

## **CHAPTER 3**

### **REPORTING FINANCIAL INSTITUTIONS**

The provisions in Part 8A of the IRO impose obligations on reporting financial institutions. Under the “wider approach” as authorized under section 50B(3), reporting financial institutions may apply the provisions in Part 8A to all account holders for identifying, maintaining and reporting information about the tax residence, of individuals and entities for whom they maintain financial accounts and to report it to the IRD to the extent that it is reportable under section 50C.

2. A reporting financial institution is any financial institution resident in Hong Kong (excluding any branch of the financial institution located outside Hong Kong), as well as any branch of a non-resident financial institution located in Hong Kong. However, the definition of reporting financial institution does not include a non-reporting financial institution (see Chapter 4 of this Guidance).

3. A financial institution is resident in Hong Kong if:

- (a) subject to paragraph 3(d) and where the financial institution is a company – it is incorporated in Hong Kong or, if incorporated outside Hong Kong, is normally managed or controlled in Hong Kong. For example, a Hong Kong incorporated subsidiary of a foreign banking group will be Hong Kong tax resident entity;
- (b) where the financial institution is a trust–
  - (i) it is constituted under the laws of Hong Kong;
  - (ii) if constituted outside Hong Kong, it is normally managed or controlled in Hong Kong; or
  - (iii) one or more of its trustees are resident in Hong Kong;
- (c) subject to paragraph 3(d) and where the financial institution is not a company or trust – it is constituted under the laws of Hong Kong or, if constituted outside Hong Kong, is normally managed or controlled in

Hong Kong; or

- (d) where the financial institution (other than a trust) is not subject to taxation as a resident in any territory–
  - (i) it is incorporated in Hong Kong or constituted under the laws of Hong Kong;
  - (ii) it has its place of management (including effective management) in Hong Kong; or
  - (iii) it is subject to financial supervision in Hong Kong.

4. A trustee is resident in Hong Kong if–

- (a) (where the trustee is an individual) the trustee ordinarily resides in Hong Kong or stays in Hong Kong for–
  - (i) more than 180 days during a year of assessment; or
  - (ii) more than 300 days in 2 consecutive years of assessment one of which is the relevant year of assessment;
- (b) (where the trustee is a company) the trustee–
  - (i) is incorporated in Hong Kong; or
  - (ii) (if incorporated outside Hong Kong) is normally managed or controlled in Hong Kong;
- (c) (where the trustee is any other entity) the trustee–
  - (i) is constituted under the laws of Hong Kong; or
  - (ii) (if constituted outside Hong Kong) is normally managed or controlled in Hong Kong.

5. If an entity (other than a trust) is dual resident, such that it is resident in Hong

Kong and also in another jurisdiction, it will still need to undertake the appropriate due diligence procedures and report any reportable accounts maintained in Hong Kong.

6. In the case of a trust, if one or more of the trustees are resident in Hong Kong, then the trust is resident in Hong Kong unless the trust is resident for tax purposes in another jurisdiction with which Hong Kong automatically exchanges financial account information and the trust reports details of reportable accounts to that jurisdiction.

7. Subsidiaries and branches of Hong Kong financial institutions that are located outside Hong Kong are not reporting financial institutions. However, where such subsidiaries and branches act as introducers of business to a Hong Kong financial institution resulting in the financial accounts being held and maintained by the Hong Kong reporting financial institution, then the reporting financial institution is required to undertake the appropriate due diligence procedures and report the details of the accounts to the IRD.

### **Financial institutions**

8. There are four categories of financial institution –

- (a) custodial institution;
- (b) depository institution;
- (c) investment entity; and
- (d) specified insurance company.

9. Each category of financial institution is determined by set criteria. Where an entity does not meet the definition of financial institution in any of the categories, then it is classified as an NFE.

### **Custodial institution**

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

11. In this context, a substantial portion is taken as being at least 20% of the entity's

gross income that is attributable to holding financial assets and providing related financial services in the shorter of –

- (a) the 3-year period that ends on 31 December or the final day of a non-calendar year accounting period; or
- (b) the period since it commenced business.

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

- (a) custody, account maintenance and transfer fees;
- (b) commissions and fees earned from executing and pricing securities transactions;
- (c) income earned from extending credit to customers;
- (d) income earned from contracts for differences and as the bid-ask spread of financial assets;
- (e) fees for providing financial advice;
- (f) fees for providing clearance and settlement services.

13. Where an entity has no operating history at the time its status as a custodial institution is being assessed, it is regarded as a custodial institution if it expects to meet the gross income threshold based on its anticipated functions, assets and employees. Consideration must be given to any purpose or function for which the entity is licensed or regulated (included those of any predecessor).

14. There may be circumstances where an entity holds financial assets for a customer where the income attributable to holding the financial assets or providing related financial services either belongs or is otherwise paid to a connected party such as another entity within the same group. This may be because the entity holds assets for a customer of a connected party, or simply that any consideration is paid to a connected party, either as an identifiable payment or as one element of a consolidated payment. In that case the attributable income should be taken account of when applying the 20%

test.

15. Where an entity holds financial assets that are the property of a connected person, for example a company may hold the financial assets of some or all members of the group to which it belongs, and no or nominal fees (i.e. less than those that would apply on a commercial basis) are paid for that service, consideration should be given to what would have been paid by an arm's length customer when applying the 20% test.

### ***Execution only broker***

16. An execution only broker that simply executes trading instructions or receives and transmits such instructions to another executing broker will not hold financial assets for the account of others so will not be a custodial institution. However, such a broker may be a financial institution if it falls with the definition of an investment entity.

### ***Clearing houses***

17. Subject to paragraphs 18 and 19 below, clearing houses providing securities clearing and settlement services would not be required to take up the due diligence and reporting obligations as a financial institution under Part 8A of the IRO, provided that they do not fall within the definition of financial institution.

18. Among the four recognized clearing houses in Hong Kong under Hong Kong Exchanges and Clearing Limited (HKEX) which is a recognized exchange controller, Hong Kong Securities Clearing Company Limited (HKSCC) provides central securities depository services to the securities market in Hong Kong which makes it a custodial institution if its gross income equals or exceeds the threshold of 20% (see paragraph 11 above). In the case where HKSCC is a custodial institution, it is responsible for undertaking due diligence and reporting obligations in respect of the Investor Participants, as defined in the General Rules of the Central Clearing and Settlement System (CCASS). Participants other than Investor Participants fall outside the scope of reportable financial accounts since they are financial institutions, and HKSCC is not required to conduct due diligence or undertake any reporting in connection with these accounts.

19. The other three clearing houses under the HKEX (namely HKFE Clearing Corporation Limited, The SEHK Options Clearing House Limited and OTC Clearing Hong Kong Limited) are engaged in securities and derivatives clearing and settlement.

In view of their activities as permitted by their respective rules and procedures, these three clearing houses do not fall within the definition of financial institution and are not required to conduct due diligence or undertake any reporting on their participants. The financial institutions, which are participants of the clearing houses, are responsible for undertaking the applicable due diligence and reporting obligations.

### ***Trust as a financial institution or an NFE***

20. Trusts are treated as entities. A trust can be either a financial institution or an NFE. Where a trust meets one of the definitions for being a financial institution, it is most likely to be an investment entity, but it may, alternatively, meet the requirements for being a custodial institution.

21. For example, shares held in trust may be in a custodial account and therefore subject to reporting by the trust as the custodial institution that maintains the account. This may be the case where an employee share scheme continues to hold financial assets, such as shares, for an employee after the shares have been granted.

22. Where an employee share scheme holds shares for the future benefit of employees, but the shares are not allocated, then under most circumstances this right to a future allocation would not fall to be a custodial account. Similarly, when shares are allocated and the trustee is directed to transfer the assets as soon as reasonably possible to the beneficiary, a broker, a custodian, etc., then the trust is not treated as maintaining a financial account for the duration of time it takes to complete the transfer.

23. Further guidance on trusts can be found at Chapter 17 of this Guidance.

### ***Fund nominees: distributors in the chain of legal ownership***

24. Distributors that hold legal title to assets on behalf of customers and are part of the legal chain of ownership of interests in CISs are financial institutions. In most cases they are custodial institutions because they are holding assets on behalf of others.

25. Fund nominees, fund intermediaries and fund platforms are nevertheless still financial institutions because they would otherwise be within the definition of investment entity. In this case the financial accounts are those maintained by the distributor, and the distributor will be responsible for ensuring it meets its obligations in respect of those accounts.

26. Fund nominees, fund intermediaries and fund platforms should be treated as custodial institutions unless specific factors indicate that their businesses are better characterised as falling within the definition of an investment entity. Normally, the primary business of a fund nominee, fund intermediary or fund platform is to hold financial assets for the account of others.

27. For the purpose of aggregating accounts to determine whether any pre-existing custodial accounts are high value accounts, a custodial institution needs to consider all the financial accounts held with them by each customer even though the underlying interests are in different CISs.

### **Depository institution**

28. A depository institution is an institution that accepts deposits in the ordinary course of a banking or similar business. This definition includes any authorized institution (a bank, a restricted licence bank or a deposit-taking company) as defined by section 2(1) of the Banking Ordinance (Cap. 155). In considering whether an entity is conducting banking or similar business, the actual activities that the entity carries out are determinative.

29. 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.

30. Entities that solely provide asset based finance services, such as a factoring or invoice discounting business, or that accept deposits from persons solely as collateral or security pursuant to a sale or lease of property, a loan secured by property or a similar financing arrangement, between such entity and the person making the deposit, are not depository institutions.

31. Entities that facilitate money transfers by instructing agents to transmit funds including the provision of merchant's payments accounts, but do not finance the transactions, are not considered to be engaged in banking or similar business as this is not seen as accepting deposits.

### **Investment entity**

32. An entity is an investment entity if it meets any of the following conditions:

- (a) a corporation licensed under the Securities and Futures Ordinance (Cap. 571) to carry out one or more of the following regulated activities –
  - (i) dealing in securities;
  - (ii) trading in futures contracts;
  - (iii) leveraged foreign exchange trading;
  - (iv) asset management;
- (b) an institution registered under the Securities and Futures Ordinance (Cap. 571) to carry out one or more of the following regulated activities –
  - (i) dealing in securities;
  - (ii) trading in futures contracts;
  - (iii) asset management;



- (c) a CIS authorized under the Securities and Futures Ordinance (Cap. 571);
- (d) an entity that primarily conducts as its business one or more of the following activities or operations for its customers –
  - (i) trading in –
    - (A) money market instruments, including cheques, bills, certificates of deposit, and derivatives;
    - (B) foreign exchange;
    - (C) exchange, interest rate and index instruments;
    - (D) transferable securities; or
    - (E) commodity futures;
  - (ii) individual and collective portfolio management;
  - (iii) otherwise investing, administering, or managing financial assets or money on behalf of other entity or individual; or

An entity is regarded as primarily conducting the above activities as a business if its gross income from conducting these activities is at least 50% of its total gross income during the shorter of –

- (i) the 3-year period that ends on 31 December or the final day of a non-calendar year accounting period; or
  - (ii) the period in which the entity has been in existence.
- (e) an entity that is managed by a custodial institution, a depository institution, a specified insurance company, or an entity mentioned in paragraphs (a), (b), (c) or (d); and whose gross income is primarily attributable to investing, reinvesting, or trading in financial assets (managed investment entity).

For paragraphs (d) and (e) above, the conditions that qualify an entity as an investment entity shall be interpreted in a manner consistent with similar language set forth in the definition of “financial institution” in the FATF Recommendations. The FATF Recommendations can be found at the link below:

<https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatfrecommendations.html>

33. An investment entity does not, however, include the following active NFE:
- (a) holding companies that are members of a non-financial group;
  - (b) start-up entities;
  - (c) entities that are liquidating or emerging from bankruptcy; or
  - (d) treasury centres that are members of a non-financial group.

Further details on active NFE can be found at Chapter 18 (Miscellaneous).

### ***Managed investment entity***

34. An entity is an investment entity if it is managed by a financial institution and meets the financial assets test as described in paragraph 37 below.

35. An entity is managed by a financial institution if that financial institution performs, either directly or through another service provider, any of the activities described in paragraph 32(d) above on behalf of the entity. An entity is not regarded as managed by a financial institution if that financial institution does not have discretionary authority to manage the entity's assets either in whole or in part.

36. An entity may be managed by a mix of other entities and individuals. If one of the entities so involved in the management of the entity is a financial institution within the meaning of section 50A of the IRO, then the entity meets the requirements for being managed by a financial institution.

37. An entity meets the financial assets test if its gross income is primarily attributable to investing, reinvesting or trading in financial assets. This is a similar test to that in paragraph 32(d) above requiring that at least 50% of its income is attributable to investing, reinvesting or trading in financial assets in the shorter of –

- (a) the 3-year period that ends on 31 December or the final day of a non-

calendar year accounting period; or

- (b) the period in which the entity has been in existence.

38. Certain types of entity can be complex and thus care must be taken when applying the definition of investment entity to them. Additional guidance is available for the following:

- (a) trusts;
- (b) charities;
- (c) partnerships;
- (d) personal investment companies; and
- (e) securitisation vehicles.

39. An entity would generally be considered to fall within one of the categories of investment entity if it functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buy-out fund or any similar investment vehicle established with an investment strategy of investing, reinvesting or trading in financial assets.

### ***Financial assets***

40. The definitions of custodial institution and investment entity make reference to “financial asset” which is defined in section 50A of the IRO to include:

- (a) any security (including share units of a stock in a corporation; partnership or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture, or other evidence of indebtedness);
- (b) partnership interest;
- (c) commodity;

- (d) swap (including interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, and similar agreements);
- (e) insurance contract or annuity contract; and
- (f) any interest (including a futures or forward contract or option) in any of the assets mentioned in paragraphs (a), (b), (c), (d) and (e),

but does not include a non-debt direct interest in real property.

41. The definition does not refer to assets of every kind, but it still intends to encompass any assets that may be held in an account maintained by a financial institution with the exception of a non-debt, direct interest in real property.

42. For example, a property fund, the gross income of which is primarily attributable to investing, reinvesting, or trading real property is not an investment entity (irrespective of whether it is professionally managed) because real property is not a financial asset. If, instead, an entity is holding an interest in another entity that directly holds real property, the interest held by the first-mentioned entity is a financial asset, and the gross income derived from that interest is to be taken into account to determine whether the entity meets the definition of investment entity.

43. Negotiable debt instruments that are traded on a regulated market or over-the-counter market and distributed and held through financial institutions, and shares or units in a real estate investment trust, would generally be considered financial assets.

### *Examples*

44. The following examples illustrate the application of paragraphs (d) and (e) of the definition of investment entity under paragraph 32 above:

- (a) **Investment advisor** – Investment Management Ltd provides advice on and discretionary management of securities held by a number of clients. The securities meet the definition for being financial assets. Almost 80% of the gross income of Investment Management Ltd for the last three years has come from providing such services. Investment Management Ltd primarily conducts a business of managing financial assets on behalf of

clients and is, therefore, an investment entity.

- (b) **Entity carrying on business managed by a financial institution** – Investment Fund-E primarily invests in equities on behalf of customers. Fund-E is managed by Invest Co Ltd, a financial institution. Fund-E was formed two years ago since when it has earned 90% of its income from these activities. Fund-E is an investment entity because it primarily conducts as a business one or more of the relevant activities or operations for or on behalf of a customer. It is not relevant that it is managed by a financial institution as it is an investment entity by virtue of its business activities.
- (c) **Entity managed by a financial institution** – Investment Partnership LLP is a vehicle set up to invest its members' contributions in financial assets. It invests in its own right and has no customers. The LLP is managed by Invest Co Ltd, a financial institution. The LLP has been investing for several years and its income is derived exclusively from its investment activities. As the LLP is managed by a financial institution and at least 50% of its income in the last three years is primarily attributable to investing, reinvesting or trading in financial assets it will be an investment entity.
- (d) **Entity managed by a foreign financial institution** – the facts are the same as in example (c) except that Investment Partnership LLP is managed by Invest Co GmbH, a German financial institution. The fact that the LLP is managed by a financial institution resident in another jurisdiction does not alter its status. It will be an investment entity, because it is managed by a financial institution and more than 50% of its gross income is primarily attributable to investing, reinvesting or trading in financial assets.
- (e) **Entity managed by an individual** – Ben, an individual, runs a business providing advice to clients on investments in financial assets and has discretionary authority to manage financial assets on behalf of clients. One of his clients is a company, PE Ltd that has earned more than 50% of its gross income in the last three years from investing, reinvesting and trading in financial assets. Ben primarily conducts investment-related activities on behalf of clients. Ben is not an investment entity because

he is an individual. PE Ltd, however, may be an investment entity if it primarily conducts as a business one or more of the relevant activities or operations for or on behalf of a customer. (Note: In practice, it is unlikely that such an entity would appoint an individual to manage its assets.)

- (f) **Family trust managed by an individual** - See Example (e) above. If Ben manages the assets of a family trust, the trust would not be an investment entity as it is not primarily conducting as a business one or more of the relevant activities or operations for or on behalf of a customer, and although its gross income is primarily attributable to investing, reinvesting, or trading in financial assets, it is not an entity that is managed by a financial institution (because Ben, as an individual, cannot be a financial institution). (Note: In practice, a trust holding assets on behalf of a family arrangement will typically appoint a financial institution to manage its assets but some family trusts may instead appoint a suitably qualified individual.)
- (g) **Family trust with a corporate trustee** – The gross income of Family Trust-ABC is primarily attributable to investing, reinvesting or trading in financial assets. The trust was set up on the advice of a law firm and that firm's own corporate trustee is the trustee of the trust. The corporate trustee acts for the law firm's clients without itself charging any fees to the clients. Even though the corporate trustee does not charge, it is a financial institution by virtue of being an investment entity. Its related entity (the law firm) is charging the clients for the corporate trustee's services of managing assets, the corporate trustee therefore primarily conducts as a business, for or on behalf of a customer, the prescribed activities. This in turn means that Family Trust-ABC is also an investment entity.

### ***Trust as an investment entity or a custodial institution***

45. Trusts are treated as entities for AEOI purposes.

46. Where a trust meets one of the definitions for being a financial institution, it is most likely to be an investment entity but it may, alternatively, meet the requirements to be a custodial institution. A trust is unlikely to be regarded as an investment entity by virtue of investing as a business because trusts generally do not carry on businesses

for or on behalf of customers. Trusts are more likely to be managed investment entities but must meet both the tests to be within this category of financial institution, that is, its gross income must be primarily derived from investing, reinvesting or trading in financial assets and it must be managed by a financial institution.

47. The test of being managed by a financial institution is met where the trust or its activities are being professionally managed. A trust is professionally managed where either one or more of the trustees is a financial institution or the trustees have appointed a discretionary fund manager who is a financial institution to manage the trust's assets. For a more detailed description of what constitutes management by a financial institution, please see paragraphs 35 and 36.

48. If the trust is not professionally managed in this way, and does not meet any of the other definitions of financial institution, it is an NFE. For example, where the trustees of a trust are individuals (and therefore not financial institutions) and the trust holds a depository account with a financial institution, and that financial institution does not have discretion to manage the account or the funds in the account, then the trust is not an investment entity. As cash is not a financial asset, where the trust only holds a depository account, it is not an investment entity (even if it is professionally managed), as the financial institution does not manage financial assets of the trust.

#### *Trust managed by a financial institution*

49. A trust is typically regarded as being managed by a financial institution where either one or more of the trustees is a financial institution or the trustees have appointed a financial institution, such as a discretionary fund manager, to manage the trust's assets or to manage the trust.

#### *Does a financial institution manage the trust?*

50. A financial institution manages the trust where it has been appointed by the trustees to carry out the day-to-day functions of the trust on behalf of the trustees. This goes beyond managing the investment of the trust's assets and includes other management functions that the trustees have to perform but which are contracted to the financial institution.

#### *Does a financial institution manage the financial assets of the trust?*

51. A financial institution manages the financial assets of the trust where it has discretion to manage the investments or investment strategy for the assets. This is usually where the trust has appointed a discretionary fund manager to manage their portfolio or a part thereof. The appointment of a discretionary fund manager should be evidenced by an agreement between the parties that provides for discretionary management.

### ***Charities***

52. A charity, or other not-for-profit association, may fall within the definition of an investment entity where it is managed by a financial institution and more than 50% of its income comes from investing in financial assets. Relevant income would include interest, dividends, royalties, annuities and other income from investing in financial assets.

53. Where a charity is a financial institution it needs to carry out due diligence processes on the financial accounts that it holds. For charities that are investment entities, financial accounts are the debt and equity interests in that entity.

54. Where a charity does not fall within the definition of a financial institution, it is an NFE. Non-profit NFEs are specifically included within the definition of active NFE if all the specified conditions are met. A charitable organization recognized as a tax exempt body under section 88 of the IRO should fulfill the specified conditions and be treated as an active NFE. This means there is no requirement to “look through” the tax-exempt organization under the rules of passive NFEs to identify their controlling persons, where that organization is an account holder of a financial institution.

### ***Partnerships***

55. Partnerships, including general partnerships, limited partnerships and limited liability partnerships, are treated as entities for AEOI purposes. Therefore, for all purposes of this Guidance, a partnership is to be treated as if it were an entity with separate legal personality.

56. A partnership can be either a financial institution or an NFE. In determining the status of the partnership, it should first consider whether or not it meets any of the definitions of financial institution. If not, it is an NFE.



### *Personal investment companies*

57. Personal investment companies may come within the definition of investment entity. This is most likely to occur where either the personal investment company itself is, or its financial assets are, managed by a financial institution.

### *Securitisation vehicles*

58. Securitisation structures are typically legally remote from the entity in relation to which the risks and rewards of the structure are associated. Typically, a securitisation structure will include an issuing entity, funding entity, seller, mortgage trustee and often counterparties.

59. Each entity within the structure must be considered to see whether it meets the definition of a financial institution. A securitisation vehicle that is a financial institution will need to consider if it has any financial accounts that may be reportable.

60. Example of a securitisation programme.

(a) Cash Flows:

- (i) Mortgage customer makes their regular monthly mortgage payment to Bank-HK1.
- (ii) Bank-HK1 identifies the appropriate special purpose vehicle (SPV) that the cash belongs to and pays the cash to that entity, say, a trust.
- (iii) Once a month on the distribution date the trust pays cash to the funding company.
- (iv) The funding company pays cash on payment date to Bank-HK2.
- (v) Bank-HK2 passes the cash to designated clearing houses, the exchanges on which the bonds are held.
- (vi) The clearing houses pass the cash to the custodian bank who then credits the bondholders' accounts. Bondholders then draw on their cash at the custodian bank.

- (b) The above scenario provides the following reporting obligations:
- (i) Mortgages are not within the financial account definition so there is no financial account with Bank-HK1 and therefore no reporting requirement in relation to them.
  - (ii) Steps described in (a)(iii) to (v) above involve payments made between financial institutions and as such there is no need for any of these payments to be reported. The trust though may have reporting requirements if any of its controlling persons are reportable persons.
  - (iii) In step described in (a)(vi) above, the custodian will have financial accounts in which the bonds are held and as such the custodian will need to identify if it has any reportable accounts. Where it does, it must perform the necessary reporting.

### **Specified insurance company**

61. A specified insurance company is an entity that is an insurance company, including a holding company of an insurance company that writes products that are classified as cash value insurance contracts or annuity contracts or makes payments with respect to such contracts.

62. An insurance company is –

- (a) an insurer authorized under the Insurance Ordinance (Cap. 41);
- (b) an entity the gross income of which arising from insurance, reinsurance and annuity contracts exceeds 50% of the entity's total gross income for a calendar year;
- (c) an entity the aggregate value of the assets of which associated with insurance, reinsurance and annuity contracts exceeds 50% of the entity's total assets at any time during a calendar year.

63. An insurance company that only offers general insurance or term life insurance

business is not a specified insurance company and therefore is not treated as a financial institution, it is instead classified as an NFE. The same applies to a reinsurance company that only provides indemnity reinsurance contracts.

64. An insurance broker that sells cash value insurance or annuity contracts on behalf of insurance companies is part of the payment chain and is not a specified insurance company unless obliged to make payments to the account holder under the terms of the cash value insurance contract or annuity contract.

65. The reserving activities of an insurance company do not cause the company to be a custodial institution, a depository institution, or an investment entity. This rule only applies to an insurance company that meets (b) or (c) of paragraph 62 above.

66. For the purposes of AEIOI, regulatory and business reserves, taxed as trading income, held by a general insurance company should be classified as active rather than passive assets, and income arising on those assets should be classified as active income. Regulatory and business reserves include:

- (a) assets backing insurance liabilities; and
- (b) assets in excess of (a) held to meet regulatory requirements.

### **Holding company or treasury centre of non-financial group**

67. An entity that is a holding company or treasury centre that regularly manages working capital by pooling the cash balances, including both positive and deficit cash balances, (i.e. cash pooling) of one or more related entities that are primarily engaged in a business other than that of a financial institution and does not provide such cash pooling services to any entity that is not a related entity will generally have the status of active NFE.

68. To determine the status of an entity that engages in cash pooling, it is necessary to consider whether the entity is a financial institution, or more specifically a depository institution or an investment entity, or an NFE. Section 50A of the IRO defines a depository institution to include an entity that accepts deposits in the ordinary course of a banking or similar business. For the purposes of determining whether an entity is a depository institution, an entity that engages in cash pooling exclusively on behalf of one or more related entities is not engaged in a banking or similar business by virtue of

such activity.

69. If the entity is not a depository institution, the entity may still be a financial institution if it meets the definition of an investment entity as set forth in section 50A, except such section specifically provides that an investment entity does not include an entity that is an active NFE because it meets any of the criteria in paragraphs (d), (e), (f) and (g) of the definition of active NFE provided in Chapter 18 (Miscellaneous).

70. The definition of an active NFE includes an NFE that 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. Since cash pooling is typically performed to reduce external debt and increase the available liquidity on behalf of related entities, cash pooling is considered a financial transaction for the purposes of the active NFE definition. Therefore, an entity that engages in cash pooling on behalf of one or more related entities that are not financial institutions and does not provide such cash pooling 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, has the status of active NFE.

### **Holding company or treasury centre of financial group**

71. A holding company or treasury centre of a financial group has the status of a financial institution if it meets the definition of financial institution provided in section 50A of the IRO. Thus, whether a holding company or treasury centre has the status of financial institution depends on the facts and circumstances, and in particular whether it engages in the specified activities or operations of a financial institution as defined even if those activities or operations are engaged in solely on behalf of related entities or its shareholders. An entity that, for example, enters into foreign exchange hedges on behalf of the entity's related entity financial group to eliminate the foreign exchange risk of such group, meets the definition of financial institution provided that the other requirements of investment entity definition are met. A holding company also meets the definition of financial institution, specifically, investment entity, if it functions as or hold itself out as an investment fund, private equity fund, venture capital fund, and similar investment vehicles if investors participate, either through debt or equity, in investment schemes through the holding company

## **Change from non-reporting financial institution to reporting financial institution**

72. With effect from 1 January 2020, the reporting financial institution includes 2020-covered institution. A 2020-covered institution refers to a reporting financial institution that is –

- (a) a mandatory provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPF scheme);
- (b) an occupational retirement scheme registered under the Occupational Retirement Schemes Ordinance (Cap. 426) (ORSO scheme);
- (c) a pooling agreement as defined by section 2(4) of the Occupational Retirement Schemes Ordinance (cap. 426) that only applies to 2 or more participating ORSO schemes;
- (d) an approved pooled investment fund as defined by section 2 of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485 sub. leg. A), in which only either or both of the MPF schemes and ORSO schemes are invested (APIF); or
- (e) a credit union registered under the Credit Unions Ordinance (Cap. 119).

73. In light of the inadequacies of the 2020-covered institution in meeting the criteria of non-reporting financial institution under the CRS, those entities are removed from the list of non-reporting financial institutions. Generally, the OECD considered that the entities have the following features:

MPF schemes and ORSO schemes:

- (a) the voluntary contributions and special voluntary contributions of MPF schemes go beyond the character of providing benefits for retirement, disability or death;
- (b) the flexibility of ORSO registered schemes, in particular the withdrawal grounds, goes beyond the character of providing benefits for retirement, disability or death;

- (c) some ORSO registered schemes do not meet the condition that no single beneficiary should have the right to more than 5% of the fund's assets; and
- (d) information reporting by MPF schemes and ORSO registered schemes to the tax authority is inadequate.

Credit unions:

- (a) credit unions render saving services and loan services, rather than merely accepting contributions leading to guaranteed benefits provided for retirement, disability or death as in retirement funds;
- (b) not all credit unions meet the requirement that no individual member holds more than 5% of the credit union's asset; and
- (c) information reporting by credit unions to the tax authority is inadequate.

As for pooling agreements and APIFs, if all the participants of the schemes are those MPF schemes and ORSO schemes that are subject to reporting under AEOI (i.e. they are also financial institutions), they are treated as not holding any reportable accounts. Each scheme participating in the pooling agreements and APIFs is responsible to identify and report on its own account holders.

74. MPF schemes, ORSO schemes, pooling agreements or APIFs falling within the definition of investment entity will be financial institutions. Apart from an authorized scheme under the Securities and Futures Ordinance (Cap. 571) that is specifically defined as an investment entity, a scheme/agreement will also be treated as an investment entity if it primarily conducts as a business investment activities or operations for its customers; or derives its gross income primarily from investing, reinvesting or trading in financial assets, and is managed by a financial institution.

75. In the context of an investment entity, the key element of the term "customer" is that the investment entity (e.g. an ORSO scheme) would need to manage the investments for unrelated investors, typically against a fee or a premium. Since the contributions from the employer and employees (if applicable) under an ORSO scheme are managed for the benefit of the employees against the payment of management fees, the employees would be customers in this particular setting. As an ORSO scheme



primarily conducts investment activities or operations for the employees enrolled in the scheme, the scheme would be an investment entity even if it is not managed by a financial institution.