset, and the gross income derived from that interest is to be taken into account to determine whether the Entity will meet the definition of Investment Entity under Section VIII, subparagraph (A)(6)(a)(iii) or paragraph (A)(6)(b). See Section VIII; subparagraph (A)(7) for the definition of Financial Asset.

5. Investment Entity definition – managed by

In the context of Section VIII (A)(6)(b), does the notion of "managed by" also include cases where an Entity has discretionary authority to manage the assets (in whole or part) of another Entity, but does not manage the second Entity itself?

Yes, the concept of "managed by" under Section VIII (A)(6)(b) also covers cases where an Entity has discretionary authority to manage the assets (in whole or part) of another Entity, but does not manage the second Entity itself.

6. Investment Entity definition – substantial activity test

In determining whether an Entity meets the “50% gross income test” under the definition of Investment Entity, is it permissible to apply the three-year test on the final day of a non-calendar year accounting period, as foreseen for the “20% gross income test” for Custodial Institutions?

Yes. In line with the approach chosen for Custodial Institutions, the three-year test for determining whether an Entity meets the “50% gross income test” under the definition of Investment Entity may be applied on the final day of a non-calendar year accounting period of the year preceding the year in which the determination is made.

B. NON-REPORTING FINANCIAL INSTITUTIONS

1. The status of a Central Bank/International Organisation/Governmental Entity

Is it not inconsistent that a Central Bank, International Organisation or Governmental Entity can meet the requirements to be both classified as a Non-reporting Financial Institution and an Active NFE?

How the Standard applies to a Central Bank, International Organisation or Governmental Entity will depend on the facts. The definition of NFE specifically excludes Financial Institutions (Section VIII, D(7)). The first test will therefore be whether the Central Bank, International Organisation or Governmental Entity qualifies as a Financial Institution. This is a functional test and depends on the facts. Where the Central Bank, International Organisation or Governmental Entity is determined to be a Financial Institution then it can be classified as a Non-reporting Financial Institution, provided it meets the requirements to be such in the Standard (Subparagraphs (1), (2), (3) and (4) of Section VIII, B, and the associated Commentary).

Where the Central Bank, International Organisation or Governmental Entity does not meet the requirements to be classified as a Financial Institution then it will be a NFE and will be consequently classified as an Active NFE (Section VIII, D, (9) and the associated Commentary).

2. Low Risk Non-reporting Financial Institutions

What is the relationship between the jurisdiction specific categories of Low Risk Non-reporting Financial Institutions and the contents of Annex 2 to the FATCA IGAs being concluded with the US?

The categories of Non-Reporting Financial Institutions in the Standard (Section VIII, B and the associated Commentary) include some of the types of institutions contained in Annex 2 of the Model FATCA IGA. During the process of developing the Standard, however, it was decided that several of the categories in Annex 2 of the Model FATCA IGA were either not appropriate or not desirable in the context of the Standard and they were therefore not included. These are categories such as Treaty Qualified Retirement Funds, Financial Institutions with a Local Client Base, Local Banks, Financial Institutions with Only Low-Value Accounts, Sponsored Investment Entities and Controlled Foreign Corporations, Sponsored and Closely Held Investment Vehicles.

There was a recognition, though, that there may be jurisdiction-specific Financial Institutions that could reasonably be understood to be similarly low risk to the categories included in the Standard but may nevertheless not be covered by the categories provided in the Standard. A residual category was therefore provided to allow Participating Jurisdictions to specifically identify these jurisdiction-specific low risk Financial Institutions as Non-Reporting Financial Institutions, provided they meet the requirements set out in the Standard (Section VIII, B, (1), c)) and the associated Commentary).

3. Depository Accounts held by a Central Bank

A Central Bank is a Non-Reporting Financial Institution except with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of the type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution. See Section VIII; subparagraph B (1) (a).

Will a Depository Account maintained by a Central Bank for its employee be considered an obligation held in connection with a commercial financial activity that will require the Central Bank to perform due diligence and reporting with respect to such account as a Reporting Financial Institution?

No. Depository Accounts held by a Central Bank for current or former employees (and the spouse and children of such employees) will not be considered held in connection with a commercial financial activity and thus the Central Bank will be a Non-Reporting Financial Institution with respect to such Financial Accounts.

C. FINANCIAL ACCOUNT

1. Debt Interest

The Standard provides that the Financial Accounts of an Investment Entity are its debt and equity interests (Section VIII, C, (1), a) and the associated Commentary). What is the definition of a debt interest?

There is no definition of debt interest provided in the Standard.

The Standard provides that if a term is not defined it shall have a meaning consistent with the local law of the applicable jurisdiction (Paragraph 2 of Section 1 of the Model Competent Authority Agreement). Therefore, the definition of debt interest is determined under local law of the implementing jurisdiction.

2. Excluded Account

The Standard provides that a life insurance contract with a coverage period that will end before the insured individual attains age 90 is an Excluded Account provided the additional requirements described in Section VIII, subparagraph C(17)(c) are satisfied. Should this exclusion be read to cover term life insurance contracts?

Yes. The Standard includes as an Excluded Account certain term life insurance contracts that meet the conditions specified in Section VIII, subparagraph C(17)(c). See Commentary to Section VIII, paragraphs 86 and 91 which use the wording “term life insurance contract”.

3. Excluded Account – Dormant accounts

The Standard provides, as an example of a Low-risk Excluded Account, a dormant account with an annual balance that does not exceed USD 1000. See Commentary on Section VIII, paragraph 103, Example 6.

In light of the fact that the USD 1000 threshold is provided as an example, to what extent can jurisdictions electing to include dormant accounts as a Low-risk Excluded Account fix a higher threshold?

Even though the USD 1000 amount is only indicative it is expected that jurisdictions electing to include dormant accounts as a Low-risk Excluded Account do not fix a threshold that substantially exceeds this amount.

4. OTC Derivatives

A Financial Asset is defined in the CRS to include a “security (for example, a share of stock in a corporation; partnership or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture, or other evidence of indebtedness), partnership interest, commodity, swap (for example, interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, and similar agreements), Insurance Contract or Annuity Contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, swap, Insurance Contract, or Annuity Contract.” See Section VIII, paragraph (A)(7).

Does the definition of Financial Asset include over-the-counter derivatives?

Yes, the definition of Financial Asset does not distinguish between exchange traded (or listed) derivatives or over-the-counter derivatives.

5. Excluded Accounts – substitute requirements – penalty regime

In accordance with subparagraph C(17)(g) of Section VIII, an account may only be included in the jurisdiction-specific list of low-risk Excluded Accounts, when (i) the account presents a low risk of being used to evade tax, (ii) the account has substantially similar characteristics to a category of Excluded Accounts foreseen by the Standard, (iii) the account is defined as Excluded Account by domestic law and (iv) the status of the account as an Excluded Account does not frustrate the purposes of the Standard.

In that context, paragraph 103 of the Commentary to Section VIII contains an example with respect to requirement (ii), stating that a penalty regime (such as a high-rate flat tax) on early withdrawals from an Annuity Contract, treated as an Excluded Account pursuant to subparagraph C(17)(a), can present a substitute requirement for not limiting the contributions to such an Annuity Contract.

How is this example to be interpreted, in particular, in light of the fact that the Account Holder of an Annuity Contract may not be resident for tax purposes in the jurisdiction of the Financial Institution issuing the Annuity Contract?

The penalty regime on early withdrawals of the jurisdiction of the Financial Institution that has issued the Annuity Contract to a non-resident must ensure that such penalties can be effectively levied by the jurisdiction of the Financial Institution. In particular, the jurisdiction of the Financial Institution should ensure that applicable international tax law, including its Double Tax Conventions, do not prevent the effective levying of such penalties.

6. Excluded Accounts – substitute requirements – reporting to tax authorities

In the context of Excluded Accounts, the fact that the information in relation to an account is required to be reported to the tax authorities constitutes both an indicator for low risk in the context of preparing the jurisdiction-specific list of low-risk Excluded Account under subparagraph C(17)(g) of Section VIII and a characteristic for qualifying a retirement or pension account as an Excluded Account pursuant to subparagraph C(17)(a) of Section VIII.

Does the fact that the information in relation to an account is required to be reported to the regulatory and/or social security authorities of the jurisdiction of the Reporting Financial Institution represent a substantially similar characteristic for the purposes of qualifying accounts as Excluded Accounts?

The fact that the information in relation to an account is required to be reported to the regulatory and/or social security authorities of the jurisdiction of the Reporting Financial Institution does only represent a substantially similar characteristic to the extent it is ensured under relevant domestic law that such information is made readily available to the tax authorities of the jurisdiction of the Reporting Financial Institution.

D. REPORTABLE ACCOUNT

1. Reporting of certain Controlling Persons

Does an Entity's Controlling Person(s) resident in the same jurisdiction as the Reporting Financial Institution need to be reported?

The Standard only requires the reporting of Reportable Jurisdiction Persons. Reportable Jurisdiction Persons are persons resident in a particular set of jurisdictions, as set out in the domestic implementing legislation of the Participating Jurisdiction where the Reporting Financial Institution is located (Section VIII, D, (3)). At a minimum, this list must include jurisdictions with which the Participating Jurisdiction has an agreement to automatically exchange information under the Standard. This would therefore not include persons resident solely in that Participating Jurisdiction itself.

There is, though, an approach discussed in the Standard which would allow a Participating jurisdiction to extend reporting to cover their own residents that are Controlling Persons, although this is not a requirement of the Standard (Paragraph 5 of Annex 5 to the Standard).

2. Passive Non-Financial Entities

An Entity is an Active Non-Financial Entity if less than 50% of its income is passive income and less than 50% of its assets produce or are held for the production of passive income. What if the assets could produce passive income but do not actually produce any income in the period concerned?

The test of whether an asset is held for the production of passive income (Section VIII, D, (9), a) and the associated Commentary) does not require that passive income is actually produced in the period concerned. Instead, the asset must be of the type that produces or could produce passive income. For example, cash should be viewed as producing or being held for the production of passive income (interest) even if it does not actually produce such income.

3. Passive Income

The CRS does not define passive income; however, the Commentary provides a list of items that should generally be considered passive income. The Commentary further provides that the determination of passive income may be made by "reference to each jurisdiction's particular rules." See Commentary on Section VIII, paragraph 126. In determining passive income, what is meant by the reference to each jurisdiction's particular rules?

To facilitate effective implementation of the Standard, a jurisdiction's definition of passive income should in substance be consistent with the list provided in the Commentary. Each jurisdiction may define in its particular rules the items contained in the list of passive income (such as, income equivalent to interest) consistent with domestic rules.

4. Reportable Person – regularly traded definition

Section VIII (D)(2)(a) provides that “a corporation the stock of which is regularly traded on one or more established securities market” is not a Reportable Person.

In this respect, paragraph 112 of the Commentary on Section VIII provides that stock is “regularly traded” if there is a meaningful volume of trading with respect to the stock on an on-going basis.

Paragraph 113 of the Commentary provides further guidance as to the meaning of “meaningful volume of trading with respect to the stock on an on-going basis” with respect to each share class of the stock of the corporation.

How is the term “each share class of the stock of the corporation” to be interpreted?

For the purposes of the Standard, “each share class of the stock of the corporation” means one or more classes of the stock of the corporation that (i) were listed on one or more established securities markets during the prior calendar year and (ii), in aggregate, represent more than 50% of (a) the total combined voting power of all class of stock of such corporation entitled to vote and (b) the total value of the stock of such corporation.

5. Protectors of a trust that is a Reporting Financial Institution

Are protectors of a trust that is a Reporting Financial Institution considered to be Account Holders of the trust in all instances or only in circumstances where their powers are such that they could be regarded as exercising control over the trust?

The protector must be treated as an Account Holder irrespective of whether it has effective control over the trust.

6. Payment type code with respect to a Cash Value Insurance Contract, an Annuity Contract, an Equity Interest and a debt interest

May code CRS504 be used to identify all the payment types that are reported with respect to a Cash Value Insurance Contract, an Annuity Contract, an Equity Interest and a debt interest?

Yes, code CRS504 may be used to identify all the payment types that are reported with respect to a Cash Value Insurance Contract, an Annuity Contract, an Equity Interest and a debt interest, including where such payments are dividends, interest, gross proceeds or redemption payments. The Standard does not require the use of a specific code (i.e. CRS501, CRS502 or CRS503) to identify each payment type that is reported with respect to a Cash Value Insurance Contract, an Annuity Contract, an Equity Interest or a debt interest.

E. MISCELLANEOUS

1. Related Entity definition in case of indirect ownership

In order to determine whether an Entity is related to another Entity, it is required, pursuant to subparagraph E(4) of Section VIII of the Standard, to verify whether either Entity controls the other Entity or whether the two entities are under common control. The same provision states that control includes direct or indirect ownership of more than 50% of the vote and value in an Entity.

In the case of indirect ownership of vote and value of one Entity in another Entity, must the ownership be measured proportionally or not?

Example:

Entity A owns 51% of the total voting power and 51% of the total value of the stock of Entity B. Entity B on its turn owns 51% of the total voting power and 51% of the total value of the stock of Entity C. Are Entity A and Entity C Related Entities? Under a proportional rule, the Entities would not be related because the rule would require the percentages of vote and value to be multiplied, whilst in reality Entity A effectively controls Entity C.

Entities are considered Related Entities, if these Entities are connected through one or more chains of ownership by a common parent Entity and if the common parent Entity directly owns more than 50% of the stock or other equity interest in at least one of the other Entities. A chain of ownership is to be understood as the ownership by one or more Entities of more than 50 percent of the total voting power of the stock of an Entity and more than 50 percent of the total value of the stock of an Entity.

Example:

Entities A and C are considered “Related Entities” pursuant to subparagraph E(4) of Section VIII because Entity A has a direct ownership of more than 50 percent of the total voting power of the stock and more than 50 percent of total value of the stock of Entity B, and because Entity B has a direct ownership of more than 50 percent of the total voting power of the stock and more than 50 percent of total value of the stock of Entity C. Entities A and C are, hence, connected through chains of ownership. Notwithstanding the fact that Entity A proportionally only owns 26 percent of the total value of the stock and voting rights of Entity C, Entity A and Entity C are Related Entities.

OTHER ISSUES

1. Data Safeguards – ISO-27000

The Standard refers to the ISO-27000 series in relation to safeguarding data. It is a requirement of the Standard that the series is applied and, if so, is a certification required?

Rather than being prescriptive, the ISO-27000 series provide an approach to managing risk through best practice recommendations on information security management, risks and controls. The precise approach taken will be shaped by the context of the overall information security management system a tax administration has. Furthermore, there are other approaches that can be seen as providing equivalent protection. There is therefore an expectation that jurisdictions either apply the ISO 27000-series, an equivalent standard or have a reasonable justification of why it is reasonable to depart from it in the context of a particular tax administration. (References to the ISO-270000 series can be found in paragraph 13 to the Commentary on Section 3 and paragraph 12 to Commentary on Section 5 of the Model Competent Authority Agreement).