



BERMUDA

INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) COMMON REPORTING STANDARD REGULATIONS 2017

BR 39 / 2017

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The Minister in exercise of the power conferred by section 12 of the International Cooperation (Tax Information Exchange Agreements) Act 2005 makes the following Regulations:

PART 1

PRELIMINARY PROVISIONS

Citation

1 These Regulations may be cited as the International Cooperation (Tax Information Exchange Agreements) Common Reporting Standard Regulations 2017.

Interpretation

2 (1) In these Regulations, unless the context otherwise requires—
“the Act” means the International Cooperation (Tax Information Exchange Agreements) Act 2005;
“Commentary” means the commentary on the Common Reporting Standard as published by the Organisation for Economic Co-operation and Development (OECD);
“Common Reporting Standard” has the meaning given in section 2 of the Act;
“electronic address” includes an email address;
“electronic portal” means the Minister’s electronic portal for the automatic exchange of information;
“give” for a notice or information, includes to deliver, provide, send, transmit or make the notice or information;
“inaccurate” means incomplete, incorrect or unreliable;
“International Agreement” means the Convention for Mutual Administrative Assistance in Tax Matters, any bilateral or multilateral tax convention, or any tax information exchange agreement to which Bermuda is a party, and that by its terms provides legal authority for the exchange of tax information between jurisdictions, including automatic exchange of such information;

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“notice” means written information given electronically or by another mode of communication;

“official website” means any website of the Minister about international tax cooperation;

“Qualifying Competent Authority Agreement” means an agreement—

- (a) that is between authorized representatives of those jurisdictions that are parties to an International Agreement; and
- (b) that requires the automatic exchange of Common Reporting Standard information between the party jurisdictions;

“required information”, for a the purposes of regulation 5, means information the Minister shall require pursuant to that regulation, which will include, but is not limited to, the following—

- (a) the Reporting Financial Institution’s name and employer tax number for payroll tax purposes as applicable;
- (b) the type or types of Reporting Financial Institution classification(s) under Section VIII paragraph A of the Common Reporting Standard; and
- (c) the full name, address, business entity, position and contact details (including an electronic address) of an individual which the Reporting Financial Institution has authorized to be its principal point of contact for compliance with these Regulations;

“resident in Bermuda for tax purposes”, for a Reporting Financial Institution, means—

- (a) being incorporated or established under the laws of Bermuda (including where such laws provide for the issuance of a permit to enable an entity incorporated or established outside of Bermuda to carry on trade or business in Bermuda);
- (b) having a place of management, including place of effective management (as defined under Section VIII paragraph 109 of the Commentary), in Bermuda;
- (c) being subject to financial supervision in Bermuda; or
- (d) having, in the case of a trust, one or more trustees resident in Bermuda;

“return” (other than as referred to in the Common Reporting Standard) means a return or report required under regulation 6.

(2) In these Regulations, a word or expression which is defined in the Act or the Common Reporting Standard has that meaning for terms not defined under paragraph (1), except to the extent that a Reporting Financial Institution may use as an alternative a definition in a Qualifying Competent Authority Agreement and in so far as such use would not frustrate the purposes of the Qualifying Competent Authority Agreement.

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(3) For the avoidance of doubt, these Regulations apply to Reporting Financial Institutions resident in Bermuda for tax purposes.

(4) For the avoidance of doubt, for the purposes of these Regulations trustees of a trust (whether or not a natural person) shall be treated as Controlling Persons of the trust.

[Regulation 2 paragraph (1) definition "resident in Bermuda for tax purposes" amended, and paragraph (4) inserted by BR 85 / 2017 reg. 2 effective 18 August 2017]

PART 2

APPLICATION OF THE COMMON REPORTING STANDARD

Common Reporting Standard in force

3 The Common Reporting Standard for the automatic exchange of financial account information has effect in Bermuda pursuant to section 4A of the Act in relation to a Qualifying Competent Authority Agreement that Bermuda may enter into with another jurisdiction, which is to be implemented in accordance with these Regulations.

Rules for applying the Common Reporting Standard

4 (1) For the purpose of any reference in the Common Reporting Standard to the 'calendar year or any other appropriate reporting period', the calendar year applies in relation to obligations of Reporting Financial Institutions under the Common Reporting Standard.

(2) Reporting Financial Institutions shall apply the 'wider approach' to the Common Reporting Standard in such manner as provided by the OECD (including the relevant changes to the wording of the Common Reporting Standard), whereby—

- (a) any language suggesting that the procedures are designed to identify accounts that are Reportable Accounts at the moment the due diligence procedures are performed is deleted or amended; and
- (b) under the indicia search procedure, the Reporting Financial Institution is required to search for indicia indicating that the Account Holder is resident in a Foreign Jurisdiction and to treat the Account as held by an Account Holder that is a resident of each Foreign Jurisdiction for which an indicium is found (unless the Reporting Financial Institution follows the 'curing procedure').

(3) "Foreign Jurisdiction", for purposes of paragraph (2), means any Jurisdiction other than the Jurisdiction of the Reporting Financial Institution.

(4) Reporting Financial Institutions shall comply with Section I subparagraph A(4) of the Common Reporting Standard as follows—

"4. the account balance or value (including in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account,".

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(5) Reporting Financial Institutions may apply the due diligence procedures under the Common Reporting Standard for—

- (a) New Accounts to Preexisting Accounts; and
- (b) High Value Accounts to Lower Value Accounts, and any such election may be made either with respect to all relevant Preexisting Accounts or, separately, with respect to any clearly identified group of such accounts (such as by line of business or the location where the account is maintained), provided that where New Account due diligence is used for Preexisting Accounts, the rules otherwise applicable to Preexisting Accounts continue to apply.

(6) Reporting Financial Institutions may apply—

- (a) either the residence address test or the electronic record search set forth in Section III paragraphs B(1) through (6) of the Common Reporting Standard; or
- (b) only the electronic record search.

(7) With respect to paragraph (6)(a), Reporting Financial Institutions may make an election to apply the residence address test either with respect to all Lower Value Accounts or, separately, with respect to any clearly identified group of such accounts (such as by line of business or the location where the account is maintained).

(8) For the purposes of Section V paragraph A of the Common Reporting Standard, Reporting Financial Institutions may apply the exclusion such that a Preexisting Entity Account with an aggregate account balance or value that does not exceed USD 250,000 as of 31 December 2015, is not required to be reviewed, identified, or reported as a Reportable Account until the aggregate account balance or value exceeds USD 250,000 as of the last day of any subsequent calendar year.

(9) A Reporting Financial Institution may treat a Financial Account that is a member's interest in a Group Cash Value Insurance Contract or Group Annuity Contract as a Financial Account that is not a Reportable Account until the date on which an amount is payable to the employee or certificate holder or beneficiary, if the Financial Account that is a member's interest in a Group Cash Value Insurance Contract or Group Annuity Contract meets the following requirements—

- (a) the Group Cash Value Insurance Contract or Group Annuity Contract is issued to an employer and covers twenty-five or more employees or certificate holders;
- (b) the employee/certificate holders are entitled to receive any contract value related to their interests and to name beneficiaries for the benefit payable upon the employee's death; and
- (c) the aggregate amount payable to any employee/certificate holder or beneficiary does not exceed USD1,000,000.

(10) In paragraph (9), the term "Group Cash Value Insurance Contract" means a Cash Value Insurance Contract that—

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- (a) provides coverage on individuals who are affiliated through an employer, trade association, labour union, or other association or group; and
- (b) charges a premium for each member of the group (or member of a class within the group) that is determined without regard to the individual health characteristics other than age, gender, and smoking habits of the member (or class of members) of the group. The term “Group Annuity Contract” means an Annuity Contract under which the obligees are individuals who are affiliated through an employer, trade association, labour union, or other association or group.

(11) Reporting Financial Institutions may use as Documentary Evidence any classification in the Reporting Financial Institution’s records with respect to the Account Holder that was determined based on a standardized industry coding system, that was recorded by the Reporting Financial Institution consistent with its normal business practices for purposes of AML/KYC Procedures or another regulatory purposes (other than for tax purposes) and that was implemented by the Reporting Financial Institution prior to the date used to classify the Financial Account as a Preexisting Account, provided that the Reporting Financial Institution does not know or have reason to know that such classification is incorrect or unreliable and the term “standardized industry coding system” means a coding system used to classify establishments by business type for purposes other than tax purposes.

(12) Any pension fund, prescribed retirement product or pension plan established in Bermuda under the National Pension Scheme (Occupational Pensions) Act 1998, the Public Service Superannuation Act 1981, Ministers and Members of the Legislature (Salaries and Pensions) Act 1975 or the Contributory Pensions Act 1970 shall be considered a Non-Reporting Financial Institution for the purposes of the Common Reporting Standard.

(13) For the purposes of Section VIII subparagraph C(17)(g) of the Common Reporting Standard, with respect to the definition “Excluded Account”, a Depository Account is defined as an Excluded Account if the account—

- (a) is a dormant account (other than an Annuity Contract), whereby—
 - (i) the Account Holder has not initiated a transaction with regard to the account or any other account held by the Account Holder with the reporting financial institution in the previous three years;
 - (ii) the Account Holder has not communicated with the Reporting Financial Institution regarding the account or any other account held by the Account Holder with the Reporting Financial Institution in the previous six years;
 - (iii) the account is treated as a dormant account under the Reporting Financial Institution’s normal operating procedures; and
 - (iv) in the case of a Cash Value Insurance Contract, the Reporting Financial Institution has not communicated with the Account Holder regarding the account or any other account held by the Account Holder with the Reporting Financial Institution in the previous six years; and

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(b) has a balance of USD 1,000 or less.

(14) For purposes of these Regulations, the definition of “Preexisting Account” at Section VIII subparagraph C(9) of the Common Reporting Standard is substituted with the following—

“ 9. The term “Preexisting Account” means—

- (a) a Financial Account maintained by a Reporting Financial Institution as of 31 December, 2015;
- (b) any Financial Account of an Account Holder, regardless of the date such Financial Account was opened, if—
 - (i) the Account Holder also holds with the Reporting Financial Institution (or with a Related Entity within the same jurisdiction as the Reporting Financial Institution) a Financial Account that is a Preexisting Account under subparagraph C(9)(a);
 - (ii) the Reporting Financial Institution (and, as applicable, the Related Entity within the same jurisdiction as the Reporting Financial Institution) treats both of the aforementioned Financial Accounts, and any other Financial Accounts of the Account Holder that are treated as Preexisting Accounts under this subparagraph, as a single Financial Account for purposes of satisfying the standards of knowledge requirements set forth in paragraph A of Section VII, and for purposes of determining the balance or value of any of the Financial Accounts when applying any of the account thresholds;
 - (iii) with respect to a Financial Account that is subject to AML/KYC Procedures, the Reporting Financial Institution is permitted to satisfy such AML/KYC Procedures for the Financial Account by relying upon the AML/KYC Procedures performed for the Preexisting Account described in subparagraph C(9)(a); however, notwithstanding the foregoing, such Reporting Financial Institutions shall, for the purposes of these Regulations, in the case of a trust or similar legal arrangement, provide information in respect of Controlling Persons in accordance with paragraphs 134, 135 and 136 of the Commentary on Section VIII; and
 - (iv) the opening of the Financial Account does not require the provision of new, additional or amended customer information by the Account Holder other than for purposes of the Common Reporting Standard.”.

(15) *[Revoked by BR 85 / 2017 reg. 3(c)]*

(16) An account balance with a negative value shall be treated as having a nil value.

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(17) If a balance or value of an account is denominated in a currency other than US dollars, then a relevant US dollar threshold amount shall be converted into the other currency by reference to the published spot rate of exchange on the date for which the Reporting Financial Institution is determining the threshold amount.

(18) A Reporting Financial Institution shall ensure that—

- (a) the review of Preexisting Lower Value Individual Accounts is completed by 31 December, 2017; and
- (b) the review of Preexisting Entity Accounts with an aggregate account balance or value that exceeds USD 250,000 as of 31 December, 2015 is completed by 31 December, 2017.

(18A) Compliance with respect to the review of High Value Preexisting Accounts is dealt with in the Guidance (page 4).

(19) Reporting Financial Institutions may align the scope of the beneficiary of a trust treated as Controlling Person of the trust with the scope of the beneficiary of a trust treated as Reportable Person of a trust that is a Financial Institution.

(20) For the purposes of the Common Reporting Standard, passive income would generally be considered to include the portion of gross income that consists of—

- (a) dividends;
- (b) interest;
- (c) income equivalent to interest;
- (d) rents and royalties, other than rents and royalties derived in the active conduct of a business conducted, at least in part, by employees of the NFE;
- (e) annuities;
- (f) the excess of gains over losses from the sale or exchange of Financial Assets that gives rise to the passive income described previously;
- (g) the excess of gains over losses from transactions (including futures, forwards, options, and similar transactions) in any Financial Assets;
- (h) the excess of foreign currency gains over foreign currency losses;
- (i) net income from swaps; or
- (j) amounts received under Cash Value Insurance Contracts,

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

(21) The Minister shall on, or as soon as is practicable after, 30 April 2017 and for every following year on, or as soon as is practicable after, 31 January publish by notice in the Gazette a list of Reportable Jurisdictions as at 31 December of the previous calendar year and, if applicable, the relevant reporting period(s) in respect of the jurisdictions

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included in the list of Reportable Jurisdictions for the purposes of the Common Reporting Standard; and notwithstanding the foregoing, for the purposes of the list of Reportable Jurisdictions published in 2017 the Minister may include any jurisdiction which the Minister has determined, in his sole discretion, is of major significance to Bermuda and which is expected to enter into a Qualifying Competent Authority Agreement with Bermuda prior to, or by, June 2017.

[Regulation 4 paragraph (4) amended, paragraph (14) amended, paragraph (15) revoked and paragraph (18A) inserted by BR 85 / 2017 reg. 3 effective 18 August 2017]

Obligation to notify

5 (1) Each Reporting Financial Institution shall give the Minister—

- (a) a notice (an “information notice”) stating the required information about the Reporting Financial Institution on or before—
 - (i) 14 July 2017; or
 - (ii) if an entity becomes a Reporting Financial Institution after that date, the next date of the 30 April after the entity became a Reporting Financial Institution; and
- (b) if any of the required information so notified changes, a notice stating details of the change (a “change notice”).

(2) An information notice or change notice shall be given electronically in such form and manner as the Minister shall determine by—

- (a) posting on an official website, for the information of Reporting Financial Institutions generally; or
- (b) stating in a notice given to any particular Reporting Financial Institution in question.

Obligation to make a return

6 (1) Each Reporting Financial Institution shall, for each calendar year from and including 2016, make a return to the Minister in respect of each Reportable Account maintained by the institution during the relevant calendar year setting out the information required to be reported under the Common Reporting Standard on or before the date specified in paragraph (4).

(2) Notwithstanding paragraph (1), if during the calendar year in question the Reporting Financial Institution maintains no Reportable Accounts, the Reporting Financial Institution is not required to file a return but may, at the Reporting Financial Institution’s own option, do so in accordance with these Regulations.

(3) The first reporting year for the purposes of the Common Reporting Standard is the calendar year 2016.

(4) A Reporting Financial Institution shall make a return on or before 30 August 2017 for the 2016 calendar year and, for every following year, on or before 31 May of the year following the calendar year to which the return relates.

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(5) A Reporting Financial Institution shall make returns setting out the information specified in the Common Reporting Standard in such form and manner as the Minister shall determine.

(6) The Minister shall notify Reporting Financial Institutions of the form and manner of making returns by—

- (a) a post on an official website, for the information of Reporting Financial Institutions generally; or
- (b) a notice given to any particular Reporting Financial Institution in question.

(7) Unless the contrary is proved, the Minister shall assume that a return accepted by the electronic portal—

- (a) has been made as required under paragraph (6); or
- (b) was made—
 - (i) when the return was accepted by the electronic portal;
 - (ii) by whoever made the return by using the electronic portal; and
 - (iii) with the authority of the Reporting Financial Institution on whose behalf the return purports to have been made.

(8) Any return received by the Minister in 2017 with respect to the 'Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Bermuda to Improve International Tax Compliance' dated 25 November 2013 will be sent by the Minister to Her Majesty's Revenue and Customs.

Use of service providers

7 (1) As referred to in Section II paragraph D of the Common Reporting Standard, a Reporting Financial Institution may use service providers to fulfil the reporting and due diligence obligations imposed on such Reporting Financial Institution, but in such cases the obligations continue to be the obligations and the responsibility of the Reporting Financial Institution.

(2) If a Reporting Financial Institution utilises service providers, the Reporting Financial Institution shall ensure that the Reporting Financial Institution continues to have access to and is able to produce to the Minister records and Documentary Evidence used to identify and report on Reportable Accounts.

(3) The Reporting Financial Institution is responsible for any failure of the person appointed under paragraph (1) to satisfy the Reporting Financial Institution's obligations under the Common Reporting Standard.

Minister's monitoring function and measures

8 (1) The Minister may, by notice given to a Reporting Financial Institution, require the Reporting Financial Institution—

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- (a) within a time specified by the Minister, to provide to the Minister information, including a copy of a relevant book, document or other record, or any electronically stored information; or
- (b) at a time specified by the Minister, to make available to the Minister for inspection, a book, document or other record, or any electronically stored information,

that is in the Reporting Financial Institution's possession or under its control that the Minister reasonably requires to decide whether or not information the institution gave the Minister was accurate.

(2) If information the Minister wants, or wants to inspect, is outside Bermuda and the Minister requires the Reporting Financial Institution to bring the information to Bermuda, the Minister shall specify a time that will enable the Reporting Financial Institution to bring the information to Bermuda and the Reporting Financial Institution shall comply with the requirement of the Minister.

Anti-avoidance

9 If a person enters into any arrangement, the main purpose or one of the main purposes of which is to avoid any obligation under these Regulations, the arrangement is deemed not to have been entered into by the person and these Regulations are to have effect as if the arrangement had never been in existence.

PART 3

OFFENCES

Offence relating to false self-certifications

10 (1) A person commits an offence, if—

- (a) that person makes a self-certification that is false in any material particular for the Common Reporting Standard; and
- (b) a Reporting Financial Institution is given the self-certification for any purpose for which the self-certification was made or purports to have been made.

(2) For paragraph (1), it does not matter that—

- (a) the self-certification was made outside Bermuda;
- (b) the person did not know, or had no reason to know, that the self-certification was false; or
- (c) the self-certification was given to the institution by someone else.

(3) In this regulation—

“makes” means to sign or otherwise positively affirm; and

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“self-certification” means information, in whatever form, that performs or purports to perform the purpose of a self-certification under the Common Reporting Standard.

Offence to contravene Part 2

11 A Reporting Financial Institution commits an offence if it contravenes any regulation in Part 2 of these Regulations.

Tampering offence

12 A person commits an offence if the person—

- (a) alters, destroys, mutilates, defaces, hides or removes information in a way that causes the person or anyone else to contravene these Regulations in relation to the information; or
- (b) authorizes, advises or counsels someone else to contravene paragraph (a).

Hindering offence

13 A person commits an offence if the person hinders the Minister in performing a function under these Regulations or the Act concerning the Common Reporting Standard.

Reasonable excuse defence

14 (1) It is a defence to a proceeding for an offence against these Regulations for the defendant to prove that the defendant had a reasonable excuse.

(2) However, neither insufficiency of funds nor reliance on an agent appointed under regulation 7 (or anyone else) is a reasonable excuse.

(3) If a defendant had a reasonable excuse for committing an offence but the excuse has ceased, the defendant is to be treated as having continued to have the excuse if the offence is remedied without unreasonable delay after the excuse ceased.

Punishment for offences under these Regulations

15 A person who commits an offence under these Regulations is liable on summary conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.

PART 4

PENALTIES

Civil penalty not to apply in case of conviction

16 (1) When a person is convicted of an offence under Part 3, such person shall not also be liable to a civil penalty imposed under this Part in relation to the same matter.

(2) When a person is liable for a civil penalty imposed under this Part, such person shall not also be charged with an offence under Part 3 in relation to the same matter.

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(3) Any civil penalty payable under this Part may be recovered by the Accountant General in the Supreme Court or in a court of summary jurisdiction as a civil debt.

[Regulation 16(1) amended by BR 85 / 2017 reg. 4 effective 18 August 2017]

Penalty for contravention or failure to comply with Section 4A(1B) or (1C) of Act

17 A person is liable to a civil penalty not exceeding \$5,000 if that person contravenes or fails to comply with section 4A(1B) or (1C) of the Act.

Penalty for false self-certifications

17A (1) A person is liable to a civil penalty not exceeding \$50,000 if—

- (a) that person makes a self-certification that is false in any material particular for the Common Reporting Standard; and
- (b) a Reporting Financial Institution is given the self-certification for any purpose for which the self-certification was made or purports to have been made.

(2) Paragraphs (2) and (3) of regulation 10 apply, with the necessary modifications, for the purposes of this regulation.

[Regulation 17A inserted by BR 85 / 2017 reg. 5 effective 18 August 2017]

Penalty for failure to comply with Regulations

18 A person is liable to a civil penalty of \$4,000 if that person fails to comply with any obligation under these Regulations.

Daily default penalty

19 Any person who fails to pay the civil penalty imposed under this Part shall be liable to a further penalty of an amount not exceeding \$200 for each day during which the first penalty remains unpaid.

Penalties for inaccurate information

20 (1) A person is liable to a civil penalty not exceeding \$5,000, if—

- (a) in complying with an obligation under Regulation 6 the person provides inaccurate information; and
- (b) condition A, B or C is met.

(2) Condition A is that the inaccuracy is—

- (a) due to a failure to comply with the due diligence requirements in Part 2 of these Regulations; or
- (b) deliberate on the part of the person.

(3) Condition B is that the person knows of the inaccuracy at the time the information is provided but does not inform the Minister at that time.

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(4) Condition C is that the person—

- discovers the inaccuracy after the information is provided to the Minister; and
- fails to take reasonable steps to inform the Minister.

Matters to be disregarded in relation to liability to penalties

21 (1) Liability to a civil penalty under this Part does not arise if there is a reasonable excuse for the contravention, failure to comply or provision of inaccurate information.

(2) For the purposes of this Regulation, neither of the following is a reasonable excuse—

- that there is an insufficiency of funds to do something; or
- that a person relies upon another person to do something.

(3) If a person had a reasonable excuse for a failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Imposition of penalties

22 (1) If a person becomes liable to a civil penalty under this Part, the Minister may impose the penalty.

(2) If the Minister intends to impose a civil penalty, the Minister must notify the person of his intention and the notice must specify—

- the Minister's reasons for holding the person liable to a civil penalty; and
- a reasonable period (which may not be less than 14 days) within which the person to whom it is given may make representations to the Minister,

and where such representations are made, the Minister shall take them into account in deciding whether to impose the penalty.

(3) A penalty under regulation 17, 18 or 19 may only be imposed within the period of twelve months beginning with the date on which the person became liable to the penalty.

(4) A penalty under regulation 20 may only be imposed—

- within the period of twelve months beginning with the date on which the inaccuracy first came to the attention of the Minister; and
- within the period of six years beginning with the date on which the person became liable to the penalty.

Right of appeal

23 (1) A person upon whom a civil penalty is imposed may, subject to this Regulation, appeal against it to the Supreme Court, pursuant to Order 55 of the Rules of the Supreme Court 1985.

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(2) An appeal under this regulation may be made on questions of law or fact or both, and the Supreme Court may affirm or reverse the penalty or substitute its own penalty for that of the Minister.

(3) A person upon whom a civil penalty is imposed may appeal it on the ground that liability to a penalty does not arise.

(4) A person upon whom a civil penalty is imposed may appeal against the amount imposed by the Minister.

(5) For the avoidance of doubt, this Regulation does not limit or otherwise affect any obligation of the person or Reporting Financial Institution under these Regulations.

Made this 19th day of April 2017

Minister of Finance

[Amended by:

BR 85 / 2017]