Common Reporting Standard
For
Automatic Exchange of Information
Guideline

2nd version
March 2021

Disclaimer

- *This guideline is limited to the Automatic Exchange of Information (AEOI) obligations that entities or other persons may have under the Tax Information Exchange Act 2012 ("TIEA 2012"). It does not cover the obligations that such entities or other persons may have in relation to any other jurisdiction.*

- *As this guideline will be reviewed by the Organisation for Economic Co-operation and Development ("OECD"), it will be updated by the Ministry of Customs and Revenue ("MCR") depending on the recommendations made by OECD.*

- *This guideline:*

    - *Summarises parts of the Common Reporting Standard ("CRS"), CRS Commentary, and the related provisions of TIEA 2012. As such, readers should refer to these sources for further detail of any obligations they may have; and*

    - *Are based on guideline set out in the OECD's CRS Implementation Handbook[1] and related information on the OECD's AEOI portal.[2] This guideline will be updated by MCR from time to time whenever OECD updates its related materials (if necessary).*

- *Dollar values stated in this guideline should be read as referring to United States dollars or any other currency (equivalent to the USD amount) that is elected by the relevant Reporting Samoa financial institutions.*

[1] www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automaticexchange-of-financialinformation-in-tax-matters.pdf

[2] www.oecd.org/tax/automatic-exchange/

1 BACKGROUND

1.1 Overview of the Common Reporting Standard (CRS) for the Automatic Exchange of Information

In broad terms, the CRS requires Samoa Financial Institutions ("SFIs") to carry out the following steps:

- **Due diligence:**
  - review their financial accounts to identify accounts held (and/or, in certain circumstances, controlled) by relevant foreign tax residents; and
  - collect prescribed identity and financial account information about such persons (and accounts);

- **Reporting**:
  - report this information to the MCR for exchange[3] with the jurisdiction(s) of tax residence of the account holder (or controlling person); and
  - report prescribed information to the local revenue authority about certain individual accounts that are referred to in the CRS as "undocumented accounts" where the institution has not been able to identify the person's tax residency.

The CRS is accompanied by the CRS Commentary, which supplements these due diligence and reporting obligations. The OECD has also produced guideline about the practical application of these obligations. This includes a CRS Implementation Handbook and guideline set out in answers to "Frequently Asked Questions". All of the OECD guideline is available on the OECD's website.[4]

The Samoan Government has committed to implement the CRS in accordance with the CRS and the CRS Commentary. Therefore, the CRS has been directly incorporated into the TIEA 2012 under section 10A with a general reference of the CRS Commentary being part of the said Act. Further, CRS applies in Samoa from 31st December 2016.

Appendix 1 provides a table with a breakdown of CRS and relevant provisions of the TIEA 2012 in which each standard has been incorporated under.

1.2 Purpose of this guideline

This guideline is intended to provide operational advice in the Samoa context, for financial institutions that are implementing the CRS, and others who may have CRS obligations. It includes references to specific parts of the CRS, the CRS Commentary that the reader may find useful.

1.3 Summary of CRS due diligence and reporting obligations

In broad terms, the CRS will require Reporting SFIs from 1 January 2017 to:

- review their financial accounts to identify accounts held (and/or, in certain circumstances, controlled) by relevant foreign tax residents[5]; more specifically:
  - commence due diligence review of New Accounts from 1st January 2017 as per Schedule 3, Section VIII(C)(10) of the TIEA 2012;
  - complete review of High Value Individual Accounts by 31st December 2017 as per Schedule 3,

[3] This would occur if there is an AEOI agreement in place between the two jurisdictions requiring the provision of such information.

[4] www.oecd.org/tax/automatic-exchange

[5] For these purposes, an entity such as a partnership, limited liability partnership or similar legal arrangement that has no residence for tax purposes is required to be treated for CRS purposes as being resident in the jurisdiction in which its place of effective management is situated.

Section III(D)(2) of TIEA 2012;

- complete review of Lower Value Individual Accounts by 31st December 2018 as per Schedule 3, Section III (D) (1) of TIEA 2012.

- collect prescribed identity and financial account information about such persons (and accounts);
- report this information to MCR on 30th June on an annual basis as per section 10C (4) of the TIEA 2012. MCR will then exchange this information with the person's jurisdiction(s) of tax residence; and
- report prescribed information annually to MCR about certain individual accounts that the CRS refers to as being "undocumented accounts" where the institution has not been able to identify the person's tax residency.

Reporting SFIs will be able to use service providers to carry out these due diligence and reporting obligations on their behalf. However, the legal obligations will remain with the Reporting SFI.

1.4 CRS due diligence – incorporating the "wider approach"

A Reporting SFI's due diligence obligations incorporate what is known as the "wider approach" to due diligence. Under the wider approach to due diligence, Reporting SFIs will be required to identify any relevant foreign tax resident **irrespective of** whether such persons are from Reportable Jurisdictions[6].

This is a compliance cost measure to deal with the fact that the number of Reportable Jurisdictions is likely to increase over time. Therefore, without the wider approach to due diligence Reporting SFIs would need to constantly redo their due diligence each time a new jurisdiction becomes a Reportable Jurisdiction.

Reporting SFIs will be required to adopt the wider approach to due diligence as follows:

- to review their financial accounts to identify accounts held (and/or, in certain circumstances, controlled) by **relevant** foreign tax residents; and
- to collect prescribed identity and financial information about such persons (and accounts).

The **relevant** persons (in this context) cover all foreign tax residents **other than**:

- a corporation the stock of which is regularly traded on one or more established securities markets;
- any corporation that is a related entity of a corporation the stock of which is regularly traded on one or more established securities markets;
- a Government entity;
- an international organisation;
- a central bank; or
- a financial institution.

2. REPORTING SFIs FOR CRS PURPOSES

2.1 Types of financial institutions

An "entity" will be a financial institution based on the activities that it carries out or how it is managed.

[6] Reportable jurisdictions does not include Samoa and the United States of America.

It is important to note that the CRS definition of "entity" covers both legal persons (for example, incorporated companies) and legal arrangements (for example, trusts and partnerships). This means that such legal persons and legal arrangements can (depending on the circumstances) be financial institutions. However, the definition of "entity" does not cover individuals, which therefore means individuals cannot be financial institutions.

There are four types of financial institutions covered by the CRS[7]:

- Custodial institutions;
- Depository institutions;
- Investment entities; and
- Specified insurance companies.

2.1.1 Custodial institution[8]

A custodial institution is an entity that holds, as a substantial portion of its business, financial assets for the account of others.

A "substantial portion" means at least 20% of the entity's gross income is attributable to holding **financial assets** and providing related financial services in the shorter of (for the purposes of this guideline this period will be referred to as the "specified period"):

- 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 its status as a custodial institution is to be determined; or
- the period in which the entity has been in existence.

The term "financial asset" is generally intended to encompass any asset that may be held in an account. Some examples of assets that would be "financial assets" are:

- shares;
- bonds;
- debentures; and
- money.

However, the term "financial asset" **does not include a non-debt direct interest in real property; or a commodity that is a physical good, such as wheat**.

Income attributable to holding financial assets and providing related financial services includes the following:

- 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);

[7] Refer to Section VIII(A)(4)(5)(6)&(8) of Schedule 3 of TIEA 2012.

[8] Refer to page 160, paragraphs 9-11 of the CRS Commentary for more information.

- income earned on the bid-ask spread of financial assets held in custody;
- fees for providing financial advice with respect to financial assets held (or potentially to be held in) custody by the entity; and
- fees for providing clearance and settlement services.

2.1.2 Depository institution[9]

A depository institution is an 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, instalment obligations, notes, drafts, cheques, 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.

2.1.3 Investment entity[10]

Entities that typically fall under this category would include collective investment vehicles, mutual funds, exchange traded funds, private equity funds, hedge funds, venture capital funds, leveraged buy-out funds or any similar investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets. For example, this definition would generally capture unit trusts and managed investment schemes.

This list is not exhaustive. Entities such as family trusts may be investment entities, particularly if the trust's financial assets are managed by another financial institution. Fund managers and investment advisers will also often be investment entities.

There are two different sets of criteria for determining whether an entity is an investment entity. If an entity meets either of these it will generally be an investment entity:[11]

- in business investment entities; and
- managed investment entities.

[9] Refer to page 160-161, paragraphs 12-14 of the CRS Commentary for more information.
[10] Refer to page 161-164, paragraphs 15 – 22 of the CRS Commentary for more information on the interpretation and illustrations of what constitutes an 'Investment Entity'.
[11] The one exception to this is if the entity is an active NFE because it meets the criteria in Section VIII(D)(9)(d)-(g) of Schedule 3 of TIEA 2012. The definition of "active NFE" is set out in full in Appendix 4.

2.1.4 Specified insurance company[12]

For CRS purposes, an entity that is an insurance company (including its holding company) is treated as a "specified insurance company" if it:

- issues investment products that are classified as cash value insurance contracts or annuity contracts; or
- makes payments under the terms and conditions of these contracts.

These types of insurance and annuity contracts usually include an investment component.

In the Samoa context and the CRS, an "insurance company" is an entity:

- that is regulated as an insurance business under the laws of Samoa;
- the gross income of which (for example, gross premiums and gross investment income) arising from insurance, reinsurance, and annuity contracts for the immediately preceding period exceeds 50% of total gross income for such period; or
- the aggregate value of the assets of which associated insurance, reinsurance and annuity contracts at any time during the immediately preceding period exceeds 50% of total assets at any time during that period.

2.2 Circumstances when a financial institution will be a "Samoa Financial Institution" (SFI)

A financial institution[13] will be a "SFI" for CRS purposes **if**:

- it is incorporated under the laws of Samoa; or
- it has its place of management (including effective management) in Samoa; or
- it is subject to financial supervision in Samoa.

The general rule is that a financial institution will be "resident" in Samoa for CRS purposes and, be a SFI, if it is tax-resident in Samoa.

In the case of a financial institution trust (irrespective of whether it is resident for tax purposes in Samoa), the trust will generally be "resident" in Samoa for CRS purposes, and, therefore an SFI, if it has one or more trustees that are tax-resident in Samoa.

However, if the trust is tax-resident in another Participating Jurisdiction and reports all the information required to be reported under the CRS (with respect to reportable accounts maintained by the trust) to that jurisdiction because it is a tax resident in that jurisdiction, the trust will not be "resident" in Samoa. Therefore, this exception will be relevant to some financial institution trusts that have trustees located overseas.

2.3 Circumstances when a SFI will be a "Reporting Samoa Financial Institution"

A SFI will be a "Reporting SFI" unless it is a "Non-Reporting SFI". The following guideline outlines the circumstances when a SFI will be a Non-Reporting SFI.

[12] Refer to page 165, paragraph 26-29 of the CRS Commentary for more information on the definition of "Specified Insurance Company".

[13] Refer to page 158-159 , paragraph 4-6 of CRS Commentary for more information.

2.4 Circumstances when a SFI will be a "Non-Reporting Samoa Financial Institution"

Section VIII (B) of Schedule 3 of TIEA 2012 explicitly defines various types of financial institutions as being nonreporting financial institutions ("NRFIs").

Section 10B of TIEA 2012 also allows the Minister for Revenue ("the Minister") to define **other** types of financial institution as being a NRFI (in the context of Samoa) if certain specified criteria are met[14] by order under section 10K of the TIEA 2012. This is done in accordance with the CRS under Section VIII (B) (1) (c). The Minister, acting on the advice of the Commissioner of Inland Revenue Services will determine what other types of financial institutions are "Non-reporting SFIs" and publish this under an Order by the Minister.

2.5 Financial institutions that the CRS defines as being "NRFIs"

The following are defined as NRFIs:

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;

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 Section VIII B(1)(a) and (b), and is defined in domestic law as a NRFI, provided that the status of such Entity as a NRFI does not frustrate the purposes of the CRS;

d. an Exempt Collective Investment Vehicle; or

e. a trust to the extent that the trustee of the trust is a Reporting Financial Institution and reports all information required to be reported pursuant to Section I with respect to all Reportable Accounts of the trust (known as "trustee documented trusts").

A full list of the requirements that must be satisfied for these entities to be treated as NRFIs is set out in Section VIII (B) (2) (3) (4) (5) (6) (7(8) & (9) of Schedule 3 of TIEA 2012.

It is also vital that readers refer to pages 166 to 174 of the CRS Commentary as the explanations provided therein help illustrate further the scope of category of NRFI.

2.6 Financial institutions that can treat as Non-Reporting Financial Institutions (excluded entities)

As previously mentioned, the CRS also provides in Section VIII (B) (1) (c) that a "Participating Jurisdiction" (such as Samoa) can treat a financial institution as being a NRFI if all the following are met:

- the financial institution presents a low risk of being used to evade tax;
- the financial institution has substantially similar characteristics to any of the types of institutions described in section VIII(B)(1)(a) or (b): Government entity, International Organisation, Central Bank, Broad Participation Retirement Fund, Narrow Participation

  Retirement Fund, Pension fund of a government entity (or International Organisation or Central Bank), or a Qualified Credit Card Issuer;

[14] Discussed in detail under clause 2.6.

- the financial institution is defined in domestic law as being a NRFI (i.e. in accordance with a legislative framework that allows the financial institution to be listed as a NRFI); and
- defining the financial institution as a NRFI does not frustrate the purposes of the CRS.

Pages 170 to 173 of the CRS Commentary provide more detailed analysis of excluded entities which **should assist SFIs that intend to make a submission that they should be treated as NRFI.** These submissions should outline why the SFI satisfies all of the bullet points outlined above and can be sent via email to (both): aahleong@revenue.gov.ws and stilialo@revenue.gov.ws. The deadline for such submission to be made to the Commissioner of Inland Revenue is the **30th March 2018**.

The expectation is that participating jurisdictions (such as Samoa) will make their list of NRFI publicly available and that each jurisdiction will have a single list of NRFIs, as opposed to different lists for different participating jurisdictions. The Commissioner of Inland Revenue will make available the list of those entities following the execution of an Order by the Minister for Revenue pursuant to section 10K of TIEA 2012.

2.6.1 The financial institution presents a low risk of being used to evade tax

Factors that may be considered to determine such a risk include:

- Low-risk factors:
  - the financial institution is subject to regulation; and o information reporting by the financial institution to the tax authorities is required.

- High-risk factors:
  - the type of financial institution is not subject to AML/KYC Procedures; and
  - the type of financial institution is allowed to issue shares in bearer form and is not subject to effective measures implementing the Financial Action Task Force Recommendations with respect to transparency and beneficial ownership of legal persons, and o the type of financial institution is promoted as a tax minimisation vehicle.

2.6.2 The financial institution has substantially similar characteristics to any of types of institutions described in section VIII (B) (1) (a) or (b) of CRS

The second requirement described in subsection B(1)(c) of section VIII of the CRS is that the financial institution has substantially similar characteristics to any of the following types of financial institutions described in Section VIII(B)(1)(a) or (b) of CRS:

- Government Entity, International Organisation, Central Bank;
- Broad Participation Retirement Fund;
- Narrow Participation Retirement Fund;
- A pension fund of a Government Entity, International Organisation, Central Bank; or
- Qualified Credit Card Issuer.

Page 172 paragraph 51 of the CRS Commentary sets out examples to illustrate factors that will be relevant when determining whether a financial institution should be treated as a NRFI under subsection B(1)(c) of section VIII of the CRS. This should assist SFIs that intend to make a submission that they should be treated as Non-reporting SFIs.

3. "FINANCIAL ACCOUNTS" ARE SUBJECT TO CRS DUE DILIGENCE

Reporting SFIs also need to carry out due diligence on the "financial accounts" they "maintain" to identify accounts held (and/or, in the case of passive non-financial entities, controlled) by relevant foreign tax residents.

The term "financial account" includes:[15]

- depository accounts;
- custodial accounts;
- equity interest in certain financial institutions
- cash value insurance contracts;
- annuity contracts

A financial account does not, however, include any account that is an excluded account.

3.1 Depository account[16]

A depository account is defined as including any commercial, cheque, 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 Reporting SFI in the ordinary course of banking or similar business. It also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon.

A depository account is considered to be maintained by a Reporting SFI that is obligated to make payments with respect to that account (excluding an agent of an FI regardless of whether such agent is an FI)

3.2 Custodial account[17]

A "Custodial Account" is defined as an account (other than an insurance contract or annuity contract) for the benefit of another person that holds one or more financial assets.

A custodial account is maintained by a Reporting SFI if such SFI holds custody over the assets in the account (including an FI that holds assets in street name for an Account Holder in such institution).

3.3 Equity interest[18]

The definition of the term "Equity Interest" specially addresses interests in partnerships and trusts. An equity or debt interest in an FI constitutes a Financial Account.

3.3.1 Definition of "equity interest" in the case of a partnership that is an FI

Under such circumstance, the term "equity interest" means a capital or profits interest in the partnership.

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[15] Section VIII(C)(1) of Schedule 3 of TIEA 2012. Refer to page 175 to 177, paragraphs 57-65 of the CRS Commentary for more relevant information.

[16] Section VIII(C)(2) of Schedule 3 of TIEA 2012. Refer also to page 177, paragraphs 66-67 of the CRS Commentary for more relevant information.

[17] Section VIII(C)(3) of Schedule 3 of TIEA 2012.

[18] Section VIII(C)(4) of Schedule 3 of TIEA 2012.

3.3.2 Definition of "equity interest" in the case of a trust that is an FI

Under such circumstance, 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 criteria for a trust that is a financial institution are applicable for a legal arrangement that is equivalent or similar to a trust, or a foundation that is a financial institution.

Readers are recommended to refer to page 178, paragraphs 69 to 71 of the CRS Commentary for more information on the interpretation and application of "equity interest".

3.4 Cash value insurance contract[19]

A "cash value insurance contract" is defined as an insurance contract (other than an indemnity reinsurance between two insurance companies) that has a cash value.

While the terms "insurance contract" and "cash value" are needed to define the scope of the term "Cash Value Insurance Contract", only a contract that is a Cash Value Insurance Contract or an Annuity Contract can be a Financial Account. A cash value insurance contract is considered to be maintained by a Reporting SFI if that SFI is obligated to make payments with respect to that contract.

Readers are recommended to refer to page 179 to 181, paragraphs 72-80 of the CRS Commentary for more information on the interpretation and application of "Cash value insurance contract".

3.4.1 Definition of "Insurance Contract"

"Insurance Contract" is defined as 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 risk.[20]

3.4.2 Definition of "Cash Value"

"Cash value" means the greater of the amount a policy holder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan), and the amount the policyholder can borrow under or with regard to the contract, but **does not include** an amount payable under an Insurance Contract:[20]

- solely upon the death of the insured under a life insurance contract;
- as a personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of an event insured against;
- as a refund of a previously paid premium due to cancellation or termination of the contract, decrease in risk exposure, or arising from the correction of a posting or similar error with regard to the premium for the contract;
- as a policyholder dividend (other than a termination dividend) provided it relates to an insurance contract under which the only benefits payable are for a personal injury or sickness benefit, or other benefit providing indemnification of an economic loss incurred upon the occurrence of an event insured against; or
- as a return of an advance premium or premium deposit for which the premium is paid at least annually if the amount of the advance premium or premium deposit does not exceed the next annual premium payable.

[19] Section VIII(C)(7) of Schedule 3 of TIEA 2012. [20] Section VIII(C)(5) of Schedule 3 of TIEA 2012.

[20] Section VIII(C)(8) of Schedule 3 of TIEA 2012.

3.5 Annuity contract [21]

An "annuity contract" is defined as 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. It also includes a contract that is considered to be an annuity contract in accordance with the law, regulation or practice of the jurisdiction in which the contract was issued and under which the issuer agrees to make payments for a term of years.

3.6 What accounts are excluded from being "financial accounts"?

As previously mentioned, Reporting SFIs need to carry out due diligence on financial accounts they maintain. **However, a financial account does not include an account that is an excluded account.**

3.6.1 "Excluded Account" as defined under CRS

The CRS defines "excluded account" as any of the following accounts:[22]

a) retirement and pension accounts;
b) an account that satisfies all requirements set out under Section VIII(C)(17)(b) of Schedule 3 of TIEA 2012;
c) a life insurance contract with a coverage period that will end before the insured individual attains age 90, provided the contract meets all the requirements under Section VIII(C)(17)(c) of Schedule 3 of TIEA 2012;
d) 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;
e) an account established in connection with any of the circumstances specified under Section VIII(C)(17(e) of Schedule 3 of TIEA 2012;
f) depository accounts that satisfies all the requirements under Schedule VIII(C)(17)(f) of Schedule 3 of TIEA 2012; and
g) any other account that presents a low risk of being sued to evade tax, has substantially similar characteristics to any of the accounts noted under (a) to (f) above, and is defined in domestic law as an Excluded Account (provided the status of such account as an Excluded Account does not frustrate the purposes of CRS)

Readers are recommended to refer to **pages 184 to 187 of the CRS Commentary** which provide the scope of 'excluded account'.

3.6.2 Accounts that can be treated as "Excluded Accounts"

In addition to the definition of excluded account noted under sub-clause 3.6.1 above, section 10B of TIEA 2012 also allows the Minister to define any other account as being an excluded account (in the context of Samoa) by order issued pursuant to section 10K of the TIEA 2012. This is done in accordance with the CRS under Section VIII(C) (17) (g). The Minister, acting on the advice of the Commissioner of Inland Revenue Services will determine what **other** types "excluded accounts" and publish this under a signed Order.

Pages 184 to 187 of the CRS Commentary provide more detailed analysis of excluded entities which **should assist Reporting SFIs that intend to make a submission that certain accounts they maintain should be**

[21] Section VIII(C)(6) of Schedule 3 of TIEA 2012.
[22] Section VIII(C)(17) of Schedule 3 of TIEA 2012.

treated as "excluded accounts". These submissions should outline why the SFI satisfies all of the necessary requirements outlined in relevant provisions of the TIEA 2012 as mentioned above; and can be sent via email to (both): aahleong@revenue.gov.ws and stilialo@revenue.gov.ws.

The expectation is that participating jurisdictions (such as Samoa) will make their list of Excluded Accounts publicly available. The Commissioner of Inland Revenue will be making available a list of those accounts following the execution of an Order by the Minister pursuant to section 10K of TIEA 2012.

4. DUE DILIGENCE PROCESS REPORTING SFI ARE REQUIRED TO UNDERTAKE UNDER CRS

As mentioned earlier, Reporting SFIs are required to review their financial accounts to identify accounts held (and/or, in certain circumstances, controlled) by relevant foreign tax residents[23].

Under CRS which has been embedded in Schedule 3 of the TIEA 2012, Reporting SFIs will need to carry out due diligence process for the following 4 types of financial accounts:

- **pre-existing individual accounts** (accounts held by an individual that are open and maintained by a Reporting SFI as of 31st December 2016);
- **new individual accounts** (accounts held by an individual that are opened and maintained by a Reporting SFI on or after 1st January 2017);
- **pre-existing entity accounts** (accounts held by an entity [such as a trust, partnership, or company] that are open and maintained by a Reporting SFI as of 31st December 2016); and
- **new entity accounts** (accounts held by an entity [such as a trust, partnership or company] that are opened and maintained by a Reporting SFI on or after 1st January 2017).

Readers are recommended to refer to the General Due Diligence requirements are set out in Section II of Schedule 3 of TIEA 2012.

4.1 4 Types of Financial Accounts subject to Due Diligence Process

4.1.1 Pre-existing individual accounts

Accounts held by an individual that are open as of 31st December 2016. These accounts are, in turn, split into the following categories:

- lower-value accounts with a balance or value of less than USD 1,000,000; and
- high-value accounts with a balance or value of USD 1,000,000 or more. A Reporting SFIs will be required to carry out enhanced due diligence on these high-value accounts.

Pre-existing individual account due diligence will generally involve the Reporting SFI either: [24]

- applying a "residential address test"(supported by documentary evidence) to determine whether the account holder is a foreign tax resident; or

[23] However, there are some special rules that apply here for identifying such foreign tax residents in the context of certain insurance products that provide death benefits to beneficiaries and for employer sponsored group insurance schemes (see page 153 of the CRS Commentary).

[24] The Reporting SFI may have already carried out due diligence on such accounts for FATCA purposes and (as part of such due diligence procedures) obtained a self-certification from the account holder. The indicia based CRS tests for such pre-existing individual accounts generally would not require the Reporting SFI to obtain a further self-certification for CRS purposes.

- reviewing the account information they have for indicia (indicators) that the account holder is a foreign tax resident.

4.1.2 New individual accounts

Accounts held by an individual that are opened on or after 1st January 2017. New individual account due diligence will generally involve the Reporting SFI:

- obtaining self-certifications from the account holder as to whether they are a relevant foreign tax resident (i.e. the account holder signing or affirming whether they are a foreign tax resident); and
- cross-checking the reasonableness of this self-certification against other information obtained in connection with the opening of the account (including AML/KYC information). This process is known as "validating" the self-certification.
  This is important because a Reporting SFI cannot rely on a self-certification or documentary evidence if they know or have reason to know that it is incorrect or unreliable.

4.1.3 Pre-existing entity accounts

Accounts held by an entity (such as a trust, partnership or company) that are open as of 31st December 2016. Pre-existing entity account due diligence will generally involve the Reporting SFI relying on a combination of account information on file and valid self-certifications to determine:

- whether the account holder is a relevant foreign tax resident; and
- whether the account holder is a passive Non-Financial Entity ("NFE") with controlling persons that are relevant foreign tax residents.

4.1.4 New entity accounts

Accounts held by an entity (such as a trust, partnership or company) and that are opened on or after 1st January 2017. New entity account due diligence will generally involve the Reporting SFI obtaining valid selfcertifications to determine:

- whether the account holder is a relevant foreign tax resident; and
- whether the account holder is a passive NFE with controlling persons that are relevant foreign tax residents.

4.2 Definition of "change in circumstances"

Page 116, paragraph 17 of the CRS Commentary provides that 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 a person's status. In addition, a change in circumstances includes any change or addition of information to the 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 an account (applying the aggregation rules) if that change or addition of information affects the status of the account.

Page 130 of the CRS Commentary states that a Reporting SFI may rely on a self-certification **without having to enquire into possible changes of circumstances** that may affect the validity of the statement, **unless** it knows or has reason to know that circumstances have changed. A Reporting SFI will not be considered to know or to have reason to know of such changes, where it has adopted reasonable and prudent procedures for identifying a change of circumstance, but where those procedures have simply not led to the identification of a change in circumstances.

4.3 Pre-existing individual accounts

4.3.1 Overview

A Reporting SFI is generally required to carry out due diligence on all pre-existing individual accounts to determine whether they are held by relevant foreign tax residents. There is no de minimis threshold (compared with FATCA, which has various de minimis thresholds).

However, a Reporting SFI is not required to review a pre-existing individual account that is a cash value insurance contract or annuity contract if they are effectively prohibited by law from selling the contract to relevant foreign tax residents.

The type of due diligence procedures that the Reporting SFI will need to carry out on pre-existing individual accounts will depend on whether:

- the account is a lower value-account: With a balance or value of USD1,000,000 or less as of 31 December 2016; or
- the account is a high value account: With a balance or value that exceeds USD1,000,000 as of 31 December 2016 or any subsequent 31 December. Reporting SFIs need to carry out enhanced due diligence for such high-value accounts.

4.3.2 CRS due diligence procedures for lower-value pre-existing individual accounts

Reporting SFIs have some flexibility when carrying out due diligence on lower-value pre-existing individual accounts:

- they can choose to adopt a "residence address test" as a proxy for determining whether the account holder is a relevant foreign tax resident; or
- alternatively, they can choose to rely on a "foreign indicia test" (searching for indicators that the account holder is a foreign tax resident) as a proxy for determining whether the account holder is a relevant foreign tax resident.

This guideline now explains how Reporting SFIs can carry out due diligence under each of these due diligence pathways for lower-value accounts.

Residence address test

Reporting SFIs have the **option** of using a **current** residence address test (based on **documentary evidence)** as a proxy to determine whether a lower-value pre-existing individual account holder is a relevant foreign tax resident. This is a key difference from FATCA, which does not have such a test.

The relevant types of **documentary evidence** are set out at Appendix 3 to this guideline. The type of documentary evidence that is most likely to be relevant in the context of the residential address test is a valid identification issued by an authorised government body (for example, a government or agency thereof), that includes the individual's name and is typically used for identification purposes.

Pages 111-115 of the CRS commentary provide a useful summary of the circumstances when a Reporting SFI can rely on such **documentary evidence** when applying the "residence address test".

If a Reporting SFI has relied on the residence address test to determine an account holder's tax residency and there is a change in circumstances that causes them to know or have reason to know that the documentary

evidence (or other documentation relied on) is incorrect or unreliable, they are required to carry out further due diligence on the account to determine its status.

The Reporting SFI must, by the later of the last day of the relevant reporting period, or 90 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 Reporting SFI cannot obtain the self-certification and new documentary evidence by such date, they must apply the electronic record search procedures outlined below.

Indicia test

A Reporting SFI that does not adopt the residential address test (or is not able to apply that test) will need to determine the account holder's tax residence by reviewing its electronic records for relevant indicia (indicators) that the account holder is a foreign tax resident. Such indicia (if identified) will be used as a proxy for determining the account holder's tax residence (i.e. indicia of tax residence in a foreign jurisdiction leading to a presumption of tax residence in that jurisdiction), unless the Reporting SFI chooses to "cure" such indicia.

The concept of "curing indicia" is outlined further below.

The Reporting SFI must (in these circumstances) review electronically searchable data that it maintains for records of the following indicia:

a. identification of the account holder as a resident of a foreign jurisdiction;
b. current mailing or residence address (including a post office box) in a foreign jurisdiction;
c. one or more telephone numbers in a foreign jurisdiction and no telephone number in Samoa;
d. standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a foreign jurisdiction;
e. currently effective power of attorney or signatory authority granted to a person with an address in a foreign jurisdiction; or
f. a "hold mail" instruction or "in-care-of" address in a foreign jurisdiction if the Reporting SFI does not have any other address on file for the account holder.

If the Reporting SFI does **not** discover any of these indicia in the electronic search, it is not required to take any further steps 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 the Reporting SFI discovers any of the indicia of foreign tax residence listed in (a) through (e) above in the electronic search, or if there is a change in circumstances that results in one or more indicia being associated with the account, the Reporting SFI must treat the account holder as a resident for tax purposes of each foreign jurisdiction for which an indicium is identified, unless it chooses to (and is able to) cure the indicia.

The relevant "curing" procedures are generally based on the Reporting SFI obtaining a combination of selfcertifications and documentary evidence to establish the account holder's residence. **These procedures are further explained on pages 120 to 121 of the CRS Commentary**.

If the Reporting SFI discovers a "hold mail" instruction or "in-care-of" address in the electronic search (and no other address) and does not identify any of the other indicia of foreign tax residence listed in (a) through (e) above for the account holder they must, in the order most appropriate to the circumstances, adopt the following procedures to determine whether the account holder is a foreign tax resident:

- apply a paper record search; or
- seek to obtain from the account holder a self-certification or documentary evidence to establish their residence(s) for tax purposes.

If the paper search fails to establish an indicium **and** the attempt to obtain the self-certification or documentary evidence is not successful, the Reporting SFI must report the account as an undocumented account.

Information to collect

If a Reporting SFI carries out the above procedures, and identifies that the account holder is a relevant foreign tax resident, they will need to collect prescribed information from the account holder.

This will include:

- the account holder's tax identification number (TIN) (or a functional equivalent,[25] in the absence of a TIN) with respect to each foreign jurisdiction they are identified as being tax resident in; and
- the account holder's date of birth (subject to the following qualifications).

4.3.3 CRS due diligence procedures for high-value pre-existing individual accounts

A Reporting SFI that maintains a high value pre-existing individual account needs to perform enhanced due diligence procedures on the account to determine if the account holder is a relevant foreign tax resident. This includes, **in addition** to the Reporting SFI being required to review electronic records for indicia[27] that the account holder is a relevant foreign tax resident (in the way outlined above with respect to lower-value accounts):

- sometimes being required to conduct a paper record search for such indicia; and
- applying an actual knowledge test when a relationship manager has actual knowledge that the account is held by a Reportable Person (the "relationship manager test").

Refer to pages 121 to 122 of the CRS Commentary for more information.

The relationship manager tests

The Reporting SFI 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.

Section III(C)(9) of the CRS provides (in this regard) that a Reporting SFI must implement procedures to ensure that a relationship manager identifies any change in circumstances relating to an account that it acts as relationship manager for. For example, if a relationship manager is notified that the account holder has a new mailing address in a foreign jurisdiction, the Reporting SFI is required to treat the new address as a change in circumstances and apply further prescribed due diligence procedures to the account.

[25] The meaning of "functional equivalent" to a TIN is outlined on page 202 of the CRS Commentary. Examples of that type of number include, for individuals, a social security/insurance number, citizen/personal identification/service code/number, and resident registration number; and for entities, a business/company registration code/number. [27] The same indicia are relevant for both lower-value and high-value accounts.

Information to collect

If a Reporting SFI carries out these procedures, and identifies that the account holder is a relevant foreign tax resident, it will need to collect the account holder's TIN (or functional equivalent) and date of birth. (However, this is subject to the same qualifications/exceptions outlined above for pre-existing lower value accounts).

4.4 New individual accounts

In broad terms, a new individual account is an account that a Reporting SFI opens on or after 1st January 2017 that is held by an individual.

Section IV of the CRS states that a Reporting SFI must carry out the following due diligence procedures for such accounts:

- obtain a self-certification "upon account opening" that allows it to determine the account holder's residence(s) for tax purposes;
- confirm the reasonableness of such self-certification based on the information it has obtained in connection with the opening of the account (including any documentation collected in accordance with AML/KYC Procedures). This is known as the "reasonableness" test for "validating" the selfcertification; and
- there is no de minimis due diligence exclusion (compared with FATCA where there is a USD50,000 threshold exclusion for certain individual accounts).

A Reporting SFI is able to rely on a self-certification that it has obtained for such accounts unless it knows or has reason to know that the self-certification is incorrect or unreliable.

4.4.1 Form of self-certification

A self-certification must be signed (or otherwise positively affirmed) by any person authorised to sign on behalf of the account holder. A parent or guardian who opens an account for a child will be required to provide the self-certification on behalf of the child account holder.[26]

A self-certification will be considered to be positively affirmed if the person making the self-certification provides the Reporting SFI with an unambiguous acknowledgement that it agrees with the representations made through the self-certification. In all cases the affirmation should be recorded by the Reporting SFI (e.g. for an oral self-certification, a voice recording or digital footprint, so a Reporting SFI can demonstrate that the self-certification was positively affirmed).

A self-certification may be obtained in any manner and in any form, i.e. in writing, electronically or orally. The only requirement is that the self-certification contains all the required information and is signed or positively affirmed.

4.4.2 Obtaining a valid self-certification on "account opening"

The OECD has provided the following guideline (in an answer to a "Frequently Asked Question" on the AEOI portal)[27] about what it considers would satisfy the requirement that such self-certifications for new accounts are obtained "upon account opening".

[26] A new self-certification is not required merely when such a child comes of age.

[27] www.oecd.org/tax/automatic-exchange/common-reporting-standard/CRS-related-FAQs.pdf

The following guideline applies for the purposes of both individual and entity account due diligence:

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

Accordingly, the OECD considers that the CRS requirement for a Reporting SFI to obtain a self-certification for an account "upon account opening" generally requires that it obtains a self-certification on "day one" of the account opening process". "Day one" would be when the Reporting SFI takes the first steps to materially progress the account opening process.

Further, the OECD has acknowledged that there may be exceptional circumstances when it is not possible for a Reporting SFI to obtain a self-certification on account opening. In such exceptional circumstances, the Reporting SFI should have processes in place to obtain a validated self-certification within 90 days of the account being opened (or in time to meet due diligence and reporting obligations in the period when the account is opened – <u>if this is earlier</u>).

It is, however, important to note that the OECD's answer to the above "Frequently Asked Question" is also clear that it is a very high bar before such exceptional circumstances would apply. The emphasis is on such exceptional circumstances (where up to 90 days would sometimes be permissible to obtain a selfcertification) only applying where it is **not possible** for the Reporting SFI to obtain a self-certification on day one of the account opening process, not when it would merely be difficult for the Reporting SFI to obtain such a self-certification.

4.4.3 Changes in circumstances

If a Reporting SFI maintains a new individual account, obtains a self-certification of the account holder's residence(s), and there is a change in circumstances that subsequently causes the Reporting SFI to know, or have reason to know, that the original self-certification is incorrect or unreliable, it cannot rely on the original self-certification and must carry out further due diligence on the account and obtain a valid self- certification (i.e. a further self-certification) that establishes the account holder's residence(s) for tax purposes.

A change in circumstances affecting a self-certification will terminate the validity of the self-certification with respect to the information that is no longer reliable, **until** the information is updated. A self-certification becomes invalid on the date that the Reporting SFI holding the self-certification knows or has reason to know

that circumstances affecting the correctness of the self-certification have changed. However, a Reporting SFI **may choose** to treat a person as having the same status that it had prior to the change in circumstances until the earlier of 90 days from the date that the self-certification became invalid due to the change in circumstances, the date that the validity of the self-certification is confirmed, or the date that a new selfcertification is obtained.

4.5 Pre-existing entity accounts

A pre-existing entity account is an account maintained by a Reporting SFI as of 31st December 2016 that is held by an entity (for example, held by a trust, company or partnership).

Reporting SFIs are generally required to conduct due diligence on pre-existing entity accounts to determine:

- whether the entity is a relevant foreign tax resident;
- whether the entity is a passive NFE; and
- if the entity is a passive NFE, whether it has any controlling persons that are relevant foreign tax residents.

However, there is a de minimis exception that applies here. If a pre-existing account has a balance or value that does not exceed USD250,000 as of 31st December 2016 it will not be subject to due diligence unless it exceeds USD250,000 on any subsequent 31 December. This de minimis exception is similar to the FATCA exclusions for such accounts. A Reporting SFI is able to choose to disregard this de minimis exception and review all of its pre-existing entity accounts (or a clearly identified group of such accounts) irrespective of the balance or value of the account.

4.5.1 Whether the entity is a relevant foreign tax resident

The Reporting SFI first needs to determine whether the entity account holder is a relevant foreign tax resident. The Reporting SFI could determine this point in either of the following ways:

- Reasonably determining whether the entity account holder is a relevant foreign tax resident on the basis of information it maintains or that is publicly available; or
- Obtaining a self-certification from the entity account holder to determine whether it is a relevant foreign tax resident.

Reasonable determination whether the entity account holder is a relevant foreign tax resident

The Reporting SFI is required to review information it maintains for regulatory or customer relationship purposes (including information collected pursuant to AML/KYC procedures) to determine the account holder's tax residence. For these purposes, information indicating the account holder's residence includes a place of incorporation or organisation, or an address in a foreign jurisdiction.[28]

If the information indicates that the account holder is a Reportable Person, the Reporting SFI must treat the account as a reportable account unless it obtains a self-certification from the account holder or reasonably determines, based on information that is publicly available or is in their possession, that the account holder is not a Reportable Person. The relevant "publicly available information" that can be used to determine an account holder's status is outlined on **page 137 of the CRS Commentary**. This includes information in a publicly accessible register maintained or authorised by an authorised government body. The reader should

[28] For example, in the case of a trust account holder, the address of the trustee in a foreign jurisdiction will be relevant indicia.

refer to the CRS Commentary for further context of the types of information that would come within this category.

A Reporting SFI is also able to use as documentary evidence in its possession, (to reasonably determine the account holder's status) any classification in its records for the account holder that was determined based on a standardised industry coding system recorded consistent with its normal business practices for purposes of AML/KYC procedures or another regulatory purpose (other than for tax purposes). This is provided that it was implemented by the Reporting SFI prior to the date used to classify the account. **Page 204 of the CRS Commentary** provides further context to the circumstances when a Reporting SFI will be able to rely on such information to determine the account holder's status.

Seeking a self-certification whether the entity account holder is a relevant foreign tax resident

Alternatively, a Reporting SFI may choose to obtain a self-certification from the account holder to determine whether the account holder is a relevant foreign tax resident. A self-certification of the account holder's tax status would only be valid if:

- it is signed (or otherwise positively affirmed) by the account holder or person with authority to sign for the account holder;
- it is dated at the latest at the date of receipt; and
- it contains each account holder's:
  - name (i.e. the name of the entity); o address;
  - jurisdiction(s) of residence for tax purposes; and
  - TIN (or functional equivalent, in the absence of a TIN) with respect to each foreign tax jurisdiction (subject to various qualifications/exceptions– outlined below).

4.5.2 Whether the entity account holder is a passive non-financial entity

A Reporting SFI that maintains a pre-existing entity account is **also** required to determine:

- whether the account holder is a passive Non-Financial Entity ("NFE"); and
- if the account holder is a passive NFE, whether any of its controlling persons are relevant foreign tax residents.

The Reporting SFI will need to carry out these steps irrespective of whether the entity account holder is a foreign tax resident. **If** an entity account holder is not a financial institution it will (by default) be a NFE.

There are also two categories of NFE: - active NFEs and passive NFEs. A NFE that is not an active NFE will (by default) be a passive NFE. [The definitions of NFE, active NFE and passive NFE are outlined in full in Appendix 3.]

Refer to page 196 of the CRS Commentary for more relevant information and definition of 'passive income'.

4.5.3 When an entity account holder is a passive non-financial entity – identifying controlling persons

If a Reporting SFI has identified that a pre-existing entity account it maintains is held by a passive NFE it is then required to:

- identify the entity's controlling persons; and
- determine whether any of the entity's controlling persons are relevant foreign tax residents.

Section VIII (D) (6) of the CRS defines "controlling persons" as meaning the natural persons who exercise control over the entity, with some elaboration (outlined below) on how this would apply to trusts. The term "controlling persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations. For the purposes of identifying the controlling persons of a passive NFE pre-existing account, a Reporting SFI may rely on information collected and maintained pursuant to AML/KYC Procedures.

For a passive NFE that is a legal person, **page 198 of the CRS Commentary** provides that the term "controlling person" means the natural person(s) who exercise 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 "controlling ownership interest", in turn, depends on the ownership structure of the legal person and is usually identified on the basis of a threshold applying a risk-based approach (for 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 exercise 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 passive NFE trust, the term "controlling persons" mean the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary (ies) or classes of beneficiaries and any other natural person(s) exercising ultimate effective control over the trust. In the case of legal arrangements other than a trust, the term means persons in equivalent or similar positions.

With respect to pre-existing entity accounts held by a passive NFE, a self-certification of the controlling person's tax residence would only be valid if:

- it is signed (or otherwise positively affirmed) by the account holder (or controlling person) with authority to sign;
- it is dated at the latest at the date of receipt; and
- it contains each controlling person's:
  - name;
  - address;
  - jurisdiction(s) of residence for tax purposes;
  - TIN (or a functional equivalent, in the absence of a TIN) with respect to each foreign tax jurisdiction (subject to various qualifications/exceptions – outlined below);[29] and
  - date of birth (subject to the qualifications outlined below).

4.5.4 Change in circumstances

If there is a change of circumstances with respect to such a pre-existing entity account that causes the Reporting SFI to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the Reporting SFI must re-determine the status of the account. The Reporting SFI must adopt the following procedures by the later of the last day of the relevant reporting period or 90 calendar days following the notice or discovery of the change in circumstances:[30]

- with respect to the determination whether the account holder is a relevant foreign tax resident, the Reporting SFI must obtain either (i) a self-certification, or (ii) a reasonable explanation and documentation (as appropriate) supporting the reasonableness of the original self-certification or

[29] The Reporting SFI would also need to collect the passive NFE"s TIN(s) (or functional equivalent, in the absence of a TIN).

[30] See page 142 of the CRS Commentary.

documentation (and retain a copy or a notation of that explanation and documentation). If the Reporting SFI fails to either obtain a self-certification or confirm the reasonableness of the original self-certification or documentation, it must treat the account holder as being a Reportable Person with respect to both jurisdictions.

- institution, with respect to the determination of whether the account holder is a financial active NFE or passive NFE, a Reporting SFI must obtain additional documentation or a self-certification (as appropriate) to establish the status of the account holder. If the Reporting SFI fails to do so, it must treat the account as a passive NFE.
- with respect to determining whether a controlling person is a relevant foreign tax resident, the Reporting SFI must obtain either (i) a self-certification, or (ii) a reasonable explanation and documentation (as appropriate) supporting the reasonableness of the original self-certification or documentation (and retain a copy or a notation of that explanation and documentation). If a Reporting SFI fails to obtain either a self-certification or confirm the reasonableness of a previously collected self-certification or documentation, it must rely on indicia of foreign tax residence in its records.

4.6 New entity accounts[31]

A new entity account is an account opened by a Reporting SFI on or after 1 January 2017 that is held by an entity (for example, held by a trust, company, or partnership).

Reporting SFIs are required to conduct due diligence on new entity accounts to determine:

- whether the entity is a relevant foreign tax resident;
- whether the entity is a passive NFE; and
- if the entity is a passive NFE, whether it has any controlling persons that are relevant foreign tax residents.

There is no de minimis threshold exemption from these procedures.

4.6.1 Whether the entity is a relevant foreign tax resident

The Reporting SFI first needs to determine whether the entity is a foreign tax resident.

The Reporting SFI needs to obtain a self-certification, which may be part of the account opening documentation, that allows it to determine the account holder's residence for tax purposes and to confirm the reasonableness of that self-certification based on the information it obtained in connection with the opening of the account (including any documentation it has collected pursuant to AML/KYC procedures).

If the self-certification indicates that the account holder is resident in a Reportable Jurisdiction, the Reporting SFI must treat the account as being a reportable account **unless** it reasonably determines, based on information in its possession or that is publicly available, that the account holder is not a Reportable Person.

The form, procedures, and timeframes that a Reporting SFI would need to adopt for obtaining and validating such self-certifications are the same as those outlined above for new individual accounts.

[31] A Reporting SFI is also able to choose to adopt these procedures for pre-existing entity accounts. Please note that a Reporting SFI is able to apply these due diligence steps **in the order that is most appropriate in the circumstances**. For example, in some circumstances a Reporting SFI may be able to reasonably determine up front (based on information in its possession or that is publicly available) that the entity is **not** a Reportable Person. In such circumstances, the Reporting SFI would not be required to obtain a selfcertification from the account holder.

A self-certification of the account holder's tax status would only be valid if:

- it is signed (or otherwise positively affirmed) by the account holder or person with authority to sign for the account holder;
- it is dated at the latest at the date of receipt; and
- it contains each account holder's:
  - name (i.e. the name of the entity);
  - address;
  - jurisdiction(s) of residence for tax purposes;[32] and
  - TIN (or a functional equivalent, in the absence of a TIN) for each foreign tax jurisdiction (subject to various exceptions – outlined below).

4.6.2 Whether the entity is a passive non-financial entity

A Reporting entity that maintains a new-existing entity account is **also** required to determine whether the account holder is a passive NFE. The same procedures outlined above for pre-existing entity accounts (**at section 4.5.4**) apply equally here.

4.6.3 When an entity account holder is a passive non-financial entity – identifying controlling persons

If a Reporting SFI has identified that a new entity account is held by a passive NFE it is required to:

- identify the entity's controlling persons; and
- determine whether any of those controlling persons are foreign tax residents.

Section VIII (D) (6) of the CRS defines "controlling persons" as meaning the natural persons who exercise control over the entity, with some elaboration (outlined below) on how this would apply to trusts. The term "controlling persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations.

For the purposes of identifying the controlling persons of a passive NFE, a Reporting SFI may generally rely on information collected and maintained pursuant to AML/KYC Procedures.

Refer to page 198 and 199 of the CRS Commentary for more information.

4.6.4 Record-keeping requirements

For record-keeping purposes, a Reporting SFI will also need to keep a record of self-certifications obtained, the process they followed to obtain such certifications, and a record of any failure to obtain a self-certification (for example, when an account holder or controlling person does not provide a self-certification on request).

4.6.5 Change in circumstances

Page 148 of the CRS Commentary provides that if there is a change in circumstances with respect to a new entity account that causes the Reporting SFI to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the Reporting SFI must redetermine the status of the account. The procedures that the Reporting SFI would need to follow in this regard are the same as the procedures when there is a change in circumstances for pre-existing entity accounts (referred to above at sub-clause 4.5.4).

[32] If the entity certifies that they have no residence for tax purposes, the Reporting SFI may rely on the address of the entity's principal office to determine its residency.

5 OUTLINE OF CRS INFORMATION TO BE REPORTED

This guideline has so far outlined the following points:

- the circumstances when an entity will be a Reporting SFI; and
- the due CRS diligence obligations that Reporting SFIs have to identify reportable accounts and undocumented accounts.

In broad terms, a Reporting SFI will be required to report to Inland Revenue prescribed identity and financial account information about a financial account it maintains in the following circumstances:[33]

- the Reporting SFI has identified that the account is held (and/or, in the case of a passive NFE, controlled) by a Reportable Person from a Reportable Jurisdiction; or
- the Reporting SFI has decided to adopt the wider approach to reporting and has identified that the account is held (and/or, in the case of a passive NFE, controlled) by a relevant foreign tax resident.

Reporting SFIs must report two types of prescribed information about such accounts:

- identity information about the relevant foreign tax resident account holder (and foreign tax-resident controlling person – in the case of accounts held by passive NFEs); and
- financial account information – for example, the account balance or value and various amounts paid or credited to[34] the account.

These reporting requirements will apply on an annual basis (i.e. by 30 June of the relevant year). In other words, Reporting SFIs that have identified an account as reportable should continue to report the prescribed account information annually to Inland Revenue unless there is a change in circumstances that means that the account is not reportable.

A Reporting SFI that does not have any accounts to report for a particular reporting period must provide a nil return in accordance with Section 10C(3) of TIEA 2012.

This guideline now outlines in detail the prescribed identity and financial account information that Reporting SFIs need to report annually about any reportable accounts it has identified.

5.1 Identity information that Reporting SFIs will need to report for a reportable account

Reporting SFIs will **generally** need to annually report the following identity information to Inland Revenue about reportable accounts:

- the name, address, jurisdiction(s) of residence, TIN(s)[35] and date of birth in the case of any individual account holder that is a Reportable Person**.**
- the name, address, jurisdiction(s) of residence and TIN(s) of any entity account holder that is a Reportable Person.
- in the case of any passive NFE account holder that is identified as having one or more controlling persons that is a Reportable Person:
    - the name, address, jurisdiction(s) of residence, TIN(s) of the passive NFE; and

[33] Reporting SFIs also need to report accounts that they have identified as being undocumented accounts. The circumstances when an account will be an undocumented account are outlined at sections 1.6, 5.3.2 and 5.3.3 of this guidance.

[34] As explained in detail further below, this also sometimes covers amounts paid or credited **with respect to** the account.

[35] As noted above, in the absence of a TIN, the functional equivalent should be collected and reported.

- the name, address, jurisdiction(s) of residence, TIN(s), and date of birth of the controlling person (or persons).
- the account number (or functional equivalent in the absence of an account number).
- the name and identifying number (if any) of the Reporting SFI.

If a Reporting SFI has identified that a controlling person is reportable, **and** they **also** have information available that identifies the **type** of controlling person (for example, whether they are 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 Financial Action Task Force (FATF) Recommendations require the identification of the settlor, trustees, beneficiaries, protectors and any other natural person exercising ultimate effective control of the trust, Reporting SFIs should have this information available.[36]

This guideline now provides some further context to some of the identification information that Reporting SFIs need to provide and the exceptions/qualifications that apply.

TIN

A Reporting SFI generally needs to report a TIN (or functional equivalent, in the absence of a TIN) for reportable accounts (i.e. the TIN of the relevant foreign tax resident account holder or controlling person). However, there are some important exceptions and qualifications to this.

Exceptions: A TIN (or functional equivalent) is not required to be obtained and reported if:

- the person has not been issued with a TIN (or functional equivalent).
- the person's jurisdiction of tax residence does not require the collection of TINs issued by that jurisdiction. [However, a Reporting SFI is not prevented from asking for, and collecting, the person's TIN for reporting purposes **if** the person chooses to provide it. In this case, the Reporting SFI must report the TIN.][39]

Qualification: A Reporting SFI that identifies that an account holder (or controlling person) of a reportable **pre-existing** account is a relevant foreign tax resident, and does not otherwise have the person's TIN (or functional equivalent) in its records, will be required to use reasonable efforts to obtain and report the TIN (or functional equivalent) by the end of the second reporting period following the period in which the account is identified as being held (or controlled) by a Reportable Person.

Date of birth

A Reporting SFI generally needs to report date of birth information of the relevant **individual** account holder (or controlling person) for reportable accounts (i.e. the date of birth information of the relevant foreign tax resident account holder or controlling person).

Qualification: A Reporting SFI that identifies that an individual account holder (or controlling person) of a **preexisting** account is a relevant foreign tax resident, and does not otherwise have the person's date of birth in their records,[37] will be required to use reasonable efforts to obtain and report the date of birth by the end

[36] See page 85 of the OECD's CRS implementation handbook.

[39] See page 104 of the CRS commentary.

[37] A Reporting SFI may already have such date of birth information in its records because it has already collected such information for AML or other regulatory purposes. This CRS transitional period for collecting date of birth information for pre-existing accounts

of second reporting period following the period in which the account is identified as being held (or controlled) by a Reportable Person.

It should be further noted that, while the date of birth must be reported, the place of birth is <u>not</u> required to be reported, and should not be reported to Inland Revenue.

5.2 Financial account information that Reporting SFIs will need to report for a reportable account

Reporting SFIs will also need to report the following financial information about reportable accounts:

- the account balance or value as at the end of the reporting period or, if the account was closed during that period, the closure of the account.
- in the case of a custodial account:
  - the total gross amount of interest paid or credited to the account (or with respect to the account) during the relevant period ending 31 December;
  - the total gross amount of dividends paid or credited to the account (or with respect to the account) during the relevant period ending 31 December;
  - the total gross amount of other income generated with respect to the assets held in the account and paid or credited to the account (or with respect to the account) during the relevant period ending 31 December; and
  - the total gross proceeds from the sale or redemption of financial assets paid or credited to the account (or with respect to the account) during the relevant period ending 31 December with respect to which the Reporting SFI acted as a custodian, broker, nominee or otherwise as an agent for the account holder.
- in the case of a depository account, the total gross amount of interest paid or credited to the account during the relevant period ending 31 December.
- in the case of any other type of account, the total gross amount paid or credited to the account holder with respect to the account during the relevant period ending 31 December with respect to which the Reporting SFI is the obligor or debtor. This includes the aggregate amount of any redemption payments made to the account holder during the reporting period.

Where an account is jointly held, each holder of the account is attributed the entire balance or value of the joint account, as well as the entire amounts paid or credited to the joint account (or with respect to the joint account).

This guideline now provides some further context to the financial information that Reporting SFIs need to report about such reportable accounts.

Account balance or value

Reporting SFIs are (subject to the following) required to report the account balance or value of a reportable account as of the end of the relevant period ending 31 December. However, if an account was closed during that period, the Reporting SFI must report the closure of the account. An account will be considered to be closed according to the Reporting SFI's normal operating procedures that are consistently maintained for all accounts. In most cases, it will be fairly self-explanatory as to whether an account has been closed. An equity or debt interest account would generally be considered to be closed upon termination, transfer, surrender,

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should be read as covering those instances where the Reporting SFI does not have such information in its records **and** they are not otherwise required to collect the information. This principle for the timing of the collection of date of birth information applies for all pre-existing accounts (individual and entity).

redemption, cancellation or liquidation. An account with a balance or value equal to zero or that is negative will not be considered to be closed solely by reason of having such a balance or value.

If the account was closed during the period, the Reporting SFI must report that the account was closed, but not the account balance or value before or at the time of closure. This is a key difference between the CRS and FATCA. For FATCA, it is the balance immediately prior to closure that needs to be reported.

Refer to pages 98 and 99 of the CRS Commentary for more information.

Gross proceeds

A clearing or settlement organisation that maintains accounts, and settles sales and purchases may not know the gross proceeds from sales and dispositions. Where this is the case, gross proceeds are limited to the net amount paid or credited to a member's account that is associated with sales or other dispositions of financial assets by that member as of the time that the transactions are settled under the organisation's settlement procedures (see **paragraph 18 on page 100 of the CRS Commentary**). With respect to a sale that is effected by a broker that results in a payment of gross proceeds, the date the gross proceeds are considered paid is the date that the proceeds of sale are credited to the account of, or made available to, the person entitled to the payment.

Currency

The information that a Reporting SFI reports about an account must be **reported** in the currency in which the account is denominated **and** the information reported must **identify** the currency in which each amount is denominated.

In the case of an account denominated in more than one currency, the Reporting SFI may elect to report the information in a currency in which the account is denominated and is required to identify the currency in which the account is reported.

If the balance or value of a financial account or other amount is denominated in a currency **other than** the currency used by a Participating Jurisdiction when implementing the CRS (for purposes of thresholds or limits), a Reporting SFI must calculate the balance or value by applying a spot rate to translate such balance or value into the currency equivalent. For the purpose of a Reporting SFI reporting an account, the spot rate must be determined as of the last day of the reporting period for which the account is being reported.[38]

6. FORMAT A REPORTING SFI CAN USE FOR REPORTING CRS INFORMATION

MCR will be notifying and holding consultation with all affected persons on how CRS information will be reported around March 2018 in time for the first CRS reporting period in September.

7. CRS RECORD KEEPING OBLIGATIONS

7.1 Obligation to keep and retain records

Section 10F of the TIEA 2012 requires a Reporting SFI to keep records that it obtains or creates for the purposes of complying with CRS including self-certifications and records of documentary evidence. This would also include recording the steps and measures taken by the Reporting SFI to obtain such documents.

[38] See page 102 of the CRS commentary.

Do note that there is no requirement that such documentation be **stored** in paper form. Instead, a Reporting SFI is merely required to store such documentation **in a way that can be converted into** paper form **if** requested by the Commissioner. This is a requirement that is explicitly set out at **pages 131 and 205 of the CRS commentary**.

7.1.1 Records to be in English and retained in Samoa

In accordance with section 10F of the TIEA 2012, a Reporting SFI must also retain such records in English. Records must be able to be produced to the Commissioner, in English, when requested.

7.1.2 Period of retention of records

Reporting SFIs will need to keep records for a period of at least seven (7) years following:

- in the case of self-certification, the day the related financial account is closed; and
- in any other case, the end of the last calendar year in respect of which the record is relevant.

In summary, record keeping requirements apply to the following circumstances:

- when a Reporting SFI relies on *publicly available information*[39] as part of CRS due diligence (i.e. what records does the SFI need to keep about the publicly available information it has relied on).
- when a Reporting SFI relies on *documentary evidence*[40] obtained as part of CRS due diligence (i.e. what records does the SFI need to keep about the documentary evidence it has relied on).
- when a Reporting SFI relies on a self-certification obtained as part of CRS due diligence (i.e. what records does the SFI need to keep about a self-certification it obtains).
- when a self-certification would otherwise fail the "reasonableness test" and a Reporting SFI gathers further information to determine the veracity of the self-certification (i.e. what records does the SFI need to keep about such information).
- when there has been a change in circumstances that calls into question a self-certification a Reporting SFI has obtained and it has gathered further information to determine the validity of the selfcertification (i.e. what records does the SFI need to keep about such information?).
- the procedures adopted by a Reporting SFI as part of the requirement to use "reasonable efforts" to obtain TINs for pre-existing accounts held or controlled by Reportable Persons (i.e. what records does the SFI need to keep about the steps that it follows for obtaining TINs for such accounts?).
- process followed to obtain self-certifications; including any failure to obtain such self-certification.

The above obligations are needed in order for MCR to determine whether the Reporting SFI has compiled with its due diligence and reporting obligations

A Reporting SFI should refer to the CRS Commentary for further detail about the range of circumstances where they will need to keep records of the steps that they have undertaken and the evidence they have relied upon in carrying out their CRS due diligence and reporting.

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[39] See section V(C)(1)(b) and VI(A)(1)(b) of page 137, paragraph 12 of the CRS Commentary.

[40] In general, a Reporting SFI must obtain any relevant documentary evidence on an account-by account basis. However, a Reporting SFI may rely upon the documentary evidence furnished by a customer for another account if both accounts are treated as a single account for purposes of satisfying the standards of knowledge requirements in section A of section VII of the CRS (see page 205 of the CRS Commentary).

7.1.3 Self-certifications

7.1.3.1 Copy of self-certification

As noted above, the CRS requires Reporting SFIs to obtain self-certifications from account holders (and in certain circumstances controlling persons) as to whether or not they are foreign tax residents. The selfcertification may be provided in any matter and in any form. A Reporting SFI must retain a copy of these selfcertifications. This may be an original, certified copy or photocopy (including a microfiche, electronic scan or similar means of electronic storage).

If the self-certification is provided electronically, the electronic system must ensure that the information received is the information sent, and must document all occasions of user access including the submission, renewal or modification of a self-certification. The system must also ensure that the person accessing the system and furnishing the self-certification is the person named in the self-certification. A Reporting SFI must be able to provide on request a hard copy of all electronic self-certifications.[41]

A self-certification may be signed (or otherwise positively affirmed) by any person authorised to sign on behalf of the account holder (or controlling person) under domestic law. The self-certification, authorisations to sign and details of user access must be able to be made available to the Commissioner in hard copy upon request. These obligations align with the requirement for a Reporting SFI to keep records (available for request by the Commissioner) of the steps undertaken and evidence relied upon for the purposes of undertaking due diligence.

7.1.3.2 Positive affirmation

As noted above, for a self-certification to be valid, the CRS requires that it must be signed or "otherwise positively" affirmed by the relevant account holder or (if applicable) controlling person. In addition to manually signed self-certifications, this allows the self-certification to be completed online or orally, including over the phone.

In accordance with an answer to a "Frequently Asked Question", the OECD has confirmed on the AEOI portal[42] that a self-certification will be "otherwise positively affirmed" if the person making the self-certification provides the Reporting SFI with an unambiguous acknowledgment that they agree with the representations made through the self-certification. In all cases, the positive self-certification is expected to be captured by the Reporting SFI in a manner such that it can credibly demonstrate that the self-certification was positively affirmed (for example, by voice recording, etc). The approach taken by the Reporting SFI in obtaining the selfcertification is expected to be in a manner consistent with the procedures they follow for the opening of the account. The Reporting SFI will need to maintain a record of this process for audit purposes, in addition to the self-certification itself. This aligns with the requirement that a Reporting SFI keeps a record of **both** the steps undertaken (which would cover such processes) and evidence that it has relied on (which would cover the self-certification itself) in carrying out CRS due diligence.

7.1.3.3 Incorrect or unreliable self-certifications/change of circumstances

As noted above, a Reporting SFI cannot rely upon a self-certification for CRS due diligence purposes if it knows, or has reason to know, that the self-certification is incorrect or unreliable.

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[41] See page 129, section 9 of the CRS Commentary.

[42] www.oecd.org/tax/automatic-exchange/common-reporting-standard/CRS-related-FAQs.pdf

[46] See page 130 of the CRS Commentary.

If a Reporting SFI has carried out CRS due diligence on a financial account and, as part of that process, obtained a self-certification about the tax residence of an account holder (or, if applicable, controlling person), and there is a change of circumstances that causes a Reporting SFI to know that the original self-certification is incorrect or unreliable, the Reporting SFI cannot rely upon the original self-certification. The Reporting SFI would need to obtain either a valid self-certification that establishes the residence for the tax purposes of the account holder (or, if applicable, controlling person), or a reasonable explanation and documentation (as appropriate) supporting the validity of the original self-certification.

If the Reporting SFI obtains a **new** self-certification it would need to keep a record of that self-certification – just like any other self-certification it obtains.

If the Reporting SFI relies on a reasonable explanation and documentation supporting the validity of the **original self-certification** it will be required to retain a copy or a notation of the explanation and documentation.[46] This is in addition to the requirement to keep a record of the **self-certification itself**.

7.1.4 Reasonable efforts to obtain a TIN

As noted above, if a Reporting SFI maintains a pre-existing account that is held (and/or, in the case of a passive NFE, controlled) by a relevant foreign tax resident, and it does not have the person's TIN (or functional equivalent) in its records, it is required to use reasonable efforts to obtain the person's TIN by the end of the second reporting period following the period in which the account is identified as being held (and/or controlled) by a Reportable Person.

"Reasonable efforts" in this context means genuine attempts to obtain the TIN, which must be made at least once a year by, for example, contacting the account holder by mail, in person or by phone, including a request made as part of other documentation or electronically (for example, by facsimile or by email) and reviewing electronically searchable information maintained by a related entity of the Reporting SFI.[43] The only exceptions to this are if either:

- the Reportable Person is tax-resident in a jurisdiction that does not issue either TINs or a functional equivalent (or has not had either a TIN or a functional equivalent issued to them); or
- the Reportable Person is tax-resident in a jurisdiction that does not require the collection of TINs.

It is expected that a Reporting SFI would keep a record of the steps that it undertakes to obtain TINs in such circumstances and the evidence of how those policies and procedures are followed.[44] This will assist MCR in monitoring compliance and, in particular, determining whether the Reporting SFI has made reasonable efforts to obtain TINs in such circumstances.

A procedural manual describing appropriate "reasonable efforts" can be a record describing the "steps" undertaken provided there is also evidence as to how those policies and procedures are followed. In the case of a mail merge, for example, this would not require a Reporting SFI to keep actual copies of the letters sent, but it must be able to provide, upon request, the document that contains the information that is the same in each version and the data file where the unique information is stored.[45]

[43] See page 103 of the CRS Commentary.
[44] See page 209 of the CRS Commentary.
[45] See page 209, at paragraph 9 of the CRS Commentary.

8. PENALITIES REGIME

8.1 Administrative Penalty – Fines

Under **subsection 10J (1) and (2)** of the TIEA 2012, the Commissioner may impose a fine not exceeding $25,000 where:

- A Reporting SFI fails to comply with any of the obligations under CRS (i.e. due diligence, record keeping, reporting, confidentiality); and
- An account holder:
  - refuses to provide a self-certification or details with which tax residence can be established; or
  - provides false, incomplete or misleading information.

8.1.1 Prior written notification by the Commissioner

Before imposing a fine on a Reporting SFI or an account holder, the Commissioner is required under **subsection 10J(3)** of the TIEA 2012 to serve on the Reporting SFI or account holder a written notice setting out the following details:

a) the nature of the offence committed;

b) the proposed penalty to be imposed;

c) a reasonable time in which the reporting financial institution or account holder is required to meet requirements and correct any failures;

d) a time in which the reporting financial institution or account holder is to respond in writing to the Commissioner, as to whether or not it accepts or denies committing the offence; and

e) any other relevant information.

If the amount of the penalty is paid in full, the matter is considered settled and the Commissioner cannot pursue further proceeding for the alleged offence.

8.2 Penalties imposed upon criminal conviction

Subsection 10J(4) of the TIEA 2012 provides that where a Reporting SFI denies committing the offence upon receipt of the Commissioner's written notification under subsection (3) (*refer to clause 8.1.1 above*) or fails to remedy failure within timeframe set out in the notice, the Commissioner may prosecute the offence in court.

Part 15 of the Tax Administration Act 2012 ("TAA 2012") also provides the following types of offences relevant to CRS:

- knowingly or recklessly makes a statement to a tax officer that is false or misleading in a material particular (max penalty of SAT$3,000, upon conviction, or 1 year imprisonment, or both);[46]
- hindering or obstructing a tax officer in the performance of duties under a tax law (max penalty of SAT$3,000 or 1 year imprisonment or both; [51]

[46] Section 75 of TAA 2012. [51] Section 76 of TAA 2012.

It should be noted that section 80 of the TAA 2012 places the authority on the Commissioner to compound an offence under TAA 2012 similar to the written notification process provided under section 10J of TIEA 2012.

9 CRS REQUIREMENT TO HAVE AN AVOIDANCE PROVISION

As noted above, section IX(A)(1) of the CRS requires that implementing jurisdictions (such as Samoa) have rules to prevent financial institutions, persons or intermediaries from adopting practices intended to circumvent the CRS due diligence and reporting procedures. The CRS Commentary on the application of section IX states that the form of the CRS "anti-avoidance" rule is not important as long as the rule is effective to prevent circumvention of the CRS reporting requirements and the due diligence procedures.[47]

9.1 Samoa's anti-avoidance provision

In order to meet the OECD's expectations set out in section IX of the CRS, a specific anti-avoidance rule has been introduced into **section 10H** of the TIEA 2012.

Section 10H provides that if a person enters into any transactions or schemes, the main purpose or one of the main purposes, of which can reasonably be considered to avoid an obligation imposed under CRS, the person is subject to the obligation as if the person had not entered into the transaction or scheme.

This section allows the Commissioner to reconstruct the avoidance arrangement to ensure that the CRS requirements are best complied with.

This guideline now outlines the following matters that are relevant to section 10H:

- what constitutes a "transaction or scheme"; and
- what is meant by "main purpose or one of the main purposes" (in entering into such a transaction or scheme)

9.2 What constitutes a "transaction or scheme" under section 10H

For the purposes of section 10H, the definition of "scheme" will be used when defining "transaction" given the absence of a definition for transaction under tax laws, and also because "scheme" is being used to refer to tax avoidance which is relevant for the purposes of the anti-provision under CRS .

Subsection 79(2) of the Income Tax Act 2012 broadly defines "scheme" to mean an agreement, arrangement, understanding, or undertaking, whether express or implied and whether or not enforceable, and includes a unilateral action.

9.3 What is meant by "a main purpose or one of the main purposes" in entering into a transaction or scheme under section 10H

The reference to a "main" purpose (in this context) would cover a "substantial" purpose. This would be a higher threshold than when such avoidance is merely incidental (i.e. a mere result of due diligence and reporting not applying would not, in and of itself, be enough for section 10H to apply).

Further, it is not a requirement to section 10H that purpose be the "sole" purpose or "the" main purpose. A transaction or scheme might be entered into with several main purposes. Now, if one of those main purposes

[47] See page 208 of the CRS Commentary.

is the avoidance of an obligation under CRS, then section 10H applies, and such person will be held to be subject to the obligation as if that person had not entered into that transaction or scheme.

APPENDICES

Appendix 1

Summary of CRS and relevant sections of TIEA 2012

CRS	TIEA 2012
General Reporting Requirements	Section I of Schedule 3
General Due Diligence Requirements	Section II of Schedule 3
Due Diligence for Pre-existing Individual Accounts	Section III of Schedule 3
Due Diligence for New Individual Accounts	Section IV of Schedule 3
Due Diligence for Pre-existing Entity Accounts	Section V of Schedule 3
Due Diligence for New Entity Accounts	Section VI of Schedule 3
Special Due Diligence Rules	Section VII of Schedule 3
Defined Terms	Section VII of Schedule 3

Appendix 2

Documentary evidence under the CRS

"Documentary evidence" is defined in the CRS (see **page 209 at section 8 of the CRS Commentary and subsection E (6) of Section VIII of the CRS**) for these purposes as including any of the following:

- a certificate of residence issued by an authorised government body (for example, a government or agency thereof, or a municipality) of the jurisdiction in which the payee claims to be a resident. Examples of such a certificate include a certificate of residence for tax purposes indicating that the account holder has filed its most recent income tax return; residence information published by an authorised government body of that jurisdiction such as a list published by a tax administration that includes the names and residences of taxpayers, and residence information in a publicly accessible register maintained or authorised by an authorised government body of a jurisdiction, such as a public register maintained by a tax administration.
- with respect to an individual, 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.
- with respect to an entity, any official documentation issued by an authorised government body (for example, a government or agency thereof, or a municipality) that includes the name of the Entity and either he address of its principal office in the jurisdiction in which it claims to be a resident or the jurisdiction in which the entity was incorporated or organised. The address of the principal office will generally be where its place of effective management is situated. The address of a Financial Institution with which the entity maintains an account, a post office box or an address used solely for mailing purposes is not an address of the Entity's principal office unless it is the only address used by the Entity and appears as its registered address in its organisational documents. Further, an address that is provided subject to instructions to hold all mail to that address is not the address of the Entity's principal office.
- any audited statement, third-party credit report, bankruptcy filing or securities regulator's report.

Pages 204-205 of the CRS commentary summarise the requirements that must be satisfied for the validity of such documentary evidence (including the circumstances when documentation collected by other persons – such as service providers - can be relied on/used).

Appendix 3

Definitions of Active NFE and Passive NFE

"Active NFE" is defined in Section VIII (D) (9) of Schedule 3 of TIEA 2012 as any NFE that meetings any of the following criteria:

a. less than 50% of the NFE's 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;

b. 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. the NFE is a Governmental Entity, an international organisation, a Central bank, or an Entity wholly owned by one or more of the foregoing;

d. substantially all 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 businesses other than the business of a Financial Institution, except that an Entity does not qualify for this status if the Entity functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout 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. the NFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFE does not qualify for this exception after the date that is 24 months after the date of the initial organisation of the NFE;

f. the NFE was not a Financial Institution in the past five years, and is in the process of liquidating its assets or is reorganising with the intent to continue or recommence operations in a business other than that of a Financial Institution;

g. the NFE 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; or

h. the NFE meets all of the following requirements:

i. it is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organisation, civic league or an organisation operated exclusively for the promotion of social welfare;

ii. it is exempt from income tax in its jurisdiction of residence;

iii. it has no shareholders or members who have a proprietary or beneficial interest in its income or assets;

iv. the applicable laws of the NFE's jurisdiction of residence or the NFE's 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 NFE's 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; and

v. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents require that, upon the NFE's the government of the NFE's jurisdiction of residence or any political subdivision thereof.

"Passive NFE" is defined in Section VIII (D) (8) with reference to Section VIII (A) (6) (b) of Schedule 3 of TIEA 2012 to mean:

a. any NFE that is not an Active NFE; or

b. A managed investment entity from a jurisdiction that is not a Participating Jurisdiction.