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Guidelines for the implementation of  
the  
**EU Council Directive 2014/107/EU** of  
9 December 2014 amending Directive  
2011/16/EU as regards mandatory  
automatic exchange of information in  
the field of taxation **(DAC2)**  
in Malta

and the

**Common Reporting Standard (CRS)**  
issued in terms of Article 96(2) of the  
Income Tax Act (Chapter 123 of the  
Laws of Malta)

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## Abbreviations

Common Reporting Standard	<b>CRS</b>
EU Council Directive 2014/107/EU	<b>DAC II</b>
Malta Financial Institution	<b>MFI</b>
Non-Financial Entity	<b>NFE</b>
Non-Reporting Malta Financial Institution	<b>NRMFI</b>
Reporting Malta Financial Institution	<b>RMFI</b>

## 1. Introduction

In recent years, the challenge posed by cross-border tax fraud and tax evasion has increased considerably and has become a major focus of concern within the European Union and at global level. Unreported and untaxed income is considerably reducing national tax revenues. An increase in the efficiency and effectiveness of tax collection is therefore urgently needed. The automatic exchange of information constitutes an important tool in this regard.

### 1.1 Outline of EU Council Directive 2014/107/EU ('DAC2')

The Commission in its communication of 6 December 2012 containing an Action Plan to strengthen the fight against tax fraud and tax evasion highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters.

In this respect Council Directive 2011/16/EU provided for the mandatory automatic exchange of information between Member States on certain categories of income and capital, mainly of a non-financial nature that taxpayers hold in Member States other than their State of residence. It also established a step-by-step approach to reinforcing automatic exchange of information by its progressive extension to new categories of income and capital and the removal of the condition that the information only has to be exchanged if available. Currently, given the increased opportunities to invest abroad in a wide range of financial products, the existing Union and international administrative cooperation instruments in the field of taxation have become less effective in combating cross-border tax fraud and evasion.

In view of this, the Council of the European Union adopted EU Council Directive 2014/107/EU that extended the cooperation between EU tax authorities to automatic exchange of financial account information (hereinafter referred to as 'DAC2'). This extension effectively incorporated the Common Reporting Standard within EU Council Directive 2011/16/EU as regards administrative cooperation in the field of taxation. This is because in order to minimise costs and administrative burdens, both for tax administrations and for economic operators, it was crucial to ensure that the expanded scope of automatic exchange of information within the Union is in line with international developments.

### 1.2 Outline of the Common Reporting Standard ('CRS')

A jurisdiction implementing the Common Reporting Standard (hereinafter referred to as 'CRS') must have rules in place that require financial institutions to report information consistent with the scope of reporting and to follow due diligence procedures consistent with the procedures set out in the Standard. These rules underpin the automatic exchange of financial account information.

The financial institutions covered by the standard include custodial institutions, depository institutions, investment entities and specified insurance companies, unless they present a low risk of

being used for evading tax and are excluded from reporting, as laid out in Annex I, Section VIII, Part B of the amended Corporation with Other Jurisdiction on Tax Matters Regulations.

The financial information to be reported with respect to reportable accounts includes interest, dividends, account balance or value, income from certain insurance products, sales proceeds from financial assets and other income generated with respect to assets held in the account or payments made with respect to the account.

Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations), and the Standard includes a requirement to look through passive entities to report on the relevant controlling persons.

The due diligence procedures to be performed by reporting financial institutions for the identification of reportable accounts are set out in the Standard. The rules distinguish between individual accounts and entity accounts, and further distinguish between pre-existing and new accounts – recognizing it is more difficult and costly for financial institutions to obtain information from existing account holders rather than requesting such information upon account opening.

Thus generally –

- For **Preexisting Individual Accounts** financial institutions are required to review accounts without application of any *de minimis* threshold. The CRS distinguishes between Higher and Lower Value Accounts. For Lower Value Accounts it provides for a permanent residence address test based on documentary evidence or a determination of residence on the basis of an indicia search. A self-certification (and/or documentary evidence) would be needed in case of conflicting indicia. In the absence of providing such self-certification and/or documentary evidence, reporting would be made to all reportable jurisdictions for which indicia have been found. For Higher Value Accounts enhanced due diligence procedures apply, including a paper record search and an actual knowledge test by the relationship manager.
- For **New Individual Accounts** the CRS requires a self-certification (and the confirmation of its reasonableness) without *de minimis* threshold.
- For **Preexisting Entity Accounts**, financial institutions are required to determine:
  - Whether the Entity itself is a Reportable Person, which can generally be done on the basis of available information (AML/KYC procedures) and if not, a self-certification would be needed; and
  - Whether the Entity is a Passive Non-Financial Entity and, if so, whether the Entity is controlled by Reportable Person/s.

For a number of account holders the active/passive assessment is rather straight forward and can be made on the basis of available information whilst for others this may require self-certification. Furthermore, CRS provides an optional exemption from review and reporting for preexisting entity accounts with a balance or value of USD 250 000 (approximately equivalent to EUR 222, 250).

- For **New Entity Accounts**, the same assessments need to be made as for Preexisting Accounts. However, as it is easier to obtain self-certification for New Accounts, the USD 250 000 threshold does not apply.

### **1.3 Implementation of DAC2 and CRS into Maltese legislation**

The DAC2 and CRS have been implemented into Maltese legislation by virtue of LN 384 of 2015 entitled the Cooperation with Other Jurisdiction on Tax Matters (Amendment) Regulations, 2015, which regulations amend the Cooperation with Other Jurisdiction on Tax Matters Regulations with effect from 1<sup>st</sup> January 2016. In line with regulation 45 of the afore-mentioned regulations, the DAC2 and CRS will be implemented uniformly into Maltese legislation.

### **1.4 Purpose of these Guidelines**

These guidelines are issued in terms of Article 96(2) of the Income Tax Act (Chapter 123 of the Laws of Malta) and are to be read in conjunction with LN 384 of 2015 and apply to Maltese Financial Institutions.

These guidelines will be regularly reviewed and if necessary updated to reflect any changes or other clarifications that the Commissioner deems necessary for the purposes of a more correct application of the DAC2 and/or CRS. Any changes will be uploaded as a standalone document for the reader's ease of reference and furthermore the revised version of the guidelines will be published on the Inland Revenue website.

### **1.5 The reciprocal automatic exchange framework**

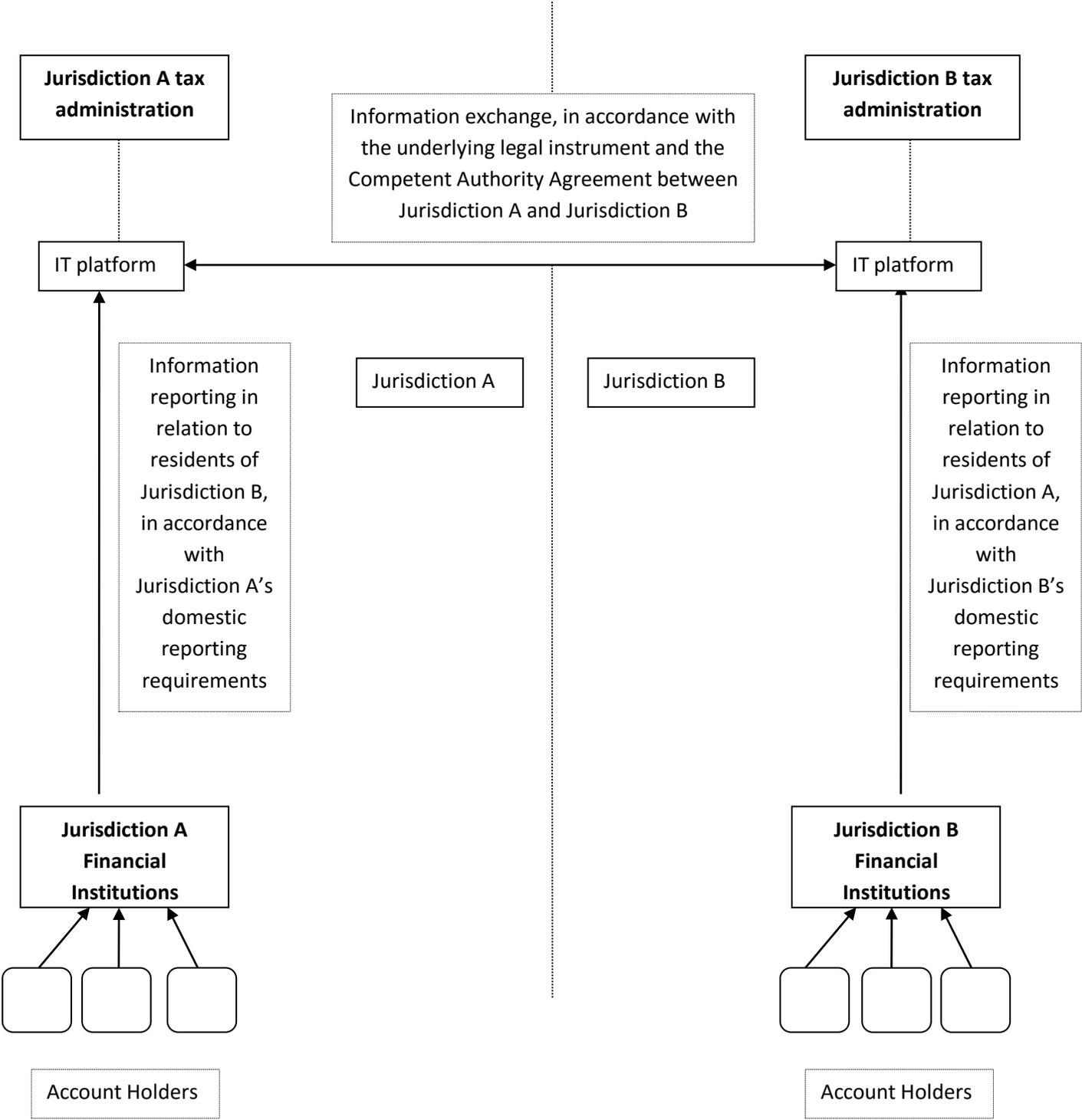
Figure 1 below shows the automatic exchange framework for reciprocal information exchange under the DAC2 and the CRS.

Maltese reporting financial institutions report information to the Commissioner for Revenue (hereinafter referred to as 'Commissioner'), which information consists of details of the financial assets they hold on behalf of taxpayers from jurisdictions with which the Maltese competent authority exchanges information. On the other hand, the Maltese competent authority will receive information from a foreign competent authority on the basis of an underlying legal instrument allowing for the exchange of information to take place. The information that the Maltese competent authority receives is information that the foreign competent authority would have received from its reporting financial institutions.

### **1.6 Competent Authority**

In the case of Malta, this term is to be interpreted in line with the provisions of Regulation 8 of the Cooperation with Other Jurisdictions on Tax Matters Regulations (LN 295 of 2011 as amended).

**Figure 1 – Automatic Exchange Framework for Reciprocal Information Exchange**



## 2. Section I: General reporting requirements

Section I of Annex I to the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that “...each Reporting Malta Financial Institution must report the following information with respect to each Reportable Account of such Reporting Malta Financial Institution...”.

Each Reporting Malta Financial Institution (hereinafter referred to as ‘RMFI’) is obliged to collect the information detailed in Section 9 of these guidelines with respect to each of their Reportable Accounts, which information is in turn then reported to the Commissioner.

Therefore collection of information by the RMFIs is the first core requirement so that the competent authority in Malta is ultimately able to automatically exchange information in terms of regulation 13 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations.

Below is a breakdown of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, providing more detail and guidance to Malta’s Financial Institutions.

### 2.1 Reporting Financial Institutions

Section VIII, Part A 1. of the Annex to the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that:

*The term “**Reporting Financial Institution**” means any Malta Financial Institution that is not a Non-Reporting Malta Financial Institution.*

Furthermore Section VIII, Part A (1) of the Annex to the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that:

*The term “**Malta Financial Institution**” means*

- (i) Any Financial Institution that is resident in Malta, but excludes any branch of that Financial Institution that is located outside Malta, and*
- (ii) Any branch of a Financial Institution that is not resident in Malta, if that branch is located in Malta.*

Therefore for a Financial Institution to be a RMFI it first needs to be a Malta Financial Institution (hereinafter referred to as ‘MFI’). Subsequently the MFI must not fall in any of the categories of a Non-Reporting Malta Financial Institution (hereinafter referred to as ‘NRMFI’).

A MFI is “resident” in Malta if it is subject to the jurisdiction of Malta i.e. Malta is able to enforce reporting. Generally, a FI is a ‘Malta Financial Institution’ if Malta is the jurisdiction of its tax residence (and where the FI would be subject to the jurisdiction of Malta). This is the reporting nexus<sup>1</sup>.

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<sup>1</sup> Refer to Section 2.3 below

When it comes to branches, a “branch” is a unit, business, or office of a FI that is treated as a branch under the regulatory regime of a jurisdiction or that is otherwise regulated under the laws of a jurisdiction as separate from other offices, units or branches of the FI. A branch includes a unit, business, or office of a FI located in a jurisdiction in which the FI is resident, and a unit, business, or office of a FI located in the jurisdiction in which the FI is created or organised. All units, businesses, or offices of a RFI in a single jurisdiction shall be treated as a single branch.

Therefore, the branch of a FI that is resident in Malta and which branch is located outside Malta will not be a Maltese RFI. On the other hand, if the branch is located in Malta it will be a Maltese RFI, despite the fact that the FI of which it is a branch of is not located in Malta. Reference is made to Figure 3.

A Malta Financial Institution is resident in Malta if it falls under the definition of “resident in Malta” in Article 2 of the Income Tax Act. A branch of a Financial Institution is a permanent establishment in line with internationally agreed principles that has a place of business in Malta (including any oversea company in terms of the Companies Act). In many cases whether or not a FI is resident in Malta or whether a branch of a FI is located in Malta will be clear, but there may be situations where this is less obvious. In such cases the Financial Institution will need to seek confirmation of its status from the Commissioner.

In the case of trusts, if any of the trustees are resident in Malta for tax purposes then the trust is to be considered as Malta resident. See Section 8 for further information regarding treatment of trusts.

### **2.1.1 Financial Institutions**

*The term “**Financial Institution**” means a Custodial Institution, a Depository Institution, an Investment Entity or a Specified Insurance Company.*

Whether an Entity is subject to the financial laws and regulations of Malta, or is subject to supervision and examination by agencies having regulatory oversight of financial institutions, is relevant to, but not necessarily determinative of, whether that Entity qualifies as a Financial Institution.

Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides definitions of each of the above mentioned Financial Institutions.

**Note 1:** In what circumstances, if any, will a holding company or treasury centre of a financial group have the status of Financial Institution?

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. Thus, whether a holding company or treasury centre has the status of Financial Institution depends on the facts and circumstances, and in particular on whether it engages in the specified activities or operations of a Financial Institution 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 the 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.

### 2.1.1.1 Custodial Institution

The term **"Custodial Institution"** means **any Entity that holds, as a substantial portion of its business, Financial Assets for the account of others.**

The definition of a 'custodial institution' establishes the "substantial portion" test i.e. an Entity holds Financial Assets for the account of others as a substantial portion of its business if the Entity's gross income attributable to the holding of Financial Assets and related financial services<sup>2</sup> equals or exceeds 20% of the Entity's gross income during the shorter of:

- (i) The three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or
- (ii) The period during which the Entity has been in existence

*"Income attributable to the holding of Financial Assets and related financial services" means*

- *custody, account maintenance, and transfer fees;*
- *commissions and fees earned from executing and pricing securities transactions with respect to Financial Assets held in custody;*
- *income earned from extending credit to customers with respect to Financial Assets held in custody (or acquired through such extension of credit);*
- *income earned on the bid-ask spread of Financial Assets held in custody; and*

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<sup>2</sup> Defined below

- *fees for providing financial advice with respect to Financial Assets held in (or potentially to be held in) custody by the entity; and for clearance and settlement services.*

Entities that safe keep Financial Assets for the account of others, such as custodian banks, brokers and central securities depositories, would generally be considered Custodial Institutions. Entities that do not hold Financial Assets for the account of others, such as insurance brokers, will not be Custodial Institutions.

### **2.1.1.2 Depository Institution**

*The term “**Depository Institution**” means any Entity that accepts deposits in the ordinary course of a banking or similar business.*

An Entity is considered to be engaged in a “*banking or similar business*” if, in the ordinary course of its business with customers, the Entity accepts deposits or other similar investments of funds and regularly engages in one or more of the following activities:

- a) makes personal, mortgage, industrial, or other loans or provides other extensions of credit;
- b) purchases, sells, discounts, or negotiates accounts receivable, installment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- c) issues letters of credit and negotiates drafts drawn thereunder;
- d) provides trust or fiduciary services;
- e) finances foreign exchange transactions; or
- f) enters into, purchases, or disposes of finance leases or leased assets.

An Entity is not considered to be engaged in a banking or similar business if the Entity solely accepts deposits from persons as a collateral or security pursuant to a sale or lease of property or pursuant to a similar financing arrangement between such Entity and the person holding the deposit with the Entity.

Savings banks, commercial banks, savings and loan associations, and credit unions would generally be considered Depository Institutions. However, whether an Entity conducts a banking or similar business is determined based upon the character of the actual activities of such Entity.

Entities falling within this definition include entities regulated in Malta as a savings or commercial bank. Any relevant exclusion contained in the Banking Act will also apply for the purposes of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. However in considering whether an entity is conducting banking or similar business, it will be the actual activities that the entity carries out that will finally be determinative.

### 2.1.1.3 Investment Entity

The term “Investment Entity” includes two types of Entities:

1. Entities that primarily conduct as a business investment activities or operations on behalf of other persons; and
2. Entities that are managed by those entities or other Financial Institutions.

The first type of “Investment Entity” is explained as:

- (i) Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- (ii) Individual and collective portfolio management; or
- (iii) Otherwise investing, administering, or managing Financial Assets or money on behalf of other persons.

Such activities or operations do not include rendering non-binding investment advice to a customer.

The second type of “Investment Entity” is explained as that which has its gross income primarily attributable to investing, reinvesting, or trading in Financial Assets, if the Entity is managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment Entity described in the first type of investment entity above.

An Entity is “managed by” another Entity if the managing Entity performs, either directly or through another service provider, any of the activities or operations described in (i) to (iii) above on behalf of the managed Entity. However, an Entity does not manage another Entity if it does not have discretionary authority to manage the Entity’s assets (in whole or part). Where an Entity is managed by a mix of Financial Institutions, NFEs or individuals, the Entity is considered to be managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment Entity described in the first type of investment entity above, if any of the managing Entities is such another Entity.

An Entity is treated as primarily conducting as a business one or more of the activities described in the first type of Investment Entity described above, or an Entity’s gross income is primarily attributable to investing, reinvesting, or trading in Financial Assets for the purposes of the second type of Investment Entity, if the Entity’s gross income attributable to the relevant activities equals or exceeds 50% of the Entity’s gross income during the shorter of:

- (i) The three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or
- (ii) The period during which the Entity has been in existence.

The term “Investment Entity” does not include an Entity that is an Active NFE because that Entity meets any of the criteria relating to holding NFEs and treasury centres that are members of a nonfinancial group; start-up NFEs; and NFEs that are liquidating or emerging from bankruptcy.<sup>3</sup>

An Entity would generally be considered an Investment Entity if it functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buy-out fund or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in Financial Assets. An Entity that primarily conducts as a business investing, administering, or managing non-debt, direct interests in real property on behalf of other persons, such as a type of real estate investment trust, will not be an Investment Entity.

The definition of Investment Entity has to be interpreted in a manner that is consistent with similar language set forth in the definition of “financial institution” in the Financial Action Task Force Recommendations.<sup>4</sup>

**Example 1 (Investment advisor):**

*Fund manager is an Investment Entity within the meaning of the first type of Investment Entity described above. Fund manager, among its various business operations, organizes and manages a variety of funds, including Fund A, a fund that invests primarily in equities. Fund manager hires Investment advisor, an Entity, to provide advice and discretionary management of a portion of the Financial Assets held by Fund A. Investment advisor earned more than 50% of its gross income for the last three years from providing similar services; because Investment advisor primarily conducts a business of managing Financial Assets on behalf of clients, Investment advisor is an Investment Entity under the first type of Investment Entity. It is recognized, however, that only the Investment Entity maintaining the Financial Accounts will be responsible for the reporting and due diligence obligations with respect to such Financial Accounts.*

**Example 2 (Entity that is managed by a FI):**

*The facts are the same as Example 1. In addition, in every year since it was organized, Fund A has earned more than 50% of its gross income from investing in Financial Assets. Accordingly, Fund A is an Investment Entity (second type of Investment Entity) because it is managed by Fund manager and Investment advisor and its gross income is primarily attributable to investing, reinvesting, or trading in Financial Assets.*

<sup>3</sup> Reference is made to Note 1 in Page 12.

<sup>4</sup> FATF/OECD (2013), *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, the FATF Recommendations February 2012, FATF/OECD, Paris, available on [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)

**Example 3 (Investment manager):**

*Investment manager, a Jurisdiction B Entity, is an Investment Entity within the meaning of the first type of Investment Entity. Investment manager organizes and registers Fund A in Jurisdiction A. Investment manager is authorized to facilitate purchases and sales of Financial Assets held by Fund A in accordance with Fund A's investment strategy. In every year since it was organized, Fund A has earned more than 50% of its gross income from investing, reinvesting, or trading in Financial Assets. Accordingly, Fund A is an Investment Entity under the second type of Investment Entity.*

**Note 2: 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 VIII, subparagraph A(6)(a)?**

*The Guidelines provide, 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).*

*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).*

**Note 3:** 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. 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 below for definition of Financial Asset). The latter will however not apply should the Entity satisfy the conditions of a holding NFE, as defined under Section 2.7.4.2 of these Guidelines.

### ➤ **Financial Asset**

The definitions of 'Custodial Institution' and 'Investment Entity' above make reference to 'Financial Assets' which is defined in Section VIII of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations as:

The term "**Financial Asset**" includes:

- 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.

The term "Financial Asset" does not include a non-debt, direct interest in real property.

The definition does not refer to assets of every kind, but it still intends to encompass any assets that may be held in an account maintained by a FI with the exception of a non-debt, direct interest in real property.

Negotiable debt instruments that are traded on a regulated market or over-the-counter market and distributed and held through FIs, and shares or units in a real estate investment trust, would generally be considered Financial Assets.

### 2.1.1.4 Specified Insurance Company

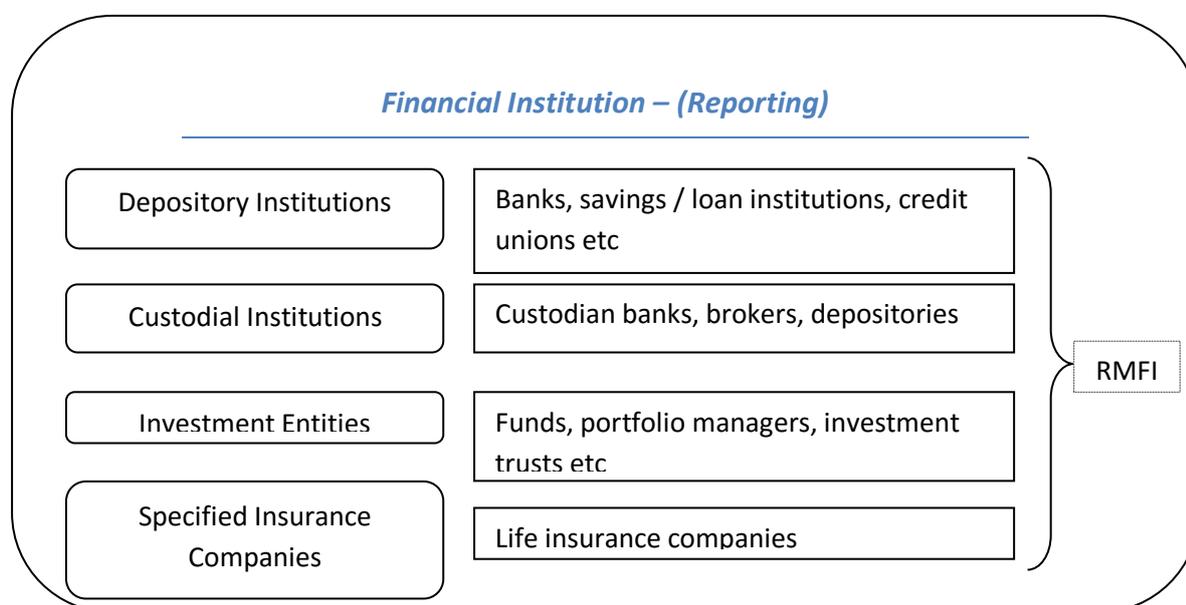
The term **“Specified Insurance Company”** means **any Entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.**

An “insurance company” is an Entity:

- (i) That is regulated as an insurance business under the laws, regulations, or practices of any jurisdiction in which the Entity does business;
- (ii) The gross income of which (for example, gross premiums and gross investment income) arising from insurance, reinsurance, and Annuity Contracts for the immediately preceding calendar year exceeds 50% of total gross income for such year; or
- (iii) The aggregate value of the assets of which associated with insurance, reinsurance, and Annuity Contracts at any time during the immediately preceding calendar year exceeds 50% of total assets at any time during such year.

Most life insurance companies would generally be considered Specified Insurance Companies. Entities that do not issue Cash Value Insurance Contracts or Annuity Contracts nor are obliged to make payments with respect to them, such as most non-life insurance companies, most holding companies of insurance companies, and insurance brokers, will not be Specified Insurance Companies.

The reserving activities of an insurance company will not cause the company to be a Custodial Institution, a Depository Institution, or an Investment Entity i.e. a FI.



### *Financial Institutions – further defined*

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- **Depository Institutions**
  - Accepts deposits in the course of a banking or similar business
- **Custodial Institutions**
  - $\geq 20\%$  of gross income from holding Financial Assets for others
- **Investment Entities**
  - (i) Gross income primarily ( $\geq 50\%$ ) from business investment activities (trading / investing in Financial Assets, portfolio management etc) on behalf of customers; **or**
  - (ii) Gross income primarily ( $\geq 50\%$ ) from investment in Financial Assets and managed by a Financial Institution
- **Specified Insurance Contracts**
  - Insurance company making payments on a Cash Value Insurance / Annuity Contracts
- **Non-Reporting Financial Institutions**

**Note 4:** What is the 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 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 Regulations define a Depository Institution as an Entity that accepts deposits in the ordinary course of a banking or similar business. 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)(8)(d) through (g). An Active NFE described in Section VIII, subparagraph (D)(8)(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.

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 status of Active NFE.

## 2.2 Non-Reporting Malta Financial Institutions

With reference to the definition of 'Reporting Malta Financial Institution' (see above), a FI will be deemed to be a Reporting Financial Institution if it is a Malta Financial Institution – provided it is not a Non-Reporting Malta Financial Institution. The term “Non-Reporting Malta Financial Institution” is set forth through several definitions.

A Non-Reporting Malta Financial Institution is any Financial Institution that is:

- a) A Governmental Entity; International Organisation or Central Bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution;  
The above FIs are to be considered as NRFI so far as other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution;
- b) a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; a Pension Fund of a Governmental Entity, International Organisation or Central Bank; or a Qualified Credit Card Issuer;
- c) any other Entity that presents a low risk of being used to evade tax, has substantially similar characteristics to any of the Entities described in subparagraphs B(1)(a) and (b), and is included in the list of Non-Reporting Malta Financial Institutions referred to in Article 8(7a) of DAC2, provided that the status of such Entity as a Non-Reporting Malta Financial Institution does not frustrate the purposes of this Directive;
- d) an Exempt Collective Investment Vehicle; or
- e) a trust to the extent that the trustee of the trust is a Reporting Malta Financial Institution and reports all information required to be reported pursuant to Section I with respect to all Reportable Accounts of the trust.

**Note 5:** 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 Non-Financial Entity (NFE)?

*How the Regulations apply to a Central Bank, International Organisation or Governmental Entity will depend on the facts. The definition of NFE specifically excludes Financial Institutions. 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 Regulations. 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.*

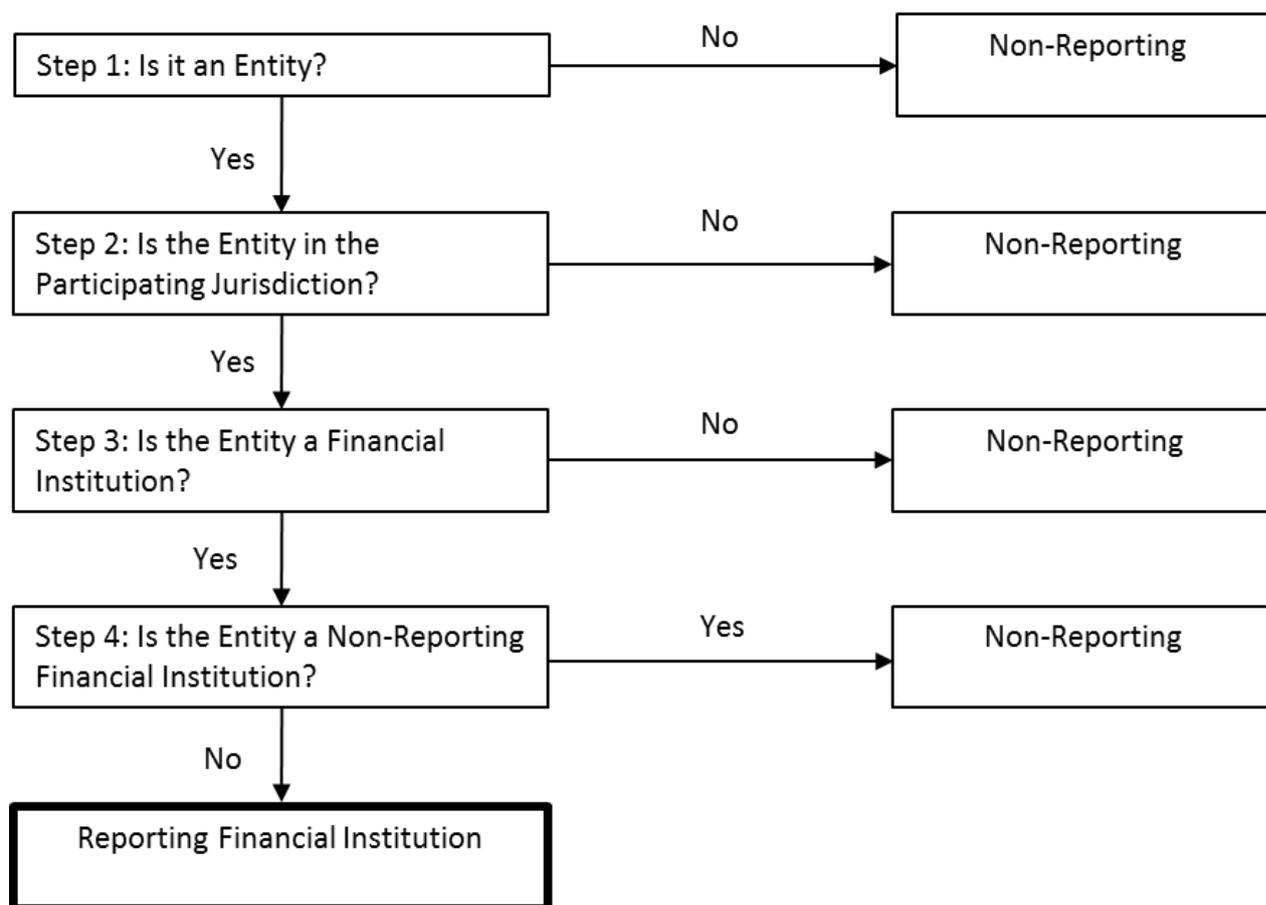
Malta's specific list of Non-Reporting Financial Institutions published by the Commissioner can be found as an Annex to these guidelines which list is also published in the *Official Journal of the European Union*.

Malta financial institutions that are listed as Non-Reporting Financial Institutions in the lists mentioned above should periodically review their status as such. In the case of a change in circumstances such that they no longer have a low risk of being used to evade tax, such Financial Institution would need to register with the Commissioner in accordance with Section 2.4 and follow the obligations as set out in the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Subsequent to this change in status of a particular Financial Institution, the Commissioner will remove it from the list of Non-Reporting Financial Institution and inform the Commission accordingly.

### 2.3 Summary of the above

Thus, as stated earlier, it is a core requirement for the automatic exchange of financial account information that every financial institution establishes whether it is a RMFI and not a NRMFI. This process can be broken down into a four step test, as shown below.

Figure 2: The steps to identify a Reporting Malta Financial Institution



### 2.3.1 Step 1: Is it an Entity?

Only **Entities** can be Reporting Malta Financial Institutions. The definition of Entity is broad and means *“a legal person or a legal arrangement, such as a corporation, partnership, trust or foundation”*<sup>5</sup>. Individuals are therefore excluded from being a Reporting Malta Financial Institution by virtue of the definition of ‘Entity’.

### 2.3.2 Step 2: Is the Entity in Malta?

The target is **entities in Malta** as these can be most effectively compelled to report the necessary information by Malta. This is the reporting nexus mentioned earlier.

The **general rule** is that Entities **resident** in Malta, their branches located in Malta and branches of foreign Entities that are located in Malta are included within Malta’s reporting nexus, while foreign Entities, their foreign branches and foreign branches of domestic Entities are not. This is depicted in Figure 3 where, assuming all the entities and branches are Reporting Malta Financial Institutions,

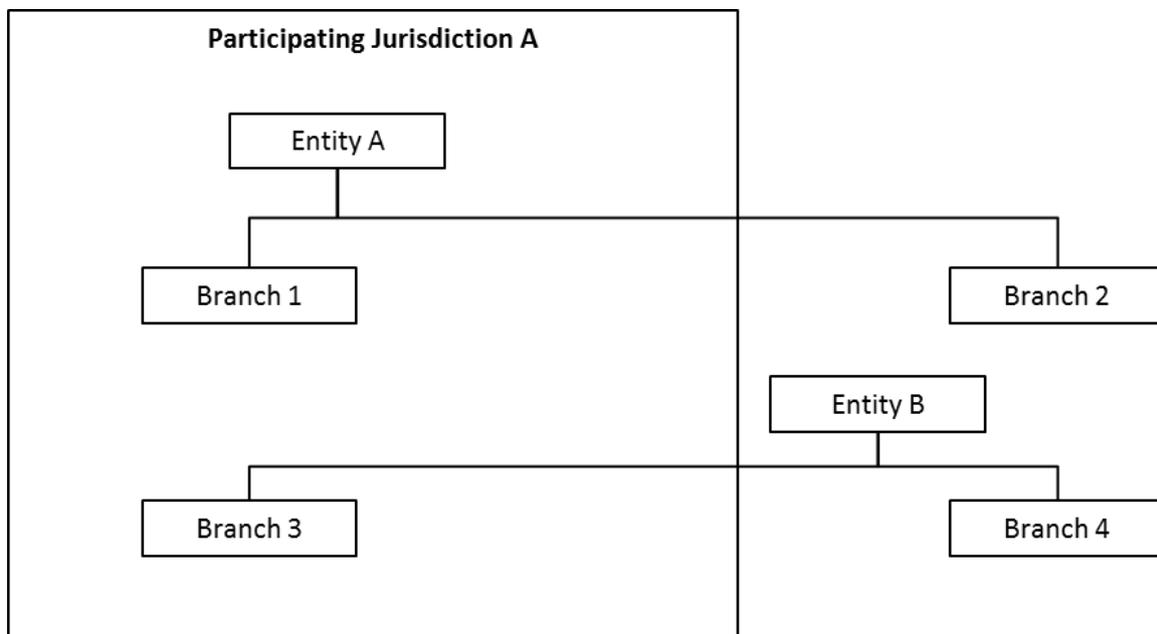
<sup>5</sup> Section VIII, Part E of DAC2 and CRS

Participating Jurisdiction A will need to require Entity A, Branch 1 and Branch 3 to report information to its tax authority.

**Note 6:** Which jurisdiction's rules should apply to determine an Entity's status?

The guidelines provide that an Entity's status as a MFI or non-financial entity (NFE) should be resolved under the laws of the Participating Jurisdiction in which the Entity is resident. If an Entity is resident in a jurisdiction that has not implemented the provisions of EU Council Directive 2014/107/EU or the CRS, the rules of the jurisdiction in which the account is maintained determine the Entity's status as a MFI 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, Malta permits an Entity that has an account that is maintained in Malta, to determine its status as an active or passive NFE under the rules of the jurisdiction in which the Entity is resident.

**Figure 3: Reporting Nexus under the DAC2 and CRS**



**Table 1: Determining whether an Entity is resident in Malta**

Entity	Location under the DAC2 and CRS
Tax resident Entities	Residence for tax purposes i.e. in Malta if Malta is able to enforce reporting by the FI (and therefore is a “Malta Financial Institution”)
Trust (and similar arrangements, e.g. foundations) that is a Financial Institution	<p>A trust is considered to be subject to the jurisdiction of Malta if one or more of the trustees are resident in Malta. This applies unless the trustee knows the required information is being reported elsewhere, because the trust is treated as tax resident there. In any event, in case of doubt, reporting is to be done in Malta.</p> <p>In the case of a foundation, references to a trustee shall be construed as references to the administrator of a foundation.</p>
FI (other than a trust) that does not have a residence for tax purposes (ex: because it is treated as fiscally transparent, or is located in a jurisdiction that does not have an income tax)	<p>It is considered to be subject to the jurisdiction of Malta and is therefore a “Malta Financial Institution” if:</p> <ul style="list-style-type: none"> <li>• It is incorporated under the laws of Malta;</li> <li>• It has its place of management (including effective management) in Malta; or</li> <li>• It is subject to financial supervision in Malta.</li> </ul>
FI (other than a trust) that is resident in two or more jurisdictions	The FI will be subject to the reporting and due diligence obligations of the jurisdiction in which it maintains the Financial Account(s) i.e. the FI may be required to report the Financial Account(s) it maintains to the tax authorities in each of the jurisdictions in which it maintains them.

### *2.3.3 Step 3: Is the Entity a Financial Institution?*

Refer to the definitions provided above of 'Financial Institution' and the various categories which are shown in Figure 4.

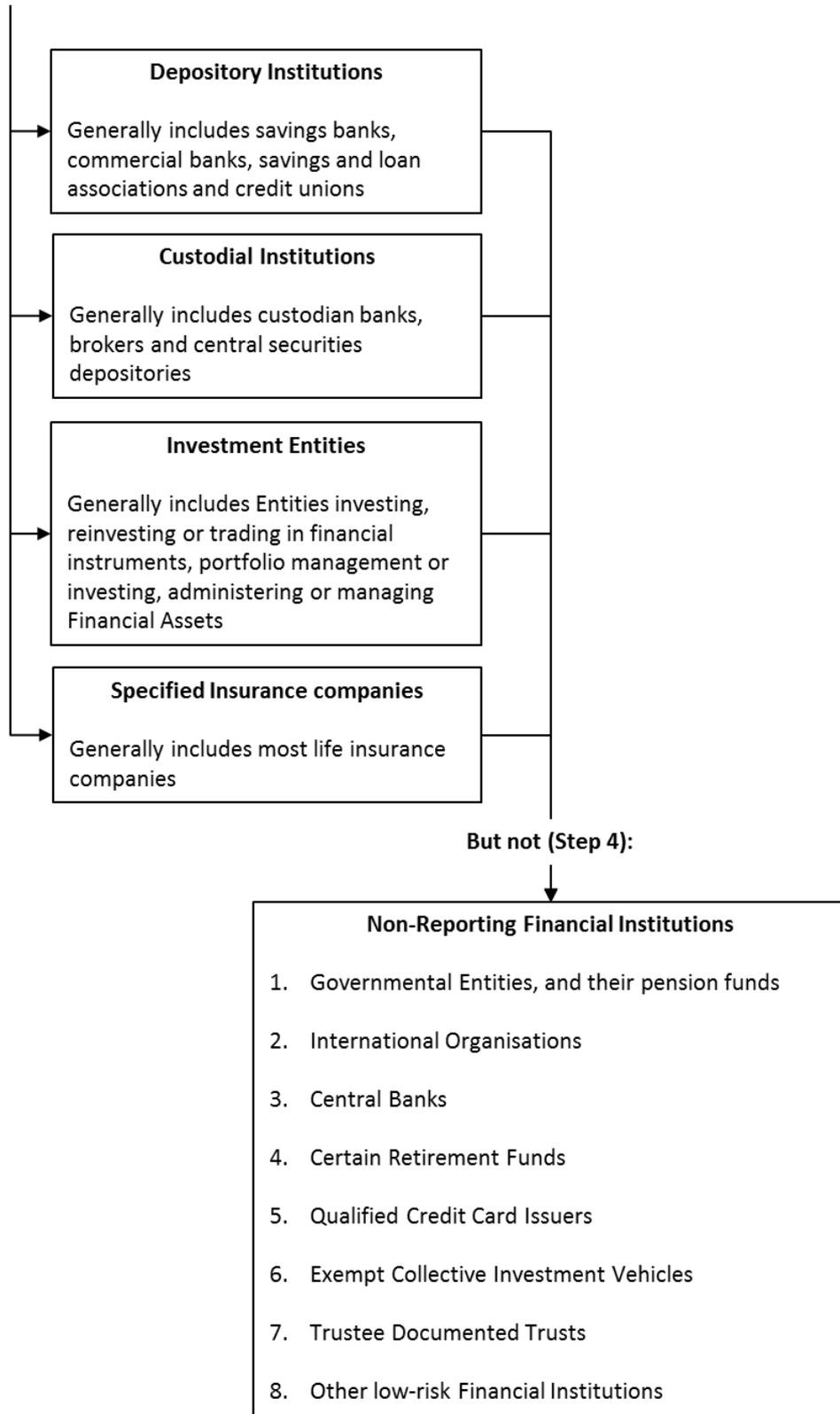
### *2.3.4 Step 4: Is the Entity a Non-Reporting Malta Financial Institution?*

Categories of Financial Institutions are then specifically excluded from being required to report information due to posing a low risk of being used to evade tax. These are Non-Reporting Malta Financial Institutions. These are also shown in Figure 4.

One of the categories of Non-Reporting Malta Financial Institution is a general category of "Other Low-risk Non-Reporting Malta Financial Institutions". This is a list of **jurisdiction-specific Financial Institutions** that are excluded from reporting provided they meet certain conditions, including that their categorisation as such does not frustrate the purposes of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. The Commissioner for Revenue has published this list on the website and can be found as an Annex to these guidelines. Whilst the two systems are independent from each other, the starting point for this list was the Financial Institutions treated as Exempt Beneficial Owners or Deemed-Compliant FFIs with respect to the FATCA IGA.

**Figure 4: Financial Institutions that need to report**

Reporting Financial Institutions are defined as (Step 3):



## 2.4 Registration requirements

A Malta Financial Institution is obliged to register with the Commissioner for the purposes of DAC2 and CRS. This registration is to be accomplished through the online registration process through the website of the Inland Revenue Department and that will be made available in due course.

Registration needs to be done by the later of 30<sup>th</sup> June, 2016 or 30 days following which an entity becomes a Malta Financial Institution, whichever date is the later. A Malta Financial Institution needs to be in possession of a TIN prior to proceeding with such registration.

When effecting registration the Malta Financial Institution will be asked to provide details concerning its identification, type of entity, type of financial institution, whether it is a reporting or non-reporting Malta Financial Institution, types of financial accounts maintained, elections to be made (if any) in relation to the options available under Annex I and II to the 'Cooperation with Other Jurisdictions on Tax Matters Regulations', registration number as well as contact details.

A Malta Financial Institution which has already registered with the Commissioner for the purposes of FATCA will not be obliged to register again for the purposes of DAC2 and CRS. However they will be required to inform the Commissioner of their classification as an MFI, the type of financial accounts held and any applicable elections in relation to the options available under Annex I and II to the 'Cooperation with Other Jurisdictions on Tax Matters Regulations'. This information shall be submitted in such form as the Commissioner may require.

## 2.5 Information to be collected by the RMFI

As quoted above, Section I of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that *"...each Reporting Malta Financial Institution must report the following information with respect to each Reportable Account of such Reporting Malta Financial Institution..."*.

Information that needs to be reported by the RMFI to the Commissioner, and which information is subsequently exchanged, is the information that needs to be collected by the same RMFI subsequent to the application of reporting and due diligence rules detailed in the amended Cooperation with Other Jurisdiction on Tax Matters Regulations.

Broadly speaking the information is:

- Information required for the automatic exchange partner jurisdiction to identify the Account Holder concerned (Identification information);
- Information to identify the account and the Financial Institution where the account is held (Account information); and
- Information in relation to the activity taking place in the account and the account balance (Financial information).

Together, this information should be sufficient to identify the account holder and then to establish a picture of the compliance risk of that account holder (i.e. whether they have properly declared the relevant financial information). The tables in Section 9 set out the information to be reported in greater detail.

### *2.5.1 “Reasonable efforts”*

The RMFI needs to ensure that it has made reasonable efforts in collecting the information it is obliged to collect. ‘Reasonable efforts’ means genuine attempts to acquire such information i.e. actual, legitimate and valid attempts. This includes a record being kept by the RMFI describing the steps that were undertaken and evidence as to how the requisite policies and procedures were followed. Such efforts must be made, at least once a year, during the period between the identification of the Pre-existing Account as a Reportable Account and the end of the second calendar year following the year of that identification. Examples of reasonable efforts include contacting the Account Holder (e.g., by mail, in-person or by phone), including a request made as part of other documentation or electronically (e.g., by facsimile or by e-mail); and reviewing electronically searchable information maintained by a Related Entity of the Reporting Malta Financial Institution, in accordance with the aggregation principles set forth in paragraph C of Section VII. However, reasonable efforts do not necessarily require closing, blocking, or transferring the account, nor conditioning or otherwise limiting its use. Notwithstanding the foregoing, reasonable efforts may continue to be made after the abovementioned period.

It is always advisable that the RMFI keeps a record of the steps it undertook and any evidence it relied upon in the performance of its obligations.

### *2.5.2 Retention of documents*

All the documentation and other evidence that the RMFI or the third party undertaking the obligations for the RMFI, collects in the course of meeting their obligations need to be retained by the RMFI or the third party service provider for a minimum period of five years starting from the end of the year in which the information relates. They must retain records of the documentary evidence, or a notation or record of the documents reviewed and used to support an account holder’s status.

Such evidence does not have to be in original and may be a certified copy, a photocopy or at least contains a notation of:

- The type of documentation reviewed;
- Each type of document;
- The date the documentation was received;
- The document’s identification number (if any) (e.g. passport number) and
- Whether any indicium was identified.

Where a RMFI fails to retain the documentation and information it collected in the course of meeting its reporting and due diligence obligations for a minimum period of five years starting from

the end of the year in which the information relates, the RMFI will be subject to a penalty of two thousand five hundred euro (€2,500)<sup>6</sup>.

## 2.6 Obligations under the Wider Approach

The 'wider approach' is intended to enable RMFIs to collect and maintain information on the tax residence of Account Holders irrespective of whether or not that Account Holder is a Reportable Person for any given Reportable Period.

Unless this wider approach is adopted, the due diligence procedures outlined in the Cooperation with Other Jurisdictions on Tax Matters Regulations would be designed to identify accounts which are held by residents of jurisdictions with which Malta has an obligation to exchange information. However, the number of these jurisdictions is not fixed and there is an expectation that Malta will be exchanging information with more jurisdictions as these become signatories to the Multilateral Competent Authority Agreement and thus become participating and reportable jurisdictions for the purpose of the Cooperation with Other Jurisdictions on Tax Matters Regulations. RMFIs will need to cater for such changes on an ongoing basis. It may be therefore that RMFIs will find themselves in a position where their systems could not be updated in time to carry out the required due diligence procedures following the addition of new jurisdictions with which Malta has to exchange information. Consequently, the regulations applying the due diligence rules have been extended to adopt a wider approach to recording the territory in which a person is tax resident, irrespective of whether that territory is a Non-EU Reportable Jurisdiction at the time that the Regulations come into force. In this way, RMFIs will have the necessary information so as to enable them to meet these obligations relating to the due diligence procedures when new jurisdictions are added to the list of Non-EU Reportable Jurisdictions.

Under this wider approach, RMFIs are required to identify the territory in which an Account Holder or a Controlling Person is resident for tax purposes and to maintain this information for a period of five years starting from the end of the year in which the information relates, in line with Regulation 21 of the Cooperation with Other Jurisdictions on Tax Matters Regulations. It is important to note that the RMFIs will be obliged to collect and maintain such information, but shall not report this information to the Commissioner for Revenue. The information for the relevant years will be subsequently reported by the RMFI to the Commissioner once the relevant jurisdiction becomes a reportable jurisdiction and there is a basis for exchange of information.

This wider approach could effectively reduce costs for the RMFI because they would not need to perform additional due diligence procedures to identify their account holders each time Malta enters into a new automatic exchange relationship. Thus this enables the RMFI to create a standard process right from the start, such that when a new jurisdiction is added to the list of Non-EU Reportable Jurisdictions, the work in identifying where existing customers are resident has already been carried out. Reducing the number of times that due diligence processes have to be carried out should result in lower costs for the RMFIs in complying with their obligations. Financial Institutions

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<sup>6</sup> Regulation 44(1)(a) of the amended Cooperation with Other Jurisdictions on Tax Matters Regulations

will only need to revisit the determination of tax residence in those cases where there has been a change of circumstance.

## 2.7 Reportable Accounts

RMFIs are required to review the Financial Accounts they maintain to identify whether any of them are Reportable Accounts, in which case information relating to them needs to be reported to the Commissioner.

Primarily a RMFI needs to identify its Financial Accounts. This is then followed by an exercise wherein the RMFI excludes certain Financial Accounts on the basis of them being low risk of being used to evade tax and hence fall outside the scope. The latter accounts are excluded from needing to be reviewed or reported (see Excluded Account, Section 2.6.2 below).

### 2.7.1 Financial Account

Section VIII of Annex I of the of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations defines the term “Financial Account” as ***“an account maintained by a Financial Institution”***. It is further clarified that this term includes:

- Depository Accounts;
- Custodial Accounts;
- Equity and debt interest in certain Investment Entities’
- Cash Value Insurance Contracts; and
- Annuity Contracts.

The term “Financial Account” however, does not include any account that is an Excluded Account and which thus is not subject to the due diligence procedures that apply for the purposes of identifying Reportable Accounts. In addition, the term “Financial Account” does not include certain Annuity Contracts i.e. a noninvestment-linked, non-transferable, immediate life annuity<sup>7</sup> that is issued to an individual and monetizes a pension or disability benefit provided under an account that is an Excluded Account<sup>8</sup>. Pension or disability benefits include retirement or death benefits, respectively.

A *“noninvestment-linked, non-transferable, immediate life annuity”* is a non-transferable Annuity Contract that:

- (i) *Is not an investment-linked annuity contract;*  
*“investment-linked annuity contract” means an Annuity Contract under which benefits or premiums are adjusted to reflect the investment return or market value of assets associated with the contract.*
- (ii) *Is an immediate annuity; and*

<sup>7</sup> See definition below

<sup>8</sup> Subparagraph C(1)(c), Section VIII

*“immediate annuity” means an Annuity Contract that*

- (i) Is purchased with a single premium or annuity consideration; and*
- (ii) No later than one year from the purchase date of the contract commences to pay annually or more frequently substantially equal periodic payments.*

*(iii) Is a life annuity contract.*

*“life annuity contract” means an Annuity Contract that provides for payments over the life or lives of one or more individuals.*

According to C(1)(a) of Section VIII any equity or debt interest in an Investment Entity is considered a Financial Account. However, equity or debt interests in an Entity that is an Investment Entity solely because it is an investment advisor, or an investment manager, are not Financial Accounts. Thus, equity or debt interests that would generally be considered Financial Accounts include equity or debt interests in an Investment Entity:

- (i) that is a professionally managed investment entity; or*
- (ii) that functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in Financial Assets.*

According to C(1)(b) of Section VIII an equity or debt interest in a FI other than those described in C(1)(a) (described above) is considered a Financial Account only if the class of interests was established with a purpose of avoiding reporting in accordance with Section I of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Thus, equity or debt interests in a Custodial Institution, Depository Institution, Investment Entity other than an investment advisor or an investment manager described in C(1)(a), or Specified Insurance Company, that were established with a purpose of avoiding reporting will be Financial Accounts.

*(a) in the case of an Investment Entity, any equity or debt interest in the Financial Institution.*

*Notwithstanding the foregoing, the term “Financial Account” does not include any equity or debt interest in an Entity that is an Investment Entity solely because it:*

- (i) renders investment advice to, and acts on behalf of; or*
  - (ii) manages portfolios for, and acts on behalf of, a customer for the purpose of investing, managing, or administering Financial Assets deposited in the name of the customer with a Financial Institution other than such Entity;*
- (b) in the case of a Financial Institution not described in subparagraph C(1)(a), any equity or debt interest in the Financial Institution, if the class of interests was established with the purpose of avoiding reporting in accordance with Section I; and*
- (c) any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a non-investment-linked, non-transferable immediate*

*life annuity that is issued to an individual and monetises a pension or disability benefit provided under an account that is an Excluded Account.*

*The term “Financial Account” does not include any account that is an Excluded Account.<sup>9</sup>*

**Note 7:** *The Regulations provide that the Financial Accounts of an Investment Entity are its debt and equity interests. What is the definition of a debt interest?*

*There is no definition of debt interest provided in the Regulations; however the term shall have a meaning consistent with Maltese legislation (Paragraph 2 of Section 1 of the Model Competent Authority Agreement), including the FATCA guidelines.*

### **2.7.1.1 Depository Account**

The term **“Depository Account”** includes **any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business.**

A Depository Account **also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon.**

An account that is evidenced by a passbook would generally be considered a Depository Account. Negotiable debt instruments that are traded on a regulated market or over-the-counter market and distributed and held through Financial Institutions would not generally be considered Depository Accounts, but Financial Assets.

**Note 8:** *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 employees 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 RMFI?*

*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.*

<sup>9</sup> Annex I, Section VIII, Part C of the EU Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, and Section VIII, Part C of the CRS

### 2.7.1.2 Custodial Account

The term **“Custodial Account”** means an account (other than an Insurance Contract or Annuity Contract) which holds one or more Financial Assets for the benefit of another person.

### 2.7.1.3 Equity Interest

The definition of the term “Equity Interest” specifically addresses interests in partnerships and trusts.

- In the case of a partnership that is a Financial Institution, either a capital or profits interest in the partnership;
- In the case of a trust that is a Financial Institution, an Equity Interest is considered to be held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust.
  - The same as for a trust that is a FI is applicable for a legal arrangement that is equivalent or similar to a trust, or foundation that is a FI.
  - A Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.

For these purposes, a beneficiary who may receive a discretionary distribution from the trust only will be treated as a beneficiary of a trust if such person receives a distribution in the calendar year or other appropriate reporting period (i.e. either the distribution has been paid or made payable). The same is applicable with respect to the treatment of a Reportable Person as a beneficiary of a legal arrangement that is equivalent or similar to a trust, or foundation.

Where Equity Interests are held through a Custodial Institution, the Custodial Institution is responsible for reporting, not the Investment Entity. By way of example, a Reportable Person *Mr. B* holds shares in investment fund *L*. *Mr. B* holds the shares in custody with custodian *Y*. Investment Fund *L* is an investment entity and from its perspective, its shares are Financial Accounts [i.e. equity interests in an Investment Entity]. *L* must treat its custodian *Y* as its account holder. However, since *Y* is a Financial Institution in its own right [i.e. a Custodial Institution] such shares are not subject to be reported by the investment fund *L*, since **financial institutions are not Reportable Persons**. Thus, as a custodial institution, *Y* is responsible for reporting the shares it is holding on behalf of *Mr. B*.

#### 2.7.1.4 Insurance and Annuity Contracts

The term **“Insurance Contract”** means **a contract** (other than an Annuity Contract) **under which the issuer agrees to pay an amount upon the occurrence of a specified contingency involving mortality, morbidity, accident, liability, or property risk.**

The term **“Annuity Contract”** means **a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals.** The term also includes a contract that is considered to be an Annuity Contract in accordance with the law, regulation, or practice of the Member State or other jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

The term **“Cash Value Insurance Contract”** means an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value.

The term **“Cash Value”** means the greater of:

- (i) the amount that the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan); and
- (ii) the amount the policyholder can borrow under or with regard to the contract. Notwithstanding the foregoing, the term “Cash Value” does not include an amount payable under an Insurance Contract:
  - (a) solely by reason of the death of an individual insured under a life insurance contract;
  - (b) as a personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against;
  - (c) as a refund of a previously paid premium (less cost of insurance charges whether or not actually imposed) under an Insurance Contract (other than an investment-linked life insurance or annuity contract) due to cancellation or termination of the contract, decrease in risk exposure during the effective period of the contract, or arising from the correction of a posting or similar error with regard to the premium for the contract;

The exclusions mentioned in (a) and (c) above are amounts payable in connection with an investment-linked life insurance contract<sup>10</sup>, and in (c) also an investment-linked life annuity contract<sup>11</sup>. A “life insurance contract” is an Insurance Contract under which the issuer, in exchange for consideration, agrees to pay an amount upon the death of one or more

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<sup>10</sup> “Investment-linked life insurance contract” is an Insurance Contract that

- (i) Is an investment-linked insurance contract; and
- (ii) Is a life insurance contract.

<sup>11</sup> “Investment-linked life annuity contract” is an Annuity Contract that:

- (i) Is an investment-linked annuity contract; and
- (ii) Is a life annuity contract

individuals. That a contract provides one or more payments in addition to a death benefit does not cause the contract to be other than a life insurance contract.

*(d) as a policyholder dividend<sup>12</sup> (other than a termination dividend) provided that the dividend relates to an Insurance Contract under which the only benefits payable are described in subparagraph C(8)(b); or*

*(e) as a return of an advance premium or premium deposit for an Insurance Contract for which the premium is payable at least annually if the amount of the advance premium or premium deposit does not exceed the next annual premium that will be payable under the contract.*

Note: only a contract that is a Cash Value Insurance Contract or an Annuity Contract can be a Financial Account.

Micro insurance contracts that do not have a Cash Value (including a Cash Value equal to zero) will not be considered Cash Value Insurance Contracts. Insurance wrapper products<sup>13</sup>, such as private placement life insurance contracts, would generally be considered Cash Value Insurance Contracts.

It is suggested that prior to reviewing its financial accounts it is ideal that the RFI determines whether the Financial Accounts in question are an Excluded Account, as per Section 2.6.2 below

The below table shows which Financial Institution is **generally** considered to maintain each type of Financial Account.

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<sup>12</sup> A “policyholder dividend” is any dividend or similar distribution to policyholders in their capacity as such, including:

- a) An amount paid or credited (including as an increase in benefits) if the amount is not fixed in the contract but rather depends on the experience of the insurance company or the discretion of management;
- b) A reduction in the premium that, but for the reduction, would have been required to be paid; and
- c) An experience rated refund or credit based solely upon the claims experience of the contract or group involved.

A policyholder dividend cannot exceed the premiums previously paid for the contract, less the sum of the cost of insurance and expense charges (whether or not actually imposed) during the contract’s existence and the aggregate amount of any prior dividends paid or credited with regard to the contract.

A policyholder dividend does not include any amount that is in the nature of interest that is paid or credited to a contract holder to the extent that such amount exceeds the minimum rate of interest required to be credited with respect to contract values under local law.

<sup>13</sup> An “insurance wrapper product” includes an insurance contract the assets of which are:

- (i) Held in an account maintained by a financial institution; and
- (ii) Managed in accordance with a personalised investment strategy or under the control or influence of the policyholder, owner or beneficiary of the contract.

**Table 2: Who maintains the Financial Accounts**

Accounts	The Financial Institution generally considered to maintain the financial account
Depository Accounts	The Financial Institution that is obliged to make payments with respect to the account (excluding an agent of a Financial Institution).
Custodial Accounts	The Financial Institution that holds custody over the assets in the account.
Equity and debt interests	The interests in an Investment Entity (or other Financial Institution – anti-avoidance) are maintained by that Investment Entity (or other Financial Institution)
Cash Value Insurance Contracts	The Financial Institution that is obliged to make payments with respect to that contract
Annuity Contracts	The Financial Institution that is obliged to make payments with respect to that contract

While the above sets out the general expected Financial Institution to maintain the Financial Account in question, there may be cases where the RMFI is not in possession of all the information to be reported with respect to an account they would generally be treated as maintaining. Below are some examples of this:

*In some Participating Jurisdictions securities may be held in owner-registered accounts that are maintained by a central securities depository and operated by other FIs. In principle, the central securities depository would be treated as the RFI with respect to the accounts and, thus, responsible for fulfilling all due diligence and reporting obligations. However, since the client relationships are managed and the due diligence procedures are applied by the other FIs in their capacity of account operators, the central securities depository may not be in a position to comply with such obligations. Participating Jurisdictions may address such a case, for example, by treating the relevant Custodial Accounts as held by such other FIs, and such other FIs as responsible for any reporting required with respect to such Custodial Accounts. However, where the relevant Custodial Accounts are treated as held by such other FIs, in accordance with paragraph D of Section II, a central securities depository may report on behalf of such other FIs.*

*A similar case may occur in some Participating Jurisdictions where trades of equity interests in an exchange traded fund are effected, and the due diligence procedures are applied, by brokers, but the end investors are directly registered in the fund's interest register. In principle, the fund would be treated as the RFI with respect to the equity interests; however, it would not have the information to comply with its reporting obligations. Participating Jurisdictions may address such a*

case, for example, by requiring the brokers to provide all the necessary information to the fund, so that it may fulfill its reporting obligations.

**Note 9:** Does an Entity's Controlling Person(s) resident in the same jurisdiction as the Reporting Financial Institution need to be reported?

*The Regulations only require the reporting of Reportable Jurisdiction Persons. Reportable Jurisdiction Persons are persons resident in a reportable jurisdiction, which does not include Malta, and which residence is to be determined in accordance with that jurisdiction's tax legislation (Section VIII D(3)).*

### 2.7.2 Excluded Account

Certain accounts are seen to be low risk of being used to evade tax and are therefore specifically excluded from reporting. These are called Excluded Accounts and are found in Section C(17) of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Broadly these are:

- retirement and pension accounts;
- non-retirement tax-favoured accounts;
- term life insurance contracts;
- estate accounts;
- escrow accounts;
- Depository Accounts due to not-returned overpayments; and
- low-risk excluded accounts.

These categories are consistent with the types of accounts excluded from the definition of "Financial Accounts" in the FATCA IGA.

For purposes of determining whether an account satisfies all the requirements of a particular category of 'Excluded Account', a RMFI may rely on information in its possession (including information collected pursuant to AML/KYC Procedures) or that is publicly available, based on which it can reasonably determine that the account is an Excluded Account.

*"AML/KYC Procedures" means the customer due diligence procedures of a RFI pursuant to the anti-money laundering or similar requirements to which such RFI is subject.*

"Publicly available" information includes:

- *Information published by an authorised government body (example: a government or an agency thereof, or a municipality) of a jurisdiction, such as information in a list published by a tax administration that contains the names and identifying numbers of financial institutions;*

- *Information in a publicly accessible register maintained or authorised by an authorised government body or a jurisdiction;*
- *Information disclosed on an established securities market; and*

**Note:** an “established securities market” means an exchange that is officially recognised and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange.

- *Any publicly accessible classification with respect to the Account Holder that was determined based on a standardised industry coding system and that was assigned (example: by a trade organisation or a chamber of commerce) consistent with normal business practices).*

**Note:** “standardised industry coding system” means a coding system used to classify establishments by business type for purposes other than tax purposes. Malta makes use of the NACE Code which is the Statistical classification of economic activities in the European Community.

In this respect, the RMFI is expected to retain a notation of the type of information reviewed, and the date the information was reviewed.

*The term “**Excluded Account**” means any of the following accounts:*

- (i) *a retirement or pension account that satisfies the following requirements:*
  - (i) *the account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits);*
  - (ii) *the account is tax-favoured (i.e., contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the Account Holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);*
  - (iii) *information reporting is required to the tax authorities with respect to the account;*
  - (iv) *withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events; and*
  - (v) *either*
    - (i) *annual contributions are limited to an amount denominated in euro that corresponds to USD 50 000 or less; or*
    - (ii) *there is a maximum lifetime contribution limit to the account of an amount denominated in euro that corresponds to USD 1 000 000 or less, in each case applying the rules set forth in paragraph C of Section VII for account aggregation and currency translation.*

*A Financial Account that otherwise satisfies the requirement of subparagraph (a)(v) will not fail to satisfy such requirement solely because such Financial Account may receive assets or funds transferred from one or more Financial Accounts that meet the requirements of subparagraph (a) or (b) or from one or more retirement or pension funds that meet the requirements of any of the following:*

- Broad participation retirement fund
- Narrow participation retirement fund
- Pension fund of a governmental entity, international organisation or central bank

Therefore a retirement or pension account can be an Excluded Account, provided that it satisfies all the requirements listed in (a) above. These requirements must be satisfied under the laws of the jurisdiction where the account is maintained. In summary, it is required that:

- a) The account is subject to regulation;
- b) The account is tax-favoured;
- c) Information reporting is required to the tax authorities with respect to the account<sup>14</sup>;
- d) Withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events; and
- e) Either:
  - i) Annual contributions are limited to USD 50 000 or less, or
  - ii) There is a maximum lifetime contribution limit to the account of USD 1,000,000 or less, excluding rollovers.

(ii) *an account that satisfies the following requirements:*

- (i) *the account is subject to regulation as an investment vehicle for purposes other than for retirement and is regularly traded on an established securities market, or the account is subject to regulation as a savings vehicle for purposes other than for retirement;*
- (ii) *the account is tax-favoured (i.e., contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the Account Holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);*
- (iii) *withdrawals are conditioned on meeting specific criteria related to the purpose of the investment or savings account (for example, the provision of educational or medical benefits), or penalties apply to withdrawals made before such criteria are met; and*
- (iv) *annual contributions are limited to an amount denominated in the domestic currency of each Member State that corresponds to USD 50 000 or less, applying the rules set forth in paragraph C of Section VII for account aggregation and currency translation.*

*A Financial Account that otherwise satisfies the requirement of subparagraph (b)(iv) above, will not fail to satisfy such requirement solely because such Financial Account may receive assets or funds transferred from one or more Financial Accounts that meet the requirements of subparagraph (a) or (b) or from one or more retirement or pension funds that meet the requirements of any of any of the following:*

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<sup>14</sup> Note: provided there is information reporting required to the relevant tax authorities in the jurisdiction where the account is maintained, the time and manner of such reporting is not determinative of whether the account satisfies this requirement.

- Broad participation retirement fund
- Narrow participation retirement fund
- Pension fund of a governmental entity, international organisation or central bank

A non-retirement account can be an Excluded Account, provided that it satisfies all the requirements listed in (b) above. These requirements must be satisfied under the laws of the jurisdiction where the account is maintained. In summary, it is required that:

- a) The account is subject to regulation, and in the case of an investment vehicle is regularly traded on an established securities market. An “established securities market” means an exchange that is officially recognised and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange;
- b) The account is tax-favoured;
- c) Withdrawals are conditioned on meeting specified criteria, or penalties apply to withdrawals made before such criteria are met; and
- d) Annual contributions are limited to USD 50 000 or less, excluding rollovers.

*(iii) a life insurance contract with a coverage period that will end before the insured individual attains age 90, provided that the contract satisfies the following requirements:*

- i) periodic premiums, which do not decrease over time, are payable at least annually during the period the contract is in existence or until the insured attains age 90, whichever is shorter;*
- ii) the contract has no contract value that any person can access (by withdrawal, loan, or otherwise) without terminating the contract;*
- iii) the amount (other than a death benefit) payable upon cancellation or termination of the contract cannot exceed the aggregate premiums paid for the contract, less the sum of mortality, morbidity, and expense charges (whether or not actually imposed) for the period or periods of the contract's existence and any amounts paid prior to the cancellation or termination of the contract; and*
- iv) the contract is not held by a transferee for value.*

A life insurance contract with a coverage period that will end before the insured individual attains age 90, can be an Excluded Account, provided that the contract satisfies the requirements set out in (c) above. “Life Insurance Contract” is an Insurance Contract under which the issuer, in exchange for consideration, agrees to pay an amount upon the death of one or more individuals.

*(iv) an account that is held solely by an estate if the documentation for such account includes a copy of the deceased's will or death certificate.*

In accordance with the (d) above, an account that is held solely by an estate<sup>15</sup> can be an Excluded Account if the documentation for such account includes a copy of the deceased's will or death certificate. For this purpose, accounts of deceased persons will be Excluded Accounts if the RMFI that maintains them has received and is in possession of a formal notification of the account holder's death (e.g. a copy of the deceased's death certificate or a copy of the will). Therefore the RMFI must treat the account as having the same status that it had prior to the death of the account holder, until the date it obtains such copy.

(v) *an account established in connection with any of the following:*

(i) *a court order or judgment.*

(ii) *a sale, exchange, or lease of real or personal property, provided that the account satisfies the following requirements:*

- *the account is funded solely with a down payment, earnest money, deposit in an amount appropriate to secure an obligation directly related to the transaction, or a similar payment, or is funded with a Financial Asset that is deposited in the account in connection with the sale, exchange, or lease of the property,*
- *the account is established and used solely to secure the obligation of the purchaser to pay the purchase price for the property, the seller to pay any contingent liability, or the lessor or lessee to pay for any damages relating to the leased property as agreed under the lease,*
- *the assets of the account, including the income earned thereon, will be paid or otherwise distributed for the benefit of the purchaser, seller, lessor, or lessee (including to satisfy such person's obligation) when the property is sold, exchanged, or surrendered, or the lease terminates,*
- *the account is not a margin or similar account established in connection with a sale or exchange of a Financial Asset, and*
- *the account is not associated with an account described in subparagraph C(17)(f);*

Note: The concept of real or personal property needs to be linked to the concept in terms of the laws of Malta i.e. the jurisdiction where the account is maintained, so as to avoid difficulties of interpretation over the question whether an asset or a right is to be regarded as real property (i.e. immovable property), personal property or neither or them.

(iii) *an obligation of a Financial Institution servicing a loan secured by real property to set aside a portion of a payment solely to facilitate the payment of taxes or insurance related to the real property at a later time;*

(iv) *an obligation of a Financial Institution solely to facilitate the payment of taxes at a later time;*

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<sup>15</sup> In determining what is meant by "estate", reference must be made to Malta's particular rules on the transfer or inheritance of rights and obligations in the event of death, namely the law of succession..

Subparagraph (e) above generally refers to accounts where money is held by a third party on behalf of transacting parties (i.e. escrow accounts). These accounts can be Excluded Accounts where they are established in connection with any of the above mentioned circumstances.

(vi) *a Depository Account that satisfies the following requirements:*

- (i) *the account exists solely because a customer makes a payment in excess of a balance due with respect to a credit card or other revolving credit facility and the overpayment is not immediately returned to the customer; and*
- (ii) *beginning on or before 1 January 2016, the Malta Financial Institution implements policies and procedures either to prevent a customer from making an overpayment in excess of an amount denominated in euro that corresponds to USD 50 000, or to ensure that any customer overpayment in excess of that amount is refunded to the customer within 60 days, in each case applying the rules set forth in paragraph C of Section VII for currency translation. For this purpose, a customer overpayment does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns;*

As mentioned earlier, a RMFI that does not satisfy the requirements to be a Qualified Credit Card Issuer, but accepts deposits when a customer makes a payment in excess of a balance due with respect to a credit card or other revolving credit facility, may still not report a Depository Account that qualifies as an Excluded Account under category (f) above, provided that the requirements in (i) and (ii) above are satisfied.

(vii) *any other account that presents a low risk of being used to evade tax, has substantially similar characteristics to any of the accounts described in subparagraphs (a) through (f)<sup>16</sup>, and is included in the list of Excluded Accounts that is referred to in Article 8(7)(a) of the DAC2, provided that the status of such account as an Excluded Account does not frustrate the purposes of this Directive.*

This “open” category of Excluded Accounts is intended to accommodate jurisdiction-specific types of accounts that satisfy the requirements listed in (g) above, and avoids the need to negotiate classes of Excluded Accounts when concluding an agreement on the automatic exchange of financial account information.

The first requirement described in (g) above is that the account presents a low risk of being used to evade tax. Factors that may be considered to determine such a risk include:

- a) low-risk factors:
  - (1) the account is subject to regulation.
  - (2) The account is tax-favoured.
  - (3) Information reporting to the tax authorities is required with respect to the account.
  - (4) Contributions or the associated tax relief are limited.
  - (5) The type of account provides appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes.

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<sup>16</sup> Of the definition of ‘Excluded Account’

- b) high-risk factors:
- (1) the type of account is not subject to AML/KYC Procedures.
  - (2) The type of account is promoted as a tax minimisation vehicle.

The second requirement described in (g) above is that the account has substantially similar characteristics to any of the accounts described in (a) – (f) of the definition of ‘Excluded Account’. This requirement cannot be used solely to eliminate a specific element of a description.

The following examples illustrate the application of the class of Excluded Accounts contemplated in (g):

*Unlimited Annuity Contract: a type of Annuity Contract that satisfies all the requirements listed in (a) above, apart from the one contained in (a)(v) i.e. contributions are not limited. However, the applicable penalties apply to all withdrawals made before reaching a specified retirement age and include taxing the contributions that were previously tax-favoured with a high flat-rate surtax (example: 60%). Because there is a substitute requirement that provides equivalent assurance that the account presents a low-risk of tax evasion, this type of account could be defined in domestic law as an Excluded Account.*

*Unlimited Savings Account: a type of Savings Account that satisfies all the requirements listed in (b) above, apart from the one contained in (b)(iv) i.e. contributions are not limited. However, the tax relief associated to the contributions is limited by reference to an indexed amount. Because there is a substitute requirement that provides equivalent assurance that the account presents a low-risk of tax evasion, this type of account could be defined in domestic law as an Excluded Account.*

*Dormant Account: A type of Depository Account*

- (i) *With an annual balance that does not exceed USD 1 000 or its equivalent in euro,*
- (ii) *That is a dormant account i.e. an account (other than an ‘Annuity Contract’) is a “dormant account” if:*
  - a. *The Account Holder has not initiated a transaction with regard to the account or any other account held by the Account Holder with the RFI in the past three years;*
  - b. *The Account Holder has not communicated with the RFI that maintains such account regarding the account or any other account held by the Account Holder with the RFI in the past 6 years; and*
  - c. *In the case of a Cash Value Insurance Contract, the RMFI has not communicated with the Account Holder that holds such account regarding the account or any other account held by the Account Holder with the RFI in the past 6 years.*

*Alternatively, an account (other than an Annuity Contract) may also be considered as a “dormant account” under the applicable laws or regulations or the normal operating procedures of the RMFI that are consistently applied for all accounts maintained by such institution in a particular jurisdiction, provided that such laws or regulations or such procedures contain substantially similar requirements to those in previous sentence.*

An account ceases to be a dormant account when:

- i) *The Account Holder initiates a transaction with regard to the account or any other account held by the Account Holder with the RFI;*
- ii) *The Account older communicates with the RFI that maintains such account regarding the account or any other account held by the Account Holder with the RFI; or*
- iii) *The account ceases to be a dormant account under applicable laws or regulations or the RFI's normal operating procedures.*

Malta's specific list of Excluded Accounts published by the Commissioner can be found as an Annex to these guidelines which list is also published in the *Official Journal of the European Union*.

The status of Excluded Accounts that are listed as such in the lists mentioned above should be periodically reviewed by the RMFI. In the case of a change in circumstances so that they no longer have a low risk of being used to evade tax, the RMFI will need to apply the due diligence procedures and report such account accordingly as set out in the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Subsequent to this change in status of a particular account, the Commissioner will remove the account from the above-mentioned list and inform the Commission accordingly.

**Note 10:** The Regulations provide 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?

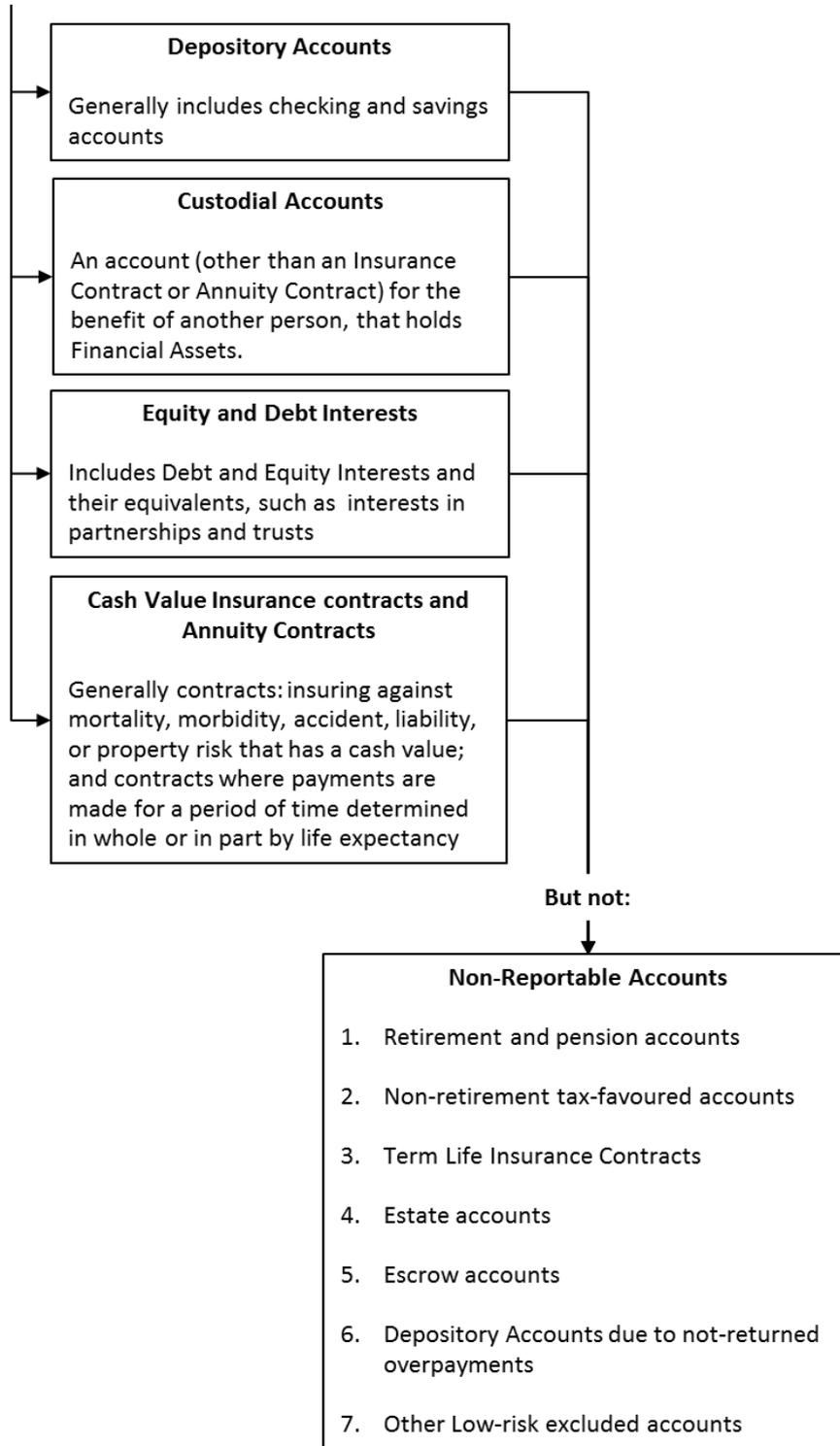
*Yes. The Regulations include as an Excluded Account certain term life insurance contracts that meet the conditions specified in Section VIII, subparagraph C(17)(c).*

### 2.7.3 Recap of Section 2.7

Figure 5 below sets out the categories of Financial Accounts as explained in both sets of definitions above.

**Figure 5 – Financial Accounts**

**Financial Accounts that need to be reviewed:**



**Note 11:** Are Excluded Accounts required to be included when applying the aggregation rules?

No. The aggregation rules refer to the aggregation of Financial Accounts. The definition of Financial Accounts specifically excludes Excluded Accounts.

#### 2.7.4 Reportable Account

Once a RMFI has identified the Financial Accounts it maintains and excluded any 'Excluded Accounts', it is required to review those accounts to identify whether any of them are Reportable Accounts. Where they are found to be Reportable Accounts, information in relation to those accounts must be reported to the Commissioner.

The definition of a 'Reportable Account' is found in Annex I, Section VIII, Part D of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations are the following respectively:

*The term "Reportable Account" means **a Financial Account that is maintained by a Reporting Malta Financial Institution<sup>17</sup> and is held by one or more Reportable Persons or by a Passive NFE with one or more Controlling Persons that is a Reportable Person**, provided it has been identified as such pursuant to the due diligence procedures described in Sections II through VII.*

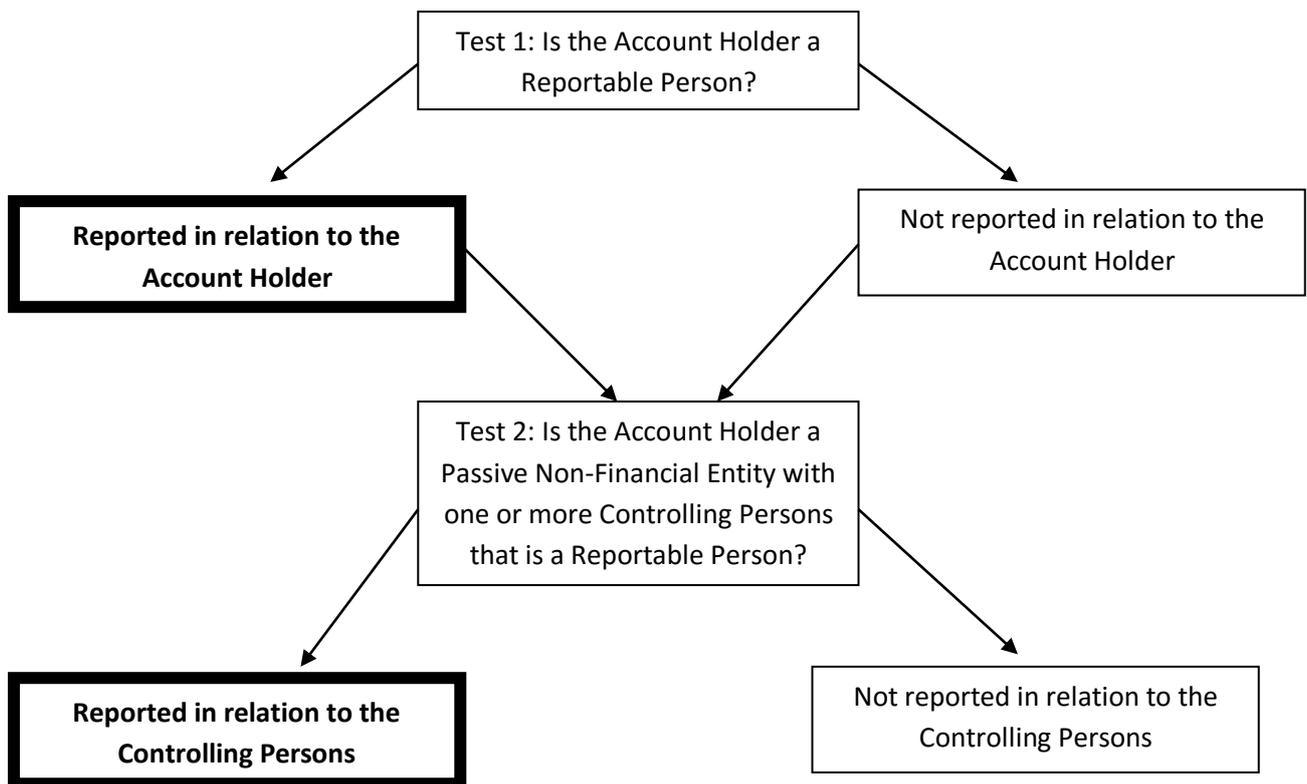
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<sup>17</sup> The words "is maintained by a Member State Reporting Financial Institution" is not found in the definition of "Reportable Account" in the CRS

Establishing whether an account is a Reportable Account requires two tests:

- 1) First test is in relation to the Account Holder; and
- 2) The second test is in relation to Controlling Persons of certain Entity Account Holders.

**Figure 6: Two tests to determine a Reportable Account**



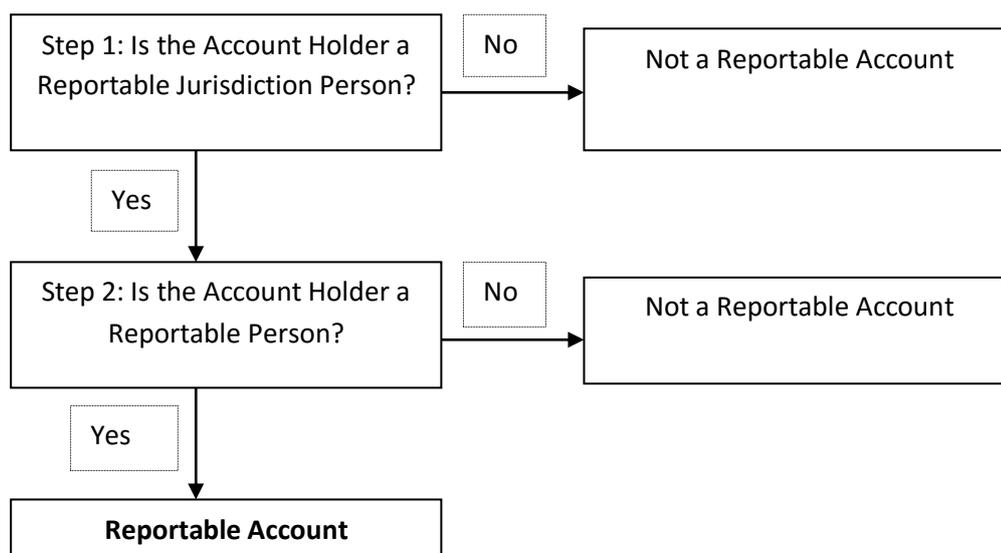
### 2.7.4.1 First Test: Reportable Accounts by virtue of the Account Holder

The first test establishes whether a Financial Account is a Reportable Account by virtue of the Account Holder. This test can be broken down into two further steps, as shown in Figure 7 below.

The “Account Holder” means **the person listed or identified as the holder of a Financial Account by the Malta Financial Institution that maintains the account**. A person, other than a MFI, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for these purposes, and such other person is treated as holding the account.

In the case of a Cash Value Insurance Contract or an Annuity Contract, the Account Holder is any person entitled to access the Cash Value or change the beneficiary of the contract. If no person can access the Cash Value or change the beneficiary, the Account Holder is any person named as the owner in the contract and any person with a vested entitlement to payment under the terms of the contract. Upon the maturity of a Cash Value Insurance Contract or an Annuity Contract, each person entitled to receive a payment under the contract is treated as an Account Holder.

**Figure 7: Reportable account by virtue of the Account Holder**



#### **Step 1: Is the Account Holder a Reportable Jurisdiction Person?**

A “Reportable Jurisdiction Person”, is an individual or Entity **resident** in the reportable jurisdiction **for tax purposes** under the tax laws of that jurisdiction. As an exception to this rule, an Entity that has no residence for tax purposes (example: because it is treated as fiscally transparent) is considered to be resident in the jurisdiction in which such Entity has its place of effective management situated. However, in order to avoid duplicate reporting (given the wide scope of “Controlling Persons” in the case of trusts) a trust that is a Passive NFE may not be considered a similar legal arrangement, for the scope of the definition of an Entity. Reference is made to Section 8 of these guidelines.

The “place of effective management” is the place where key management and control decisions that are necessary for the conduct of the Entity’s business as a whole are in substance made. All relevant facts and circumstances must be examined to determine the place of effective management. An Entity may have more than one place of management, but it can only have one place of effective management at any one time.

In Malta, there are 2 types of commercial partnerships and the distinction is based on the extent of liability of the partners. However with reference to the definition of “company” in Article 2 of the Income Tax Act, both types of partnerships are treated as a company and therefore considered resident in their place of incorporation i.e. neither of them considered as fiscally transparent.

Section 3 to 7 of these guidelines sets out the detailed due diligence rules that RMFI are obliged to follow in order to be able to establish where the Account Holder is resident, including specific rules for accounts held by individuals and for accounts held by entities. In general, for preexisting accounts Financial Institutions must determine the residency of the Account Holder based on the information it has on file, whereas for new accounts a self-certification is required from the Account Holder.

### ***Step 2: Is the Account Holder a Reportable Person?***

The next step is to determine whether the Reportable Jurisdiction Person is a Reportable Person. This will be the case **unless specifically excluded**. In general, the exclusions are the following:

- a) a corporation the stock of which is regularly traded on one or more established securities markets;
- b) any corporation that is a Related Entity of a corporation described in a) above;
- c) a Governmental Entity;
- d) an International Organisation;
- e) a Central Bank; or
- f) a Financial Institution

Whether a corporation that is a Reportable Jurisdiction Person is a Reportable Person, can depend on the stock of that corporation being regularly traded on one or more established securities market. Stock is “regularly traded” if there is a meaningful volume of trading with respect to the stock on an on-going basis. There is “a meaningful volume of trading with respect to the stock on an on-going basis” if:

- i. trades in each such class are effected, other than in *de minimis* quantities, on one or more established securities markets on at least 60 business days during the prior calendar year; and
- ii. the aggregate number of shares in each such class that are traded on such market or markets during the prior year are at least 10% of the average number of shares outstanding in that class during the prior calendar year.

A class of stock would generally be treated as meeting the “regularly traded” requirement for a calendar year if the stock is traded during such year on an established securities market and is regularly quoted by dealers making a market in the stock. A dealer makes a market in a stock only if

the dealer regularly and actively offers to, and in fact does, purchase the stock from, and sell the stock to, customers who are not related persons with respect to the dealer in the ordinary course of a business.

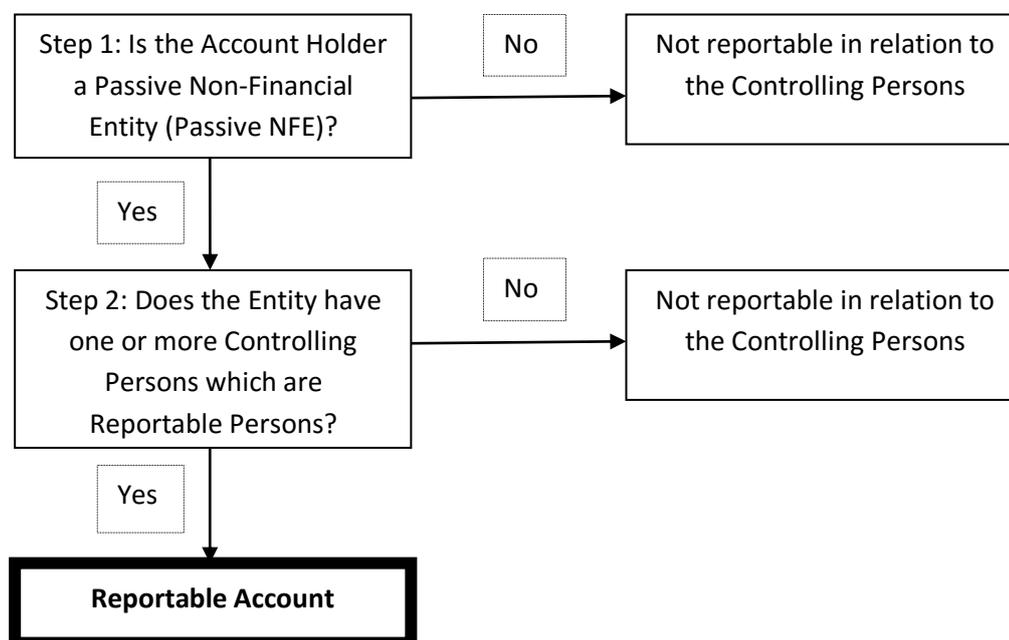
With reference to (f) above, Malta Financial Institutions are excluded from the term “Reportable Person” as they will do their own reporting or are otherwise considered to present a low risk of being used to evade tax. They are thus excluded from reporting, except for Investment Entities that are not Malta Financial Institutions, which are treated as Passive NFEs and thus reported.

### 2.7.4.2 Second Test: Reportable Accounts by virtue of the Account Holders’ Controlling Persons

Regardless of whether the Financial Account is a Reportable Account by virtue of the Account Holder, there is then a **second test** in relation to the Controlling Persons of certain Entity Account Holders. This may mean that additional information is required to be reported in relation to an already Reportable Account or a previously Non-Reportable Account which becomes a Reportable Account by virtue of the Controlling Persons.

This second test can also be broken down into two steps, as shown in Figure 8. Explanations of each step are provided below.

**Figure 8: Reportable account by virtue of the Controlling Persons**



### **Step 1: Is the Account Holder a Passive Non-Financial Entity?**

Non-Financial Entities are referred to by their acronym, NFEs. An NFE is essentially **any Entity that is not a Financial Institution**. NFEs are then split into Passive NFEs or Active NFEs with additional procedures required in relation to Passive NFEs (reflecting the greater tax evasion risks they pose).

The general rule is that a **Passive NFE** is an NFE that is **not an Active NFE**. The definition of **Active NFE** essentially excludes Entities that receive substantial passive income or hold substantial amounts of assets that produce passive income (such as dividends, interest, rents etc.), and includes entities that are publicly traded (or related to a publicly traded Entity), Governmental Entities, International Organisations, Central Banks, or a holding NFEs of nonfinancial groups. An exception to this is an Investment Entity that is not a Participating Jurisdiction Financial Institution, which is always treated as a Passive NFE.

**Note 12:** 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 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.*

Any NFE can be an Active NFE, provided that it meets any of the criteria listed in the definition of Active NFE, which in summary refers to:

- a) Active NFEs by reason of income and assets;

The criterion to qualify for the Active NFE status for “Active NFEs by reason of income and assets” is the following:

- less than 50% of the NFEs gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50% of the assets held by the NFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income.

In determining what is meant by “passive income”, reference must be made to Malta’s laws, including the FATCA guidelines.<sup>18</sup> Passive income would generally be considered to include the portion of gross income that consists of:

<sup>18</sup> Passive income should not be construed to mean ‘passive interest and royalties’ as defined in Article 2 of the Income Tax Act.

1. Dividends;
2. Interest;
3. Income equivalent to interest;
4. Rents and royalties, other than rents and royalties derived in the active conduct of a business conducted, at least in part, by employees of the NFE;
5. Annuities;
6. The excess of gains over losses from the sale or exchange of Financial Assets that gives rise to the passive income described previously;
7. The excess of gains over losses from transactions (including futures, forwards, options, and similar transactions) in any Financial Assets;
8. The excess of foreign currency gains over foreign currency losses;
9. Net income from swaps; or
10. Amounts received under Cash Value Insurance Contracts.

Notwithstanding the above, passive income will not include, in the case of a NFE that regularly acts as a dealer in Financial Assets, any income from any transaction entered into in the ordinary course of such dealer's business as such a dealer.

b) Publicly traded NFEs;

The criterion to qualify for the Active NFE status for "publicly traded NFEs" is the following:

The stock of the NFE is regularly traded on an established securities market or the NFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market.

c) Governmental Entities, International Organisations, Central Banks, or their wholly owned Entities;

d) Holding NFEs that are members of a nonfinancial group;

The criterion to qualify for the Active NFE status for "holding NFEs that are members of a nonfinancial group" is the following:

substantially all<sup>19</sup> of the activities of the NFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or business other than the business of a MFI, except that an Entity does not qualify for this status if the Entity functions (or holds itself out) as an investment fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes.

e) Start-up NFEs;

f) NFEs that are liquidating or emerging from bankruptcy;

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<sup>19</sup> "Substantially all" means 80% or more. If however, the NFEs holding or group finance activities constitute less than 80% of its activities but the NFE receives also active income (i.e. income that is not passive income) otherwise, it qualifies for the Active NFE status, provided that the total sum of activities meets the "substantially all test".

- g) Treasury centres that are members of a nonfinancial group; or
- h) Non-profit NFEs.

The criterion to qualify for the Active NFE status for “non-profit NFE” is the following:

the applicable laws of the NFEs jurisdiction of residence or the NFEs formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFEs charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased. In addition, the income or assets of the NFE could be distributed to, or applied for the benefit of, a private person or non-charitable Entity as payment of reasonable compensation for the use of property.

Consequently a Passive NFE:

- Includes: Entities with  $\geq 50\%$  of income which is passive income or  $\geq 50\%$  of assets produce passive income (dividends, interest, rents etc)
- Includes: certain Investment Entities located in non-Participating Jurisdictions.
- Excludes: publically traded Entities (and Entities related to them), Government Entities, holding NFEs of non-financial groups.

As a result of the fact that a Passive NFE includes certain Investment Entities located in non-Participating Jurisdictions, RFIs are required to look-through that type of Investment Entity – as illustrated by this example:

*Example: Jurisdiction A has a reciprocal agreement on the automatic exchange of financial account information in place with Jurisdiction B, but has no agreement in place with Jurisdiction C. W, a Jurisdiction A RFI, maintains Financial Accounts for Entities X and Y, both of which are Investment Entities as described above. Entity X is resident in Jurisdiction B and Entity Y is resident in Jurisdiction C. from the perspective of W, Entity X is a Participating Jurisdiction FI and Entity Y is not a Participating Jurisdiction FI. As a result, W must treat Entity Y as a Passive NFE.*

Sections 3 to 7 of these guidelines set out the details due diligence rules a Malta Financial Institution must follow to determine whether the Entity Account Holder is a Passive NFE, setting out the procedures both for pre-existing account and new accounts.

**Step 2: Does the Entity have one or more Controlling Persons which are Reportable Persons?**

If the Entity Account Holder is a Passive NFE then the Financial Institution must “**look-through**” the Entity to **identify its Controlling Persons**. The term Controlling Persons corresponds to the term ‘beneficial owner’ as described in the Financial Action Task Force Recommendation 10 and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.

For an Entity that is a legal person, “Controlling Persons” means the **natural person(s) who exercises control over the Entity.**

- “Control” over an Entity is generally exercised by the natural person(s) who ultimately has a controlling ownership interest in the Entity.
- A “control ownership interest” depends on the ownership structure of the legal person and is usually identified on the basis of a threshold applying a risk-based approach (example any person(s) owning more than a certain percentage of the legal person, such as 25%).  
Where no natural person(s) exercises control through ownership interests, the Controlling Person(s) of the Entity will be the natural person(s) who exercises control of the Entity through other means. Where no natural person(s) is identified as exercising control of the Entity, the Controlling Person(s) of the Entity will be the natural person(s) who holds the position of senior managing official.
- In the case of a trust (and equivalents), “Controlling Persons” means settlor(s), trustee(s), protector(s) – if any, and the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising effective control over the trust. These must always be treated as Controlling Persons of a trust, regardless of whether or not any of them exercises control over the trust. In addition, any other natural person(s) exercising ultimate effective control over the trust (including through a chain of control or ownership) must also be treated as a Controlling Person of the trust.
  - With a view to establishing the source of funds in the account(s) held by the trust, where the settlor(s) of a trust is an Entity, RFIs must also identify the Controlling Person(s) of the settlor(s) and report them as Controlling Person(s) of the trust.
  - For beneficiary(ies) of trusts that are designated by characteristics or by class, RFIs should obtain sufficient information concerning the beneficiary(ies) to satisfy the RFI that it will be able to establish the identity of the beneficiary(ies) at the time of the pay-out or when the beneficiary(ies) intends to exercise vested rights. Therefore, that occasion will constitute a change in circumstances and will trigger the relevant procedures.
- In the case of a legal arrangement other than a trust, the term “Controlling Persons” means persons in equivalent or similar positions as those that are Controlling Persons of a trust. Thus, taking into account the different forms and structures of legal arrangements, RFIs should identify and report persons in equivalent or similar positions, as those required to be identified and reported for trusts.
- In the case of legal persons that are functionally similar to trusts, RFIs should identify Controlling Persons through similar customer due diligence procedures as those required for trusts, with a view to achieving appropriate levels of reporting.

Where a RMFI relies on information collected and maintained pursuant to AML/KYC Procedures for purposes of determining the Controlling Persons of an Account Holder of a New Entity Account, such AML/KYC Procedures must be consistent with Recommendations 10 and 25 of the 2012 FATF Recommendations, including always treating the settlor(s) of a trust as a Controlling Person of the trust and the founder(s) of a foundation as a Controlling Person of the foundation. For the purposes of determining the Controlling Persons of an Account Holder of a Preexisting Entity Account, a RMFI may rely on information collected and maintained pursuant to the RMFI's AML/KYC Procedures.

If the Controlling Persons are Reportable Persons then information in relation to the Financial Account must be reported, including details of the Account Holder and each reportable Controlling Person.

### 3. Section II of Annex I of the Regulations: General Due Diligence Requirements

This part of the guidelines contains the general due diligence requirements. It also deals with the reliance on service providers and alternative due diligence procedures for Preexisting Accounts.

Section II of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations lays down the due diligence rules that have to be applied by Reporting Malta Financial Institutions to be able to establish whether a Financial Account is held by a Reportable Person and is therefore a Reportable Account. These rules are largely based on existing processes, particularly in the case of preexisting accounts where it is more challenging and costly for Malta Financial Institutions to obtain new information from the Account Holder.

The due diligence rules distinguish between accounts held by individuals and entities, and preexisting and new accounts, reflecting the differing characteristics between the different types of accounts.

#### 3.1 Reportable Account

An account is treated as a Reportable Account, beginning as of the date it is identified as such pursuant to the due diligence procedures in Sections II through VII of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Once an account is a Reportable Account, it maintains such status until the date it ceases to be a Reportable Account – even if the account balance or value is equal to zero or is negative, or there was not any amount paid or credited to the account (or with respect to the account).

Where an account is identified as a Reportable Account based on its status at the end of the calendar year or reporting period, information with respect to that account must be reported as if it were a Reportable Account through the full calendar year or reporting period in which it was identified as such. Where a Reportable Account is closed, information with respect to that account must be reported until the date of closure. Unless otherwise provided, information with respect to a Reportable Account must be reported annually in the calendar year following the year to which the information relates.

##### **Example 1 – Account that becomes a Reportable Account**

*An account opened on 28 May 2016 is identified as a Reportable Account on 3 December 2017. Because the account was identified as a Reportable Account in calendar year 2017, information with respect to that Reportable Account must be reported in calendar year 2018 with respect to the full calendar year 2017 and on an annual basis thereafter.*

### Example 2 – Account that ceases to be a Reportable Account

*The facts are the same as Example 1. However on 24 March 2018, the Account Holder ceases to be a Reportable Person and, as a consequence, the account ceases to be a Reportable Account. Because the account ceased to be a Reportable Account on 24 March 2018, information with respect to that account is not required to be reported in calendar year 2019 nor afterwards, unless the account once again becomes a Reportable Account in calendar year 2019 or any subsequent calendar year.*

### Example 3 – Account that is closed

*An account is opened on 9 September 2020 and becomes a Reportable Account on 8 February 2021. However, on 27 September 2021, the Account Holder closes the account. Because the account was a Reportable Account between 8 February and 27 September 2021 and was closed in calendar year 2021, information with respect to that account (including the closure of the account) must be reported in calendar year 2022 with respect to the part of calendar year 2021 between 1 January and 27 September.*

### Example 4 – Account that ceases to be a Reportable Account and is closed

*The facts are the same as in Example 2, except that on 4 July 2018 the Account Holder closes the account. Because the account ceased to be a Reportable Account on 24 March 2018, information with respect to that account is not required to be reported in calendar year 2019.*

## 3.2 Balance or value of an account

Whilst the balance or value of an account is part of the information to be reported, it is also relevant for other purposes, such as the due diligence procedures for Preexisting Entity Accounts, and the account balance aggregation rules. According to paragraph B of Section II of the DAC2 and CRS, the balance or value of an account is to be determined as of the last day of the calendar year or other appropriate reporting period.

Where a balance or value threshold is to be determined as of the last day of the calendar year, according to paragraph C of Section II of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, the relevant balance or value must be determined as of the last day of the reporting period that ends with or within that calendar year. However, if the reporting period ends with the calendar year, then the relevant balance or value must be determined as of 31 December of the calendar year. However, if the reporting period ends within the calendar year, then the relevant balance or value must be determined as of the last day of the reporting period, but within the calendar year.

**Note 13:** What balance or value of an Equity Interest should be reported where the value is not otherwise frequently determined by the MFI (e.g. it is not routinely recalculated to report to the customer)?

*The Regulations define the account balance or value in the case of an Equity interest as the value calculated by the MFI for the purpose that requires the most frequent determination of value. 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 MFI has not otherwise recalculated the balance or value for other reasons.*

### 3.3 Reliance on Service Providers

In accordance with paragraph D of Section II of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, Malta allows RMFIs to use service providers to fulfill the reporting and due diligence obligations imposed on such RMFI. This allows Maltese RMFIs to use a service provider that is resident in Malta or in another jurisdiction.

If the RMFI opts to do so, the RMFI must satisfy the requirements contained in Maltese legislation and remain responsible for its reporting and due diligence obligations i.e. the service provider's actions are imputed to the RMFI, including their obligations under domestic law on confidentiality and data protection. Also, this reliance does not modify the time and manner of the reporting and due diligence obligations, which remain the same as if they were still being fulfilled by the RMFI itself.

#### 3.3.1 Multiple Service Providers

A fund manager may use different transfer agents for different fund ranges within the same country. In such cases the fund manager itself cannot know whether an existing account holder in one of the fund ranges opens a New Account in the other fund range. This in itself should not preclude the same fund manager from acting as a sponsor for both fund ranges. It does mean that the full benefits of sponsoring (such as not re-documenting existing account holders when they make new investments) might not be realised where different service providers are used.

### 3.4 Due diligence procedures

Malta allows RMFIs to apply the due diligence procedures for New Accounts to Preexisting Accounts as well as due diligence procedures for High Value Accounts to Lower Value Accounts.

### 3.4.1 Pre-existing Accounts

As indicated above, Malta allows RMFIs to apply the due diligence procedures for New Accounts to Preexisting Accounts. This implies that the RMFI may elect to apply such exclusion with respect to:

- ⇒ All Preexisting Accounts; or
- ⇒ With respect to any clearly identified group of such accounts (such as by line of business or location where the account is maintained).

A customer is treated as pre-existing if it holds a Financial Account with the RMFI or a Related Entity. Thus, if a pre-existing customer opens a new account, the MFI may rely on the due diligence procedures it (or its Related Entity) applied to the customer's Pre-existing Account to determine whether the account is a Reportable Account. A requirement for applying these rules is that the RMFI must be permitted to satisfy its AML/KYC procedures for such account by relying on the AML/KYC performed for the Pre-existing Account and the opening of the account does not require new, additional, or amended customer information.

## 3.5 Treatment of Accounts opened at a time prior to AML/KYC requirements

While likely to be rare in practice, there may be accounts that were opened at a time where there were no AML/KYC requirements in place and the RMFI therefore was not obliged to review any Documentary Evidence in the initial on boarding process, or since the opening of the account.

The FATF Recommendations, which set out the international standards on combating money laundering and include the requirement to verify the identity of the customers on the basis of reliable independent sources, were first issued in 1990 and subsequently revised in 1996, 2003 and 2012. Even for accounts opened before the introduction of such requirements and 'grandfathered' under the rules, there is a requirement to apply customer due diligence measures to existing customers on the basis of materiality and risk.

In addition, with respect to Reportable Accounts that are Pre-existing Accounts, RMFIs are already required to use reasonable efforts and contact their customers to obtain their TIN and date of birth (subject to the application of paragraphs C and D of Section I of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. It would be expected that such a contact would also be used to request Documentary Evidence. As a result, such instances of accounts without Documentary Evidence should be exceptional, relate to low-risk accounts, and affect accounts opened prior to 2004.

## 3.6 Penalties

Where a RMFI fails to apply the due diligence procedures specified in Section II through to Section VII of Annex I to the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, which are further explained below, to a penalty of five thousand euro (€5,000).

## 4. Section III of Annex I of the Regulations: Due Diligence for Pre-existing Individual Accounts

This part contains the due diligence procedures for purposes of identifying Reportable Accounts among Preexisting Individual Accounts. It distinguishes between Lower Value Accounts (LVA) and High Value Accounts (HVA).

Figure 9 - Due Diligence for Pre-existing Individual Accounts

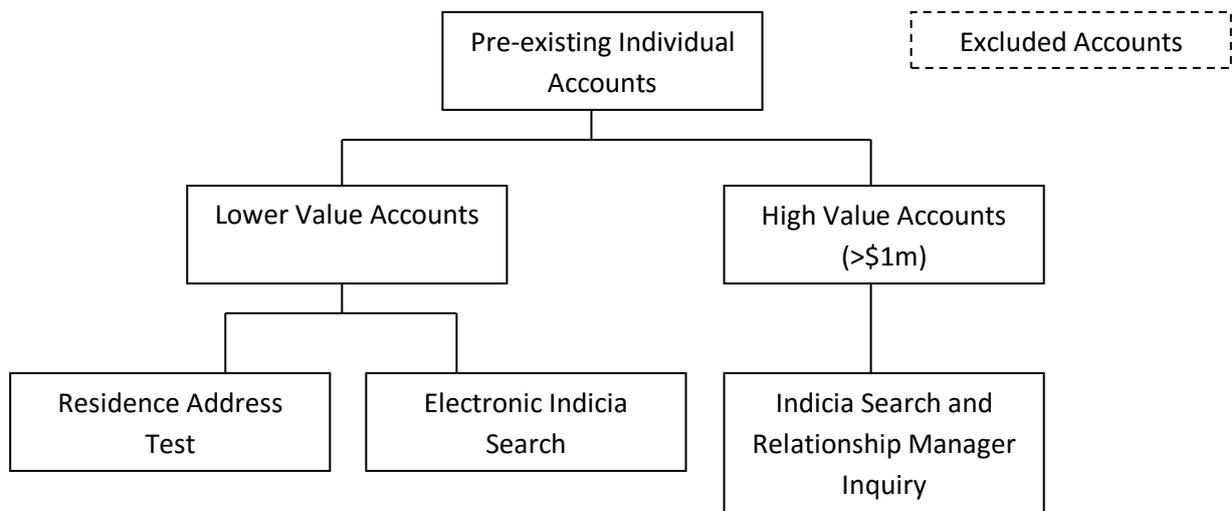
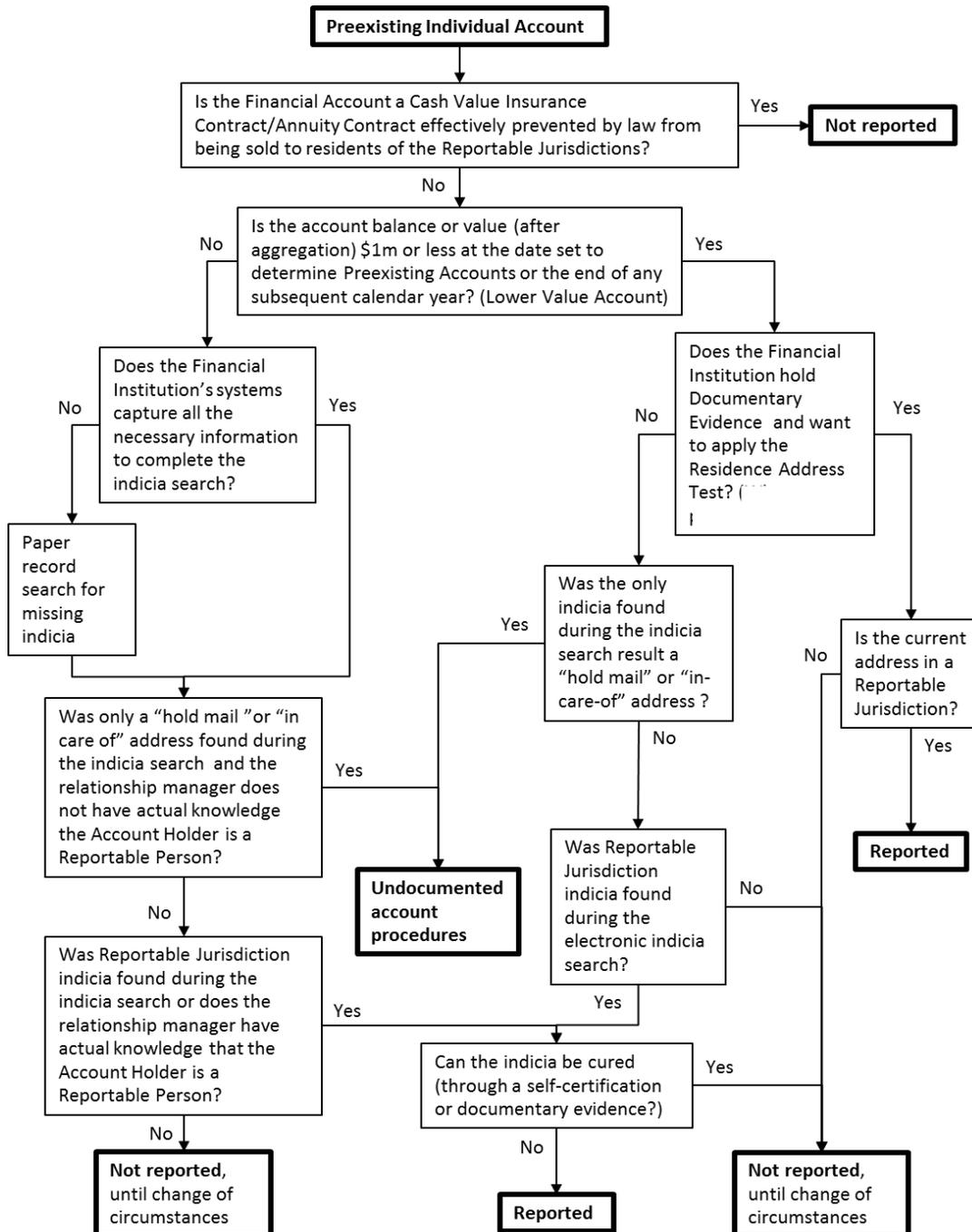


Figure 10 below depicts the due diligence rules for Pre-existing Individual Accounts from the perspective of the Financial Institution. Each part of the figure is later described in more detail.

**Figure 10 – Financial Institution Due Diligence for Pre-existing Individual Accounts**



## 4.1 Lower Value Accounts

### Is the account balance or value (after aggregation) \$1m or less? (Lower Value Account)

A balance or value of \$1m or less at the point of review (starting on 31<sup>st</sup> December 2015) means that the account is a **Lower Value Account**. The due diligence procedures for Lower Value Accounts are less stringent and a greater flexibility in this approach is provided<sup>20</sup>. Such procedures are the **residence address test** and the **electronic record search**.

### Does the Financial Institution hold Documentary Evidence and wish to apply the Residence Address Test?

For Lower Value Accounts Malta allows RMFI to apply the residence address test rather than the electronic record search.

The residence address test provides a simplified approach to the due diligence procedure and builds on the approach used in the EU Savings Directive. Essentially, where the RMFI has on its records a **current residence address** for the Account Holder based **on Documentary Evidence** (largely consisting of government-issued documentation), the Account Holder may be treated as resident in the jurisdiction where the address is. If any of the requirements of the residence address test are not satisfied, then the RMFI must perform the electronic record search.

A Financial Institution (or the third party service provider acting on behalf of the Financial Institution) can accept documentary evidence to support an account holder's status provided the documentation (in original or certified copy form) meets one of the following criteria:

- Is a Certificate of Residence issued by an appropriate tax official of the country in which the account holder claims to be resident. For example a certificate in relation to a person's Malta tax residence issued by the Commissioner for Revenue;
- Any valid identification issued by an authorised Government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes. For example a passport or driving licence;
- Any financial statement, third party credit report or bankruptcy filing;
- Any of the following documents:
  - For natural persons (one or more of the following documents):
    - a) Passport;
    - b) National identity card;
    - c) a birth certificate for persons under 18 years of age (but only where it is ascertained that other applicable documentary evidence mentioned in this section is not available).

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<sup>20</sup> RMFIs may opt to apply the due diligence procedures for New Accounts to Pre-existing Accounts – refer to section 3.4 above

- For legal persons:
  - a) For partnerships: a copy of the Certificate of Incorporation or a copy of the partnership agreement (particularly where such a certificate is not available) and evidence of the appointment and powers of the current partners;
  - b) For corporations: a copy of the Certificate of Incorporation and the Memorandum and Articles of Association that is registered with the Registrar of Companies;
  - c) For Trusts: either a copy of the Trust deed and any subsidiary deed evidencing the appointment and powers of trustees, or certified copies of extracts from the deeds.

#### **4.1.1 Residence Address Test**

Under this test, a RMFI must have policies and procedures in place to verify the residence address based on Documentary Evidence. This test is an alternative to the electronic indicia search for establishing residence. If the residence address test cannot be applied for some reason (e.g. the only address on file is an “in-care-of” address) the RMFI must perform the electronic indicia search.

For purposes of determining whether an individual Account Holder is a Reportable Person, the RMFI may treat such individual as being a resident for tax purposes of the jurisdiction in which an address is located if:

**a) the RMFI has in its records a residence address for the individual Account Holder;**

This first requirement entails that the RMFI has in its records a residence address for the individual Account Holder. In general, an “in-care-of” address or a post office box is not a residence address. However, a post office box would generally be considered a residence address where it forms part of an address together with, e.g., a street, an apartment or suite number, or a rural route, and thus clearly identifies the actual residence of the Account Holder. Similarly, in special circumstances such as that of military personnel, an “in-care-of” address may constitute a residence address.

**b) such residence address is current; and**

The second requirement is that the residence address in the RMFI’s records is current. A residence address is considered to be ‘current’ where it is the most recent residence address that was recorded by the RMFI with respect to the individual Account Holder. However, a residence address is not considered to be ‘current’ if it has been used for mailing purposes and mail has been returned undeliverable-as-addressed (other than due to an error).

Notwithstanding the foregoing, a residence address associated with an account that is a dormant account would be considered to be 'current' during the dormancy period.<sup>21</sup>

**c) such residence address is based on Documentary Evidence.**

The third requirement is that the current residence address in the RMFI's records is based on Documentary Evidence.

This requirement is satisfied if the RMFI's policies and procedures ensure that the current residence address in its records is the same address, or in the same jurisdiction, as that on the Documentary Evidence (e.g., identity card, driving license, voting card, or certificate of residence).

The third requirement is also met if the RMFI's policies and procedures ensure that where it has government-issued Documentary Evidence but such Documentary Evidence does not contain a recent residence address or does not contain an address at all (e.g., certain passports), the current residence address in the RMFI's records is the same address, or in the same jurisdiction, as that on recent documentation issued by an authorised government body or a utility company, or on a declaration of the individual Account Holder under penalty of perjury. Acceptable documentation issued by an authorised government body includes, for example, formal notifications or assessments by a tax administration. Acceptable documentation issued by utility companies relates to supplies linked to a particular property and includes a bill for water, electricity, telephone (landline only), gas, or oil. A declaration of the individual Account Holder under penalty of perjury is acceptable only if:

- (i) the RMFI has been required to collect it under domestic law for a number of years;
- (ii) it contains the Account Holder's residence address; and
- (iii) it is dated and signed by the individual Account Holder under penalty of perjury.

In such circumstances, the standards of knowledge applicable to Documentary Evidence would also apply to the documentation relied upon by the RMFI. Alternatively, a RMFI can meet the third requirement if its policies and procedures ensure that the jurisdiction in the residence address corresponds to the jurisdiction of issuance of government-issued Documentary Evidence.

In the case of accounts that were opened at a time prior to AML/KYC requirements, this third requirement may also be satisfied if the RMFI's policies and procedures ensure that current residence address in its records is in the same jurisdiction:

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<sup>21</sup> In the case of dormant accounts the requirement for the address to be current is relaxed, so the residence address test can still be used in such cases.

- a) as that of the address on the most recent documentation collected by such RMFI (e.g., a utility bill, real property lease, or declaration by the individual Account Holder under penalty of perjury); and
- b) as that reported by the RMFI with respect to the individual Account Holder under any other applicable tax reporting requirements (if any).

Alternatively to meet the third requirement in the abovementioned circumstances, in the case of a Cash Value Insurance Contract, a RMFI may rely on the current residence address in its records until:

- a. there is a change in circumstances that causes the RMFI to know or have reason to know that such residence address is incorrect or unreliable, or
- b. the time of pay-out (full or partial) or maturity of the Cash Value Insurance Contract. The pay-out or maturity of such contract will constitute a change in circumstances and will trigger the relevant procedures.

The following examples illustrate the application of a Reporting Financial Institutions' policies and procedures with respect to subparagraph B(1), Section III of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations:

**Example 1 (Identity card):** *M, a bank that is a Reporting Financial Institution, has policies and procedures in place, pursuant to which it has collected a copy of the identity card of all its Pre-existing Individual Accounts and pursuant to which it ensures that the current residence address in its records for those accounts is in the same jurisdiction as the address on their identity card. M may treat such Account Holders as being resident for tax purposes of the jurisdiction in which such address is located.*

**Example 2 (Passport and utility bill):** *M has account opening procedures in place pursuant to which it relies on the Account Holder's passport to confirm the identity of the Account Holder and on recent utility bills to verify their residence address, as recorded in M's systems. M may treat its Pre-existing Individual Account Holders as being resident for tax purposes of the jurisdiction recorded in its systems.*

**Example 3 (Utility bill with reporting obligations):** *H, a bank that is a Reporting Financial Institution, has a number of accounts opened prior to 1990 that have been grandfathered from the application of AML/KYC Procedures and the related rules on materiality and risk have not required re-documenting the accounts. H has in its records a current residence address for these accounts that is supported by utility bills collected upon account opening. Such address is also the same address as that periodically reported by H with respect to those accounts under its non-tax reporting obligations. Because H's records do not contain any Documentary Evidence associated with these accounts and H is not required to collect it under AML/KYC Procedures, and the current residence address in H's records is the same as that on the most recent documentation collected by H and as that reported by H under its non-tax reporting obligations, H may treat its Account Holders as being resident for tax purposes of the jurisdiction in which such address is situated.*

A withholding certificate or other documentary evidence, including a self-certification, used to establish an account holder's status will remain valid indefinitely subject to a change in circumstance which results in a change of the account holder's status.

### Change in circumstances

If a RMFI has relied on the residence address test described above and there is a change in circumstances that causes the RMFI to know or have reason to know that the original Documentary Evidence (or other documentation as described above) is incorrect or unreliable, the RMFI must, by the later of the last day of the relevant calendar year or other appropriate reporting period, or 90 calendar days following the notice or discovery of such change in circumstances, obtain a self-certification and new Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder. If the RMFI cannot obtain the self-certification and new Documentary Evidence by such date, the RMFI must apply the electronic record search procedure described in subparagraphs B(2) through (6), Section III of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations.

The following examples illustrate the procedures to be followed in case of a change in circumstances:

**Example 1:** *I, a bank that is a Reporting Financial Institution, has relied on the residence address test to treat an individual Account Holder, P, as a resident of Reportable Jurisdiction X. Five years later, P communicates to I that he has moved to jurisdiction Y, which is also a Reportable Jurisdiction, and provides his new address. I obtains from P a self-certification and new Documentary Evidence confirming that he is resident for tax purposes in jurisdiction Y. I must treat P as a resident of Reportable Jurisdiction Y.*

**Example 2:** *The facts are the same as in Example 1, except that I does not obtain a self certification from P. I must apply the electronic record search procedure described in subparagraphs B(2) through (6) and, as a result, treat P as a resident of, at least, jurisdiction Y (based on the new address provided by the Account Holder).*

#### Was the only indicia found during the indicia search a "hold mail" or "in-care-of" address?

Where the indicia search is completed (see below) and the only indicia found is a "hold mail" or "in-care-of" address and no other address is found, then special procedures apply (the **undocumented account procedures**<sup>22</sup>). In the order most appropriate, the Reporting Financial Institution must:

- complete a paper record search;
- or obtain Documentary Evidence or a self-certification from the Account Holder.

<sup>22</sup> Reference is made to Section 4.2.4 of the Guidelines

If neither of these procedures successfully establishes the Account Holder's residence for tax purposes then the RMFI must report the account to the tax authority as an undocumented account.

Once a RMFI determines that a Lower Value Account is an undocumented account, the RMFI is not required to re-apply the procedure set forth in subparagraph B(5) to the same Lower Value Account in any subsequent year until there is a change in circumstances that results in one or more indicia being associated with the account, or the account becomes a High Value Account. However, the RMFI must report the Lower Value Account as an undocumented account until such account ceases to be undocumented.

Whenever an RMFI reports an undocumented account, the Commissioner will use its information-gathering powers under the Income Tax Acts as mentioned in regulation 42 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, to obtain information regarding the undocumented account(s) reported. Such communication will need to take place at least 6 months prior to the next reporting period. A RMFI that fails to comply with such a request for information by the Commissioner will be subject to a penalty of:

- a) one thousand euro (€1,000); and
- b) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total thirty thousand euro (€30,000);

**Note 14:** Does the requirement in the guidelines to confirm the residence address with the Documentary Evidence on file require accounts to be manually reviewed?

*The guidelines do 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. If a RMFI has kept a notation of the Documentary Evidence, as described earlier, 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 RMFI will have satisfied the Documentary Evidence requirement of the residence address test.*

**Note 15:** 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, 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.*

### 4.1.2 Electronic Indicia Search

Where the conditions are not met for the residence address test, the electronic search must be carried out. Under the electronic record search, the RMFI must review its electronically searchable data for any of the following **indicia** (these are a series of factors that indicate where an Account Holder is resident):

**(a) Identification of the Account Holder as a resident of a Reportable Jurisdiction(s);**

This indicium is an identification of the Account Holder as a resident of a Reportable Jurisdiction. This indicium is met if the RMFI's electronically searchable information contains a designation of the Account Holder as a Reportable Jurisdiction's resident for tax purposes.

**(b) Current mailing or residence address (including a post office box) in a Reportable Jurisdiction(s);**

A mailing or residence address is considered to be 'current' where it is the most recent mailing or residence address that was recorded by the RMFI with respect to the individual Account Holder. A mailing or residence address associated with an account that is a dormant account (see above) would be considered to be 'current' during the dormancy period. Where the RMFI has recorded two or more mailing or residence addresses with respect to the Account Holder and one of such addresses is that of a service provider of the Account Holder (e.g., external asset manager, investment advisor, or attorney), the RMFI is not required to treat the service provider's address as an indicium of residence of the Account Holder.

**(c) One or more current or most recent telephone numbers in a Reportable Jurisdiction(s) and no telephone number in the jurisdiction of the RMFI;**

The telephone number(s) in a Reportable Jurisdiction is only required to be treated as an indicium of residence of the Account Holder where it is a 'current' telephone number(s) in a Reportable Jurisdiction.

For these purposes, a telephone number(s) is considered to be 'current' where it is the most recent telephone number(s) that was recorded by the RMFI with respect to the individual Account Holder. Where the RMFI has recorded two or more telephone numbers with respect to the Account Holder and one of such telephone numbers is that of a service provider of the Account Holder (e.g., external asset manager, investment advisor, or attorney), the RMFI is not required to treat the service provider's telephone number as an indicium of residence of the Account Holder.

**(d) Current standing instructions (other than with respect to a Depository Account) to repeatedly transfer funds to an account maintained in a Reportable Jurisdiction(s);**

The term 'standing instructions to transfer funds' means current payment instructions provided by the account holder, or an agent of the account holder, that will repeat without further instructions being provided by the account holder.

Therefore, for example, a transfer instruction to make an isolated payment is not a standing instruction to transfer funds, even if the instructions are given one year in advance. However, an instruction to make payments indefinitely is a standing instruction to transfer funds for the period during which such instructions are in effect, even if such instructions are amended after a single payment.

The following example illustrates the application of subparagraph B(2)(d):

*An individual, K, holds a Custodial Account with E, a custodial bank resident in Reportable Jurisdiction R. K also holds a Depository Account with F, a commercial bank resident in Reportable Jurisdiction S. K has provided E with standing instructions to transfer to the Depository Account, all the income generated with respect to the securities held in the Custodial Account. Because the standing instructions are with respect to a Custodial Account and the funds are to be transferred to an account maintained in a Reportable Jurisdiction, then such standing instructions are an indicium of residence in Reportable Jurisdiction S.*

**(e) Currently effective power of attorney or signatory authority granted to a person with an address in a Reportable Jurisdiction(s); or**

**(f) a current “hold mail” instruction or “in-care-of” address in a Reportable Jurisdiction(s) if the RMFI does not have any other address on file for the Account Holder.**

A “hold mail” instruction is a current instruction by the Account Holder, or an agent of the Account Holder, to keep the Account Holder’s mail until such instruction is amended.

Where such an instruction is in place and the RMFI does not have any address on file for the Account Holder, the indicium is met. An instruction to send all correspondence electronically is not a “hold mail” instruction. Where the RMFI holds an “in-care-of” address in a Reportable Jurisdiction and does not have any other address on file for the Account Holder, the indicium is also met.

If none of the above-mentioned indicia (found in subparagraph B(2)) are discovered in the electronic search, no further action is required until there is a change in circumstances that results in one or more indicia being associated with the account, or the account becomes a High Value Account.

If any of the indicia listed above are discovered in the electronic search, or if there is a change in circumstances that results in one or more indicia being associated with the account, then, according to Section III, B(4) of the Regulations, the RMFI must treat the Account Holder as a resident for tax purposes of each Reportable Jurisdiction for which an indicium is identified, unless it elects to apply the curing procedure (described in Section III, B(6)) and one of the exceptions in B(6) applies with respect to the account (see below).

However, in case of a change in circumstances, a RMFI may choose to treat a person as having the same status that it had prior to the change in circumstances until the later of the last day of the

relevant calendar year or other appropriate reporting period or 90 calendar days following the date that the indicium was identified due to the change in circumstances.

A 'change in circumstances' includes any change that results in the addition of information relevant to a person's status or otherwise conflicts with such person's status. In addition, a change in circumstances includes any change or addition of information to the account holder's account (including the addition, substitution, or other change of an account holder) or any change or addition of information to any account associated with such account (applying the account aggregation rules described in subparagraphs C(1) through (3) of Section VII) if such change or addition of information affects the status of the account holder.

Despite the fact that the indicia described in subparagraph B(2) should limit the number of instances in which the electronic record search results in indicia for different Reportable Jurisdictions, these instances may still occur in practice. Some of these cases may be 'false' indications of residence in a Reportable Jurisdiction. Some others may be genuine cases of Account Holders that are resident in multiple jurisdictions.

RMFIs would often contact their customers to resolve such cases (by applying the curing procedure described in subparagraph B(6)) and advise them that if the conflicting indicia cannot be cured, information may be exchanged with two or more jurisdictions. Such course of action would often already result from customer relationship considerations and the need to handle customer information with care. The same would apply in the context of the due diligence procedures for Pre-existing Individual Accounts that are High Value Accounts.

#### *4.1.3 Special Procedure*

In the case that a "hold mail" instruction or "in-care-of" address is discovered in the electronic search, and none of the other indicia listed in subparagraph B(2)(a) through (e) and no other address (within such indicia) are identified for the Account Holder in such electronic search, the RMFI must, in order most appropriate to the circumstances:

- apply the paper record search, or
- seek to obtain from the Account Holder a self-certification or Documentary Evidence to establish the residence(s) for tax purposes of such Account Holder.

If the paper search fails to establish an indicium and the attempt to obtain the self-certification or Documentary Evidence is not successful, the RMFI must report the account as an undocumented account.

Whenever an RMFI reports an undocumented account, the Commissioner will use its information-gathering powers under the Income Tax Acts as mentioned in regulation 42 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, to obtain information regarding the undocumented account(s) reported. Such communication will need to take place at least 6 months prior to the next reporting period. A RMFI that fails to comply with such a request for information by the Commissioner will be subject to a penalty of:

- a) one thousand euro (€1,000); and
- b) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total thirty thousand euro (€30,000).

#### *4.1.4 Curing Procedure*

Subparagraph B(6) contains a procedure for curing a finding of indicia under subparagraph B(2) i.e. and consequently the Account Holder is not treated as resident in a jurisdiction by virtue of the indicia.

A RMFI is not required to treat an Account Holder as a resident of a Reportable Jurisdiction if:

- (a) the Account Holder information contains a current mailing or residence address in the Reportable Jurisdiction, one or more telephone numbers in the Reportable Jurisdiction (and no telephone number in the jurisdiction of the RMFI) or standing instructions (with respect to Financial Accounts other than Depository Accounts) to transfer funds to an account maintained in a Reportable Jurisdiction, the RMFI obtains, or has previously reviewed and maintains a record of:
  - a. a self-certification from the Account Holder of the jurisdiction(s) of residence of such Account Holder that does not include such Reportable Jurisdiction; and
  - b. Documentary Evidence establishing the Account Holder's non-reportable status.
- (b) the Account Holder information contains a currently effective power of attorney or signatory authority granted to a person with an address in the Reportable Jurisdiction, the RMFI obtains, or has previously reviewed and maintains a record of:
  - a. a self-certification from the Account Holder of the jurisdiction(s) of residence of such Account Holder that does not include such Reportable Jurisdiction; or
  - b. Documentary Evidence establishing the Account Holder's non-reportable status.

The curing procedure entails that the RMFI obtains a self-certification from the Account Holder stating their jurisdiction(s) of residence and Documentary Evidence establishing the Account Holder's status. A self-certification or Documentary Evidence that has been previously reviewed may be relied upon for purposes of the curing procedure unless the RMFI knows or has reasons to know that the self-certification or Documentary Evidence is incorrect or unreliable.

The self-certification that is part of the curing procedure does not need to contain an express confirmation that an Account Holder is not resident in a given Reportable Jurisdiction provided the Account Holder confirms that it contains all its jurisdictions of residence (i.e., the information with respect to the Account Holder's jurisdiction(s) of residence is correct and complete). Documentary Evidence is sufficient to establish an Account Holder's non-reportable status if the Documentary Evidence

- i. confirms that the Account Holder is resident in a jurisdiction other than the relevant Reportable Jurisdiction;
- ii. contains a current residence address outside the relevant Reportable Jurisdiction; or
- iii. is issued by an authorised government body of a jurisdiction other than the relevant Reportable Jurisdiction.

## 4.2 High Value Accounts

Paragraph C, Section I of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, contains the enhanced review procedures that apply with respect to High Value Accounts. These are accounts with a balance or value of over \$1,000,000, after aggregating all accounts held by the same Account Holder to the extent the Financial Institution's computerised systems allow and those known about by the relationship manager, at the date set to determine Pre-existing Accounts or at the end of any subsequent calendar year. Such procedures are the electronic record search, the paper record search and the relationship manager inquiry.

### 4.2.1 Electronic Record Search

In the first instance, the electronic record search as set out above, is required to be completed with respect to all High Value Accounts (i.e. the residency test may not be used). As provided in subparagraph C(1), the RMFI must review electronically searchable data maintained by the RMFI for any of the indicia described in subparagraph B(2)<sup>23</sup>.

### 4.2.2 Paper Record Search

If the RMFI's **electronically searchable databases** include fields for, and capture all of the information described in, subparagraph C(3), then a further paper record search is not required. This means that the RMFI's electronically searchable database has fields for the information described in subparagraph C(3)<sup>24</sup> from which, via an electronic search, it can determine whether information is contained in such fields. Thus, the exception for the paper record search would not be available where a field was simply left blank unless, pursuant to the RMFI's policies and procedures, the fact that such field is left blank means that the information described in subparagraph C(3) is not in the RMFI's records (e.g., because a telephone number has not been provided, or a power of attorney has not been granted).

A RMFI is not required to perform the paper record search described in subparagraph C(2) to the extent the RMFI's electronically searchable information includes the information described in subparagraph C(3) i.e.:

- a. the Account Holder's residence status;
- b. the Account Holder's residence address and mailing address currently on file with the RMFI;
- c. the Account Holder's telephone number(s) currently on file, if any, with the RMFI;
- d. in the case of Financial Accounts other than Depository Accounts, whether there are standing instructions to transfer funds in the account to another account (including an account at another branch of the RMFI or another Financial Institution);

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<sup>23</sup> These may be found in section 4.1.2 above

<sup>24</sup> See below for a full list of the information listed in C(3)

- e. whether there is a current “in-care-of” address or “hold mail” instruction for the Account Holder; and
- f. whether there is any power of attorney or signatory authority for the account.

Thus, if the RMFI’s electronically searchable information does not include all the information described in subparagraph C(3), then the RMFI is only required to perform the paper record search with respect to the information described in subparagraph C(3) that is not included in its electronically searchable information. E.g. a RMFI’s electronically searchable database that includes all the information described in subparagraph C(3) apart from the one contained in subparagraph C(3)(d) (i.e., standing instructions to transfer funds), only causes the RMFI to perform the paper record search with respect to the information described in subparagraph C(3)(d).

Similarly, a RMFI’s electronically searchable database that does not include all the information described above with respect to a clearly identified group of High Value Accounts, only causes the RMFI to perform the paper record search with respect to such group of accounts and limited to the information described in subparagraph C(3) that is not included in its electronically searchable information.

When the RMFI is required to perform the ‘paper record search’ with respect to a High Value Account (by reason of the fact that the electronically searchable databases do not capture the necessary information), the RMFI must also review the current customer master file for indicia and, to the extent not contained in the current customer master file, the documents listed in subparagraph C(2) and records associated with the account and obtained by the RMFI within the last five years for any of the indicia described in subparagraph B(2).

### **4.2.3 Relationship Manager Inquiry**

For High-Value Accounts, **the relationship manager inquiry** is required in addition to any electronic or paper record searches. The RMFI must treat as a Reportable Account any High Value Account assigned to a relationship manager (including any Financial Accounts aggregated with that High Value Account) if the relationship manager has actual knowledge that the Account Holder is a Reportable Person.

A ‘relationship manager’ is an officer or other employee of a RMFI who is assigned responsibility for specific account holders on an on-going basis (including as an officer or employee that is a member of a RMFI’s private banking department), advises account holders regarding their banking, investment, trust, fiduciary, estate planning, or philanthropic needs, and recommends, makes referrals to, or arranges for the provision of financial products, services, or other assistance by internal or external providers to meet those needs.

Relationship management must be more than ancillary or incidental to the job function of a person for the person to be considered a relationship manager. As such, a person whose functions do not involve direct client contact or which are of a back office, administrative or clerical nature is not considered a relationship manager. It is recognized that regular contact can exist between an Account Holder and an employee of a RMFI without causing the employee to be a relationship

manager. For example, a person at a RMFI who is largely responsible for processing transactions/orders or ad hoc requests may end up knowing an Account Holder well. However, the person is not considered a relationship manager unless that person is ultimately charged with managing the Account Holder's affairs at the RMFI.

Notwithstanding the above, a person is only a relationship manager for purposes of subparagraph C(4) with respect to an account that has an aggregate balance or value of more than \$1,000,000, taking into account the account aggregation and currency translation rules described in paragraph C of Section VII. Thus, in determining whether an officer or employee of a RMFI is a relationship manager:

- i. the employee must satisfy the definition of relationship manager and
- ii. the aggregate balance or value the Account Holder's accounts must exceed \$1,000,000.

The following examples illustrate how to determine whether an employee of a RMFI is a relationship manager:

**Example 1:** *An individual, P, holds a custodial account with R, a bank that is a RMFI. The value in P's account at the end of year is \$1,200,000. An employee of R's private banking department, O, oversees the account of P on an on-going basis. Because O satisfies the definition of 'relationship manager' and the value in P's account is more than \$1,000,000, O is a relationship manager with respect to P's account.*

**Example 2:** *Same facts as Example 1, except that the value in P's custodial account at the end of year is \$800,000. In addition, P also holds a depository account with R, the balance of which at the end of year is \$400,000. Both accounts are associated with P and with one another by reference to R's internal identification number. Because O satisfies the definition of 'relationship manager' and, once the account aggregation rules have been applied, the aggregated balance or value in P's accounts is more than \$1,000,000, O is a relationship manager with respect to P's accounts.*

**Example 3:** *Same facts as Example 2, except that O's functions do not involve direct contact with P. Because O does not satisfy the definition of 'relationship manager', O is not a relationship manager with respect to P's accounts.*

**Note 16:** How might the standard of knowledge test applicable to a Relationship Manager contained in the Regulations be operationalised in practice?

*The standard of knowledge test applicable to a Relationship Manager could be operationalised through regular (e.g. yearly) instructions and training by a MFI to all of its employees that could be considered Relationship Managers according to the Standard. This could include the MFI 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 MFI in the manner required by the Standard.*

It is important to note that special aggregation rules apply in the case of relationship managers, as per subparagraph C(3), Section VII of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Where a relationship manager knows, or has reason to know, that Financial Accounts are held by the same person an RMFI is also required to aggregate all such accounts, in order to determine whether a Financial Account is a High Value Account. The following examples illustrate this rule applicable to relationship managers.

**Example 1 - Accounts held by a Passive NFE and by one of its Controlling Person:**

*A Passive NFE, T, holds a depository account with A, a commercial bank that is a Reporting Financial Institution. One of T's Controlling Persons, N, also holds a depository account with A. Both accounts are associated with N and with one another by reference to A's internal identification number. In addition, A has assigned a relationship manager to N. Because the accounts are associated in A's system **and** by a relationship manager, A is required to aggregate the accounts under subparagraphs C(1) through (3) of Section VII of Annex I of the Regulations..*

**Example 2 - Accounts held by different Passive NFEs with a common Controlling Person:**

*The same facts as in Example 1 apply. In addition, another Passive NFE, I, holds a depository account with A. N is also one of I's Controlling Persons. I's account is **not** associated with N nor with T's and N's accounts by reference to A's internal identification number. Because the accounts are **associated by a relationship manager**, A is required to aggregate the accounts under subparagraphs C(1) through (3) of Section VII of Annex I of the Regulations.*

#### **4.2.4 Finding Indicia**

If none of the indicia listed in subparagraph B(2) are discovered in the enhanced review of High Value Accounts, and the account is not identified as held by a Reportable Person in subparagraph C(4), then, according to subparagraph C(5)(a), further action is not required until there is a change in circumstances that results in one or more indicia being associated with the account.

If any of the indicia listed in subparagraph B(2)(a) through (e) are discovered in the enhanced review of High Value Accounts, or if there is a subsequent change in circumstances that results in one or more indicia being associated with the account, then, pursuant to subparagraph C(5)(b), the RMFI must treat the account as a Reportable Account with respect to each Reportable Jurisdiction for which an indicium is identified unless it elects to apply the curing procedure contained in subparagraph B(6)<sup>25</sup> and one of the exceptions in such subparagraph applies with respect to that account.

An indicium discovered in one review procedure such as the paper record search or the relationship manager inquiry, cannot be used to cure an indicium identified in another review procedure such as the electronic record search. E.g. a current residence address in a Reportable Jurisdiction within the

<sup>25</sup> See section 4.1.4 above

knowledge of the relationship manager cannot be used to cure a different residence address currently on file with the RMFI discovered in the paper record search.

Where the only indicia found is a “hold mail” instruction or “in-care-of” address in the enhanced review of High Value Accounts, and no other address and none of the other indicia listed in subparagraph B(2)(a) through (e) are identified for the Account Holder, then, according to subparagraph C(5)(c), the special procedure applies i.e. the **undocumented account procedure**, wherein the RMFI must obtain from such Account Holder a self-certification or Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder. If the RMFI cannot obtain such self-certification or Documentary Evidence or the procedure does not successfully establish the Account Holder’s residence for tax purposes, the RMFI must report the account as an undocumented account until such account ceases to be undocumented.

Whenever an RMFI reports an undocumented account, the Commissioner will use its information-gathering powers under the Income Tax Acts as mentioned in regulation 42 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations, to obtain information regarding the undocumented account(s) reported. Such communication will need to take place at least 6 months prior to the next reporting period. A RMFI that fails to comply with such a request for information by the Commissioner will be subject to a penalty of:

- a) one thousand euro (€1,000); and
- b) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total thirty thousand euro (€30,000);

### 4.3 Additional procedures

According to subparagraph C(6), if a Pre-existing Individual Account is not a High Value Account as of 31 December 2015 (i.e. it is a Lower Value Account), but becomes a High Value Account as of the last day of a subsequent calendar year, the RMFI must complete the enhanced review for High Value Accounts with respect to such account within the calendar year following the year in which the account becomes a High Value Account. If based on such review such account is identified as a Reportable Account, the RMFI must report the required information about such account with respect to the year in which it is identified as a Reportable Account and subsequent years on an annual basis, unless the Account Holder ceases to be a Reportable Person.

According to subparagraph C(7), once a RMFI applies the enhanced review procedures of High Value Accounts, the RMFI is not required to re-apply such procedures, other than the relationship manager inquiry, to the same High Value Account in any subsequent year unless the account is undocumented. In such a case, the RMFI should re-apply them annually until such account ceases to be undocumented. Similarly, with respect to the relationship manager inquiry, annual verifications would suffice without there being a requirement for a relationship manager to confirm on an account-by-account basis that it does not have actual knowledge that each Account Holder assigned to him is a Reportable Person.

According to subparagraph C(8), if there is a change of circumstances with respect to a High Value Account that results in one or more indicia described in subparagraph B(2) being associated with the account, then the RMFI must treat the account as a Reportable Account with respect to each Reportable Jurisdiction for which an indicium is identified unless it elects to apply subparagraph B(6) and one of the exceptions in such subparagraph applies with respect to that account. However, a RMFI may choose to treat a person as having the same status that it had prior to the change in circumstances during the 90 calendar days following the date that the indicium was identified due to the change in circumstances.

A RMFI must have appropriate communication channels and procedures in place to ensure that a relationship manager identifies any change in circumstances of an account, as provided in subparagraph C(9). E.g. if a relationship manager is notified that the Account Holder has a new mailing address in a Reportable Jurisdiction, the RMFI is required to treat the new address as a change in circumstances and, if it elects to apply subparagraph B(6), is required to obtain the appropriate documentation from the Account Holder.

#### **4.4 Timing of review and additional procedures**

Paragraph D, Section III of Annex I of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations contains the rule governing the timing of the review procedures for identifying Reportable Accounts among Pre-existing Individual Accounts. Such rule requires that the review must be completed by 31 December 2016 for High Value Individual Accounts and by 31 December 2017 for Lower Value Individual Accounts.

Paragraph E contains an additional procedure applicable to Pre-existing Individual Accounts - any Pre-existing Individual Account that has been identified as a Reportable Account under Section III must be treated as a Reportable Account in all subsequent years, unless the Account Holder ceases to be a Reportable Person.

## 5. Section IV of Annex I of the Regulations: Due Diligence for New Individual Accounts

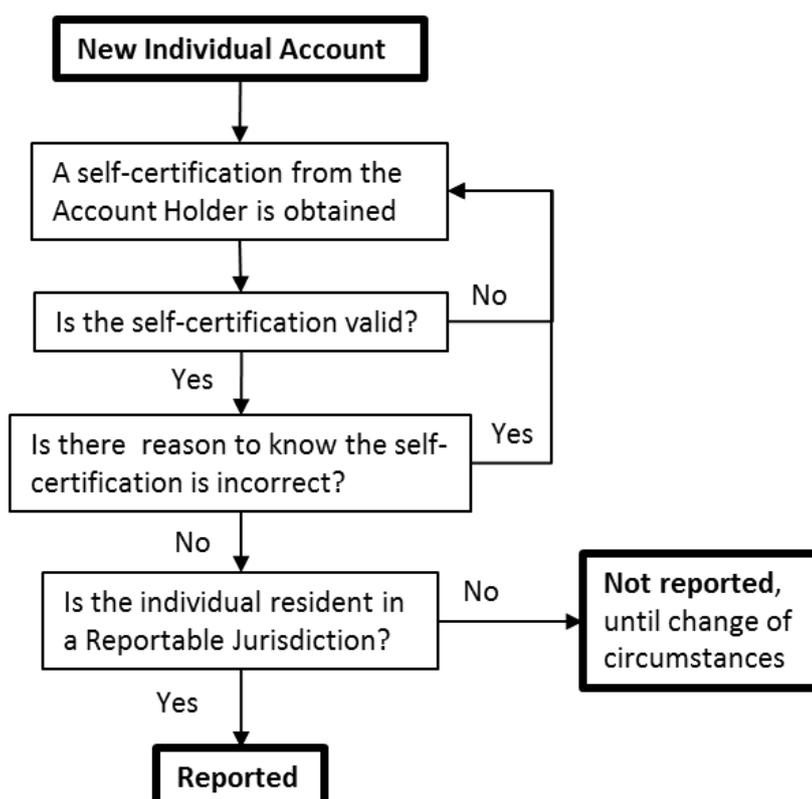
This part contains the due diligence procedures for New Individual Accounts and provides for the collection of a self-certification (and confirmation of its reasonableness).

While the due diligence for Pre-existing Accounts relies mainly on information the MFI already has on file, the opening of a New Account requires the MFI to request additional information relevant to tax compliance. Figure 11 sets out the process for New Individual Accounts.

In general a New Account is an account opened on or after 1<sup>st</sup> January 2016.

The below figure depicts the due diligence rules for New Individual Accounts from the perspective of the MFI. Each part of the figure is later described in more detail.

**Figure 11: Due diligence for New Individual Accounts**



## 5.1 Self Certification

Any individual that opens an account needs to provide a **self-certification** which establishes where the individual is resident for tax purposes. If the self-certification establishes that the Account Holder is resident for tax purposes in a Reportable Jurisdiction, then, the RMFI must treat the account as a Reportable Account.

Regulation 39(1)(a)(b) of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that a RMFI will be considered to have obtained satisfactory self-certification documentation or documentary evidence to establish the residence for tax purposes of the Account Holder if it obtains any of the following:

- (a) A certificate of residence issued by an authorised government body of the jurisdiction in which the payee claims to be resident;
- (b) With respect to an individual, any valid identification issued by an authorised government body that includes the individual's name and is typically used for identification purposes;

Therefore, the self-certification can be provided in any form but in order for it to be valid it must be **signed** (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by the Account Holder, **be dated, and must include** the Account Holder's: name; residence address; jurisdiction(s) of residence for tax purposes; TIN(s) and date of birth.

Once the RMFI has obtained a self-certification it must **confirm its reasonableness** based on the information obtained in connection with the opening of the account, including any documentation collected pursuant to AML/KYC procedures (the reasonableness test).

A RMFI is considered to have confirmed the reasonableness of a self-certification if it **does not know or have reason to know** that the self-certification is incorrect or **unreliable**. Where a self-certification fails the reasonableness test the RMFI is expected to either obtain a valid self-certification or a reasonable explanation and documentation as appropriate supporting the reasonableness of the self-certification.

In order to be able to increase reliability on the self-certification presented to the competent authority of Malta, regulation 44(1)(a) of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations provides that where a RMFI signs or otherwise positively affirms a false self-certification, the RMFI will be liable to a penalty of five thousand euro (€5,000).

Note: a RMFI may want to include language in its self-certification template requiring the Account Holder to update RMFI if there is a change in the information that affects the Account Holder's status. This may reduce the onus on the RMFI in applying the reasonableness test.

**Note 17:** 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 Regulations provide that a MRFI 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, MRFIs 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.

**Note 18:** Do the Regulations 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.

### 5.1.1 Wording of self-certification

A MFI can choose the form of wording it uses to determine the tax residence of a New Individual Account holder. However the wording must be sufficient for an account holder to confirm they are tax resident in the particular jurisdiction.

### 5.1.2 Format of self-certification

Since Financial Institutions may permit individuals to open accounts in various ways (e.g. by telephone, online or on paper application forms) the method of self-certification does not necessarily have to follow the account application method. Self-certifications are to be obtained in any of these account opening procedures.

The following examples are intended to illustrate how these may operate, but are not exhaustive:

**Example 1 - Telephone Applications:**

*An individual makes a telephone call to a MFI, asking to open an account in line with the MFI's normal account opening procedures.*

*The MFI asks the account holder to state where they are tax resident. The individual provides this information on the phone and the MFI records the confirmation on its system. Subsequent paperwork sent to the investor to confirm the account opening should include their response to these self-certification questions and require them to contact the Financial Institution in the event that it is not correct.*

**Example 2 - Online Applications:**

*An individual accesses the website of a MFI to open an account in line with the MFI's normal account opening procedures. On the account opening web page, along with information about the individual such as name and address, the individual is asked to select the appropriate country or countries in which they are tax resident.*

**Note 19: What are the obligations of a MFI to establish the tax residence of its customers in relation to the New Accounts procedures?**

*A MFI is not required to provide customers with tax advice or to perform a legal analysis to determine the reasonableness of self-certification. Instead, for New Accounts the MFI 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.*

**Note 20: With respect to a Taxpayer Identification Number(TIN) provided on a self-certification, when will a RMFI know or have reason to know the self-certification is incorrect or unreliable?**

*The Guidelines provide that a RMFI may rely on a self-certification unless it knows or has reason to know that the self-certification is incorrect or unreliable. This includes, among the other information provided on the self-certification, the TIN in relation to a Reportable Jurisdiction.*

*A RMFI 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. RMFIs are not expected to confirm the format and other specifications of a TIN with the information provided on the Automatic Exchange Portal. However, RMFIs 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.*

## 6. Section V of Annex I of the Regulations: Due Diligence for Pre-existing Entity Accounts

This part contains the due diligence procedures for Preexisting Entity Accounts. In this case the due diligence process has two parts:

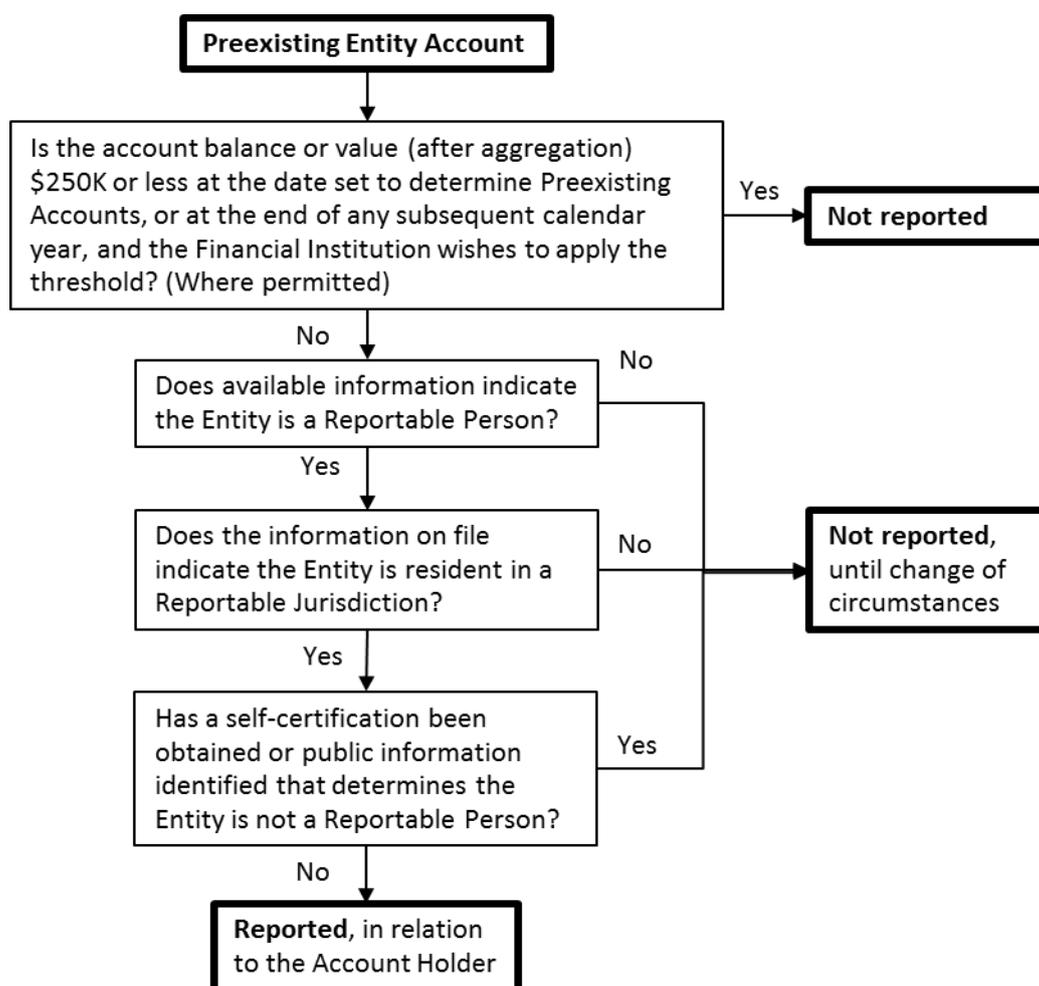
1. First, the RMFI must establish whether the Entity is a Reportable Person. If so, the account is then a Reportable Account.
2. Second, for certain Entity Account Holders (Passive NFEs), the RMFI must establish whether the Entity is controlled by a Reportable Person(s).

These processes are set out in further detail below.

### Review procedure to establish whether the Entity is a Reportable Person

Figure 12 below and the associated text sets out the process to establish whether the Entity Account Holder is a Reportable Person and therefore whether the account is a Reportable Account by virtue of its Account Holder.

**Figure 12 – Due Diligence Procedures for Preexisting Entity Accounts**



Is the account balance or value (after aggregation) \$250k or less (or its equivalent in euro) at the date set to determine Pre-existing Accounts, or at the end of any subsequent calendar year, and the MFI wishes to apply the threshold?

The Regulations provide RMFIs with an optional exemption with respect to reviewing certain Pre-existing Entity Accounts. The RMFI may elect to apply this exemption to all Pre-existing Entity Accounts or to a clearly identified group of accounts.

Does available information indicate the Entity Account Holder is a Reportable Person?

In determining whether a Pre-existing Entity Account is held by a Reportable Person, the RMFI **may follow the procedures in the order most appropriate under the circumstances**. E.g. as publicly traded corporations, Government Entities and Financial Institutions are among those Entities explicitly excluded from being Reportable Persons the RMFI may first establish the Entity Account Holder is such an Entity and therefore not a Reportable Person. Alternatively, it may be more straightforward to first establish that the Entity is not resident in a Reportable Jurisdiction and is therefore not a Reportable Person.

In order to determine whether an Entity is resident in a Reportable Jurisdiction, a RMFI **must review information maintained for regulatory or customer relationship purposes**, including information collected for AML/KYC purposes (this includes place of incorporation, address, or address of one or more of the trustees of a trust). Indications of residence for different types of Entity are set out in Table 3 below.

**Table 3: Indications of the Entity Account Holder's residence**

<b>Entity type</b>	<b>Indication of residence</b>
Most taxable entities	Place of incorporation or organisation
Fiscally transparent entities excluding trusts	Address (which could be indicated by the registered address, principal office or place of effective management)
Trusts	The address of one or more trustees

Has a self-certification been obtained or public information identified that determine the Entity is not a Reportable Person?

If the information indicates that the Account Holder is resident in a Reportable Jurisdiction, then the RMFI must treat the account as a Reportable Account, unless it obtains a **self-certification** from the Account Holder, or reasonably determines based on information in its possession or that is publicly available (including information published by an authorised government body or standardised industry coding systems), that the Account Holder is not a Reportable Person.

For the self-certification to be valid the Regulations set out that it must be **signed** (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by a person authorised to sign on behalf of the Entity, **be dated, and must include** the Account Holder's: name; address; jurisdiction(s) of residence for tax purposes and TIN(s).

The self-certification may also contain information on the Account Holder's status, such as the type of Financial Institution or the type of NFE it is. This could be useful for the rest of the due diligence process for Pre-existing Entity Accounts (see the steps below in relation to Controlling Persons).

#### Review procedure for Controlling Persons

Whether or not the account has been identified as a Reportable Account during the first part of the review procedure, the RMFI must carry out the **second part to the review** procedure to first identify whether the Entity is a Passive NFE and then, if so, identify its **Controlling Persons**. This could result in additional information becoming reportable (including to one or more additional jurisdictions) in relation to an account already identified as a Reportable Account or in the account becoming a Reportable Account by virtue of the Entity Account Holder's Controlling Person(s). The process is set out in the diagram below (Figure 13) with each step subsequently explained in further detail.

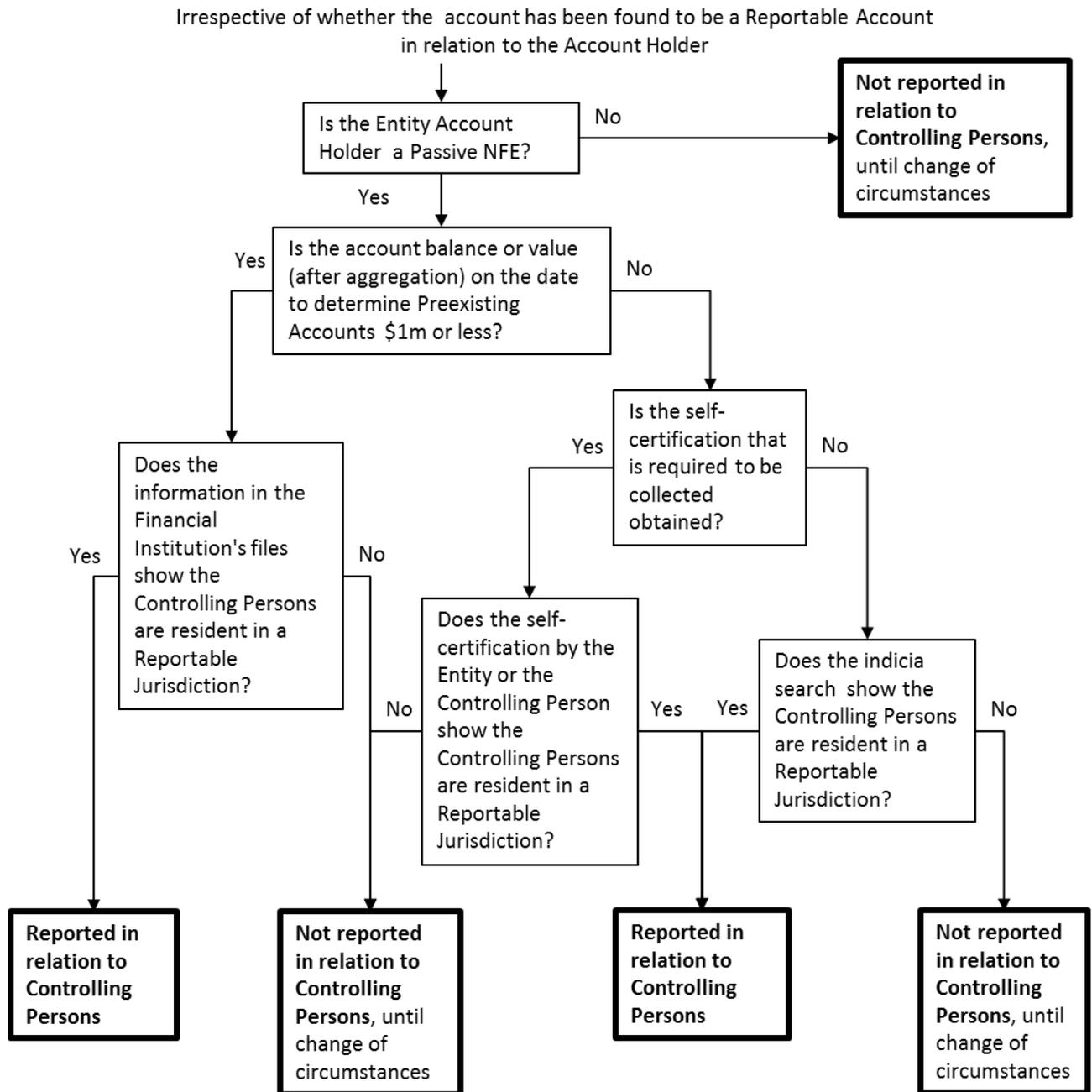
**Note 21:** A requirement for a self-certification to be valid on account opening under the Regulations is that it must be signed or positively affirmed by the customer. How should "otherwise positively affirmed" be understood?

A self-certification is otherwise positively affirmed if the person making the self-certification provides the MFI 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 MFI 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 MFI in obtaining the self-certification is expected to be in a manner consistent with the procedures followed by the MFI for the opening of the account. The MFI will need to maintain a record of this process for audit purposes, in addition to the self-certification itself.

**Note 22:** Do the Regulations allow for the gathering of information for a self-certification verbally on account opening under the Regulations?

A self-certification may be provided in any manner and in any form. Therefore, provided the self-certification contains all the required information and the self-certification is signed or positively affirmed by the customer, a MFI may gather verbally the information required to populate or otherwise obtain the self-certification. The approach taken by the MFI in obtaining the self-certification is expected to be in a manner consistent with the procedures followed by the MFI for the opening of the account. The MFI will need to maintain a record of this process for audit purposes, in addition to the self-certification itself.

**Figure 13: Due diligence procedure in relation to Controlling Persons for Pre-existing Accounts**



The review procedure is designed to determine whether a Pre-existing Entity Account is held by one or more Entities that are Passive NFEs with one or more Controlling Persons that are Reportable Persons. Where this is the case then the Financial Account becomes a Reportable Account in relation to the Controlling Persons, with information in relation to the Reportable Account and the Controlling Persons becoming reportable. In making these determinations the RMFI can follow the guidance in the order most appropriate under the circumstances.

Is the Entity Account Holder a Passive NFE?

For the purposes of determining whether the Account Holder is a Passive NFE the RMFI **may use any of the following information** with which it can reasonably determine that the Account Holder is an Active NFE or a Financial Institution, other than a professionally managed Investment Entity resident in a Non- Participating Jurisdiction which is always treated as a Passive NFE (i.e. an Investment Entity that is not a Participating Jurisdiction Financial Institution):

1. **Information in its possession** (such as information collected pursuant to AML/KYC procedures); **or**
2. **Information that is publicly available** (such as information published by an authorised government body or a standardised industry coding system).

Otherwise the RMFI must obtain a self-certification from the Account Holder to establish its status.

Is the account balance or value (after aggregation) \$1m or less (or its equivalent in Euro)?

If the Account Holder is an NFE, then the balance or value of the account must be determined. The due diligence procedures are less stringent for accounts with a **balance or value of \$1,000,000 or less**.

Where the account balance is \$1,000,000 or less, in order to determine the Controlling Persons of an NFE and establish whether they are Reportable Persons, the Financial Institution may **rely on information collected and maintained** pursuant to AML/KYC Procedures.

Where the balance or value of the accounts **exceeds \$1,000,000 a self- certification** with respect to the Controlling Persons must be collected (from either the Account Holder or the Controlling Person(s)). The self-certification can be provided in any form but in order for it to be valid the Regulations set out that it must be **signed** (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by the Controlling Person(s) or the Entity Account Holder, **be dated, and must include** each Controlling Person's: name; residence address; jurisdiction(s) of residence for tax purposes; TIN(s) and date of birth.

**If the self-certification is not obtained** the Financial Institution must rely on the **indicia search** to determine whether the Controlling Person(s) is a Reportable Person(s).

If there is a **change in circumstances** that causes the RMFI to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the RMFI must re-determine the status of the account by the later of the end of the reporting period or 90 days.

**Note 23:** 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 Regulations provide 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. Since, in the example given, the MFI 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.*

## 7. Section VI of Annex I of the Regulations: Due Diligence for New Entity Accounts

As with the procedure for Pre-existing Entity Accounts, the due diligence procedure for New Entity Accounts has **two parts**:

1. First, the RMFI must establish whether the Entity is a Reportable Person. If so, the account is then a Reportable Account.
2. Second, for certain Entity Account Holders (Passive NFEs), the RMFI must establish whether the Entity is controlled by a Reportable Person(s).

These processes are set out below.

### Review procedure to establish whether the Entity is a Reportable Person

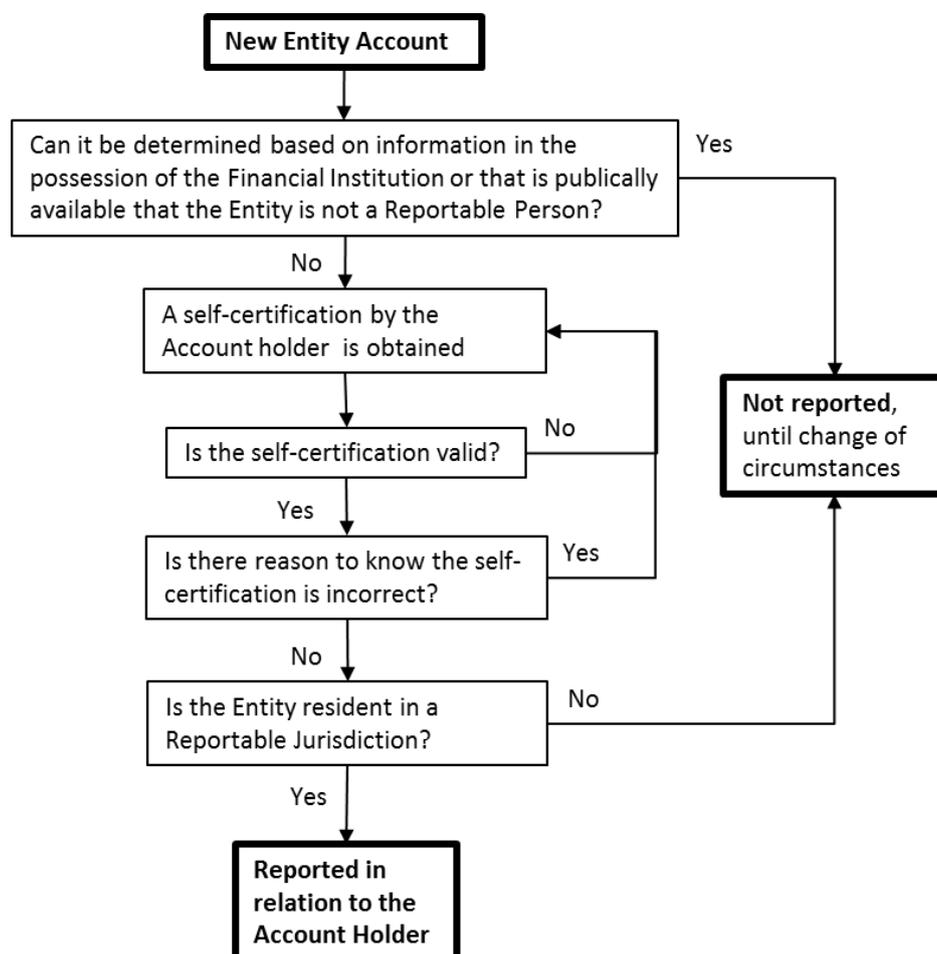
Figure 14 below and the associated text set out the process to establish whether the Entity Account Holder is a Reportable Person and therefore whether the account is a Reportable Account by virtue of its Account Holder.

The **optional provision in relation to Pre-existing Account** as set out in the context of New Individual Accounts also applies to Entity Accounts. So where provided for, some accounts that would otherwise need to be treated as New Accounts can be instead treated as Pre-existing Accounts, as per Section VIII, Part C (9)(b) of the Annex to the amended Cooperation with Other Jurisdiction on Tax Matters Regulations.

### Can it be determined based on information in the possession of the Financial Institution or that is publicly available that the Entity is not a Reportable Person?

In determining whether a New Entity Account is held by one or more Entities that are Reportable Persons, the RMFI **may follow the procedures in the order most appropriate** under the circumstances. E.g. as publicly traded corporations, Government Entities and Financial Institutions are among those Entities explicitly excluded from being Reportable Persons the RMFI may first establish the Entity Account Holder is such an Entity and therefore not a Reportable Person.

**Figure 14: Due diligence procedure for New Entity Accounts**



*A Self-certification by the Account Holder is obtained*

Alternatively, it may be more straightforward to first obtain a self-certification to establish that the Entity is not resident in a Reportable Jurisdiction and is therefore not a Reportable Person.

*Is the Self-certification valid?*

For the self-certification to be valid the Regulations set out that it must be **signed** (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by a person authorised to sign on behalf of the Entity, **be dated, and must include** the Account Holder's: name; address; jurisdiction(s) of residence for tax purposes and TIN(s).

*Is there reason to know the self-certification is incorrect?*

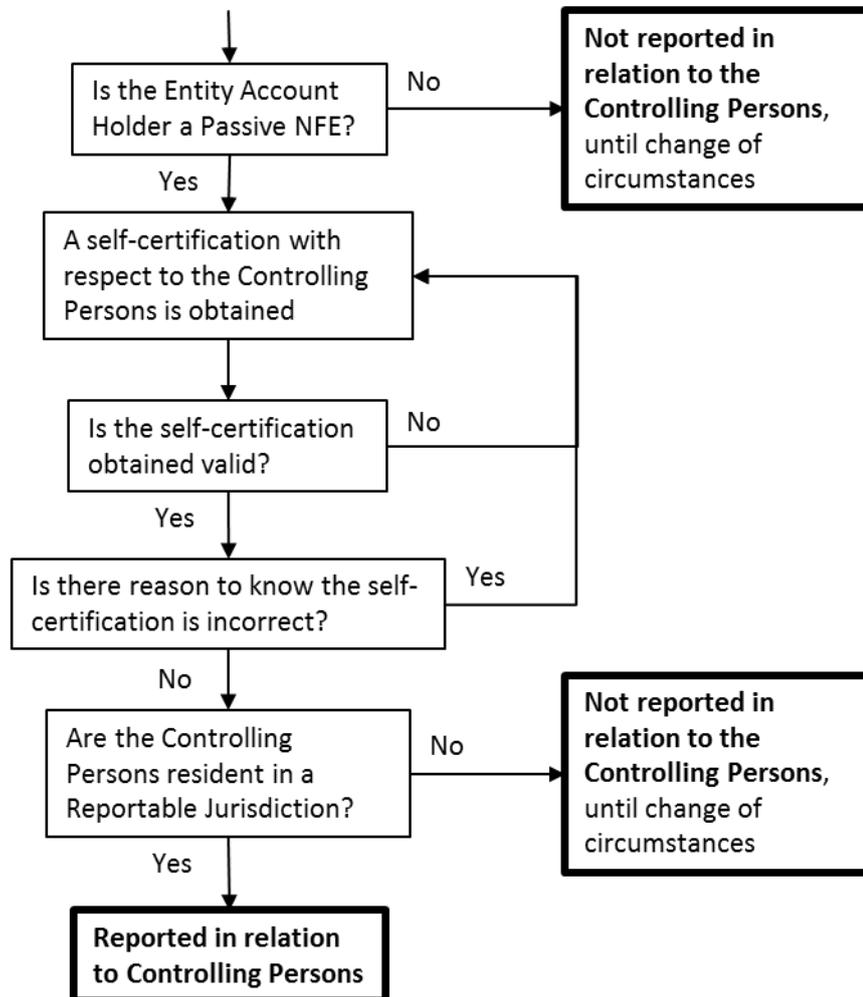
The RMFI must **confirm the reasonableness** of such self-certification based on the information obtained in connection with the opening of the account (the reasonableness test). Essentially the Financial Institution must not know or have reason to know that the self-certification is incorrect or unreliable. If the self-certification fails the reasonableness test, a new valid self-certification would be expected to be obtained in the course of the account opening procedures.

*Review procedure for Controlling Persons*

Notwithstanding whether the account has been found to be a Reportable Account following the first part of the test, the Financial Institution must carry out the **procedure in relation to Controlling Persons** to identify whether additional information must also be reported or whether an account now becomes a Reportable Account. The procedure is outlined in Figure 15 with each step described below.

**Figure 15: Due diligence procedure in respect of Controlling Persons for New Entity Accounts**

Irrespective of whether the account has been found to be a Reportable Account in relation to the Account Holder



*Is the Entity Account Holder a Passive NFE?*

For purposes of determining whether the Account Holder is a Passive NFE the RMFI may use any of the following information on which it can reasonably determine that the Account Holder is an Active NFE or a Financial Institution, other than a professionally managed Investment Entity resident in a Non-Participating Jurisdiction which is always treated as a Passive NFE (i.e., that is, an Investment Entity that is not a Participating Jurisdiction Financial Institution):

1. **Information in its possession** (such as information collected pursuant to AML/KYC procedures); or
2. **Information that is publicly available** (such as information published by an authorised government body or standardised industry coding system).

Otherwise the RMFI must obtain a **self-certification** from the Account Holder to establish its status.

For the self-certification to be valid the Regulations set out that it must be **signed** (or otherwise positively affirmed i.e. involving some level of active input or confirmation) by a person authorised to sign on behalf of the Entity, **be dated, and must include** the Account Holder's name; address; jurisdiction(s) of residence for tax purposes and TIN(s).

A RMFI that cannot determine the status of the Account Holder as an Active NFE or a Financial Institution other than non-participating professionally managed investment entity must presume that it is a Passive NFE.

#### Obtain a Self-certification with respect to the controlling persons

For the purposes of determining whether a Controlling Person of a Passive NFE is a Reportable Person, a RMFI may only rely on a **self-certification** from either the Account Holder or the Controlling Person. If self-certifications are provided to the RMFI by both the Account Holder and the Controlling Person, the RMFI can confirm the reasonableness of the self-certification by comparing both documents. Should information provided vary between one document and the other, this would be considered as a failure of the reasonableness test and the self-certifications provided would be deemed to be incorrect or unreliable.

The self-certification can be provided in any form but in order for it to be valid the Regulations set out that it must be **signed** (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by the Controlling Person(s) or the Entity Account Holder, **be dated, and must include** the Controlling Person's: name; residence address; jurisdiction(s) of residence for tax purposes; TIN(s) and date of birth.

If any of the Controlling Persons of a Passive NFE is a Reportable Person, then the account must be treated as a Reportable Account (even if the Controlling Person is resident in the same jurisdiction as the Passive NFE).

If there is a change in circumstances that causes the RMFI to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the RMFI must re-determine the status of the account by the later of the end of the reporting period or 90 days.

## 7.1 Other definitions and general due diligence rules

### 7.1.1 Timings

An account is treated as a Reportable Account beginning as of the date it is identified as such and maintains such status until the date it ceases to be a Reportable Account (e.g., because the Account Holder ceases to be a Reportable Person or the account becomes an Excluded Account, is closed, or is transferred in its entirety). Where an account is identified as a Reportable Account based on its status at the end of the calendar year or reporting period, information with respect to that account

must be reported as if it were a Reportable Account through the full calendar year or reporting period in which it was identified as such (or the date of closure). Unless otherwise provided, information with respect to a Reportable Account must be reported annually in the calendar year following the year to which the information relates. For account balances the relevant balance or value must be determined as of 31 December of the calendar year, or, if an alternative reporting period is used then the relevant balance or value must be determined as of the last day of the reporting period, within that calendar year.

### *7.1.2 Service providers*

RMFIs are allowed to use service providers to fulfil their reporting and due diligence obligations. The RMFI will always remain responsible for its reporting and due diligence obligations, including its obligations on confidentiality and data protection.

There are numerous examples where reporting might most appropriately be fulfilled by someone that is not necessarily the Financial Institution itself (e.g., fund managers on behalf of funds and trustees on behalf of trusts).

### *7.1.3 Currency translation*

Malta allows its RFIs to apply the dollar threshold amounts described in the Regulations along with the equivalent amounts in Euro. This allows FIs that operate in several jurisdictions to apply the threshold amounts in the same currency in all the jurisdictions in which they operate.

Where accounts are denominated in a currency other than US dollars then the threshold limits must be converted into the currency in which the accounts are denominated before determining if they apply. This should be done using a published spot rate for the 31 December of the year being reported, or in the case of an insurance contract or annuity contract, the date of the most recent contract valuation. In the case of closed accounts the spot rate to be used is the rate on the date the account was closed.

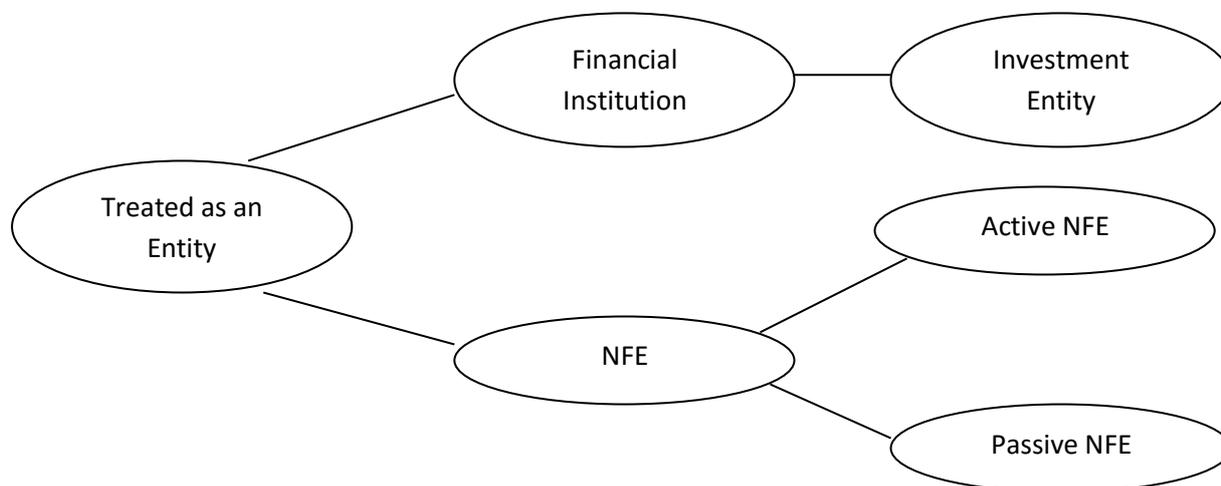
Alternatively a Financial Institution could convert non-US dollar balances into US dollars and then apply the thresholds. Regardless of the method of conversion, the rules for determining the spot rate apply. The method of conversion must be applied consistently.

Examples of acceptable published exchange rates include, Reuters, Bloomberg, Financial Times and exchange rates published on the Central Bank of Malta website.

## 8. Treatment of Trusts

The Regulations will generally apply to trusts in two circumstances:

- i. When a trust is a RMFI; and
- ii. When a trust is a NFE that maintains a Financial Account with a RMFI



### 8.1 Basic Features

In general terms, a trust is a fiduciary relationship, rather than an entity with its own separate legal personality. The parties to a trust must include a settlor, a trustee and at least one beneficiary, and there may be more than one of each. These parties may be natural persons or Entities. The beneficiaries may be named individually or members of a described group of people (a class of beneficiaries). A beneficiary may have a right to receive mandatory distributions, or may receive discretionary distributions. In general terms:

- A mandatory beneficiary has an entitlement to a set amount of property at a set time. If the trustee refused to make the distribution, a mandatory beneficiary could enforce their right against the trustee and obtain the property;
- A discretionary beneficiary does not have an enforceable right to a certain amount of property at any set time. Rather, a discretionary beneficiary is dependent on the trustee to exercise its discretion in the beneficiary's favour. If the trustee refused to make a distribution, a discretionary beneficiary could only sue the trustee to *consider* exercising its discretion in the beneficiary's favour.
- For the purposes of the Regulations, a contingent beneficiary is treated like a discretionary beneficiary. A contingent beneficiary does not have an enforceable right to trust property until a certain event or set of circumstances occur.

## 8.2 Determining whether the trust is a RMFI or a NFE

As a trust is considered to be an Entity in the Regulations, it may be a MFI or a NFE. The most likely scenario in which a trust will be a MFI is if it falls within the definition of Investment Entity. This will be the case when a trust has gross income primarily attributable to investing, reinvesting, or trading in Financial Assets and is managed by another Entity that is a MFI. This would also include trusts that are collective investment vehicles or other similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in Financial Assets.

Note: In the case where a trust is to be considered as a financial institution, it will have reporting obligations in Malta, if any part of the trust management (i.e. any trustee) is a resident of Malta, irrespective of the trustees being legal entities or individuals, and independent of whether the trust is managed professionally or otherwise. However, trusts that have no Reportable Accounts do not need to register with the Commissioner for Revenue for the purposes of DAC2 and CRS. In order to enable the Commissioner for Revenue to make a proper assessment as to any action that he may deem necessary in order to monitor the level of compliance in relation to the obligations under the Regulations, Trustees that are licensed by the MFSA shall provide the Commissioner for Revenue on a yearly basis with the following information on their Trusts for each year from 2016 onwards:

- A. A list of Trusts as at 31st December;
- B. A list of Trusts created during the year;
- C. A list of terminated Trusts and Trusts in relation to which the Trustee submitting this list was no longer Trustee during the year.

For each Trust featuring in the above-mentioned lists, the Trustees needs to provide the following information –

- (i) the name of the Trust or any other identifying feature. Where such other identifying feature is provided, this needs to be a unique identifier reference and an explanation of such unique identifying reference needs to be included. Vague references are not acceptable for this purpose. Where a trust has a name and a unique identifier reference cannot be found, the name must be entered;
- (ii) the date of its creation;
- (iii) the date when it first had a Trustee that was resident in Malta;
- (iv) the date of its termination (where applicable).

This information shall be submitted in such form and by such dates as the Commissioner for Revenue shall determine. Where a Trustee fails to comply with the reporting obligations in this Section and does not register all its trusts within 30 days after the lapse of the deadline for such reporting, it shall be deemed that the Trustee had the obligation to register all its Trusts for the purposes of the Regulations by the 1st January of the year relating to which the Trustee had failed to report the above-mentioned information and that the reporting obligations under Regulation 41 of the Regulations apply from that year onwards.

If, contrary to the above, a trust is not a MFI (i.e. it does not satisfy the criteria under the definition of Investment Entity in A(6)(b) of Section VIII of Annex I) it will be a NFE. NFEs are either Active NFEs or Passive NFEs depending on their activities. It is possible, although perhaps less common, that a trust could qualify as an Active NFE, such as a trust that is a regulated charity or a trading trust carrying on an active business.

If a trust is not an Active NFE, it will be a Passive NFE. In addition, if a trust is holding a Financial Account with a RMFI, such RMFI must treat the trust as a Passive NFE if it is an Investment Entity (see above) that is not resident or located in a Participating Jurisdiction.

### 8.3 The treatment of a trust that is a RMFI

In applying the Regulations to a trust, the trust must:

1. Determine if such trust is a RMFI;
2. Review its Financial Accounts;
3. Identify its Reportable Accounts;
4. Apply the due diligence rules set out above; and
5. Subsequently report the relevant information.

#### 1. Determining if the trust is a RMFI

A trust that is a MFI will be a RMFI if it is resident in Malta and does not qualify as a Non-reporting Financial Institution. A trust may be a Non-Reporting Financial Institution such as a Broad Participation Retirement Fund or Narrow Participating Retirement Fund. A trust could also be a Non-reporting Financial Institution where the trustee itself is a RMFI, and that trustee undertakes all information reporting in respect of all Reportable Accounts of the trust (and all such reports are exchanged with the relevant jurisdictions concerned).

A trust will be considered to be resident where the trustee(s) is resident. If there is more than one trustee, the trust will be a RFI in all Participating Jurisdictions in which a trustee is resident. In other words, if the trustees are each resident in different jurisdictions, the trust would be a RFI in each of those Participating Jurisdictions, and would each separately report in respect of their Reportable Accounts.

However, where the trust is considered to be resident for tax purposes in a particular Participating Jurisdiction, and the trust reports all the information required to be reported with respect to Reportable Accounts maintained by the trust that will relieve the trust from reporting in the jurisdictions of the residence of the other co-trustees. In order to obtain such relief, each trustee should be able to demonstrate that all necessary reporting by the trust is actually taking place.

## 2. Identifying the Financial Accounts of a trust that is a RMFI

Where a trust is a RMFI it must identify its Financial Accounts. If the trust is an Investment Entity, the Regulations define its Financial Accounts as the debt and Equity Interests in the Entity.

As mentioned earlier, debt interest is not defined in the Regulations or the guidelines, and therefore what is considered debt interest will be determined in accordance with the laws of Malta, including the FATCA guidelines.

The Equity Interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. The reference to any natural person exercising ultimate effective control over the trust, at a minimum, will include the trustee as an Equity Interest Holder. Further, a discretionary beneficiary will only be treated as an Account Holder in the years in which it receives a distribution from the trust. If a settlor, beneficiary or other person exercising ultimate effective control over the trust is itself an Entity, that Entity must be looked through, and the ultimate natural controlling person(s) behind that Entity must be treated as the Equity interest holder. The term “Controlling Persons” as applied in the context of Passive NFEs will also apply in this case, which also corresponds to the term “beneficial owner” as described in Recommendation 10 of the 2012 FATF Recommendations.

## 3. Identifying the Reportable Accounts of a trust that is a RMFI

The debt and Equity interests of the trust are Reportable Accounts if they are held by a Reportable Person. E.g. if a settlor or beneficiary is resident in a Reportable Jurisdiction, their Equity Interest is a Reportable Account.

## 4. Applying the due diligence rules

The trust will apply the due diligence rules in the Regulations in order to determine the identity and residence of its Account Holders.

Where an Equity Interest (such as the interest held by a settlor or beneficiary) is held by an Entity, the Equity Interest holder will instead be the Controlling Person of that Entity. As such, the trust will be required to look through a settlor or beneficiary that is an Entity to locate the relevant Controlling Person. This look through obligation should correspond to the obligation to identify the beneficial owner of a trust under AML/KYC Procedures.

- In respect of Pre-existing Accounts, RMFIs may rely on the information collected in connection with the account in pursuant to their AML/KYC procedures;
- In respect of New Accounts, RMFIs, in addition to other due diligence procedures, can rely on AML/KYC procedures to determine the identity of the Controlling Persons exercising ultimate control if these procedures are in accordance with the 2012 FATF Recommendations.

## 5. Reporting the relevant information

A trust that is a RMFI will report the account information and the financial activity for the year in respect of each Reportable Account. The account information includes the identifying information for each Reportable Person and the identifying information of the trust. It is possible that a trust that is a MFI may not have an account number for each of the Equity Interest Holders. The trust should in that case use a unique identifying number that will enable the trust to identify the subject of the report in the future.

The financial activity includes the account balance or value, as well as gross payments paid or credited during the year.

The account balance is the value calculated by the RMFI (the trust) for the purpose that requires the most frequent determination of value. For settlers and mandatory beneficiaries for example this may be the value that is used for reporting to the Account Holder on the investment results for a given period. If the MFI has not otherwise recalculated the balance or value for other reasons, the account balance for settlers and mandatory beneficiaries may be the value of the interest upon acquisition or the total value of all trust property.

Where an account is closed during the year, the fact of closure is reported. A debt or Equity Interest in a trust could be considered to be closed for example, where the debt is retired, or where a beneficiary is removed.

The financial information to be reported will depend on the nature of the interest held by each Account Holder. Where the trust does not otherwise calculate the account value held by each Account Holder, or does not report the acquisition value, the account balance or value to be reported is as shown below. Note: where a settlor, or beneficiary is an Entity, the Account Holder will be the Controlling Persons of that Entity.

**Table 4: The financial activity to be reported where a trust is a Financial Institution that does not otherwise calculate the account value**

<b>Account Holder</b>	<b>Account Balance or Value</b>	<b>Gross payments</b>
Settlor:	Total value of all trust property	Value of payments made to the settlor in reporting period (if any)
Beneficiary: (mandatory)	Total value of all trust property	Value of distributions made to the beneficiary in reporting period
Beneficiary: discretionary (in a year in which a distribution is received)	Nil	Value of distributions made to the beneficiary in reporting period
Any other person exercising ultimate effective control	Total value of all trust property	Value of distributions made to such person in reporting period (if any)
Debt interest holder	Principal amount of the debt	Value of payments made in reporting period
Any of the above, if account was closed	The fact of closure	

## 8.4 The treatment of a trust that is a NFE

If a NFE holds an account with a RMFI, the RMFI may be required to report the trust for the purposes of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations.

The same five steps indicated above will apply:

1. Determine if such trust is a NFE;
2. Review its Financial Accounts;
3. So as to be able to identify its Reportable Accounts;
4. By applying the due diligence rules set out above; and
5. Subsequently reporting the relevant information.

Assuming that the first two steps are met i.e. that a trust has a Financial Account with a RMFI, the below sets out the determination of whether the trust is a Reportable Person, the due diligence rules that are applied by the RMFI to the trust, and the information to be reported by the RMFI about the trust.

### 3. Identifying whether the account held by the trust is a Reportable Account

The account held by a trust that is a Passive NFE is a Reportable Account if:

- a) The trust is a Reportable Person; or
- b) The trust has one or more Controlling Persons that are Reportable Persons.

The trust will be a Reportable Jurisdiction Person only if it is resident for tax purposes in a Reportable Jurisdiction and is not excluded from the definition of Reportable Person. In many cases a trust has no residence for tax purposes – and in that case the trust is not considered to be a Reportable Person.

The account held by a trust will also be reportable if the trust has one or more Controlling Persons that are Reportable Persons. The concept of Controlling Person used in the Regulations is drawn from the 2012 FATF Recommendations on beneficial ownership. As such, the Controlling Persons of a trust are the settlor(s), trustee(s), beneficiary/ies, protector(s) and any other natural person exercising ultimate effective control over the trust. This definition of Controlling Person excludes the need to inquire as to whether any of these persons can exercise practical control over the trust.

Where the beneficiaries are not individually named but are identified as a class, the Regulations do not require that all possible members of the class be treated as Reportable Persons. Rather, when a member of a class of beneficiaries receives a distribution from the trust or intends to exercise vested rights in the trust property, this will be a change of circumstances, prompting additional due diligence and reporting as necessary. This reflects a similar obligation contained in the 2012 FATF Recommendations<sup>26</sup>.

A settlor is reported regardless of whether it is a revocable or irrevocable trust. Likewise, both mandatory and discretionary beneficiaries are included within the definition of Controlling Persons. Unlike the case of an Equity Interest in a trust that is a RMFI, discretionary beneficiaries would be reported regardless of whether a distribution is received in a given year. However, Malta allows its RFI to align the scope of the beneficiaries of a trust reported as Controlling Persons of the trust with the scope of the beneficiaries of a trust treated as Reportable Persons of a trust that is a MFI. Therefore the RMFI would only need to report discretionary beneficiaries in the year they receive distributions from the trust. Note: where RMFIs make use of this option, they must ensure that they have appropriate procedures in place to identify when a distribution is made to a discretionary beneficiary of the trust in a given year that enables the trust to report such beneficiary as a Controlling Person. For instance, the RMFI requires a notification from the trust or trustee that a distribution has been made to that discretionary beneficiary.

The Regulations also include within the definition of Controlling Person any natural person(s) that exercise ultimate control of an Entity that is a settlor, trustee, beneficiary or protector. E.g. where the settlor or beneficiaries are themselves Entities, the RMFI must identify the natural person(s) exercising control of that Entity. Although the natural person may be exercising ultimate control through the chain of ownership, only the ultimate natural controlling person(s) would be treated as

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<sup>26</sup> Refer to the Interpretive Note to Recommendation 10, at footnote 31

a Controlling Person, and not the intermediary entities in the chain of ownership. The requirement to identify the natural persons will apply consistent with the 2012 FATF Recommendations.

In the event that a Controlling Person of a trust that is a Passive NFE is resident in Malta, thus being the same jurisdiction as the RMFI, that Controlling Person would not be considered as a Reportable Person.

#### 4. Applying the due diligence rules

The RMFI must apply the due diligence rules to determine if the account held by the trust is a Reportable Account.

RMFIs may rely on information collected pursuant to AML/KYC procedures to identify the Controlling Persons.

- In respect of Pre-existing Entity Accounts, RMFIs may rely on the information collected in connection with the account pursuant to their AML/KYC procedures;
- In respect of New Entity Accounts, RMFIs can rely only on AML/KYC procedures to determine the identity of Controlling Persons if these procedures are in accordance with the 2012 FATF Recommendations.

#### 5. Reporting the relevant information

Where a trust is a Reportable Person, the RMFI will report the account information and the financial activity for the year with respect to the account of the trust. The account information includes the identifying information for each Reportable Person (such as name, address, resident, TIN, date of birth and account number), and the identifying information of the RMFI (name and identifying number).

In respect of a trust that is a Passive NFE, the RMFI must report the Controlling Persons of the trust. Where the RMFI has information available that identifies the type of each Controlling Person (i.e. whether it is the settlor, trustee, protector or beneficiary), this information is also expected to be reported. Including this information in reports will significantly increase the usefulness of the data to the receiving Jurisdiction and benefit the Controlling Persons themselves due to the increased clarity in relation to their status. With respect to New Entity Accounts, given that the 2012 FATF Recommendations require the identification of the settlor, trustees, beneficiaries, protectors and any other natural person exercising ultimate effective control of the trust, RMFI should have this information available.

The financial information to be reported will be the account balance or value of the account held by the trust and payments made or credited to such account. Each Controlling Person is attributed the entire value of the account, as well as the entire amounts paid or credited to the account, as shown in the table below.

**Table 5: The financial activity to be reported where a trust is a Passive NFE**

<b>Account Holder</b>	<b>Account Balance or Value</b>	<b>Gross payments</b>
Settlor	Total account balance or value	Gross payments made or credited as per Section I.A
Trustee	Total account balance or value	Gross payments made or credited as per Section I.A
Beneficiary (mandatory)	Total account balance or value	Gross payments made or credited as per Section I.A
Beneficiary (discretionary)	Nil	Gross payments made or credited as per Section I.A
Protector	Total account balance or value	Gross payments made or credited as per Section I.A
Any of the above, if account was closed	The fact of closure	

## **8.5 The treatment of a foundation under these Guidelines**

For the purposes of these guidelines, any reference therein to a trust shall equally apply to a foundation. Consequently any reference to –

- A settlor of a trust shall be construed as a reference to a founder of a foundation;
- A trustee of a trust shall be construed as a reference to the administrator of a foundation; and
- A beneficiary of a trust shall be construed as a reference to a beneficiary of a foundation.

## 9. Reporting

Once a RMFI has applied the procedure and due diligence in respect of the accounts it holds and has identified Reportable Accounts then it must report information in relation to those accounts to the Commissioner. This is the information that the competent authority of Malta would have agreed to exchange with its automatic exchange partners, namely all Member States of the EU and signatories of the Multilateral Competent Authority Agreement.

This information is:

- Information required for the automatic exchange partner jurisdiction to identify the Account Holder concerned (Identification information);
- Information to identify the account and the Financial Institution where the account is held (Account Information); and
- Information in relation to the activity taking place in the account and the account balance (Financial Information).

Together, this information should be sufficient to identify the account holder and then to establish a picture of the compliance risk of the account holder in question (i.e. whether they have properly declared the relevant financial information). The tables below set out the information to be reported in greater detail.

It is important to note that where a RMFI has no Financial Accounts to report, a nil return is still required to be filed.

## 9.1 Information to be reported

TABLE 6: IDENTIFICATION INFORMATION

<b>Information required to be reported in relation to Individual and Entity Account Holders that are Reportable Persons, Entities with Controlling Persons that are Reportable Persons and the Controlling Persons themselves</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
Name	
Address	The address recorded for the Account Holder pursuant to the due diligence procedures. For individuals this will be the current residence address (or the mailing address if no current residence address is held).
Jurisdiction(s) of residence	For Pre-existing Accounts this will be based on the residency test or the indicia search and for New Accounts this will be based on a self-certification.
TIN(s)	<p>The TIN to be reported with respect to an account is the TIN assigned to the Account Holder by its jurisdiction of residence (i.e. not by a jurisdiction of source).</p> <p>The TIN is not required to be reported with respect to Pre-existing Accounts if</p> <ul style="list-style-type: none"> <li>(i) it is not in the records of the Reporting Financial Institution, and</li> <li>(ii) there is not otherwise a requirement for the TIN to be collected by the Reporting Financial Institution under domestic law (subject to reasonable efforts to obtain the information).</li> </ul>

**Note 24:** How does a RMFI report an individual that does not have both a first and last name?

*The 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 should be completed with the account holder's mononym.*

<b>Additional information required to be reported in relation to Individuals/ Controlling Persons only</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
Date of birth	The date of birth is not required to be reported with respect to Pre-existing Accounts if <ul style="list-style-type: none"> <li>(i) it is not in the records of the Reporting Financial Institution, and</li> <li>(ii) there is not otherwise a requirement for the date of birth to be collected by the Reporting Financial Institution under domestic law (subject to reasonable efforts to obtain the information).</li> </ul>
Place of birth	The place of birth is not required to be reported for both Pre-existing and New Accounts unless the Reporting Financial Institution is otherwise required to obtain and report it under domestic law and it is available in the electronically searchable data maintained by the Reporting Financial Institution.

**TABLE 7: ACCOUNT INFORMATION**

<b>Information required with respect to all Reportable Accounts</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The account number (or functional equivalent)	The identifying number of the account or, if no such number is assigned to the account, a functional equivalent (i.e. a unique serial number, contract number or policy number, or other number).
The name and identifying number (if any) of the Reporting Financial Institution	The Reporting Financial Institution must report its name and identifying number (if any) to allow Participating Jurisdictions to easily identify the source of the information reported and subsequently exchanged.

**TABLE 8: FINANCIAL INFORMATION**

<b>Information required with respect to all Reportable Accounts</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) or, if the account was closed during the reporting period, the closure of the account.	<p>An account with a balance or value that is negative must be reported as having an account balance or value equal to zero.</p> <p>In general, the balance or value of a Financial Account is the balance or value calculated by the Financial Institution for purposes of reporting to the Account Holder. In the case of an equity or debt interest in a Financial Institution, the balance or value of an Equity Interest is the value calculated by the Financial Institution for the purpose that requires the most frequent determination of value, and the balance or value of a debt interest is its principal amount.</p> <p>In the case of an account closure, the Reporting Financial Institution must only report that the account was closed (i.e. not the balance).</p> <p>Where jurisdictions already require financial institutions to report the average balance or value of the account they are free to maintain reporting of that information instead of requiring reporting of the balance or value of the account. This option would likely be most desirable where it is being used for FATCA compliance.</p>
The currency of the account.	The information reported must identify the currency in which each amount is denominated.

<b>Information required with respect to Depository Accounts only</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount of interest paid or credited to the account	

<b>Information required with respect to Custodial Accounts only</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount of interest paid or credited to the account.	
The total gross amount of dividends paid or credited to the account	
The total gross amount of other income generated with respect to the assets held in the account paid or credited to the account	The term 'other income' means any amount considered income under the laws of the jurisdiction where the account is maintained, other than any

	amount considered interest, dividends, or gross proceeds or capital gains from the sale or redemption of Financial Assets.
The total gross proceeds from the sale or redemption of Financial Assets paid or credited to the account	The term 'sale or redemption' means any sale or redemption of Financial Assets. See the optional exception below with respect to the year the information is to be reported.

<b>Information required with respect to Other Accounts only (i.e. not Depository or Custodial Accounts)</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount paid or credited to the Account Holder with respect to the account with respect to which the Reporting Financial Institution is the obligor or debtor	Such 'gross amount' includes, for example, the aggregate amount of: any redemption payments made (in whole or part) to the Account Holder; and any payments made to the Account Holder under a Cash Value Insurance Contract or an Annuity Contract even if such payments are not considered Cash Value.

### **9.1.1 RMFI's obligation to inform Reportable Persons**

Each RMFI is obliged to inform each individual Reportable Person concerned that the information relating to him will be collected and transferred in accordance with the amended Cooperation with other Jurisdictions on Tax Matters Regulations. This will need to be checked by the Commissioner, who is also required to ensure that the RMFI provides to that individual all information that he is entitled to under the Data Protection Act in sufficient time for the individual to exercise his data protection rights and, in any case, before the RMFI concerned reports the information to the competent authority in Malta. It is important to note that the method chosen to inform account holders is at the discretion of the RMFI, so long as there is a systematic process and account holders are duly informed.

## **9.2 Account closures**

As opposed to reporting for FATCA purposes (where in terms of the IGA the balance prior to closure needs to be reported) under the Regulations it is only the fact that the account was closed that needs to be reported to the Commissioner, instead of the account balance or value. This applies to all types of Financial Accounts.

## 9.3 Timetable for Reporting

### 9.3.1 Reporting Obligations

In line with regulation 41 of the amended Cooperation with other Jurisdictions on Tax Matters Regulations, Reporting Malta Financial Institutions must report the information specified in Section I of Annex I of these Regulations annually, by not later than 30<sup>th</sup> April after the end of the year to which such information relates. The manner in which such information is to be reported is outlined in Section 9.4 below.

### 9.3.2 Reporting in respect of 2016 onwards

For 2016, with respect to each Reportable Person either holding a Reportable Account or as a Controlling Person of an Entity, the information in accordance with paragraph A of Section I of Annex I of the amended Cooperation with Other Jurisdictions on Tax Matters Regulations needs to be reported to the Commissioner for Revenue by not later than 30<sup>th</sup> April 2017 in relation to the following accounts:

- Pre-existing High Value Individual Accounts;
- New Individual Accounts;
- New Entity Accounts.

### 9.3.3 Reporting in respect of 2017 onwards

For 2017, with respect to each Reportable Person either holding a Reportable Account or as a Controlling Person of an Entity, the information in accordance with paragraph A of Section I of Annex I of the amended Cooperation with Other Jurisdictions on Tax Matters Regulations needs to be reported to the Commissioner for Revenue by not later than 30<sup>th</sup> April 2018 in relation to the following accounts:

- Pre-existing Low Value Individual Accounts;
- Pre-existing Entity Accounts.

## 9.4 Format for Transmitting Information to the Commissioner for Revenue

RMFIs are to report the information required for the purposes of the Cooperation with Other Jurisdictions on Tax Matters Regulations using the XML Schema.

Where RMFIs are not in a position to transmit information using the XML schema, they are requested to apply to the Commissioner for Revenue at [irddata.mfin@gov.mt](mailto:irddata.mfin@gov.mt) with the applicable reasons. After an application is accepted the RMFI will be provided with alternative means to transmit the information to the Commissioner for Revenue for onward forwarding to other competent authorities.

Access to the system may be via web browser or Secure File Transfer Protocol (SFTP) or Web Service as requested by the RMFI and as approved by the Commissioner for Revenue.

Files will be encrypted using encryption based on the open PGP standard before submission to the Inland Revenue website. The Inland Revenue Department website will decrypt and validate the information provided to ensure that information required in the schema as “Validation” or “Mandatory” are submitted in the file.

The system will provide reports of successful, unsuccessful to Reporting Malta Financial Institutions; this report will contain high-level information about the files, when the files were sent, and the result of the transmissions. The reports will be sent via unsecure, free-text email and will not contain personal information. The system shall send all notifications about a transmission to the sender of a transmission.

The system will provide notifications with the following content:

- a. Transmission ID
- b. User-Specified File Name/ID
- c. Sending Application Timestamp
- d. From (sender)
- e. To (receiver)
- f. File Size
- g. Sending Date/Time/Timestamp
- h. Notification Date/Time/Timestamp
- i. Notification Code: Successful/Unsuccessful
- j. Unsuccessful Transmissions will indicate
  - i. Invalid file format
  - ii. Line number of error
  - iii. Invalid or erroneous error

## 9.5 Penalties for non-submission or inaccurate submission

Regulation 44 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations sets out the penalties will be applicable where a RMFI fails to provide the required information or where it provides inaccurate information.

### 9.5.1 Failure to report

Where a RMFI fails to report the information required to be reported in accordance with regulation 41 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations within the time provided in section 9.3 above, the RMFI will be subject to a penalty of:

- (i) two thousand five hundred euro (€2,500); and
- (ii) one hundred euro (€100) for every day during which the default existed: provided that this penalty shall not exceed in total twenty thousand euro (€20,000);

### 9.5.2 Failure to report in a complete and accurate manner

Where a RMFI fails to report the information required to be reported in terms of regulation 41 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations in a complete and accurate manner, the RMFI will be subject to a penalty dependent on the nature of the breach of the obligation, in line with regulation 44(1)(e) of the Regulations.

#### 9.5.2.1 Minor Errors

In the event that the information reported is corrupted or incomplete, the Commissioner shall contact the RMFI directly to try and resolve the problem. Examples of minor errors could include:

- Data fields missing or incomplete;
- Data that has been corrupted;
- Use of an incompatible format.

Where this leads to the information having to be resubmitted this will have to be via the Commissioner.

Continual and repeated administrative or minor errors shall be considered as significant non-compliance where they continually and repeatedly disrupt and prevent transfer of the information. For this purpose “continually and repeatedly” means more than two times in a row.

In cases of minor errors, the RMFI will be subject to a penalty of:

- a. two hundred euro (€200); and
- b. fifty euro (€50) for every day during which the default existed: provided that this penalty shall not exceed in total five thousand euro (€5,000).

### ***9.5.2.2 Significant non-compliance***

Significant non-compliance<sup>27</sup> will be determined by the Commissioner subsequent to communications and sufficient proof given by a foreign competent authority with which the Maltese competent authority automatically exchanges information. Where this occurs, there is an 18-month period from the date of such notification in which the RMFI must resolve the non-compliance.

In such cases of significant non-compliance, the RMFI will be notified in writing indicating:

- What the non-compliance consists of; and
- An 18-month period from the date of such notification within which the Financial Institution must resolve the non-compliance.

The Commissioner will also engage with the RMFI to:

- Discuss the areas of non-compliance;
- Discuss remedies/solution to prevent future non-compliance;
- Agree measures and a timetable to resolve its significant non-compliance.

Such engagement from the Commissioner's side does not exempt the RMFI from any applicable penalties.

In the event that issues remain unresolved after a period of 18 months, then the Commissioner will apply any relevant penalties under the Income Tax Acts, Chapters 123 and 372 of the Laws of Malta, and regulation 44 of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. In cases of significant non-compliance the RMFI will be subject to a penalty of fifty thousand euro (€50,000).

The following are examples of what would be regarded as significant non-compliance:

- Repeated failure to file a return or repeated late filing;
- Ongoing or repeated failure to register, supply accurate information or establish appropriate governance or due diligence processes;
- The intentional provision of substantially incorrect information;
- The deliberate or negligent omission of required information.

The Commissioner will inform the foreign competent authority that would have communicated such non-compliance to the competent authority of Malta of any updates in the case.

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<sup>27</sup> Significant non-compliance may be determined from either the Commissioner's perspective or the foreign competent authority receiving information from the Maltese competent authority.

### *9.5.3 Outstanding Penalties*

Where penalties remain outstanding or the default in respect of which the penalties were imposed remains unresolved notwithstanding any action taken by the Commissioner, the Commissioner may serve further default notices on the said RMFI in accordance with regulation 44(2) of the amended Cooperation with Other Jurisdiction on Tax Matters Regulations. Such successive notices will impose a penalty of double the amount of the previous penalty. This is capped at a maximum of fifty thousand euro (€50,000) in total in respect of each specific default.

Note: each successive note will supersede the previous notice served on the RMFI for the same default but any payment made in respect of that previous notice shall be taken into account accordingly.

## 10. Glossary (as per definitions provided in Section VIII of the Regulations)

1. The term **“Governmental Entity”** means the government of a Member State or other jurisdiction, any political subdivision of a Member State or other jurisdiction (which, for the avoidance of doubt, includes a state, province, county, or municipality), or any wholly owned agency or instrumentality of a Member State or other jurisdiction or of any one or more of the foregoing (each, a “Governmental Entity”). This category is comprised of the integral parts, controlled entities, and political subdivisions of a Member State or other jurisdiction.
  - (a) An “integral part” of a Member State or other jurisdiction means any person, organisation, agency, bureau, fund, instrumentality, or other body, however designated, that constitutes a governing authority of a Member State or other jurisdiction. The net earnings of the governing authority must be credited to its own account or to other accounts of the Member State or other jurisdiction, with no portion inuring to the benefit of any private person. An integral part does not include any individual who is a sovereign, official, or administrator acting in a private or personal capacity.
  - (b) A “controlled entity” means an Entity which is separate in form from the Member State or other jurisdiction or which otherwise constitutes a separate juridical entity, provided that:
    - (i) the Entity is wholly owned and controlled by one or more Governmental Entities directly or through one or more controlled entities;
    - (ii) the Entity's net earnings are credited to its own account or to the accounts of one or more Governmental Entities, with no portion of its income inuring to the benefit of any private person; and
    - (iii) the Entity's assets vest in one or more Governmental Entities upon dissolution.
  - (c) Income does not inure to the benefit of private persons if such persons are the intended beneficiaries of a governmental programme, and the programme activities are performed for the general public with respect to the common welfare or relate to the administration of some phase of government. Notwithstanding the foregoing, however, income is not considered to inure to the benefit of private persons if the income is derived from the use of a Governmental Entity to conduct a commercial business, such as a commercial banking business, that provides financial services to private persons.
2. The term **“International Organisation”** means any international organisation or wholly owned agency or instrumentality thereof. This category includes any intergovernmental organisation (including a supranational organisation) (i) that is comprised primarily of governments; (ii) that has in effect a headquarters or substantially similar agreement with the Member State; and (iii) the income of which does not inure to the benefit of private persons.
3. The term **“Central Bank”** means an institution that is by law or government sanction the principal authority, other than the government of the Member State itself, issuing instruments intended to circulate as currency. Such an institution may include an instrumentality that is

separate from the government of the Member State, whether or not owned in whole or in part by the Member State.

4. The term **“Broad Participation Retirement Fund”** means a fund established to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries who are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that the fund:
- (a) does not have a single beneficiary with a right to more than 5 % of the fund's assets;
  - (b) is subject to government regulation and provides information reporting to the tax authorities; and
  - (c) satisfies at least one of the following requirements:
    - (i) the fund is generally exempt from tax on investment income, or taxation of such income is deferred or taxed at a reduced rate, due to its status as a retirement or pension plan;
    - (ii) the fund receives at least 50 % of its total contributions (other than transfers of assets from other plans described in subparagraphs B(5) through (7) or from retirement and pension accounts described in subparagraph C(17)(a)) from the sponsoring employers;
    - (iii) distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (except rollover distributions to other retirement funds described in subparagraphs B(5) through (7) or retirement and pension accounts described in subparagraph C(17)(a)), or penalties apply to distributions or withdrawals made before such specified events; or
    - (iv) contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to earned income of the employee or may not exceed, annually, an amount denominated in the domestic currency of each Member State that corresponds to USD 50 000, applying the rules set forth in paragraph C of Section VII for account aggregation and currency translation.
5. The term **“Narrow Participation Retirement Fund”** means a fund established to provide retirement, disability, or death benefits to beneficiaries who are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that:
- (a) the fund has fewer than 50 participants;
  - (b) the fund is sponsored by one or more employers that are not Investment Entities or Passive NFEs;
  - (c) the employee and employer contributions to the fund (other than transfers of assets from retirement and pension accounts described in subparagraph C(17)(a)) are limited by reference to earned income and compensation of the employee, respectively;
  - (d) participants that are not residents of the Member State in which the fund is established are not entitled to more than 20 % of the fund's assets; and
  - (e) the fund is subject to government regulation and provides information reporting to the tax authorities.

6. The term **“Pension Fund of a Governmental Entity, International Organisation or Central Bank”** means a fund established by a Governmental Entity, International Organisation or Central Bank to provide retirement, disability, or death benefits to beneficiaries or participants who are current or former employees (or persons designated by such employees), or who are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the Governmental Entity, International Organisation or Central Bank.
7. The term **“Qualified Credit Card Issuer”** means a Financial Institution satisfying the following requirements:
- (a) the Financial Institution is a Financial Institution solely because it is an issuer of credit cards that accepts deposits only when a customer makes a payment in excess of a balance due with respect to the card and the overpayment is not immediately returned to the customer; and
  - (b) beginning on or before 1 January 2016, the Financial Institution implements policies and procedures either to prevent a customer from making an overpayment in excess of an amount denominated in the domestic currency of each Member State that corresponds to USD 50 000, or to ensure that any customer overpayment in excess of that amount is refunded to the customer within 60 days, in each case applying the rules set forth in paragraph C of Section VII for account aggregation and currency translation. For this purpose, a customer overpayment does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns.
8. The term **“Exempt Collective Investment Vehicle”** means an Investment Entity that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle are held by or through individuals or Entities that are not Reportable Persons, except a Passive NFE with Controlling Persons who are Reportable Persons.

An Investment Entity that is regulated as a collective investment vehicle does not fail to qualify under subparagraph B(9) as an Exempt Collective Investment Vehicle, solely because the collective investment vehicle has issued physical shares in bearer form, provided that:

- (a) the collective investment vehicle has not issued, and does not issue, any physical shares in bearer form after 31 December 2015;
- (b) the collective investment vehicle retires all such shares upon surrender;
- (c) the collective investment vehicle performs the due diligence procedures set forth in Sections II through VII and reports any information required to be reported with respect to any such shares when such shares are presented for redemption or other payment; and
- (d) the collective investment vehicle has in place policies and procedures to ensure that such shares are redeemed or immobilised as soon as possible, and in any event prior to 1 January 2018.

## 11. Lists of Jurisdictions

### 11.1 List of Non-EU Reportable Jurisdictions

In terms of Regulation 45 of the Cooperation with Other Jurisdiction on Tax Matters Regulations, the list of Non-EU Reportable Jurisdictions include the following jurisdictions:

### 11.2 List of Participating Jurisdictions

The list of jurisdictions with which Malta has an agreement in place pursuant to which it will provide information [referred to as 'Participating Jurisdictions' in line with the definition in D.4. of Section VIII of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations] include the following jurisdictions:

1. Albania
2. Andorra
3. Anguilla
4. Antigua and Barbuda
5. Argentina
6. Aruba
7. Austria
8. Australia
9. The Bahamas
10. Barbados
11. Belgium
12. Belize
13. Bermuda
14. Brazil
15. British Virgin Islands
16. Brunei Darussalam
17. Bulgaria
18. Canada
19. Cayman Islands
20. Chile
21. China
22. Colombia
23. Costa Rica
24. Croatia
25. Curacao
26. Cyprus
27. Czech Republic
28. Denmark
29. Dominica

30. Estonia
31. Faroe Islands
32. Finland
33. France
34. Germany
35. Gibraltar
36. Greece
37. Greenland
38. Grenada
39. Guernsey
40. Hong Kong (China)
41. Hungary
42. Iceland
43. India
44. Indonesia
45. Ireland
46. Isle of Man
47. Israel
48. Italy
49. Japan
50. Jersey
51. Korea
52. Latvia
53. Liechtenstein
54. Lithuania
55. Luxembourg
56. Macao (China)
57. Malaysia
58. Malta
59. Marshall Islands
60. Mauritius
61. Mexico
62. Monaco
63. Montserrat
64. Netherlands
65. New Zealand
66. Niue
67. Norway
68. Poland
69. Portugal
70. Qatar
71. Romania
72. Russian Federation
73. Saint Kitts and Nevis

74. Saint Lucia
75. Saint Vincent and the Grenadines
76. Samoa
77. San Marino
78. Saudi Arabia
79. Seychelles
80. Singapore
81. Sint Maarten
82. Slovak Republic
83. Slovenia
84. South Africa
85. Spain
86. Sweden
87. Switzerland
88. Trinidad and Tobago
89. Turkey
90. Turks and Caicos Islands
91. United Arab Emirates
92. Uruguay

## Annex I – Specific List of Non-Reporting Financial Institutions

Malta has no financial institution that is to be treated as a Non-Reporting Financial Institution for the purposes of B.1(c) of Section VIII of Annex I.

## Annex II – Specific List of Excluded Accounts

Malta has no account that is to be treated as an Excluded Account for the purposes of C.17(g) of Section VIII of Annex I.