



## CHAPTER 11

### DUE DILIGENCE: PRE-EXISTING ENTITY ACCOUNTS

Pre-existing accounts are those in existence as at 31 December 2016 (if the financial institution is not a 2020-covered institution<sup>1)</sup>) or 31 December 2019 (if the financial institution is a 2020-covered institution). An entity for the purposes of AEOI regime can be a legal person or legal arrangement. An entity account covers accounts held by any person other than a natural person. Thus it covers accounts held by any entity that falls within the definition of company under the Companies Ordinance (Cap. 622) along with legal arrangements including partnerships and trusts.

2. Under the AEOI regime, an entity is either a financial institution or an NFE.

#### **Threshold exemption**

3. Unless election is made by a reporting financial institution, a pre-existing entity account with an aggregate account balance or value that does not exceed \$1.95 million as at 31 December (or the last day of other appropriate reporting period) of the second calendar year before the reporting year is not required to be reviewed, identified, or reported as a reportable account until the aggregate balance or value exceeds \$1.95 million as at the last day of any subsequent calendar year or reporting period.

#### **Reportable accounts**

4. A pre-existing entity account is a reportable account where the account is identified as held by one or more entities that are reportable persons or a passive NFE with one or more controlling persons that are reportable persons.

5. For example, XYZ Partnership is a passive NFE resident in Hong Kong. It has three individuals who are identified as controlling persons of the partnership. Two of them are Hong Kong tax residents but the third is a tax resident of France (which is a reportable jurisdiction). As a result, any accounts held by the partnership with a reporting financial institution are reportable accounts (by virtue of the entity having a controlling person that is a reportable person).

#### ***Available information***

6. Where the reporting financial institution has reviewed information maintained for regulatory and customer relationship purposes (including information collected and

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<sup>1)</sup> Definition of “2020-covered institution” can be found in Chapter 3 (Reporting Financial Institutions) of this Guidance.



maintained pursuant to AML/KYC procedures) and has indications that the account holder is a resident of a reportable jurisdiction, the account must be treated as a reportable account unless the reporting financial institution obtains a self-certification from the account holder, or reasonably determines, based on information in its possession or that is publicly available, that the account holder is not a reportable person.

7. Such information includes, but is not limited to:
  - (a) a place of incorporation or organization in a reportable jurisdiction;
  - (b) an address in a reportable jurisdiction; or
  - (c) where the entity is a trust, an address of one or more of the trustees in a reportable jurisdiction.
8. Such information may also include the following:
  - (a) information published by an authorized government body of a jurisdiction, e.g. the list of Foreign Financial Institutions published by the US tax administration;
  - (b) information in a publicly accessible register maintained or authorized by an authorized government body of a jurisdiction;
  - (c) information disclosed on an established securities market; and
  - (d) information previously recorded in the files of the financial institution.
9. Where the reporting financial institution relies on such information, it must retain a notation of the type of information reviewed and the date the review was carried out.
10. As the definition of entity goes beyond corporate structures to include fiscally transparent vehicles such as trusts and partnerships, the address of the entity should be interpreted widely to include the registered office, principal office and/or place of effective management.
11. The existence of a permanent establishment (including a branch) in a reportable jurisdiction is not, in isolation, an indication of residence for this purpose.
12. Although there is no exemption from a paper record search for pre-existing entity accounts, such a search is not required in areas where all the information is electronically searchable (for example, information held for AML/KYC purposes).



### ***Self-certification***

13. A self-certification for an entity must be signed (or otherwise positively affirmed) by the person with authority to sign on behalf of the entity. This includes:

- (a) an officer or director of a corporate entity;
- (b) a partner of a partnership;
- (c) a trustee of a trust;
- (d) any person holding an equivalent title to any of the above; and
- (e) any other person with written authorization from the entity to sign documentation on behalf of the entity.

14. The self-certification must be dated at the latest at the date of receipt by the reporting financial institution and must contain the following information in respect of the entity:

- (a) the name;
- (b) the address;
- (c) the jurisdiction(s) of residence; and
- (d) the TIN with respect to each jurisdiction of residence.

15. The reporting financial institution may also request the entity account holder to state its status in the self-certification as either a financial institution or an NFE. When requesting this information from an account holder, the reporting financial institution is expected to provide the account holder with sufficient information to enable it to determine its status. Reporting financial institutions may produce their own guidance for this purpose or they may make reference to the IRD's Guidance for Financial Institutions or the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters.

16. The requirements for the validity of such a self-certification are the same as for those for self-certification of individual accounts.

### ***Financial institution***

17. If the entity account holder falls within the definition of a financial institution, no further review, identification or reporting will normally be required. The exception



is where the entity account holder is a passive NFE that:

- (a) is an investment entity as described in paragraph (e) of the definition of investment entity (a managed investment entity) (see Chapter 3 of this Guidance);
- (b) is not a participating jurisdiction financial institution; and
- (c) is not a financial institution in Hong Kong.

18. When seeking a self-certification from an entity, the categories that may be recorded for a financial institution are:

- (a) managed investment entity; and
- (b) financial institution other than (a) above.

### **NFE**

19. If the entity account holder falls within the definition of an NFE, then the information to be reported depends on whether the entity is an active NFE or a passive NFE.

20. When a reporting financial institution has determined that an account holder is an NFE, it must carry out review procedures to determine:

- (a) whether the account holder is an active NFE or passive NFE; and
- (b) if the account holder is a passive NFE, the controlling persons of that passive NFE and their jurisdiction of residence.

21. Definition of “Controlling Persons” can be found in Chapter 18 (Miscellaneous) of this Guidance.

### ***Determining whether the account holder is a passive NFE***

22. For the purpose of determining whether the account holder is a passive NFE, the reporting financial institution must obtain and rely on a self-certification from the account holder to establish the status of the account holder unless it has information in its possession, or that is publicly available, based on which it can reasonably determine that the account holder is an active NFE or a financial institution (other than a managed investment entity resident in a non-participating jurisdiction). If the reporting financial institution cannot determine as an active NFE or a financial institution, then the reporting financial institution must presume the account holder to be a passive NFE.



### ***Identifying controlling persons***

23. To identify the controlling persons, the reporting financial institution may rely on information collected and maintained pursuant to AML/KYC procedures.

### ***Determining residence of the controlling persons of passive NFE***

24. If the aggregate account balance or value of the pre-existing entity account does not exceed an amount equivalent to \$7.8 million, the reporting financial institution may rely on information collected and maintained pursuant to AML/KYC procedures to determine whether the controlling person is a reportable person or it may choose to obtain a self-certification from the account holder or the controlling person.

25. If the aggregate account balance or value of the pre-existing entity account exceeds an amount equivalent to \$7.8 million, the reporting financial institution must obtain a self-certification from either the account holder or the controlling person.

26. The self-certification requirements are the same as for individual accounts.

27. If a self-certification is required but is not obtained, the reporting financial institution must rely on the electronic record search and paper record search (if applicable) for pre-existing individual accounts to determine if there are indicia present that can be used to determine the reportable status of the controlling person. If none is present in its records, no further action is needed to be taken by the reporting financial institution unless and until there is a change of circumstance that results in one or more indicia with respect to the controlling person being associated with the account.

28. It is acknowledged that there is difference between the wording of the CRS and its Commentary and Annex 5 (i.e. wider approach to CRS), on which section 9(2) of Division 3 of Part 5 in Schedule 17D is based. The OECD has expressed the view that the wider approach section is only an example of how this approach could be operated, whereas the CRS text is the binding minimum set of rules (i.e. electronic and paper record search) for translating the CRS.

### **Change in circumstances**

29. If there is a change in circumstances that causes the reporting financial institution to know or have reason to know that the self-certification or other documentation associated with the account is incorrect or unreliable, the reporting financial institution must re-determine the status of the account in accordance with the procedures described under Division 3 of Part 5 in Schedule 17D (i.e. to determine whether the entity is a reportable person; and to determine whether the entity is a passive NFE with one or more controlling persons that are reportable persons). In this case, the reporting financial institution must apply the following procedures by the later of the last day of



the relevant calendar year or other appropriate reporting period, or 90 days following the notice or discovery of the change in circumstances:

- (a) with respect to the determination whether the account holder is a reportable person: a reporting financial institution 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 such explanation and documentation). If the reporting financial institution 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 a reportable person with respect to both jurisdictions.
- (b) with respect to the determination whether the account holder is a financial institution, active NFE or passive NFE: a reporting financial institution must obtain additional documentation or a self-certification (as appropriate) to establish the status of the account holder as an active NFE or financial institution. If the reporting financial institution fails to do so, it must treat the account holder as a passive NFE.
- (c) with respect to the determination whether the controlling person of a passive NFE is a reportable person: a reporting financial institution must obtain either (i) a self-certification, or (ii) a reasonable explanation and documentation (as appropriate) supporting the reasonableness of a previously collected self-certification or documentation (and retain a copy or a notation of such explanation and documentation). If the reporting financial institution fails to either obtain a self-certification or confirm the reasonableness of the previously collected self-certification or documentation, it must rely on the indicia described under section 3(3) of Part 3 in Schedule 17D it has in its records for such controlling person to determine whether it is a reportable person.