# Further Guidance on Performing Obligations under "The Common Reporting Standard and the Due Diligence Procedures for Financial Account Information"

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To ensure the effectiveness of implementation of the Automatic Exchange of Information (AEOI) mechanism, Reporting Financial Institutions (RFIs) are required to fulfill the reporting and due diligence obligations. Pursuant to Law no.5/2017 "Legal Regime for the Exchange of Tax Information" amended by Law no.1/2022 and Law no.21/2019, and reference to the advice and information published by the Organization of Economic Cooperation and Development (OECD), the content below intends to further elaborate the requirements of Common Reporting Standard (CRS). RFIs should take into consideration in practice to comply with the CRS requirements.

While performing the due diligence obligations, Financial Institutions (FIs) are obliged to make reference to the Commentaries to the CRS, CRS Implementation Handbook and CRS-related Frequently Asked Questions published by the OECD, as well as refer to the materials published by the OECD on the Automatic Exchange Portal[1].

## 1. Self-certification

### 1.1. Is self-certification compulsory for New Accounts?

In general, an RFI with which a customer may open an account, regardless of Individual Account or Entity Account, must obtain a self-certification on an account-by-account basis.

However, an RFI may rely upon the self-certification furnished by a customer for another account if both accounts are treated as a single account. Nevertheless, an RFI may not rely on a self-certification and Documentary Evidence if the RFI knows or has reason to know that the self-certification or Documentary Evidence is incorrect or unreliable.

For New Entity Account, unless an RFI may first reasonably determine based on information in its possession or that is publicly available, that the Account Holder is not a Reportable Person, a self-certification of the New Entity Account must be obtained.

[1] https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

The collection of a self-certification is part of the due diligence procedures for New Accounts. However, any Financial Account of an Account Holder, regardless of the date such Financial Account was opened, is also considered to be Preexisting Account[2] provided that all four prerequisites set forth in subparagraph C(9) of Article VIII of the "The Common Reporting Standard and the Due Diligence Procedures for Financial Account Information" (hereinafter referred to as "Instructions" ) are met. As a result, the due diligence procedures for such accounts may be performed with accordance to the requirements for Preexisting Accounts.

### 1.2. Validity of Self-certification

A self-certification is valid only if it is signed (or otherwise positively affirmed) by the Account Holder, the person with authority to sign for the Account Holder (in the case of Entity Account) or the Controlling Person, it is dated at the latest at the date of receipt, and it contains the information of the Account Holder or Controlling Person as required. The form or manner of a self-certification does not affect its validity. Nevertheless, the self-certification must abide by the requirements stated in paragraphs 7 through 16 of the Commentary[3] on Section IV for it to remain valid.

A self-certification remains valid unless the RFI knows, or has reason to know, that the original self-certification is incorrect or unreliable. This might be the case either at the time a New Account is opened by an existing customer, or as a result of a change of circumstances of the Account Holder. Where the original self-certification becomes incorrect or unreliable, the RFI cannot rely on the original self-certification and must obtain a valid self-certification or a reasonable explanation and documentation.

### 1.3. Reliance on Self-certification and Documentary Evidence

In general, an RFI has reason to know that a self-certification or Documentary Evidence is unreliable or incorrect if:

- its knowledge of relevant facts or statements contained in the self-certification or other documentation, including the knowledge of the relevant relationship managers, if any, is such that a reasonably prudent person in the position of the

[2] For determining a "single Financial Account" among Preexisting Accounts, refer to subparagraph (b)(ii) on page 182 of The Commentary on "Common Reporting Standard and Due Diligence Procedures for Financial Account Information" Second Edition published by the OECD.

[3] Refer to pages 128-131 of The Commentary on "Common Reporting Standard and Due Diligence Procedures for Financial Account Information" Second Edition published by the OECD.

RFI would question the claim being made; or

- there is information in the documentation or in the RFI 's account files that conflicts with the customer's claim regarding its status.

### 1.3.1. Examples of standards of knowledge applicable to Self-certifications

An RFI has reason to know that a self-certification provided by a customer is unreliable or incorrect if:

- the self-certification is incomplete with respect to any item on the self-certification that is relevant to the claims made by the customer;
- the self-certification contains any information that is inconsistent with the customer's claim; or
- the RFI has other account information that is inconsistent with the customer's claim.

### 1.3.2. Examples of standards of knowledge applicable to Documentary Evidence

1) An RFI may not rely on Documentary Evidence provided by a customer if the Documentary Evidence does not reasonably establish the identity of the person presenting the Documentary Evidence. For example, Documentary Evidence is not reliable if it is provided in person by a customer and the photograph or signature on the Documentary Evidence does not match the appearance or signature of the person presenting the document.

2) An RFI may not rely on Documentary Evidence if:
   - the Documentary Evidence contains information that is inconsistent with the customer's claim as to its status;
   - the RFI has other account information that is inconsistent with the customer's status; or
   - the Documentary Evidence lacks information necessary to establish the customer's status.

## 2. Documentation and record-keeping

Any evidence relied upon and any records of the steps undertaken by FIs during the information collection procedures shall be retained to support the determination of an Account Holder's status for a period of five years beginning from the end of the year in which the RFIs must report the information required.

Documentary Evidence retained by an RFI does not have to be the original and may

be a certified copy, a photocopy or, at least, a notation of the type of documentation reviewed, the date the documentation was reviewed, and the document's identification number (if any).

Records can be retained as originals or photocopies and can exist in paper or electronic format. Records that are retained electronically should be in an electronically readable format. FIs using electronic business systems should ensure that sufficient detail is captured and retrievable. Records obtained or created in connection with a reporting obligation, such as self-certifications and Documentary Evidence, must be available to assess the validity of the reporting system. All retained records must be clearly labeled and stored in a secure environment and all records must be made available on request to Financial Services Bureau (DSF) for verification of proper identification of Reportable Account.

Records of the steps undertaken for the performance of reporting and due diligence procedures should be kept for compliance verification. For example, regarding reasonable efforts to obtain a Tax Identification Number (TIN) with respect to Preexisting Accounts, where a procedural manual describing appropriate "reasonable efforts" is in place and there is also evidence (records such as backup files, date of handling and responsible personnel) as to how those policies and procedures are followed, such evidence can be regarded as a record of the steps undertaken.

If an FI contracts out its record-keeping and reporting obligations to a third-party service provider – the compliance obligations remain on the FI. The FI is responsible to provide the required information to DSF in an electronically readable format on request.

## 3. Avoidance of CRS circumvention

### 3.1. Anti-avoidance rule

Law no. 5/2017 "Legal Regime for the Exchange of Tax Information" has been amended to address the circumvention of the reporting requirements and the due diligence procedures. Where any FIs, their agents and staff, or any other persons engages in a transaction or arrangement where the intention, or one of the intentions, is to circumvent an obligation under the "Instructions", the circumventing transactions or arrangements are considered null and void for the purpose of information exchange and Instructions' implementation and do not hinder the implementation of the "Instructions". The examples of attempting to circumvent the CRS include but are not limited to the followings:

*Example 1 - Shift Maintenance of an Account*

An RFI advises a customer to maintain an account with a Related Entity in a non-Participating Jurisdiction that enables the RFI to avoid reporting while offering to provide services and retain customer relations as if the account was maintained by the RFI itself. In such a case, the RFI should be considered to maintain the account and have the resulting reporting and due diligence requirements.

*Example 2 - Year-end amounts*

FIs, individuals, entities or intermediaries manipulate year-end amounts, such as account balances, to avoid reporting or being reported upon.

*Example 3 - Park Money with Qualified Credit Card Issuers*

Individuals or entities park balances from other Reportable Accounts with qualified credit card issuers for a short period at the end of the year to avoid reporting.

*Example 4 - Electronic records and computerised systems*

An RFI deliberately does not create any electronic records (such that an electronic record search would not yield any results) or maintains computerised systems artificially dissociated (to avoid the account aggregation rules).

### 3.2. Circumvention schemes brought under attention

The paragraphs below intend to draw RFIs' attention to the key risks identified to circumvent CRS reporting.

#### 3.2.1. Citizenship / Residence by Investment (CBI/RBI) schemes

While citizenship and residence by investment (CBI/RBI) schemes allow individuals to obtain citizenship or residence rights through local investments or against a flat fee for perfectly legitimate reasons, they can also be potentially misused to hide their assets offshore by escaping reporting under CRS. In particular, identity cards and other documentation obtained through CBI/RBI schemes can potentially be misused or abused to misrepresent an individual's jurisdiction(s) of tax residence and to endanger the proper operation of the CRS due diligence procedures.

OECD has published a list of potential high-risk CBI/RBI schemes that can be misused to misrepresent an individual's jurisdiction(s) of tax residence and undermine the effective implementation of the CRS due diligence procedures. In order to prevent such situation from happening, RFIs should take into account the OECD's

recommended actions when performing their CRS due diligence procedures to determine the tax residency(ies) of an Account Holder or Controlling Person.

Further detail is available at:
https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/

### 3.2.2. Misuse and abuse of the classification of Active Non-Financial Entities (Active NFE)

It is reported that misclassification and abuse of the Active NFE categorization are exploited to avoid the identification and reporting of information on Controlling Persons. By way of example, with regard to "Active NFEs by reason of income and assets" (Subparagraph D(9) of Article VIII of the "Instructions"), the provision requires that both the "income test" (less than 50% of the gross income is passive income) and the "assets test" (less than 50% of the assets held are assets that produce or are held for the production of passive income) should be met to qualify as an Active NFE. Hence, both abovementioned criteria should be fulfilled for correct classification.

### 3.2.3. CRS avoidance scheme on "Zero Cash Value Insurance Policies "or "Irrevocable Insurance Policies"

It is reported that Insurance Companies providing CRS avoidance schemes using "Zero Cash Value Insurance Policies" or "Irrevocable Insurance Policies" intended to ensure that a nil value is reported. Meanwhile the insurers facilitate their policyholders to gain access to the value of the policy's assets via third-party loans. This would be a misinterpretation of the term "Cash Value" under the AEOI Standard as, according to definition of "Cash Value" (Subparagraph C(8) of Article VIII of the "Instructions"), it is the greater of (i) the amount that the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan), and (ii) the amount the policyholder can borrow under or with regard to the contract. Therefore, the amount that can be borrowed in relation to the contract should be treated as the "Cash Value" and reported accordingly.

Information for further clarification of irrevocable insurance policies being in scope of CRS can be found at the CRS-related Frequently Asked Questions (FAQ) which updated by OECD in February 2019. The answer to Question 12 of Part C of Section

VIII[4] states that persons renouncing the right to access the Cash Value and the right to change the beneficiaries are to be considered Account Holders of the Cash Value Insurance Contract in all instances, unless they have finally, fully and irrevocably renounced such rights. The notion reveals that Irrevocable Insurance Policies are considered Cash Value Insurance Contracts.

To comply with the foregoing, FIs have to take into account the requirements referred to above to ensure the proper adoption of the definitions of "Cash Value Insurance Contract" and "Cash Value" while complying with their CRS obligations.

## 4. CRS obligation with respect to Trustee-Documented Trust (TDT)

The Commentary on CRS provides for a trust that is an FI (e.g. because it is an Investment Entity) is a Non-RFI, to the extent that the trustee of the trust is an RFI and reports all information required with respect to all Reportable Accounts of the trust.

Please note that the result for RFIs to use a service provider to fulfill the reporting and due diligence obligations is different from this category. The reporting and due diligence obligations fulfilled by service providers remain the responsibility of the RFI, while the responsibility of those fulfilled by the trustee of a TDT is transferred by the trust to its trustee. This category does not modify, however, the time and manner of the reporting and due diligence obligations which remain the same as if they still were the responsibility of the trust. For example, the trustee must not report the information with respect to a Reportable Account of the TDT as if it were a Reportable Account of the trustee. The trustee must report such information as the TDT would have reported (e.g. to the same jurisdiction) and identify the TDT with respect to which it fulfills the reporting and due diligence obligations. This category of Non-RFI may also apply to a legal arrangement that is equivalent or similar to a trust, such as a fideicomiso.

## 5. Additional penalties for violation of the automatic exchange of financial account information

With the aim to tackle the non-compliance with the automatic exchange of financial account information, penalties for the following violations are introduced in the Amendment to Law no. 5/2017 – Legal Regime for the Exchange of Tax Information:

[4] Available at https://www.oecd.org/tax/exchange-of-tax-information/CRS-related-FAQs.pdf

(1) Circumvention or violation of the “Instructions”;
(2) Failure of financial institutions to obtain self-certification or relevant documents from clients for proving that they are foreign residents for tax purposes upon new financial accounts opening;
(3) Failure to keep records of the evidence and steps undertaken during the information collection procedures for a specified period.

The newly introduced penalties basically follow the administrative penalty system of the original law. According to the specific circumstances and severity of the violation, a fine ranging from MOP6,000 to MOP60,000 will be imposed on the offenders. Likewise, depending on the nature of the relevant administrative violation and its severity, a fine ranging from MOP4,000 to MOP40,000 will be imposed for the administrative violations for non-complying with the “Instructions”.

Non-compliance with the “Instructions” (Paragraph 2 of Article 14 of Amendment to Law no. 5/2017 - Legal Regime for the Exchange of Tax Information) may constitute the administrative violations referred to in Paragraph 1 of the same article at the same time. Thus, a clarifying provision that when the same fact constitutes simultaneously non-compliance with the “Instructions” and other administrative violations, the offenders will only be imposed with the severer penalty is added.

Moreover, concerning the specified period during which the same administrative violation being re-committed is considered “recidivism”, another determinant “*less than five years since the date of the last administrative violation*” is added to the originally specified period “*within a period of two years after the day when the administrative decision to impose sanctions has become unappealable*” for clarifying the definition of “recidivism”.