

CRS GUIDANCE AND TRUSTS: NOTABLE MENTIONS

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Hot on the heels of Bermuda's Common Reporting Standard (**CRS**) Regulations, Bermuda has issued its CRS Guidance and a list of reportable jurisdictions.

Bermuda Reporting Financial Institutions (**RFI**) must report to the Bermuda Monetary Authority (**BMA**) by 31 August 2017. The BMA will in turn automatically exchange information with reportable jurisdictions during September, 2017.

The Guidance is not law but aims to facilitate compliance with Bermuda's CRS law. Here are some notable mentions on the Guidance from a trust perspective.

The Guidance confirms that Bermuda resident RFIs must notify the BMA by way of an information report by 14 July 2017. Notification is a one-off process. Thereafter, financial institutions must notify the BMA by 30 April following the reportable period in which the financial institution becomes an RFI.

Financial institutions that do not maintain financial accounts have no reporting obligations. RFIs with no reportable accounts must nevertheless complete the notification requirement. Most Bermuda registered pension funds will not be RFIs. Certain other pension funds must submit an annual declaration to the BMA in order not to be classified as an RFI. Otherwise, unlike certain other jurisdictions, Bermuda's non-reporting financial institutions are not required to notify.

Trusts are generally classified as financial institutions because they satisfy a financial assets test and all or part of the trust assets are managed by a financial institution. Significantly, under the Guidance, a trust would not satisfy the so called "managed by" test, notwithstanding that an RFI may be the trustee of the trust, if the right

to direct investments is reserved to the settlor or granted to an individual investment manager or an individual managing trustee under section 30A of Bermuda's Trustee Act. In some cases, this may be considered advantageous by persons considering forming a trust in Bermuda.

Trusts will generally be classified as either financial institutions or passive Non-Financial Entities (**NFEs**) under CRS. RFI trustees of financial institution trusts are required to report on the reportable account-holders of such trusts. NFEs themselves do not have notification or reporting obligations under CRS. RFIs with accounts held by passive NFEs are required to report on the passive NFEs' reportable controlling persons. Such persons are the natural persons (including trustees, protectors, settlors and beneficiaries) who exercise control over an entity. For beneficiaries, on a risk based approach each person owning more than 25 per cent of an entity would be a controlling person.

The Guidance permits RFIs to align the scope of beneficiaries treated as controlling persons of passive NFE trusts with the scope of the beneficiaries treated as account-holders of financial institution trusts. Consequently, provided the RFI has appropriate procedures to identify such distributions during a reporting period, RFIs with accounts held by passive NFE trusts are required to report discretionary beneficiaries as controlling persons only for reporting periods during which the beneficiaries receive distributions.

The Guidance provides that a licensed trust company acting as trustee of a financial institution trust is not an equity interest holder as such trustees do not have an economic interest in the trust. For a passive NFE trust, the Guidance provides that trustees who are natural persons are controlling persons and licensed trust company trustees would not be reported as controlling persons.

A protector may not have an economic interest in a trust. The Guidance does not expressly indicate whether a natural person who is a protector of a financial institution trust is always reportable if resident in a reportable jurisdiction, irrespective of whether such protector is also the settlor or a beneficiary of the trust. The "OECD FAQ" indicates that natural persons who are protectors of financial institution trusts or passive NFE trusts are always reportable if resident in a CRS reportable jurisdiction. However, the OECD FAQ is not binding as law and has been criticised as being inconsistent with the CRS itself on this point.

The Guidance confirms that managed investment entities resident in non-reporting jurisdictions (such as the US) should be classified as passive NFEs.

Underlying companies can be covered by the trustee documented trust category under the CRS thereby making the RFI trustee responsible for reporting for all Bermuda financial institutions in the structure.

Cash is a financial asset for the purpose of the Guidance.

Redaction of reportable information may be possible on human rights grounds provided the BMA accepts that the redaction is appropriate.

The Bermuda CRS reporting scheme will be the published CRS XML Schema that is available on the OECD AEOI Portal. The BMA will shortly make available an electronic portal for CRS notification and reporting, and will also issue a user guide to assist RFIs with the process of CRS notification and reporting.

The BMA will annually publish in the Gazette a list of reportable jurisdictions as at 31 December of the previous year. Bermuda intends to exchange information under the CRS with jurisdictions that have adequate measures to ensure certain confidentiality and data safeguards are met.

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