# CHAPTER 1
# BACKGROUND

Globalisation of the financial sector now makes it much easier for individuals and entities to hold money and assets outside their jurisdiction of tax residence. While the great majority comply with their tax obligations, there are some who will use the availability of offshore financial structures to evade tax.

2. For the purpose of enhancing tax transparency and combating cross-border tax evasion, the OECD released in July 2014 the CRS which is an internationally agreed standard for implementation of AEOI as an initiative on exchange of tax information between jurisdictions for tax purposes. As a responsible member of the international community and a leading financial centre, Hong Kong indicated in September 2014 our commitment to implement AEOI on a reciprocal basis and commence the first information exchanges by the end of 2018. To implement AEOI, Hong Kong has activated CRS exchange relationships with other jurisdictions on the basis of bilateral competent authority agreements and the multilateral competent authority agreement under the Convention on Mutual Administrative Assistance in Tax Matters.

3. The Government of Hong Kong has put in place a legal framework under the IRO to implement AEOI. Specifically, Part 8A of and Schedule 17C, 17D and 17E to the IRO impose obligations on Hong Kong financial institutions to establish appropriate due diligence procedures to identify reportable accounts (i.e. accounts held by persons that are tax residents of reportable jurisdictions) and collect and report the required information in respect of the reportable accounts to the IRD for onward transmission to the appropriate AEOI partners. The tax authorities of the AEOI partners would also transmit to the IRD similar information on Hong Kong tax resident individuals and entities holding accounts with their financial institutions.

4. This Guidance is intended to provide Hong Kong financial institutions with an understanding of the requirements that must be fulfilled to comply with those obligations and to aid businesses that may have responsibilities to review, collect and report information under the legislation. It is also intended as a reference source for Hong Kong financial institutions as well as tax, compliance and legal professionals for use alongside the Commentaries to the CRS, CRS related FAQs and CRS Implementation Handbook published by the OECD as well as the information contained

in the Department's website and FAQs issued by the IRD.

5. Section 50L of the IRO provides that in any proceedings under the IRO before a court, any guideline published by the Commissioner of Inland Revenue on the interpretation of Part 8A-related provisions is admissible in evidence and if any provision of the guideline appears to the court to be relevant to the interpretation of any Part 8A-related provisions or relevant to any question arising in the proceedings, the provision of the guideline must be taken into account in interpreting the Part 8A-related provisions or in determining related question.

# CHAPTER 2
# OVERVIEW OF REQUIRED INFORMATION

Under Part 8A of and Schedule 17C, 17D and 17E to the IRO, a reporting financial institution in Hong Kong is required to conduct due diligence on all financial accounts it maintains. With respect to each of such financial account, the reporting financial institution is required to: (i) determine the tax residence(s) of its account holder and, if the account holder is a passive NFE, the controlling persons of the passive NFE; and (ii) report to the IRD on an annual basis, the particulars and account information of that account holder, and where applicable, the particulars of the controlling persons that are tax residents of jurisdictions with which Hong Kong has activated exchange relationship.

**Reportable account**

2. Reportable account means a financial account that has been identified as such under the due diligence requirements in Schedule 17D to the IRO and that is held by at least one reportable person, or a passive NFE with at least one controlling person being a reportable person.

**Reportable person**

3. A reportable person means an individual or entity that is a resident for tax purposes of a reportable jurisdiction; but does not include: (i) a corporation the stock of which is regularly traded on an established securities market; (ii) a corporation that is a related entity of a corporation mentioned in (i); (iii) a government entity; (iv) an international organization; (v) a central bank; or (vi) a financial institution.

4. If the account holder (or the controlling person of the account holder that is a passive NFE) of a financial account is not a tax resident of any reportable jurisdiction, the financial account is not a reportable account and the reporting financial institution is not required to report the information of that account.

**Reportable jurisdiction**

5. Reportable jurisdictions are specified in column 1 of Part 1 of Schedule 17E to

the IRO. The list of reportable jurisdictions is available at the IRD's webpage as follows:

https://www.ird.gov.hk/eng/tax/aeoi/rpt_jur.htm

6. In general, the IRD will issue electronic notices, through the AEOI Portal, to all registered financial institutions in January annually for filing the Financial Account Information Returns (AEOI Return). The reporting financial institution should furnish the AEOI Return reporting the required information. The AEOI Return furnished must include, among others, the name and identifying number (i.e. AEOI ID) of the reporting financial institution.

7. The AEOI Return furnished must include the following information in relation to each reportable account maintained by the reporting financial institution for years from 2017 onwards (for the financial institution that is not a 2020-covered institution[1]) or 2020 onwards (for the financial institution that is a 2020-covered institution[1]):

| **In respect of** | **Information to be Reported** |
|---|---|
| Each reportable person either holding a reportable account; or as a controlling person of an entity account that is a passive NFE | Name<br>Address<br>Jurisdiction of residence<br>TIN[2&3]<br>Date of birth (only for individual)[3]<br>Place of birth (only for individual)[4]<br>Account number or functional equivalent<br>Account balance or value |

[1] Further details on "2020-covered institution" are provided in Chapter 3 of this Guidance.

[2] Reporting of TIN is required unless: (i) the TIN is not issued by the relevant jurisdiction of residence; or (ii) the domestic law of the relevant jurisdiction does not require the collection of TIN.

[3] For a pre-existing account, TIN or date of birth are reportable unless the TIN or date of birth is not kept in the records of the reporting financial institution and is not otherwise required to be collected under the laws of Hong Kong. Where the TIN and date of birth are not kept in the records of the reporting financial institution, the reporting financial institution is required to use reasonable efforts to obtain the TIN and date of birth by the end of the second calendar year following the year in which pre-existing accounts were identified as reportable accounts.

[4] The place of birth is required to be reported if: (i) the reporting financial institution is otherwise required to obtain the place of birth and report it under the laws of Hong Kong; and (ii) the place of birth is available in the electronically searchable data maintained by the reporting financial institution. Reporting financial institution is encouraged to collect place of birth as from the experience of Hong Kong's treaty partners, the collection of such information is necessary and proportionate for the purpose of enabling tax administrations to correctly and unequivocally identify the taxpayers concerned.

| In respect of | Information to be Reported |
|---|---|
| Custodial accounts | Total gross amount of interest paid to the account, or in respect of the account<br>Total gross amount of dividends paid to the account, or in respect of the account<br>Total gross amount of other income generated in respect of the financial assets held in the account, and paid to the account, or in respect of the account<br>Total gross proceeds from the sale or redemption of financial assets paid to the account |
| Depository accounts | Total gross amount of interest paid to the account |
| Other accounts | Total gross amount paid to the account holder including the aggregate amount of any redemption payments made to the account holder |

# 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/Fatf-recommendations.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 AEOI, 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.

# CHAPTER 4
# NON-REPORTING FINANCIAL INSTITUTIONS

Part 2 of Schedule 17C to the IRO excludes certain financial institutions from being reporting financial institutions. They are defined as non-reporting financial institutions. Non-reporting financial institutions are specifically not required to perform the due diligence procedures and report information on financial accounts due to posing a low risk of being used to evade tax. Each category of the non-reporting financial institution is described in the following paragraphs:

## 1. Governmental entity

A governmental entity, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution or depository institution, is a non-reporting financial institution.

## 2. International organization

An international organization, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution or depository institution, is a non-reporting financial institution.

## 3. Central bank

A central bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution or depository institution, is a non-reporting financial institution.

## 4. Hong Kong Monetary Authority

The Hong Kong Monetary Authority, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial

institution or depository institution, is a non-reporting financial institution.

**5. Pension fund of governmental entity, international organization, central bank or Hong Kong Monetary Authority**

A fund is a non-reporting financial institution if it is established by a governmental entity, international organization, central bank or the Hong Kong Monetary Authority to provide retirement, disability, or death benefits to beneficiaries or participants who -

(a) are current or former employees (or persons designated by such employees); or

(b) are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration of personal services rendered for the governmental entity, international organization, central bank or the Hong Kong Monetary Authority.

**6. Broad participation retirement fund**

A fund is a non-reporting financial institution if -

(a) it is established to provide retirement, disability or death benefits, or any combination of the above, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered; and

(b) it -

(i) does not have a single beneficiary with a right to more than 5% of the fund's assets;

(ii) is subject to government regulation and provides information reporting to the tax authorities; and

(iii) meets any of the following conditions -

(A) the fund is generally exempt from tax on investment income,

or taxation of such income is deferred or taxed at a reduced rate, owing to its status as a retirement or pension plan;

(B) the fund receives at least 50% of its total contributions (other than transfers of assets from other funds described in this paragraph or paragraph 5 or 7 of this Chapter or from a retirement and pension account described in paragraph 1 of Chapter 6 on excluded accounts) from the sponsoring employers;

(C) distributions or withdrawals from the fund are allowed only on the occurrence of specified events related to retirement, disability or death (except rollover distributions to other retirement funds described in this paragraph or paragraph 5 or 7 of this Chapter or to a retirement and pension account described in paragraph 1 of Chapter 6 on excluded accounts), or penalties apply to distributions or withdrawals made before such specified events;

(D) contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to the earned income of the employee, or may not exceed $390,000 annually, applying the rules of account aggregation and currency set out in the due diligence requirements in Schedule 17D to the IRO.

## 7. Narrow participation retirement fund

A fund is a non-reporting financial institution if -

(a) it is established to provide retirement, disability or death benefits to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered; and

(b) it -

(i) has less than 50 participants;

(ii) is sponsored by an employer that is not an investment entity or a passive NFE; and

(iii) meets all of the following conditions -

(A) the employee and employer contributions to the fund (other than transfers of assets from a retirement and pension account described in paragraph 1 of Chapter 6 on excluded accounts) are limited by reference to the earned income and compensation of the employee;

(B) the participants who are not residents for tax purposes for the jurisdiction in which the fund is established are not entitled to more than 20% of the fund's assets;

(C) the fund is subject to government regulation and provides information reporting to the tax authorities.

**8. Qualified credit card issuer**

An entity is a non-reporting financial institution if -

(a) the entity is a financial institution and it is so solely because it is an issuer of credit cards that accepts deposits only when a customer makes a payment in excess of a balance due with respect to the credit card of the customer and the overpayment is not immediately returned to the customer; and

(b) by 1 January 2017, the entity has begun to implement policies and procedures -

(i) to prevent a customer from making an overpayment in excess of $390,000; or

(ii) to ensure that any customer overpayment in excess of $390,000 is refunded to the customer within 60 days,

in each case applying the rules of account aggregation and currency set out in the due diligence requirements in Schedule 17D to the IRO.

For the purposes of paragraph (b) above, a customer overpayment does not refer to credit balances to the extent of disputed charges but includes credit balances resulting from merchandise returns.

**9. Exempt collective investment vehicle**

An investment entity is a non-reporting financial institution if -

(a) the investment entity is regulated as a collective investment vehicle; and

(b) all of the interests in the investment entity are held by or through any of the following -

(i) individuals who are not reportable persons;

(ii) entities that are not reportable persons.

The paragraph above does not apply to an investment entity if -

(a) any of the interests in the entity is held by, or through, an entity that is a passive NFE; and

(b) any one of the controlling persons of the passive NFE is a reportable person.

An investment entity that is regulated as a collective investment vehicle does not fail to qualify under the paragraph above as a non-reporting financial institution solely because the investment entity has issued physical shares in bearer form, if -

(c) the investment entity has not issued, and does not issue, any physical shares in bearer form after 1 January 2017;

(d) the investment entity retires all such shares on surrender;

(e) the investment entity applies the due diligence requirements in Schedule 17D to the IRO and reports any information required to be reported with respect to any such shares when such shares are presented for redemption or other payment; and

(f) the investment entity has in place policies and procedures to ensure that such shares are redeemed or immobilized as soon as possible, and in any event prior to 1 January 2018.

## 10. Trustee-documented trust

A trust is a non-reporting financial institution if it is established to the extent that the trustee of the trust is a reporting financial institution and reports all information required to be reported pursuant to the IRO with respect to all reportable accounts of the trust.

## 11. Grant Schools Provident Fund and Subsidized Schools Provident Fund

The Grant Schools Provident Fund maintained for teachers under the Grant Schools Provident Fund Rules (Cap. 279 sub. leg. C) is a non-reporting financial institution.

The Subsidized Schools Provident Fund maintained for teachers under the Subsidized Schools Provident Fund Rules (Cap. 279 sub. leg. D) is a non-reporting financial institution.

## 12. Mandatory provident fund schemes, occupational retirement schemes and credit union

With effect from 1 January 2020, mandatory provident fund schemes, occupational retirement schemes, pooling agreements, approved pooled investment funds and credit unions that fall within the definition of a reporting financial institution are removed from the list of non-reporting financial institution and will not be exempt from performing the obligations under Part 8A of the IRO.

# CHAPTER 5
# FINANCIAL ACCOUNTS

A financial account is an account maintained by a reporting financial institution. Only accounts that fall within the meaning of financial account as defined by section 50A of the IRO need to be reviewed. Where such an account is held by a reportable person, it becomes a reportable account.

2. The 5 categories of financial account that need to be reviewed are:

| ***Accounts*** | ***Which financial institution is generally considered to maintain them*** |
|---|---|
| Depository account | The financial institution that is obligated to make payments with respect to the account (excluding an agent of the financial institution). |
| Custodial account | The financial institution that holds custody over the assets in the account. |
| Equity and debt interest in investment entities | The investment entity that maintains the equity or debt interest. |
| Cash value insurance contract | The financial institution that is obligated to make payments with respect to the contract. |
| Annuity contract | The financial institution that is obligated to make payments with respect to the contract. |

3. Certain financial accounts are seen to be low-risk of being used to evade tax and are specifically excluded from needing to be reviewed. Details of the excluded accounts are at Chapter 6.

4. The definition of a financial account does not extend to shareholdings on an issuer's share register nor debenture/loan stock holdings (including shareholdings which have been the subject of an acquisition, as a result of which the original share register no longer exists). However shareholdings and loan/debenture stock holdings by a financial institution can be "financial instruments/contracts" and are reportable if held in a custodial account.

**Executing brokers and placing agents**

5. Where a financial institution is acting as an executing broker, and simply executing trading instructions, or receiving and transmitting such instructions to another executing broker, (either through Hong Kong Stock Exchange, multilateral trading facility or equivalent of such, a clearing organization or on a bilateral basis) then the financial institution will not be required to treat the facilities established for the purposes of executing a trading instruction, or receiving and transmitting such instructions, as a financial account under the agreement. In these cases the financial institution acting as custodian will be responsible for performing due diligence procedures and reporting where necessary.

6. It is also possible that a financial institution acting as an executing broker may be subject to failed trades and find themselves with the legal ownership of the asset that they intended to broker. In this case neither the holding of the asset, nor any resultant claims (market claims such as the passing of entitlement on dividend and coupon payments, claims compensated through a clearing house, securities depository etc.) will lead to a financial account being established by the executing broker.

7. In certain circumstances "placing agents" will typically acquire shares for a 2-3 day period (maximum 7 days) and hold these as nominee for an underlying investor. The placing agent will also have cash funds deposited by the investor for a similar period. The two would ultimately be matched and the shares delivered to the designated custodian of the investor. To eliminate the creation of a series of custodial accounts which would open and close in a 2-3 day window and therefore be potentially reportable such funds will not be regarded as financial accounts provided that:

(a) the account is established and used solely to secure the obligation of the parties to the transaction;

(b) the account only holds the monies appropriate to secure an obligation of

one of the parties directly related to the transaction, or a similar payment, or with a financial asset that is deposited in the account in connection with the transaction;

(c) the assets of the account, including the income earned thereon, is paid or otherwise distributed for the benefit of the parties when the transaction is completed.

**Reportable account**

8. Once a financial institution has identified the financial accounts it maintains, it needs to review all those accounts to identify the territory in which the account holder is tax resident and maintain the information for future use. This is the wider approach. To the extent that any of the account holders are identified as tax resident in one or more reportable jurisdictions, the account will be a reportable account which must be reported to the IRD.

9. A reportable account is an account held by one or more reportable persons or by a passive NFE with one or more controlling persons that is a reportable person.

**Depository account**

10. A depository account includes any commercial current, savings, time or thrift account, or any account evidenced by a certificate of deposit, investment certificate, thrift certificate, certificate of indebtedness, or other similar instrument where cash is placed on deposit with an entity engaged in a banking or similar business. Being engaged in a banking or similar business is explained at Chapter 3.

11. A depository account does not have to be an interest bearing account.

12. A depository account can include a credit balance on a credit card, for example where a purchase has been refunded, provided the credit card has been issued by a credit card company engaged in banking or a similar business.

13. Credit cards will not be reportable as depository accounts if the credit card issuer meets the conditions to be a qualified credit card issuer and is therefore a non-reporting financial institution. Similarly, where a financial institution does not satisfy the requirements to be a qualified credit card issuer, but accepts deposits when a customer

makes a payment in excess of a balance due with respect to a credit card or other revolving credit facility, it may still not have to report the account as a depository account if it qualifies as an excluded account.

**Custodial account**

14. A custodial account is an account (other than an insurance contract or annuity contract) for the benefit of an individual or entity that holds one or more financial assets.

15. A cash value insurance contract or an annuity contract is not considered to be a custodial account, but these could be assets held in a custodial account. Where they are assets in a custodial account, the insurer will only need to provide the custodian with the balance or value of the cash value insurance contract.

16. A custodial account does not include financial instruments or contracts (for example, a share or stock in a corporation) held in a nominee sponsored by the issuer of its own shares, which are in every other respect analogous to those held on the issuer's share register.

**Collateral**

17. Collateral accounts are accounts which are maintained for the benefit of another, or arrangements pursuant to which an obligation exists to return cash or assets to another.

18. Transactions which include the collection of margin or collateral on behalf of a counterparty may fall within the definition of custodial account. The exact terms of the contractual arrangements will be relevant in applying this interpretation. However, if collateral is provided on a full title transfer basis so that the collateral holder becomes the full legal and beneficial owner of the collateral during the term of the contract, this will not constitute a custodial account for the purposes of AEOI.

**Syndicated loans**

19. Where a borrower requires a large or sophisticated facility, or multiple types of facility, this is commonly provided by a group of lenders, known as a syndicate, under a syndicated loan agreement.

20. To facilitate the process of administering the loan on a daily basis, one member

of the syndicate is typically appointed as Agent. The Agent's role is to act as the agent for the lenders and to coordinate and administer all aspects of the loan once the loan agreement has been executed, including acting as a point of contact between the borrower and the lenders in the syndicate and monitoring the compliance of the borrower with the terms of the facility.

21. The Agent performs exclusively operational functions. For example, the borrower makes all payments of interest and repayments of principal and any other payments required under the loan agreement to the Agent and the Agent then distributes these monies to the syndicate members as required by the syndicate agreement. Similarly, the lenders advance funds to the borrower through the Agent. The terms of a syndicated loan agreement usually entitle the Agent to undertake the roles described above in return for a fee.

22. In these circumstances, the participation of a lender in a syndicated loan, where a reporting financial institution is the agent acting for and on behalf of the syndicate, does not lead to the creation of a custodial account held by the agent.

**Cash value insurance contract**

23. A cash value insurance contract is an investment product that has an element of life insurance attached to it. The life insurance element is often small compared to the investment element of the contract. General insurance products, such as term life insurance, property or motor insurance, that do not carry any investment element are not financial accounts.

24. A cash value insurance contract is an insurance contract where the policyholder is entitled to receive payment on surrender or termination of the contract. An insurance contract will also be a cash value insurance contract where the policyholder can borrow against the contract, for example by using the contract as collateral for borrowing, the contract being acceptable as collateral because of the associated cash value.

25. Other types of general insurance may be used as collateral, for example keyman insurance, but these are not cash value insurance contracts because the collateral is not reliant on any payment on surrender or termination of the contract. Rather the collateral is based on the assignment of the benefits of the contract to the lender in the event that the contingency insured against comes about.

26. The cash value of a cash value insurance contract is the greater of:

(a) the amount that the policyholder is entitled to receive on the surrender or termination of the contract without reduction for any surrender charge or loans outstanding against the policy, for example, where the policyholder receives an annual statement of the value of the policy that will be the cash value in that year; and

(b) the amount the policyholder can borrow against or with regard to the policy. Note that the policyholder does not need to have pledged the account as collateral for borrowing for this second test to apply. It is the amount that the policyholder could expect to borrow against the cash value insurance contract should they choose to use it as collateral for a loan.

27. The cash value does not include any amount payable under an insurance contract:

(a) solely by reason of the death of an individual insured under a life insurance contract;

(b) as a personal injury, sickness or other benefit providing indemnification of an economic loss arising from an event that has been insured against;

(c) as a refund of premium due to the cancellation or termination of an insurance contract, a reduction in the amount insured or a correction of a posting or similar error in relation to the premium;

(d) as a policyholder dividend, other than a termination dividend, provided that the insurance contract pays only the benefits in (b) above. A policyholder dividend is the return of premium, under the terms of the policy, resulting from an excess of income over losses and expenses;

(e) as a return of an advance premium or premium deposit for an insurance contract where the premium is payable at least annually. In this case the advance premium or premium deposit must not exceed the amount due as the next annual premium payable under the contract.

28. Cash value insurance contracts do **not** include general insurance policies or term

life insurance contracts including:

(a) indemnity insurance contracts between insurance companies;

(b) policies indemnifying against economic loss arising from specified circumstances, for example personal injury, theft, etc.;

(c) micro insurance contracts that do not have a cash value.

**Annuity contract**

29. An annuity contract is a contract under which the issuer agrees to make payments for a period of time determined, in whole or in part, by reference to the life expectancy of one or more individuals. An annuity contract also includes a contract that is considered to be an annuity contract in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

30. Reinsurance of annuity contracts between insurance companies are not annuities.

**Equity and debt interest**

31. In general, equity and debt interests are financial accounts only to the extent that they are interests in an investment entity.

32. Where an entity is an investment entity solely because it acts on behalf of a customer by investing, managing or administering financial assets in the name of the customer, the debt and equity interest in the investment entity are not financial accounts provided it renders only investment advice to, or manages portfolios for, the customer.

33. An equity interest may vary depending on the nature of the investment entity. In the case of an investment entity that is a partnership, an equity interest is either a capital or profits interest in the partnership.

34. In the case of a trust, an equity interest is any interest held by a person who is treated as a settlor or beneficiary of all or any part of the trust, or any other natural person exercising ultimate effective control over the trust.

35. A reportable person will be treated as being a beneficiary of a trust if such a person:

(a) has the right to receive a mandatory distribution from the trust and this distribution can be received either directly or indirectly, for example through a nominee; or

(b) may receive a discretionary payment from the trust and this receipt can be either directly or indirectly from the trust.

# CHAPTER 6
# EXCLUDED ACCOUNTS

Part 3 of Schedule 17C to the IRO allows for various categories of account to be excluded from being reportable financial accounts. They are defined as excluded accounts. These accounts are excluded because they have been identified as carrying a low risk of use for tax evasion. Each category of the excluded account is described in the following paragraphs:

## 1. Retirement and pension account

A retirement or pension account is an excluded account if all of the following conditions are met -

(a) the account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits);

(b) the account is tax-favoured (i.e. contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the account holder, or are taxed at a reduced rate, or taxation of the investment income from the account is deferred or made at a reduced rate);

(c) information reporting to the tax authorities is required in respect of the account;

(d) withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such events;

(e) either -

(i) the annual contributions are limited to $390,000 or less; or

(ii) there is a maximum lifetime contribution limit to the account of $7,800,000 or less,

in each case applying the rules of account aggregation and currency set out in the due diligence requirements in Schedule 17D to the IRO.

A financial account that does not meet the condition under subparagraph (e) above does not fail to meet the condition solely because the financial account may receive assets or funds transferred from one or more financial accounts as described in this paragraph and paragraph 2 of this Chapter or from one or more retirement or pension funds as described in paragraphs 5, 6 and 7 of Chapter 4 on non-reporting financial institutions.

## 2. Non-retirement tax-favoured accounts

An account is an excluded account if all of the following conditions are met -

(a) the account is, for purposes other than for retirement, subject to regulation as an investment vehicle that is regularly traded on an established securities market, or the account is, for purposes other than for retirement, subject to regulation as a savings vehicle;

(b) the account is tax-favoured (i.e. contributions to the account that would otherwise be subject to tax are deductible or excluded from the gross income of the account holder, or are taxed at a reduced rate, or taxation of the investment income from the account is deferred or made at a reduced rate);

(c) withdrawals are conditioned on meeting specific criteria related to the purpose of the investment or savings account (including the provision of educational or medical benefits), or penalties apply to withdrawals made before such criteria are met;

(d) the annual contributions are limited to $390,000 or less, applying the rules of account aggregation and currency set out in the due diligence requirements in Schedule 17D to the IRO.

A financial account that does not meet the condition under subparagraph (d)

above does not fail to meet the condition solely because the financial account may receive assets or funds transferred from one or more financial accounts as described in this paragraph and paragraph 1 of this Chapter or from one or more retirement or pension funds as described in paragraphs 5, 6 and 7 of Chapter 4 on non-reporting financial institutions.

**3. Term life insurance contracts**

A life insurance contract with a coverage period that will end before the insured individual attains age 90 is an excluded account if all of the following conditions are met -

(a) periodic premiums, which do not decrease over time, are payable at least annually during the period the contract is in existence or until the insured attains age 90, whichever is shorter;

(b) the contract has no contract value that any person can access (by withdrawal, loan, or otherwise) without terminating the contract;

(c) the amount (other than a death benefit) payable on cancellation or termination of the contract cannot exceed the aggregate premiums paid for the contract, less the sum of mortality, morbidity, and expense charges (whether or not actually imposed) for the period or periods of the contract's existence and any amounts paid prior to the cancellation or termination of the contract;

(d) the contract is not held by a transferee for value.

**4. Estate account**

An account held solely by an estate is an excluded account if its documentation includes a copy of the deceased's will or death certificate.

**5. Escrow account**

An account established in connection with any of the following is an excluded account -

(a) a court order or judgment;

(b) a sale, exchange, or lease of real or personal property, provided that the account meets the following conditions -

(i) the account is funded solely with a down payment, earnest money, deposit in an amount appropriate to secure an obligation directly related to the transaction, or a similar payment, or is funded with a financial asset that is deposited in the account in connection with the sale, exchange, or lease of the property;

(ii) the account is established and used solely to secure the obligation of the purchaser to pay the purchase price for the property, the seller to pay any contingent liability, or the lessor or lessee to pay for any damages relating to the leased property as agreed under the lease;

(iii) the assets of the account, including the income earned on the assets, will be paid or otherwise distributed for the benefit of the purchaser, seller, lessor or lessee (including satisfying the obligation of the purchaser, seller, lessor or lessee) when the property is sold, exchanged, or surrendered, or the lease terminates;

(iv) the account is not a margin or similar account established in connection with a sale or exchange of a financial asset; and

(v) the account is not associated with an account described in paragraph 6;

(c) an obligation of a financial institution servicing a loan secured by real property to set aside a portion of a payment solely to facilitate the payment of taxes or insurance related to the real property at a later time;

(d) an obligation of a financial institution solely to facilitate the payment of taxes at a later time.

Where a financial account (held by a non-financial intermediary such as a solicitor) does not meet the conditions in subparagraph above, but is an account,

holding on a pooled basis, and the funds of underlying clients of the non-financial intermediary where:

(a) the only person listed or identified on the financial account with the financial institution is the non-financial intermediary; and

(b) the non-financial intermediary is not required to disclose or pass their underlying client or clients' information to the financial institution for the purposes of AML/KYC or other regulatory requirements,

then, providing both these conditions are met, the financial institution is only required to undertake the due diligence procedures in respect of the non-financial intermediary.

**6. Depository account owing to not-returned overpayments**

A depository account is an excluded account if both of the following conditions are met -

(a) the account exists solely because a customer makes a payment in excess of a balance due with respect to a credit card or other revolving credit facility and the overpayment is not immediately returned to the customer; and

(b) beginning on or before 1 January 2017, the financial institution implements policies and procedures either to prevent a customer from making an overpayment in excess of $390,000, or to ensure that any customer overpayment in excess of $390,000 is refunded to the customer within 60 days, in each case applying the rules of account aggregation and currency set out in the due diligence requirements in Schedule 17D to the IRO.

For the purpose of subparagraph (b) above, a customer overpayment does not refer to credit balances to the extent of disputed charges but includes credit balances resulting from merchandise returns.

## 7. Dormant account

(1) An account (other than an annuity contract) with a balance that does not exceed $7,800 is an excluded account if -

(a) the account holder has not initiated a transaction with regard to the account or any other account held by the account holder with a reporting financial institution in the previous 3 years[1];

(b) 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 6 years[1]; and

(c) (for the account being 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 6 years[1].

(2) An account (other than an annuity contract) with a balance that does not exceed $7,800 maintained with a reporting financial institution is also an excluded account if -

[1] An account ceases to be dormant on the earliest of any of the following events occurring:
(a) the account holder initiates a transaction on the dormant account or any other account he or she holds with the financial institution;
(b) the account holder communicates with the financial institution about the dormant account or any other account he or she holds with it; or
(c) the account ceases to be a dormant account under the normal operating procedures of the financial institution.

(a) the account is treated as a dormant account -

(i) in accordance with the laws, regulations or procedures applicable to the institution; or

(ii) under the normal operating procedures of the financial institution that are consistently applied for all accounts maintained with such institution; and

(b) the laws, regulations or procedures mentioned in subparagraph (2)(a) above contain provisions that are substantially similar to subparagraph (1).

# CHAPTER 7
# PERSON WHO ACTS FOR A NON-CORPORATE FINANCIAL INSTITUTION TO MAINTAIN FINANCIAL ACCOUNTS

For a reporting financial institution that is not a corporation, sections 50B, 50C and 50D of the IRO apply to a person who acts for the institution to maintain financial accounts as if the obligations were imposed on that person.

2. To determine whether a person acts for a reporting financial institution to maintain financial accounts, all the relevant facts have to be considered, in particular whether the person is performing due diligence obligations under AML legislation. The person who acts for a reporting financial institution to maintain financial accounts could differ with a different type of financial institutions. The determination depends very much on the particular facts of each case. Generally, the following person is considered to be acting for the reporting financial institution to maintain financial accounts:

| **Types of financial institution** | | **Person who acts for the financial institution to maintain financial accounts** |
|---|---|---|
| (a) | Custodial institution | The person who holds custody over the assets in the account |
| (b) | Authorized CIS | The fund manager who is the product provider of the CIS with responsibility for fulfilling the AML obligations or having the most in-depth knowledge of equity or debt interest holders |
| (c) | Investment entity that is trading or managing financial assets for customers (e.g. private equity fund, hedge fund or other similar investment vehicle which are not authorized CIS) | The fund manager with responsibility for fulfilling the AML obligations or having the most in-depth knowledge of equity or debt interest holders |
| (d) | Professionally managed trust other than (b) and (c) above (e.g. the trustee is a financial institution or the trustee has appointed a discretionary fund manager who is a financial institution to manage the trust assets) | The trustee responsible for the overall management of the trust is considered as the person who acts for the trust to maintain financial accounts in respect of debt or equity interests |

| Types of financial institution | | Person who acts for the financial institution to maintain financial accounts |
|---|---|---|
| (e) | Other non-corporate investment entity | Depending on the particular facts of the case, the general consideration is the person who is obliged to apply AML due diligence procedures or who is obligated to make payments with respect to the financial accounts |

# CHAPTER 8
# DUE DILIGENCE: GENERAL REQUIREMENT

The due diligence procedures that reporting financial institutions must follow are prescribed in Schedule 17D to the IRO. There are different due diligence procedures for financial accounts held by individuals and entities as well as for pre-existing and new accounts.

2. A financial account held by an individual as a partner of a partnership is to be treated as an entity account and is not to be treated as an individual account. On the other hand, if a financial account is held by an individual as a sole-proprietor of a business, the account is to be treated as an individual account.

3. The legislation for AEOI authorizes financial institutions to identify, maintain and report information on the tax residence of account holders, irrespective of whether or not they are tax resident in a reportable jurisdiction. This is referred to as the "wider approach". Financial institutions are required to carry out due diligence procedures on financial accounts that they hold in order to establish if the person holding the account is tax resident of a reportable jurisdiction.

4. If an account holder is identified as being tax resident in any of the reportable jurisdictions, then he is a reportable person and the account is a reportable account.

5. An account is treated as a reportable account as of the date it is identified as such pursuant to the due diligence procedures that financial institutions must follow.

## The wider approach

6. The wider approach enables reporting financial institutions to capture and maintain information on the tax residence of account holders irrespective of whether or not that account holder is a reportable person for any given reportable period.

7. The due diligence procedures are designed to identify accounts which are held by the residents of the reportable jurisdictions. However, the number of these jurisdictions is not fixed and more jurisdictions may be added to the list of reportable jurisdictions over time. As a result, the legislation for AEOI has been designed to authorize a wider approach to recording the territory in which a person is tax resident irrespective of whether that territory is a reportable jurisdiction at the time when the due diligence procedures are performed. The wider approach also authorizes the collection of TIN and date of birth from account holders irrespective of whether or not that account holder is a reportable person for any given reportable period.

8. Reporting financial institutions are authorized to identify the territory in which an account holder or a controlling person is resident for income tax or corporation tax purposes, or for the purposes of any other tax of a similar character that has been imposed by that territory. This effectively enables the financial institutions to "future proof" their processes such that when a new jurisdiction is added to the list of reportable jurisdictions the work in identifying where existing customers are resident has already been carried out. Reducing the number of times that due diligence processes have to be carried out should result in lower costs for the financial institutions in complying with their obligations. Financial institutions will only need to revisit the determination of tax residence in those cases where there has been a change of circumstance.

9. The following examples illustrate the application of due diligence under the wider approach (for MPF schemes, ORSO schemes, pooling agreements, approved pooled investment funds and credit unions, please see the examples in paragraph 10):

(a) Example 1: New accounts

Mr. X is a tax resident of Jurisdiction F and opens an account with Bank-HK on 1 March 2017 (i.e. a new account). At the time of account opening, Jurisdiction F is not a reportable jurisdiction.

Under the wider approach, Bank-HK will need to collect a self-certification from Mr. X, which will include his jurisdiction of residence for tax purposes, TIN and date of birth at the account opening stage, irrespective of whether Jurisdiction F is a reportable jurisdiction.

If subsequently Jurisdiction F becomes a reportable jurisdiction which takes effect from 2019, Bank-HK can rely on the self-certification to establish that the account is a reportable account and will then need to report Mr. X's 2018 financial account information to the IRD in 2019.

(b) Example 2: Pre-existing accounts

Mr. Y is a tax resident of Jurisdiction F and opened an account with Bank-HK in 2014 (i.e. a pre-existing account). Jurisdiction F becomes a reportable jurisdiction as from 2019.

Under the wider approach, Bank-HK will need to conduct an indicia search of all pre-existing accounts to identify accounts held by residents of any other territories outside Hong Kong in 2017. In 2018, Bank-HK may rely on the results of the 2017 exercise to determine whether Mr. Y's account is a reportable account.

Bank-HK would be required to collect Mr. Y's TIN and date of birth by the end of 2020 (the second calendar year following the year in which the

account is identified as a reportable account).

10. The following examples illustrate the application of due diligence under the wider approach are applicable to MPF schemes, ORSO schemes, pooling agreements, approved pooled investment funds and credit unions (which are treated as reporting financial institutions with effect from 1 January 2020):

(a) Example 1: New accounts

Mr. X is a tax resident of Jurisdiction F and opens an account with Bank-HK on 1 March 2020 (i.e. a new account). At the time of account opening, Jurisdiction F is not a reportable jurisdiction.

Under the wider approach, Bank-HK will need to collect a self-certification from Mr. X, which will include his jurisdiction of residence for tax purposes, TIN and date of birth at the account opening stage, irrespective of whether Jurisdiction F is a reportable jurisdiction.

If subsequently Jurisdiction F becomes a reportable jurisdiction which takes effect from 2022, Bank-HK can rely on the self-certification to establish that the account is a reportable account and will then need to report Mr. X's 2021 financial account information to the IRD in 2022.

(b) Example 2: Pre-existing accounts

Mr. Y is a tax resident of Jurisdiction F and opened an account with Bank-HK in 2017 (i.e. a pre-existing account). Jurisdiction F becomes a reportable jurisdiction as from 2022.

Under the wider approach, Bank-HK will need to conduct an indicia search of all pre-existing accounts to identify accounts held by residents of any other territories outside Hong Kong in 2020. In 2021, Bank-HK may rely on the results of the 2020 exercise to determine whether Mr. Y's account is a reportable account.

Bank-HK would be required to collect Mr. Y's TIN and date of birth by the end of 2023 (the second calendar year following the year in which the account is identified as a reportable account).

**Reportable accounts**

11. An account is treated as a reportable account from the date it is identified as such pursuant to the due diligence procedures that the reporting financial institution is required to follow. Generally, information must be reported annually to the IRD on that account in the calendar year following the year to which the reportable information

relates.

12. Once an account has been identified as a reportable account, it remains so until there is a change that takes the account out of the definition of reportable account. This can happen in a number of ways:

(a) the account holder ceases to be a reportable person;

(b) the account is closed or transferred to another financial institution in its entirety (where it may become a reportable account by that business);

(c) the account becomes an excluded account;

(d) the reporting financial institution becomes a non-reporting financial institution.

13. While the account remains a reportable account, it must be reported even where the balance or value of the account is zero or negative. It also remains reportable where nothing has been credited to or in respect of the account during the appropriate reportable period.

14. When an account ceases to be a reportable account it no longer needs to be reported, but where the account is closed information with respect to that account must be reported until the date of closure.

15. The following examples illustrate the circumstances where an account becomes or ceases to be a reportable account (for MPF schemes, ORSO schemes, pooling agreements, approved pooled investment funds and credit unions, please see the examples in paragraph 16):

(a) **Account becomes reportable** – a reporting financial institution carries out due diligence procedures on low value pre-existing individual accounts as at 31 December 2016 between 1 January 2017 and 31 December 2018. On 22 March 2018, the financial institution identifies an account that belongs to an individual resident in Jurisdiction F (a reportable jurisdiction). The account is a reportable account from that date. Information on that account is reportable for the full calendar year 2018, the first report being made in 2019 and annually thereafter.

(b) **Account reportable after change of circumstance** – a new account is opened by an individual on 20 June 2017. The self-certification provided by the individual on opening the account shows that the individual is not a tax resident of any reportable jurisdiction. The account is thus not a reportable account. On 13 September 2019, the individual notifies the reporting financial institution of his move to Jurisdiction F to work and

provides the financial institution with a residential address in Jurisdiction F. This provides an indicium of tax residence in Jurisdiction F which is a change of circumstances. The account becomes a reportable account from that and is reportable for the full calendar year 2019, the first report being made in 2020 and annually thereafter.

(c) **Account ceases to be reportable** – the account holder of the account in (a) above notifies the reporting financial institution that he has moved permanently to Hong Kong and is no longer a tax resident of Jurisdiction F with effect from 17 April 2020. As a result, the individual ceases to be a reportable person. As the account ceases to be a reportable account in the calendar year 2020, no report from the reporting financial institution is required in 2021 or any subsequent calendar year unless the account becomes reportable once again.

(d) **Account is closed** – a reportable account is closed by the account holder on 14 August 2018. The reporting financial institution must report in 2019 that the account has been closed along with information in respect of that account for the period from 1 January 2018 to the date of closure. The amount of information will depend on the regime under which reporting occurs.

(e) **Account ceases to be reportable and is then closed** – the account holder in (c) above closes the account with the reporting financial institution on 11 October 2020. As the closure occurred after the account ceased to be reportable, information with respect to the closure of the account is not required to be reported in 2021.

16. The following examples illustrate the circumstances where an account becomes or ceases to be a reportable account are applicable to MPF schemes, ORSO schemes, pooling agreements, approved pooled investment funds and credit unions:

(a) **Account becomes reportable** – a reporting financial institution carries out due diligence procedures on low value pre-existing individual accounts as at 31 December 2019 between 1 January 2020 and 31 December 2021. On 22 March 2021, the financial institution identifies an account that belongs to an individual resident in Jurisdiction F (a reportable jurisdiction). The account is a reportable account from that date. Information on that account is reportable for the full calendar year 2021, the first report being made in 2022 and annually thereafter.

(b) **Account reportable after change of circumstance** – a new account is opened by an individual on 20 June 2020. The self-certification provided by the individual on opening the account shows that the individual is not a tax resident of any reportable jurisdiction. The account is thus not a

reportable account. On 13 September 2022, the individual notifies the reporting financial institution of his move to Jurisdiction F to work and provides the financial institution with a residential address in Jurisdiction F. This provides an indicium of tax residence in Jurisdiction F which is a change of circumstances. The account becomes a reportable account from that and is reportable for the full calendar year 2022, the first report being made in 2023 and annually thereafter.

(c) **Account ceases to be reportable** – the account holder of the account in (a) above notifies the reporting financial institution that he has moved permanently to Hong Kong and is no longer a tax resident of Jurisdiction F with effect from 17 April 2022. As a result, the individual ceases to be a reportable person. As the account ceases to be a reportable account in the calendar year 2022, no report from the reporting financial institution is required in 2023 or any subsequent calendar year unless the account becomes reportable once again.

(d) **Account is closed** – a reportable account is closed by the account holder on 14 August 2022. The reporting financial institution must report in 2023 that the account has been closed along with information in respect of that account for the period from 1 January 2022 to the date of closure. The amount of information will depend on the regime under which reporting occurs.

(e) **Account ceases to be reportable and is then closed** – the account holder in (c) above closes the account with the reporting financial institution on 11 October 2022. As the closure occurred after the account ceased to be reportable, information with respect to the closure of the account is not required to be reported in 2023.

## Balance or value of account

17. The balance or value of a reportable account is part of the reportable information that is to be automatically exchanged. It is also relevant for other purposes such as the due diligence procedures for pre-existing entity accounts and the account aggregation rules.

18. The balance or value of the reportable account is to be determined as of the last day of the calendar year or other appropriate reporting period. If the balance or value of the account requires conversion from one currency to another, the Guidance at Chapter 14 on rules of account aggregation and currency should be considered.

19. If the balance or value of the account is negative, it should be reported as a zero balance or value.

## Date for determining the balance or value for thresholds

20. Thresholds apply to pre-existing individual and entity accounts. For due diligence purposes, it is necessary to determine whether the aggregate value of accounts held by an individual exceeds an amount equivalent to $7.8 million or the value of accounts held by an entity exceeds $1.95 million.

21. The thresholds are applied on the last day of a calendar year. If a reporting financial institution has elected to report on other appropriate reporting period instead of the calendar year, the balance or value on the account that is to be used for determining if the threshold has been exceeded is that on the last day of the appropriate reporting period ending in that year.

22. Where a reporting financial institution values financial accounts at regular points during the year, the balance or value on the last such valuation in the calendar year or appropriate reporting period may be used for determining if the aggregate value has exceeded the thresholds.

## Reliance on service providers

23. Reporting financial institutions may use third party service providers to fulfill some or all of their due diligence obligations but the obligations remain the responsibility of the financial institution. Any failure by a third party service provider would be regarded as a failure by the financial institution.

24. For example, where a financial adviser has the customer relationship for introducing business to a reporting financial institution, such as cash value insurance contracts, the financial adviser is often best placed to obtain the self-certification needed to carry out the due diligence process on the new account. The reporting financial institution may rely on the financial adviser to obtain the self-certifications on its behalf.

25. Similarly, when a reporting financial institution engages a third party to run AML/KYC processes it may rely on the report provided on the basis that the third party has relied on appropriate documentary evidence in producing the report. In such a case the reporting financial institution may not hold the original documents or certified copies of them. If the IRD requires sight of documents in these circumstances, photocopies will be acceptable subject to the reporting financial institution being able to obtain originals or certified copies should that be necessary.

## Alternative procedures for pre-existing accounts

26. Reporting financial institutions may apply:

(a) the due diligence procedures for new accounts to pre-existing accounts,

and/or

(b) the due diligence procedures for high value accounts to low value accounts.

27. Where a reporting financial institution chooses to apply one or both of these alternatives, it may do so with respect to all its pre-existing accounts or, separately, to any clearly identified group of such accounts. A group of accounts may, for example, be those maintained by a particular line of business or those maintained in a particular location.

28. Where a reporting financial institution chooses to apply the new account procedures to pre-existing accounts, the rules that otherwise apply to pre-existing accounts continue to apply. For example, the reporting financial institution can still rely on the exception for reporting a TIN or date of birth if it is not in its records and is not otherwise required to be collected by domestic law. However, the reporting financial institution is required to use reasonable efforts to obtain the TIN and date of birth by the end of the second calendar year following the year in which the account is identified as a reportable account.

**New accounts treated as pre-existing accounts**

29. The classification of a financial account as "pre-existing account" or "new account" is generally dependent on the account opening date. New account means a financial account opened and maintained by a reporting financial institution on or after 1 January 2017 (1 January 2020 for a 2020-covered institution). For accounts opened prior to this date, they are classified as pre-existing accounts. Subject to meeting certain conditions, a reporting financial institution may treat certain new accounts held by pre-existing customers as pre-existing accounts for due diligence purposes, i.e. relying on paragraph (b) of the definition of pre-existing account in section 50A of the IRO (the expanded definition).

30. A customer is treated as pre-existing if it holds a financial account with a reporting financial institution or its related entity within Hong Kong. Thus, if a pre-existing customer opens a new account, the reporting financial institution may rely on the due diligence procedures it (or its related entity) applied to the customer's pre-existing account to determine whether the account is a reportable account.

31. For a "new account" (subsequent account) to be treated as a pre-existing account, the following conditions have to be met:

(a) the account holder also holds with the reporting financial institution, or its related entity within Hong Kong, a financial account that is a pre-existing account (old financial account);

(b) the reporting financial institution (and, as applicable, its related entity within Hong Kong) treats both accounts, and any other subsequent accounts of the account holder that are treated as pre-existing accounts, as a single account for the purposes of satisfying knowledge requirement and determining the balance or value of any of the financial accounts when applying any account thresholds;

(c) the subsequent account is subject to AML/KYC procedures and the institution is permitted to carry out such AML/KYC procedures for the subsequent account by relying on the AML/KYC procedures carried out for the old financial account; and

(d) the opening of the subsequent account does not require the provision of new, additional, or amended customer information by the account holder other than for the purpose of complying with paragraphs 50B, 50C 50F and 50G of the IRO.

32. The expanded definition of pre-existing account may also be relied on by fund managers to treat certain new equity or debt interests held by existing customers as pre-existing accounts for due diligence purposes. A fund is a related entity of another fund if the two entities are investment entities as described in paragraph (e) of the definition of investment entity and (a) the entities are under common management; and (b) the management fulfills the due diligence requirements for the entities under Schedule 17D to the IRO.

# CHAPTER 9
# DUE DILIGENCE: PRE-EXISTING INDIVIDUAL ACCOUNTS

Pre-existing accounts are those in existence as at 31 December 2016 (if the financial institution is not a 2020-covered institution[1]) or 31 December 2019 (if the financial institution is a 2020-covered institution). Pre-existing individual accounts are accounts held by individuals. These are split between high value accounts and low value accounts and there are different due diligence procedures for each type. High value pre-existing individual accounts are accounts with an aggregate balance or value that exceeds an amount equivalent to $7.8 million as at the date that the pre-existing accounts first need to be reviewed or at any 31 December following the initial review date. Low value pre-existing individual accounts are those with an account balance or value that does not exceed an amount equivalent to $7.8 million.

2. As well as differences in the amount of due diligence required for the two types of pre-existing individual accounts, reporting financial institutions have longer period to carry out their due diligence on low value accounts compared to high value accounts. The below table shows the latest completion date of review for high value accounts and low value accounts:

| | Financial institution that is not a 2020-covered institution | Financial institution that is a 2020-covered institution |
|---|---|---|
| Pre-existing account that is a high value account | 31 December 2017 | 31 December 2020 |
| Pre-existing account that is a low value account | 31 December 2018 | 31 December 2021 |

However, to the extent that low value accounts are identified as reportable accounts in a calendar year they are reportable for that calendar year. For example, if financial institutions that are not 2020-covered institutions have until 31 December 2018 to carry out due diligence on low value accounts in existence at 31 December 2016 thus all such accounts must be reported no later than 2019 but if any reportable accounts are identified on or before 31 December 2017 they must be reported in 2018. Similarly, if financial institutions that are 2020-covered institutions have until 31 December 2021 to carry out due diligence on low value accounts in existence at 31 December 2019 thus all such accounts must be reported no later than 2022 but if any reportable accounts are identified on or before 31 December 2020 they must be reported in 2021. The due diligence requirements in Schedule 17D to identify reportable accounts also apply to those pre-existing accounts that are closed prior to the reporting financial institutions

[1] Definition of "2020-covered institution" can be found in Chapter 3 (Reporting Financial Institution) of this Guidance.

carrying out their due diligence procedures.

3. It is expected that more jurisdictions will become reportable jurisdictions over time. Under the wider approach, usually reporting financial institutions should have identified the territory of tax residence of all pre-existing account holders even if they were not subject to reporting at that moment. Any change of tax residence as a result of a change of circumstances has to be captured when the change is recognized by the reporting financial institution. Therefore, when a jurisdiction becomes a reportable jurisdiction subsequently, the reporting financial institutions have to contact relevant account holders to acquire other required information needed for reporting purposes, for example TIN or date of birth, if the information is not available.

**Accounts not required to be reviewed, identified or reported**

4. A pre-existing individual account that is a cash value insurance contract or an annuity contract is not required to be reviewed, identified or reported, if the reporting financial institution is effectively prevented by law from selling the contract to residents for tax purposes of a reportable jurisdiction.

5. A reporting financial institution is "effectively prevented by law" from selling cash value insurance contracts or annuity contracts to residents for tax purposes of a reportable jurisdiction if:

(a) the laws of Hong Kong prohibit or otherwise effectively prevent the sale of such contracts to residents in another jurisdiction; or

(b) the laws of a reportable jurisdiction prohibit or otherwise effectively prevent the reporting financial institution from selling such contracts to residents of such reportable jurisdiction.

6. Where the applicable law does not prohibit reporting financial institutions from selling insurance or annuity contracts outright, but requires them to fulfill certain conditions prior to being able to sell such contracts to residents of the reportable jurisdiction (such as obtaining a license and registering the contracts), a reporting financial institution that has not fulfilled the required conditions under the applicable law is considered to be "effectively prevented by law" from selling such contracts to residents of such reportable jurisdiction.

**Low value accounts**

7. In determining whether an account holder of a low value account is a reportable person, reporting financial institutions have two options for making such a determination. They can apply either:

(a) a residence address test; or

(b) an electronic record search.

8. In the event that the reporting financial institution applies the residence address test but this does not determine the jurisdiction of residence of the individual account holder, then it must also apply the electronic record search.

9. Reporting financial institutions can apply the residence address test to all low value accounts or, separately, to any clearly identified group of such accounts. A group of accounts may, for example, be those maintained by a particular line of business or those maintained in a particular location.

10. Reporting financial institutions may also opt to go straight to an electronic record search for indicia of tax residence without first applying the residence address test.

***Residence address test***

11. The due diligence procedures are for the purpose of identifying whether or not an account holder is a reportable person. If an account holder is identified as a reportable person, the reporting financial institution then has to collate reportable information for the purpose of reporting to the IRD.

12. In determining whether an account holder of a low value account is a reportable person, reporting financial institutions may apply the residence address test.

13. Where the reporting financial institution has policies and procedures in place to verify the residence address of an account holder based on documentary evidence, a person is regarded as a resident for tax purposes of the jurisdiction in which an address is located if:

(a) the reporting financial institution has in its records a residence address for the account holder;

(b) the residence address held is current; and

(c) the residence address is based on documentary evidence.

*Residence address definition*

14. The residence address held by a reporting financial institution must be sufficiently detailed to identify where the account holder resides and is generally in a form that identifies the street and the town, city or area where the individual lives in sufficient detail for the reporting financial institution to determine the jurisdiction in which the residence is located.

15. In general, an "in-care-of" address or a post office box is not a residence address. However, a post office box can be part of a residence address where the address also contains a street, an apartment or suite number, or a rural route and thus clearly identifies the actual residence of the account holder.

16. An "in-care-of" address is unlikely to provide sufficient detail to identify the residence of the account holder as the address is that of the person receiving mail on behalf of the account holder. Exceptionally, an "in-care-of" address may be relied on where it is clear that the account holder is military personnel and the "in-care-of" address is a standard address of the type used for individuals residing on military bases. Additionally, an "in-care-of" address may be relied on where the address that clearly identifies a residence address relates to a care or residential home, provided that the reliance on this type of address does not frustrate the purpose of the CRS.

*Current residence address*

17. The residence address held by a reporting financial institution must be current. A residence address is considered to be current where it is the most recent address that the reporting financial institution has recorded for the account holder. Such an address is not regarded as current if it has been used for mailing purposes and mail has been returned undeliverable-as-addressed other than due to an error.

18. If mail has been returned and the account (other than an annuity contract) is dormant, then the residence address may continue to be regarded as current in certain circumstances. A residence address associated with an account (other than an annuity contract) may be considered current even though mail has been returned undeliverable-as-addressed and the account is dormant.

19. Further details on dormant accounts can be found in chapter 6 (Excluded Accounts) of this Guidance.

*Address based on documentary evidence*

20. Another requirement is that the current residence address in the reporting financial institution's records is based on documentary evidence. This requirement is satisfied if: (a) the reporting financial institution's policies and procedures ensure that the current residence address in its records is the same address, or in the same jurisdiction, as that on the documentary evidence (e.g. identity card, driving license, voting card, or certificate of residence); (b) the reporting financial institution's policies and procedures ensure that where it has government-issued documentary evidence but such documentary evidence does not contain a recent residence address or does not contain an address at all (e.g. certain passports), the current residence address in the reporting financial institution's records is the same address, or in the same jurisdiction, as that on recent documentation issued by an authorized government body or a utility

company, or on a declaration of the individual account holder under penalty of perjury. Acceptable documentation issued by an authorized government body includes, for example, formal notifications or assessments by a tax administration. Acceptable documentation issued by utility companies relates to supplies linked to a particular property and includes a bill for water, electricity, telephone (landline only), gas, or oil. A declaration of the individual account holder under penalty of perjury is acceptable only if: (a) the reporting financial institution has been required to collect it under the laws of Hong Kong for a number of years; (b) it contains the account holder's residence address; and (c) it is dated and signed by the individual account holder under penalty of perjury. In such circumstances, the standards of knowledge applicable to documentary evidence would also apply to the documentation relied upon by the reporting financial institution (see Chapter 14 of this Guidance). Alternatively, a reporting financial institution can meet the requirement in paragraph 13(c) if its policies and procedures ensure that the jurisdiction in the residence address corresponds to the jurisdiction of issuance of government-issued documentary evidence.

21. Financial institutions are generally required to carry out due diligence checks, often referred to as AML/KYC procedures, on their customers in respect of anti-money laundering regulations. These checks, which are based on FATF recommendations, can be found in the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) and the Guideline on Anti-Money Laundering and Counter-Terrorist Financing (for Authorized Institutions) which in turn require the financial institution to verify the customer's identity based on documents, data or information obtained from a reliable and independent source.

22. Where a reporting financial institution has identified the residence address of an account holder based on the documents which fulfill the conditions set out in paragraph 20, including those obtained through AML/KYC procedures, the reporting financial institution may rely on that address when applying the residence address test.

23. After adoption of the current FATF recommendations, account holders have been subject to AML/KYC processes and their accounts, with supporting documents fulfilling the conditions set out in paragraph 20, are in scope for this treatment.

24. For accounts opened prior to adoption of FATF Recommendations, the policies and procedures that the reporting financial institution has in place must ensure that the current residence address they hold is in the same jurisdiction:

(a) as that of the address on the most recent documentation collected by the reporting financial institution, for example, a utility bill, a real property lease or a declaration by the account holder made under penalty of perjury (the requirements to rely on a declaration under penalty of perjury mentioned in paragraph 20 also apply); and

(b) as that reported by the reporting financial institution with respect to the account holder under any other applicable tax reporting requirements (if any).

25. Alternatively, in the case of a cash value insurance contract, the reporting financial institution may rely on the current residence address in its records until:

(a) there is a change in circumstances that causes the reporting financial institution to know or have reason to know that the address held is incorrect or unreliable; or

(b) the time of pay-out, whether full or partial, or maturity of the contract. The pay-out or maturity of the contract will trigger a change of circumstances requiring the reporting financial institution to update its records.

26. If there is a change of address and the new address is in the same jurisdiction as the previous address, no further due diligence procedure is required by the reporting financial institution. The reporting financial institution may rely on the new address for residence address test.

*Residence address test: Change in circumstances*

27. If a reporting financial institution has relied on the residence address test and there is a change in circumstances that causes the reporting financial institution to know or have reason to know that the original documentary evidence or other documentation is incorrect or unreliable, the reporting financial institution must, 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 such change in circumstances, obtain a self-certification and new documentary evidence to establish the residence(s) for tax purposes of the account holder. If the reporting financial institution cannot obtain the self-certification and new documentary evidence by such date, the reporting financial institution must apply the electronic record search procedure described in paragraphs 29 to 50 below. The following examples illustrate the procedures to be followed in case of a change in circumstances:

(a) **Example 1**: Bank-HK has relied on the residence address test to treat an individual account holder, A, as a resident of reportable Jurisdiction X. Five years later, A communicates to Bank-HK that he has moved to Jurisdiction Y, which is also a reportable jurisdiction, and provides his new address. Bank-HK obtains from A a self-certification and new documentary evidence confirming that he is resident for tax purposes in Jurisdiction Y. Bank-HK must treat A as a resident of reportable Jurisdiction Y.

(b) **Example 2**: The facts are the same as in Example 1, except that Bank-HK does not obtain a self-certification from A. Bank-HK must apply the electronic record search procedure described in paragraphs 29 to 50 below and, as a result, treat A as a resident of, at least, jurisdiction Y (based on the new address provided by A).

**Electronic record search**

28. Where a reporting financial institution fails to establish the residence of an individual with a low value account from the residence test, or is unable, or chooses not to apply the residence address test, it must review its electronically searchable data for indicia of the individual's residence.

29. The account holder is regarded as a resident of a reportable jurisdiction if any of the indicia below apply:

(a) the account holder is identified as resident of a reportable jurisdiction;

(b) the current mailing or residence address (including a post office box) of the account holder is in a reportable jurisdiction;

(c) there are one or more current telephone numbers in a reportable jurisdiction and, no telephone number in Hong Kong;

(d) standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a reportable jurisdiction.

(e) a current effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction;

(f) a "hold mail" instruction or an "in-care-of" address in a reportable jurisdiction if the reporting financial institution does not have any other address on file for the account holder.

30. If none of the above indicia are discovered through an electronic search, no further action is required in respect of low value accounts unless and until there is a subsequent change of circumstance that results in one or more of the above indicia being associated with the account or the account holder, or the account becomes a high value account. Where such indicia arise, the account becomes a reportable account unless the reporting financial institution takes steps to cure or repair the indicia. Only where the indicia remain in place after the cure or repair is completed, the account becomes a reportable account.

31. In addition, where a number of the above indicia are present but provide contradictory evidence, the reporting financial institution may take steps to cure or

repair the indicia. For example, if the indicia, with the exception of a current telephone number in France, all point to the individual being resident in Hong Kong, the reporting financial institution can seek a self-certification with documentary evidence from the individual to confirm where he or she is resident for tax purposes before treating the account as belonging to a French reportable person.

32. A reporting financial institution is not treated as having reason to know that an account holder's status is incorrect because it retains information or documentation that may conflict with its review of the account holder's status if it was not necessary to review that information or those documents under the procedures for the electronic record search.

33. Where the indicia found during the electronic search indicates that the account holder is resident for tax purposes in a reportable jurisdiction, the account is a reportable account subject to applying the curing procedure for this indicator of a reportable jurisdiction.

***Mailing or residence address***

34. Where the indicia found during the electronic search indicates a current mailing or residence address (including a post office box) in a reportable jurisdiction, the account is a reportable account subject to applying the curing procedure for this indicium.

35. A mailing or residence address is considered to be current for this purpose where it is the most recent address recorded by the reporting financial institution with respect to the account holder. Where the account is a dormant account, the mailing or residence address attached to the account can be considered as "current" during the period of dormancy.

36. Where the reporting financial institution has recorded two or more mailing or residence addresses in different reportable jurisdictions, the account holder and details of the account are potentially reportable to multiple jurisdictions. However, where one or more of those addresses is for a service provider of the account holder, for example, an asset manager, investment advisor or lawyer, the reporting financial institution is not required to treat the service provider's address as an indication of residence.

***Telephone number in reportable jurisdiction***

37. The telephone number(s) in a reportable jurisdiction is only required to be treated as an indicium of residence where that number is current, that is, it is the most recent telephone number(s) held by the reporting financial institution for that account holder.

38. If two or more telephone numbers are held, any that relate to a service provider of the account holder such as a lawyer, accountant or financial adviser, etc., is not an

indicium of residence of the account holder.

39. In the case of any number that is known not to relate to a telephone, for example a permanent fax number, the number should not be treated as indicium of residence. However, if there is any doubt over the function, or the number has a combined function at least one of which is as a phone number, the number should be treated as indicium of residence if it is a reportable jurisdiction number.

***Standing instructions***

40. Where at the time of review there are current standing instructions to transfer funds to an account maintained in a reportable jurisdiction, the account (other than a depository account) must be reported unless the reporting financial institution obtains or currently maintains a record of:

(a) a self-certification that the account holder is not tax resident in the reportable jurisdiction; and

(b) a form of acceptable documentary evidence which establishes the account holder's non-reportable status.

41. There is a standing instruction if the account holder has mandated the reporting financial institution to make repeat payments without further instruction from the account holder, to another account that can be clearly identified as being an account maintained in a reportable jurisdiction.

42. Instructions to make an isolated payment are not standing instructions even when given significantly in advance of the payment being made.

***Power of attorney***

43. Where the indicium found is a current effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction, the account must be reported unless the reporting financial institution obtains or currently maintains a record of one of the following:

(a) a self-certification showing that the account holder is not tax resident in the reportable jurisdiction; or

(b) a form of acceptable documentary evidence which establishes the account holder's residence other than in a reportable jurisdiction.

***Hold mail or in-care-of address only***

44. In the case that a hold mail instruction or in-care-of address is discovered in the

electronic record search, and none of the other indicia described in paragraph 29(a) through (e) and no other address (within such indicia) is identified for the account holder, the reporting financial institution must, in the order most appropriate to the circumstances:

(a) apply the paper record search described in paragraphs 59 to 60 below, or

(b) seek to obtain from the account holder a self-certification or documentary evidence to establish the jurisdiction of residence for the account holder.

45. If neither of these procedures successfully establishes the account holder's residence for tax purposes, the reporting financial institution must report the account as an undocumented account until the account ceases to be undocumented. The IRD may make enquiries if particular reporting financial institution appears to have a disproportionate number of undocumented accounts.

***Curing indicia***

46. There may be occasions when the electronic record search gives indications of residence in a reportable jurisdiction that the reporting financial institution considers may be incorrect. In such circumstances, the reporting financial institution may take steps to "cure" the information before treating the account holder as a reportable person.

47. Where the reporting financial institution holds information about the account holder that includes any of the following indicia:

(a) a current mailing address or residence address in a reportable jurisdiction;

(b) one or more telephone numbers in a reportable jurisdiction and no telephone number in Hong Kong;

(c) standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a reportable jurisdiction; or

(d) a currently effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction;

then the reporting financial institution may obtain a self-certification from the account holder to "cure" the information by establishing the jurisdiction of residence. The reporting financial institution can rely on self-certifications it has previously reviewed and maintained a record of, but in either case the self-certification must be supported by documentary evidence. If the self-certification supported by documentary evidence establishes that the account holder is not a reportable person, then the reporting financial institution is not required to treat the account holder as resident in a reportable jurisdiction.

48. The self-certification obtained as part of the curing procedure does not need to contain an express confirmation that an account holder is not resident in a particular jurisdiction. Provided the self-certification positively identifies the jurisdiction where the account holder is resident, it can be taken that the account holder is not resident in any other jurisdiction.

49. Where a reporting financial institution has contacted an account holder for a self-certification but the account holder has not responded, the account should be treated as reportable 90 days after initiating contact. The 90-day period is to allow the account holder sufficient time to respond to the request for information.

50. The information in paragraph 47(d) above may arise in circumstances where the account holder cannot provide a self-certification. In such a case the reporting financial institution may rely on documentary evidence that establishes the account holder's non-reportable status.

**High value accounts**

51. High value pre-existing accounts are accounts with an aggregated balance or value that exceeds $7.8 million as at the date that the pre-existing accounts first need to be reviewed or at any 31 December following the initial review date.

52. The aggregated amount is that across all accounts held by the individual with the reporting financial institution and includes accounts held by related entities of the reporting financial institution (see Chapter 14 of this Guidance on rules of account balance aggregation and currency).

53. When an account is identified as a high value account, the residence address test may not be used to establish the residence jurisdiction of the account holder.

54. The reporting financial institution must start with the electronic record search and then continue, where appropriate, with a paper record search and a relationship manager inquiry (the three-stage due diligence procedures are referred to as the "enhanced due diligence procedures").

55. The reporting financial institution may choose to apply the new account procedures and seek self-certifications from account holders rather than carry out the enhanced due diligence procedures for pre-existing high value accounts.

***Electronic record search***

56. For high value accounts, a reporting financial institution must review its electronically searchable data for indicia of the individual's residence. The process of indicia search is the same as that of low value account.

57. The account holder is regarded as a resident of a reportable jurisdiction if any of the indicia below apply:

(a) the account holder is identified as resident of a reportable jurisdiction;

(b) the current mailing or residence address (including a post office box) of the account holder is in a reportable jurisdiction;

(c) there are one or more current telephone numbers in a reportable jurisdiction and no telephone number in Hong Kong;

(d) standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a reportable jurisdiction;

(e) a current effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction;

(f) a "hold mail" instruction or "in-care-of" address in a reportable jurisdiction if the reporting financial institution does not have any other address on file for the account holder.

58. To the extent that the reporting financial institution's electronically searchable databases do not include fields for the above or do not otherwise capture this information, a paper record search is required. Where the electronically searchable databases include fields for the required information but are left blank, a paper record search is required unless the reporting financial institution has policies and procedures in place meaning that a field is only left blank when the information is not in the reporting financial institution's records. For example, a blank field in respect of paragraph 57(e) above would indicate positively that the reporting financial institution does not hold a power of attorney or other signatory authority for the account holder.

***Paper record search***

59. A reporting financial institution must carry out a paper record search to the extent that the information on residence of an account holder is not captured by the electronic search. For example, where the electronically searchable databases contain all the required information except for details of standing instructions to transfer funds, the paper record search is only required to look for that information.

60. The paper record search should include a review of the current master file and, to the extent that they are not contained in the current master file, the following documents associated with the account and obtained by the financial institution within the last 5 years:

(a) the most recent documentary evidence collected with respect to the account;

(b) the most recent account opening contract or documentation;

(c) the most recent documentation obtained by the reporting financial institution for AML/KYC procedures or other regulatory purposes;

(d) any power of attorney or signatory authority currently in effect; and

(e) any standing instructions (other than with respect to a depository account) to transfer funds currently in effect.

61. These should be reviewed for any of the indicia of residence detailed in paragraph 57 above.

62. A reporting financial institution can rely on the review of high value accounts by third party service providers where there is a contract obliging the service provider to perform the review.

***Relationship manager inquiry***

63. The relationship manager enquiry is required for high value individual accounts in addition to the electronic record search and the paper record search. The reporting financial institution must consider whether any relationship manager associated with an account, which includes any accounts aggregated with such an account, has actual knowledge that would identify the account holder as a reportable person. The reporting financial institution must treat the account and any accounts aggregated with such an account, as reportable accounts if the relationship manager knows that the account holder is a reportable person.

64. A relationship manager is an employee or officer of the reporting financial institution who has been assigned responsibility for specific account holders on an ongoing basis. A relationship manager provides advice to account holders regarding their accounts as well as recommending and arranging for the provision of financial products, services and other related assistance.

65. Relationship management must be more than ancillary or incidental to a person's job role. Thus a person with some contact with account holders, but whose functions are of a back office, administrative or clerical nature, is not considered to be a relationship manager.

66. Notwithstanding the above, a person is only a relationship manager with respect to an account that has aggregate balance or value of more than $7.8 million, taking into

account the account aggregation and currency rules. Thus, in determining whether an officer or employee of a reporting financial institution is a relationship manager, (a) the employee must satisfy the above definition of relationship manager and (b) the aggregate balance or value of the account holder's accounts must exceed $7.8 million.

67. The relationship manager also has an important role in identifying any change of circumstance in relation to a high value individual account. A reporting financial institution must ensure that it has procedures in place to capture changes that are made known to the relationship manager in respect of the account holder's reportable status.

***Relationship manager inquiry: Examples***

68. The following examples illustrate when an employee of reporting financial institution would be regarded as a relationship manager:

(a) **Example 1**: An individual holds a custodial account with a reporting financial institution. The value of the account at the end of the appropriate reporting period is $8.5 million. An employee of the reporting financial institution has a role that requires him to manage the account on an ongoing basis and maintain the reporting financial institution's relationship with the individual account holder. As the account has a value in excess of $7.8 million, the employee is a relationship manager with respect to this account.

(b) **Example 2**: An individual holds a custodial account with a reporting financial institution with a value at the end of the appropriate reporting period of $5.5 million. In addition, the individual also has a depository account with the reporting financial institution with a balance at the same date of $6 million. The reporting financial institution's internal systems link the accounts to the same account holder, thus the accounts must be aggregated, the aggregate balances exceed $7.8 million so belong to a high value account holder. The relationship with the account holder is managed in a similar way to that in (a) above. The employee with that role is a relationship manager in respect of the accounts held by this account holder.

(c) **Example 3**: The facts are the same as in (b) above except that the employee has no direct contact with the account holder simply performing an administrative role in relation to the accounts. Here the employee is not a relationship manager.

***Effect of finding indicia***

69. Where the enhanced due diligence procedures for high value individual accounts have been carried out and any of the indicia described in paragraph 57 are found, the

account must be treated as a reportable account with respect to each reportable jurisdiction for which an indicium is identified unless it elects to apply the curing procedures described in paragraph 47 and one of the exceptions applies with respect to that account.

70. Where the information arising from the due diligence procedures contains potentially conflicting information, for example, the electronic search identifies a residential address in Italy but the relationship manager has knowledge of an address in France, the financial institution may attempt to cure the information by seeking a self-certification with documentary evidence from the account holder.

71. If no indicators of residence in a reportable jurisdiction are found in any of the enhanced due diligence procedures, then no further action is required unless and until there is a change in circumstances.

***Hold mail instruction or in-care-of address***

72. If a hold mail instruction or in-care-of address is discovered in the enhanced review of high value accounts, and no other address or indicia of residence are identified for the account holder, the reporting financial institution must request a self-certification or other documentary evidence from the account holder to establish the jurisdiction of tax residence of the account holder.

73. If the reporting financial institution cannot obtain a self-certification or documentary evidence from the account holder, the financial institution is required to treat the account holder as an undocumented account.

74. Where the reporting financial institution has identified and reported an account as an undocumented account, the reporting financial institution must repeat the enhanced due diligence procedures for high value individual accounts annually until the account ceases to be undocumented.

***Low value account becomes high value***

75. If a pre-existing individual account at the time of review is a low value account, it needs to be monitored at the end of each subsequent reporting period to see if it has become a high value account.

76. If the balance or value of the account on the last day of the appropriate reporting period, after taking into account of any aggregation, exceeds an amount equivalent to $7.8 million, the reporting financial institution must complete the enhanced due diligence procedures for high value accounts within the calendar year following the year that the account becomes a high value account.

77. If, as a result of the enhanced review, the account is identified as a reportable

account following this review it is reportable with respect to the year in which it is so identified and remains reportable in all subsequent years unless and until the account holder ceases to be a reportable person.

**Change of circumstances**

78. Once the due diligence procedures have been completed, the account holder is identified as either a reportable or non-reportable person. That status will not change until such time as a change of circumstance is identified by the reporting financial institution.

79. A change of circumstances includes any change that results in the addition of information relevant to a person's status or otherwise conflicts with such person's status. In addition, a change of circumstances includes any change or addition of information to the account holder's account (including the addition, substitution, or other change of an account holder) or any change or addition of information to any account associated with such account (applying the account aggregation rules described in Chapter 14 of this Guidance) if such change or addition of information affects the status of the account holder.

80. A change of circumstance is only relevant if the new information affects the status of the account holder for the purposes of AEOI, whether that is based on the due diligence procedures or from a self-certification. For example, a person who has been identified as reportable to the UK provides the reporting financial institution with details of a change of residential address to a property in France. That is evidence that there has been a change of circumstance affecting the reportable status of the account holder. If, however, the new address had also been in the UK the reportable status established earlier would not be affected and no further action would be required on the part of the reporting financial institution.

81. Once a change of circumstance has been identified, the reporting financial institution must request a self-certification and new documentary evidence from the account holder to establish whether the individual is a reportable person and, if so, to which jurisdiction the reportable information should be sent. If the account holder fails to respond to the request within 90 days following the notice or discovery of the change of circumstances, the reporting financial institution should treat the account holder as reportable to each jurisdiction for which it holds indicia.

# CHAPTER 10
# DUE DILIGENCE: NEW INDIVIDUAL ACCOUNTS

New accounts mean financial accounts opened and maintained by reporting financial institutions on or after 1 January 2017 (if the financial institution is not a 2020-covered institution[1]) or 1 January 2020 (if the financial institution is a 2020-covered institution). New individual accounts are new accounts held by one or more individuals.

2. The due diligence procedures for new individual accounts require that a self-certification is obtained from the account holder.

3. If the self-certification establishes that the account holder is a resident for tax purposes of a reportable jurisdiction, then the reporting financial institution must treat the account as a reportable account.

4. The wider approach that requires reporting financial institutions to identify the territory in which a person is tax resident irrespective of whether or not that territory is a reportable jurisdiction, applies to new accounts as well as pre-existing accounts. The self-certification process can be used for this purpose.

5. The procedures applying for the purposes of identifying reportable accounts among new individual accounts are described below.

**Obtaining a valid self-certification on account opening**

6. Upon account opening, the reporting financial institution must obtain a self-certification that allows the institution to determine the jurisdiction of residence for the account holder. It is expected that reporting financial institutions have maintained account opening processes that facilitate collection of a self-certification at the time of the account opening, whether that process is done face-to-face, online or by telephone. The reporting financial institution must also confirm the reasonableness of such self-certification based on the information obtained by the institution in connection with the opening of the account, including any documentation collected pursuant to AML/KYC procedures. If a reporting financial institution does not obtain the self-certification upon opening of a new account, the reporting financial institution should not complete the account opening process. If the reporting financial institution opens the account in such circumstances, the reporting financial institution is not compliant with the due diligence requirements. Penalty under Part 14 of the IRO will be imposed upon failure to obtain the self-certification. While the penalty may be remitted for failure to obtain a self-certification upon account opening with "reasonable excuse", such "reasonable

[1] Definition of "2020-covered institution" can be found in Chapter 3 of this Guidance.

excuse" is only limited to the instances described in paragraph 7 below.

7. There are a limited number of instances, where due to the specificities of a business section it is not possible to obtain a self-certification on "day one" of the account opening process, for example where an insurance contract has been assigned from one person to another or in the case where an investor acquires shares in an investment trust on the secondary market and this does not come to the attention of the financial institution until after the event. In such circumstances, the self-certification should be both obtained and validated as quickly as feasible and in any case within a period of 90 days after the financial institution has knowledge that a new account has come into existence. Given that obtaining a self-certification for new accounts is a critical aspect of ensuring that the CRS is effective, strong measures must be in place to ensure that valid self-certifications are always obtained for new accounts. In all cases, reporting financial institutions must have processes and procedures in place to ensure that they have obtained and validated the self-certification in time to be able to meet their due diligence and reporting obligations with respect to the reporting period during which the account was opened.

***Format of self-certification***

8. There is no prescribed format for a self-certification but it may, for example, form part of the account opening documentation. Whatever form it takes, it must allow the reporting financial institution to determine the account holder's residence(s) for tax purposes, and confirm the reasonableness of such self-certification based on the information obtained by the reporting financial institution in connection with the opening of the account, including any documentation collected pursuant to AML/KYC procedures.

9. A self-certification must be signed by the account holder (or a person authorized to do so for her/him under domestic law), or in the case of an account opened by telephone or the internet the self-certification must be positively affirmed – that is, the account holder must confirm the information provided. The self-certification must be dated no earlier than the date the account holder received the form; undated self-certifications may be date stamped by the receiving financial institution on receipt and that date will be taken as the date of signature. A self- certification is required for all accounts, including those held in the names of minors.

10. The self-certification must include all of the following information for the account holder:

(a) name;

(b) residence address;

(c) jurisdiction(s) of residence for tax purposes;

(d) TIN with respect to each jurisdiction; and

(e) date of birth.

11. Reporting financial institutions are also encouraged to collect place of birth as from the experience of our treaty partners, the collection of such information is necessary and proportionate for the purpose of enabling tax administrations to correctly and unequivocally identify the taxpayers concerned.

12. The self-certification may be pre-populated by the reporting financial institution to include the account holder's information, except for the jurisdiction(s) of residence for tax purposes, to the extent already available in its records. This includes records held in a central on-boarding system available across multiple jurisdictions in which the financial institution operates.

13. The self-certification may be provided in any manner and in any form, for example it can be in paper or electronic format. If the self-certification is provided electronically, the reporting financial institution must have systems in place to ensure that the information provided is that of the account holder and it must be able to provide a hard copy of all such self-certifications to the IRD on request.

14. Where an account holder provides a paper self-certification, a financial institution may retain an original, certified copy, or photocopy (including a microfiche, electronic scan, or similar means of electronic storage) of the self-certification. Any documentation that is stored electronically must be made available by the financial institution in hard copy form to the IRD upon request.

***Self-certifications: Examples***

15. The following examples illustrate how a self-certification may be provided:

(a) **Example 1**: Individual A completes an online application to open an account with Bank-HK. All the information required for self-certification is entered by A on an electronic application (including a confirmation of A's jurisdiction of residence for tax purposes). A **positively affirms that the information provided is correct by ticking a box** on the application form.

A's information, as provided in the electronic self-certification, is confirmed by Bank-HK's service provider to be reasonable based on the information it has collected pursuant to AML/KYC procedures. A's self-certification is valid.

(b) **Example 2**: Individual B makes an application in person to open an account with Bank-HK. B produces his driving licence as proof of identification and provides all the information required for self-certification to an employee of Bank-HK who enters the information into the Bank's systems.

The application is subsequently signed by B. B's self-certification is valid.

***Self-certification incorrect or unreliable***

16. A self-certification remains valid unless the reporting financial institution 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 reported by the account holder, for example, a change of address.

17. Whatever the cause, where the reporting financial institution cannot rely on the original self-certification it must obtain either –

(a) a valid self-certification that establishes the residence(s) for tax purposes of the account holder; or

(b) a reasonable explanation and documentation (as appropriate) supporting the validity of the original self-certification (and retain a copy or a notation of such explanation and documentation).

18. A reporting financial institution may have reason to know that a self-certification or documentary evidence is unreliable or incorrect. It may have information in its possession that suggests different facts pertaining to the account holder than those on the self-certification. This includes the knowledge of the relevant relationship managers. If a reasonably prudent person in the position of the reporting financial institution would question the information provided, then there is reason to know that the information may be incorrect or unreliable.

19. A reporting financial institution also has reason to know that a self-certification or documentary evidence is unreliable or incorrect if there is information in the documentation or in the reporting financial institution's account files that conflicts with the person's claim regarding its status.

***Standards of knowledge applicable to self-certifications and documentary evidence***

20. A reporting financial institution has reason to know that a self-certification provided by a person is unreliable or incorrect if:

(a) the self-certification is incomplete with respect to any item on the self-certification that is relevant to the claims made by the person;

(b) the self-certification contains any information that is inconsistent with the person's claim; or

(c) the reporting financial institution has other account information that is inconsistent with the person's claim.

21. A reporting financial institution that relies on a service provider to review and maintain a self-certification is considered to know or have reason to know the facts within the knowledge of the service provider.

22. A reporting financial institution may not rely on documentary evidence provided by a person if the documentary evidence does not reasonably establish the identity of the person presenting it.

23. A reporting financial institution may not rely on documentary evidence if it contains information that is inconsistent with the person's claim as to its status, the reporting financial institution has other account information that is inconsistent with the person's status, or the documentary evidence lacks information necessary to establish the person's status.

24. A reporting financial institution may choose to treat a person as having the same status that it had prior to the change in circumstances until the earlier of 90 calendar days from the date that the self-certification became invalid due to the change in circumstances, the date that the validity of the self-certification is confirmed, or the date that a new self-certification is obtained. A reporting financial institution may rely on a self-certification without having to inquire into possible changes of circumstances that may affect the validity of the statement, unless it knows or has reason to know that circumstances have changed.

25. If the reporting financial institution cannot obtain a confirmation of the validity of the original self-certification or a valid self-certification during such 90-day period, the reporting financial institution must treat the account holder as resident of the jurisdiction in which the account holder claimed to be resident in the original self-certification and the jurisdiction in which the account holder may be resident as a result of the change in circumstances.

**Change of circumstances**

26. A self-certification can become invalid as a result of a change of the account holder's circumstances. Reporting financial institutions need to have procedures to ensure that any change that constitutes a change in circumstances is identified.

27. A reporting financial institution is expected to notify any person providing a self-certification of the person's obligation to notify the reporting financial institution of a change in circumstances.

28. A change in circumstances affecting the self-certification provided to the reporting financial institution invalidates the self-certification with respect to the information that is no longer reliable until the information is updated.

29. A self-certification becomes invalid as soon as the reporting financial institution knows or has reason to know that circumstances affecting the correctness of the self-certification have changed. However, a reporting financial institution may treat the status of the account holder as unchanged until the earlier of –

(a) 90 calendar days from the date that the self-certification became invalid due to the change in circumstances;

(b) the date that the validity of the self-certification is confirmed (where appropriate); or

(c) the date that a new self-certification is obtained.

30. A reporting financial institution may rely on a self-certification without having to inquire into possible changes of circumstances that may affect the validity of the statement, unless it knows or has reason to know that circumstances have changed.

31. If the reporting financial institution cannot obtain a confirmation of the validity of the original self-certification or a valid self-certification during the 90-day period, the reporting financial institution must continue to treat the account holder as resident in the jurisdiction identified in the original self-certification and must also treat the account holder as resident in the jurisdiction indicated by the change of circumstance.

# 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[1]) 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

[1] 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.

# CHAPTER 12
# DUE DILIGENCE: NEW ENTITY ACCOUNTS

New accounts mean financial accounts opened and maintained by reporting financial institutions on or after 1 January 2017 (if the financial institution is not a 2020-covered institution[1]) or 1 January 2020 (if the financial institution is a 2020-covered institution). The due diligence procedures for new entity accounts are broadly the same as those for pre-existing entity accounts except that there is no de minimis threshold.

2. Reporting financial institutions must determine:

(a) whether a new entity account is held by one or more entities that are reportable persons; and

(b) whether a new entity account is held by one or more entities that are passive NFE with one or more controlling persons who are reportable persons.

**Self-certification**

3. Where a new entity account is held by one or more entities that are reportable persons, then the account must be treated as a reportable account. To determine this, reporting financial institutions must obtain a self-certification as part of the account opening procedure and confirm the reasonableness of such self-certification based on the information obtained in connection with the opening of the account, including any documentation collected pursuant to AML/KYC procedures. In practice, this means the reporting financial institution must know or have reason to know that the self-certification is incorrect or unreliable. If the self-certification fails the reasonableness test, a new valid self-certification must be obtained. Reporting financial institutions are not, however, expected to carry out an independent legal analysis of relevant tax laws to confirm the reasonableness of a self-certification.

4. The following examples illustrate the application of the reasonableness test:

(a) **Example 1**: A reporting financial institution obtains a self-certification from the account holder upon account opening. The address contained in the self-certification conflicts with that contained in the documentation collected pursuant to AML/KYC procedures. Due to the conflicting information, the self-certification is incorrect or unreliable and, as a consequence, it fails the reasonableness test.

[1] Definition of "2020-covered institution" can be found in Chapter 3 (Reporting Financial Institutions) of this Guidance.

(b) **Example 2**: A reporting financial institution obtains a self-certification from the account holder upon account opening. The documentation collected pursuant to AML/KYC procedures only indicates the account holder's place of incorporation. In the self-certification, the account holder claims to be resident for tax purposes in a jurisdiction that is different from its jurisdiction of incorporation. The account holder explains to the reporting financial institution that under relevant tax laws its residence for tax purposes is determined by reference to place of effective management, and that the jurisdiction where its effective management is situated differs from the jurisdiction in which it was incorporated. Thus, because there is a reasonable explanation of the conflicting information, the self-certification is not incorrect or unreliable and, as a consequence, passes the reasonableness test.

(c) **Example 3**: A reporting financial institution obtains a self-certification from the account holder upon account opening. The self-certification does not contain a TIN, but the information included on the AEOI Portal developed by the OECD indicates that reportable jurisdiction issues TINs to all tax residents. Due to the conflicting information, the self-certification is incorrect or unreliable and, as a consequence, fails the reasonableness test. To enhance the quality of the information collected and minimize the administrative burden associated with any follow up concerning reporting of an incorrect TIN, reporting financial institutions may nevertheless wish to confirm the format and other specifications of a TIN with the information provided on the AEOI Portal.

5. The self-certification must allow determining the account holder's residence(s) for tax purposes (see paragraphs 10 to 13 below). With respect to new entity accounts, a self-certification is valid only if it complies with the requirements for the validity of self-certifications for pre-existing entity accounts.

6. If the self-certification indicates that the account holder is resident in a reportable jurisdiction, the reporting financial institution must treat the account as a reportable account. An exception applies where the financial institution can reasonably determine, based on information in its possession, or that is publicly available that the account holder is not a reportable person in respect to that jurisdiction. For example, where the entity is a corporation that is publicly traded, or is a government entity.

*Timing of self-certification*

7. It is expected that reporting financial institutions maintain account opening processes that facilitate collection of a self-certification at the time of the account opening, whether that process is done face-to-face, online or by telephone. There may be circumstances where it is not possible or practical to obtain a self-certification on

"day one" of the account opening process, for example where an insurance contract has been assigned from one person to another or in the case where an investor acquires shares in an investment trust on the secondary market and this does not come to the attention of the financial institution until after the event.

8. In such circumstances, the self-certification should be obtained as soon as possible and in any case within a period of 90 days after the reporting financial institution has knowledge that a new account has come into existence. This must be in sufficient time for the account to be reported, where the account holder is a reportable person, for the period in which the financial institution identifies the account. Reporting financial institutions must make proper endeavours to obtain the self-certification in these circumstances. Financial Institutions likely to be affected by this must have processes and procedures in place to ensure that self-certifications are sought from such account holders.

**Jurisdiction of residence**

9. The domestic laws of the various jurisdictions lay down the conditions under which an entity is to be treated as fiscally resident.

10. Generally, an entity is resident for tax purposes in a jurisdiction if, under the laws of that jurisdiction, it is liable to tax by reason of its domicile, residence, place of management or incorporation, or any other criterion of a similar nature.

11. Where an entity such as a partnership, limited liability partnership or similar legal arrangement has no residence for tax purposes, it shall be treated as resident in the jurisdiction in which its place of effective management is situated or, in the case of a trust, the jurisdiction(s) in which the trustee(s) is/are resident.

12. The following examples illustrate how an entity's residence for tax purposes may be determined:

(a) **Example 1**: A company is incorporated in Jurisdiction A and has its place of effective management in Jurisdiction B. Under the laws of Jurisdiction A, residence for tax purposes is determined by reference to place of incorporation. The same applies under the laws of Jurisdiction B. Thus, the company is resident only in Jurisdiction A.

(b) **Example 2**: Same facts as Example 1, except that, under the laws of Jurisdiction B, residence for tax purposes is determined by reference to place of effective management. Thus, the company is resident in both Jurisdictions A and B.

(c) **Example 3**: Same facts as Example 1, except that, under the laws of Jurisdictions A and B, residence for tax purposes is determined by

reference to place of effective management. Thus, the company is resident only in Jurisdiction B.

(d) **Example 4**: Same facts as Example 1, except that, under the laws of Jurisdiction A, residence for tax purposes is determined by reference to place of effective management and, under the laws of Jurisdiction B, residence for tax purposes is determined by reference to place of incorporation. Thus, the company is not resident in either Jurisdiction A or B.

**Passive NFE and controlling persons**

13. Reporting financial institutions must determine whether a new entity account holder is a passive NFE with one or more controlling persons who are reportable persons. If so, then the account must be treated as a reportable account. In making this determination, the reporting financial institution must follow the guidance below but may do so in the order most appropriate under the circumstances.

14. Definition of "Controlling Persons" can be found in Chapter 18 (Miscellaneous) of this Guidance.

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

15. A reporting financial institution may obtain a self-certification from the account holder to establish its status, or instead may use:

(a) information in its possession (such as information collected pursuant to AML/KYC procedures); or

(b) information that is publicly available (such as information published by an authorized government body) based upon which it can reasonably determine that the account holder is an active NFE or a financial institution.

16. Note though that a managed investment entity resident in a non-participating jurisdiction is always treated as a passive NFE, it would be treated as a financial institution if it is resident in a participating jurisdiction (this ensures that it is not possible for controlling persons to avoid reporting by setting up such entities in non-participating jurisdictions).

**Determining controlling persons**

17. For the purposes of determining the controlling persons of an account holder, a reporting financial institution may rely on information collected and maintained

pursuant to AML/KYC procedures if these procedures are in accordance with the 2012 FATF Recommendations.

**Determining whether a controlling person is a reportable person**

18. For the purposes of determining whether a controlling person of a passive NFE is a reportable person, a reporting financial institution may only rely on a self-certification from either the entity account holder or the controlling person.

**Change in circumstances**

19. 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 an account is incorrect or unreliable, the reporting financial institution must re-determine the status of the account in accordance with the procedures described in Chapter 11 (Due Diligence: Pre-existing Entity Accounts) 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.

# CHAPTER 13
# DUE DILIGENCE: INVESTMENT ENTITY WITH REGULARLY TRADED SECURITIES

A difference between AEOI and FATCA[1] is that under the FATCA regime, the definition of financial account excludes equity and debt interests in an investment entity where those interests are regularly traded on an established securities market. Under the AEOI regime, there is no similar exclusion. That means that equity and debt interests in certain listed investment entities (LIEs), for example listed investment companies, can be in scope under AEOI.

2. For an LIE that is a reporting financial institution, the equity interests in the LIE are all held by HKSCC Nominees Limited (HKSCC Nominees) as the equity interest holder (with a few exceptions known as "Other LIE"). Since HKSCC Nominees is a reporting financial institution, the LIE is not required to report on HKSCC Nominees and HKSCC Nominees would have its own obligation to identify and report on its own account holders.

3. In certain circumstances, Other LIE may not possess information or have relationship with the account holder that enables it to comply with its due diligence and reporting obligations. Section 50H of the IRO contains provisions allowing the use of third party service provider with respect to AEOI to assist the Other LIE in meeting its due diligence and reporting obligations in such circumstances.

4. Where new account holders in Other LIE arise as a result of interests (as to which HKSCC Nominees is not the account holder) being acquired on the secondary market, a periodic check for new account holders will be required to be done by the Other LIE. The frequency of such checks will depend on the systems and processes of the Other LIE that are in place. An annual check may be considered adequate if performed at the year-end if the systems in place are sufficiently robust. However, for operational reasons such checks may be performed at every six months or at more frequent intervals.

[1] In 2010, the US enacted the FATCA provisions which are contained in the HIRE Act 2010. These provisions aimed at reducing tax evasion by US citizens and entities. FATCA requires financial institutions outside the US to pass information about their US customers to the US tax administration, the Internal Revenue Service. The legislation allows for a 30% withholding tax to be applied to the US source income of any non-US financial institution that falls to comply with this requirement.

5. For new account holders that arise as a result of primary market issues of interests (as to which HKSCC Nominees is not the account holder) by Other LIE, the Other LIE would be required to perform due diligence on the new account holders, whether through procedures described below or otherwise. The share application form for such interests can be amended to include the self-certification required on new account opening. Any incomplete applications would need to be returned to the applicant. In accordance with existing AML practice, incomplete applications could be accepted and the missing information be requested but if the missing information was not received the shares could be re-allotted or sold to a third party and/or the register of members rectified, provided that the terms and conditions of the offer and any applicable law allowed this.

# CHAPTER 14
# DUE DILIGENCE: SPECIAL DUE DILIGENCE RULES

## Reliance on self-certifications

Where information already held by a reporting financial institution, including knowledge about the customer held by a relationship manager, conflicts with any statements or self-certification, or the reporting financial institution has reason to know that the self-certification or other documentary evidence is incorrect, it may not rely on that evidence or self-certification.

2. A reporting financial institution will be considered to have reason to know that a self-certification or other documentation associated with an account is unreliable or incorrect if, based on the relevant facts, a reasonably prudent person would know this to be the case.

### *Reliance upon an audited financial statement*

3. Reporting financial institutions may rely upon an audited financial statement to establish that an account holder meets a certain income or asset threshold, but are not obliged to where the entity's status can be established from other information or documentation that it holds.

4. If a reporting financial institution does rely upon an audited financial statement to establish a status for an account holder, it has reason to know that the status claimed is unreliable or incorrect only if the audited financial statement for the account holder or the notes or footnotes to the financial statement conflicts with the self-certification provided to it.

5. If a reporting financial institution relies upon an audited financial statement to establish a status for an account holder that does not require the account holder to meet an asset or income threshold, it will be required to review only the notes or footnotes to the financial statement to determine whether the financial statement supports the claimed status. If a reporting financial institution does rely upon other documentation to establish the account holder's status there is no need to review any financial statements that may have been provided to it as part of the account opening.

### *Reliance upon other documentation*

6. Where a reporting financial institution relies on organizational documents to establish that an account holder has a particular status, it will only be required to review the documents to the extent needed to establish that the requirements applicable to the particular status are met.

## Limits on reason to know

*Pre-existing entity accounts*

7. For the purposes of determining whether a reporting financial institution that maintains a pre-existing entity account has reason to know that the status applied to the entity is unreliable or incorrect, the reporting financial institution is only required to review information that may contradict the status claimed if such information is contained in:

(a) the most recent self-certification and documentary evidence;

(b) the current customer master file;

(c) the most recent account opening contract; and

(d) the most recent documentation obtained for AML/KYC procedures or for other regulatory purposes.

*Multiple accounts*

8. A reporting financial institution that maintains multiple accounts for a single account holder will have reason to know that a claimed status for the person is inaccurate based on account information for another account held by the person only to the extent that the accounts are either required to be aggregated or because of any other "reason to know"; for example, knowledge of a relationship manager.

*Change of address within same jurisdiction*

9. A change of address in the same jurisdiction as that of the previous address is not a reason to know that the self-certification or documentary evidence provided is inaccurate.

*Conflicting indicia*

10. A reporting financial institution does not know or have reason to know that a self-certification or documentary evidence is unreliable or incorrect solely because it discovers any of the following indicia and such indicia conflicts with the self-certification or documentary evidence:

(a) one or more telephone numbers in a reportable jurisdiction and no telephone number in Hong Kong; or

(b) standing instructions (other than with respect to a depository account) to transfer funds to an account maintained in a reportable jurisdiction; or

(c) currently effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction.

11. The following examples illustrate the application of the limits on the standards of "reason to know":

(a) **Example 1: Reporting financial institution Bank-HK maintains a depository account for individual account holder "A"**

A holds a pre-existing depository account with Bank-HK. Bank-HK has relied on the address in its records for A, as supported by his passport and a utility bill collected upon opening of the account, to determine that A is resident for tax purposes in Jurisdiction X (application of the residence address test).

Five years later, A provides a power of attorney to his sister, who lives in Jurisdiction Y, to operate his account. The fact that A has provided such power of attorney is not sufficient by itself to give Bank-HK reason to know that the documentary evidence relied upon to treat A as a resident of Jurisdiction X is unreliable or incorrect.

(b) **Example 2: Reporting financial institution Insurance Company I has entered into a cash value insurance contract with individual account holder "B"**

The contract is a new individual account. Insurance Company I has obtained a self-certification from B and confirmed its reasonableness on the basis of the AML/KYC documentation collected from B. The self-certification confirms that B is resident for tax purposes in Jurisdiction X.

Two years after Insurance Company I entered into the contract with B, B provides a telephone number in Jurisdiction Y to Insurance Company I. Although Insurance Company I did not previously have any telephone number in its records for B, the sole receipt of a telephone number in Jurisdiction Y does not in itself constitute a reason to know that the original self-certification is unreliable or incorrect.

## Alternative procedures for cash value insurance and annuity contracts

### *Individual beneficiary of a cash value insurance contract or an annuity contract*

12. A reporting financial institution can treat an individual beneficiary (other than the owner) who receives a death benefit under a cash value insurance contract or an annuity contract as a non-reportable person unless the reporting financial institution has knowledge or reason to know that the beneficiary is in fact a reportable person. A reporting financial institution has reason to know that a beneficiary of a cash value insurance contract or an annuity contract is a reportable person if the information collected and associated with the beneficiary contains indicia as described in paragraph 30 of Chapter 9 (Due Diligence: Pre-existing Individual Accounts).

### *Group cash value insurance contracts or group annuity contracts*

13. A reporting financial institution can treat an account that is a group cash value insurance contract or a group annuity contract, and that meets the requirements set out below, as a non-reportable account until the date on which an amount is payable to an employee/certificate holder or beneficiary.

14. A reporting financial institution is not required to review all the account information collected by the employer to determine if an account holder's status is unreliable or incorrect.

15. The requirements are that:

(a) the group cash value insurance contract or group annuity contract is issued to an employer and covers twenty-five or more employees/certificate holders;

(b) the employees/certificate holders are entitled to receive any contract value and to name beneficiaries for the benefit payable on the death of the employee/certificate holder; and

(c) the aggregate amount payable to any employee/certificate holder or beneficiary does not exceed $7.8 million.

## Aggregation and currency rules

### *Aggregation of individual accounts and entity accounts*

16. Identical rules apply to aggregation for individual and entity accounts.

17. An account held by one or more individuals as a partner(s) of a partnership is treated as an entity account and is not treated as an individual account.

18. Reporting financial institutions are required to aggregate all financial accounts maintained by it or by a related entity, but only to the extent that the reporting financial institution's computerized systems link the financial accounts by reference to a data element such as client number or TIN, and allow account balances or values to be aggregated.

19. Each joint holder of a financial account must be attributed the entire balance or value of the account for purposes of applying the aggregation requirements.

***Special aggregation rule applicable to relationship managers – all accounts***

20. In determining the aggregate balance or value of financial accounts held by a person to determine whether a financial account is a high value account, a reporting financial institution is also required to aggregate all accounts held by that person which a relationship manager knows, or has reason to know, are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by that person.

21. The following examples illustrate the application of the account aggregation rules:

(a) **Example 1 (Reporting financial institution is not required to aggregate accounts)**: Entity E, holds two depository accounts that are pre-existing accounts with Bank-HK. The respective balances of the two depository accounts at year end are $1.5 million and 1 million. E's accounts are not associated with one another in the shared computerized information system of Bank-HK. As the accounts are not associated in Bank-HK's system, Bank-HK is not required to aggregate the accounts to determine whether the accounts meet the de minimis threshold. Both accounts are eligible for the exemption as neither account exceeds $1.95 million.

**Example 2 (Reporting financial institution is required to aggregate accounts)**: Same facts as Example 1, except that both of E's depository accounts are associated with E and with one another by reference to Bank-HK's internal identification number. The system shows the account balances for both accounts, and such balances may be electronically aggregated, though the system does not show a combined balance for the accounts. In determining whether the accounts meet the de minimis threshold, Bank-HK is required to aggregate the account balances of the depository accounts under the account aggregation rules. Under those rules, E is treated as holding depository accounts with Bank-HK with an aggregate balance of $2.5 million. Accordingly, neither account is eligible for the exemption, because the accounts, when aggregated, exceed the $1.95 million threshold.

(b) **Example 3 (Aggregation rules for joint accounts maintained by a reporting financial institution)**: Individual H holds a custodial account that is a pre-existing account at Bank-HK1. The balance of the account at year end is $5 million. H also holds a joint custodial account that is a pre-existing account with her spouse, W, at Bank-HK2. The balance of the joint account at year end is also $5 million. Bank-HK1 and Bank-HK2 are related entities and share computerized information management systems. Both H's custodial account at Bank-HK1 and Bank-HK2 and W's custodial account at Bank-HK2 are associated with H and with one another by reference to Bank-HK1's internal identification number and the system allows the balances to be aggregated. In determining whether the accounts meet the definition of high value account, Bank-HK1 is required to aggregate the account balances of accounts held in whole or in part by the same account holder under the account aggregation rules. Under those rules, H is treated as having financial accounts with Bank-HK1 and Bank-HK2, each with an aggregate balance of $10 million. Accordingly, both of H's accounts are high value accounts. W is only treated as having a financial account with Bank-HK2 with a balance of $5 million. Thus, W's account is a low value account.

22. The following additional examples illustrate the application of the special aggregation rule applicable to relationship manager:

(a) **Example 1 (Accounts held by a passive NFE and by one of its controlling person)**: A passive NFE, PNFE-1, holds a depository account with Bank-HK. One of PNFE-1's controlling persons, C, also holds a depository account with Bank-HK. Both accounts are associated with C and with each other by reference to Bank-HK's internal identification number. In addition, Bank-HK has assigned a relationship manager to C. As the accounts are associated in Bank-HK's system and by a relationship manager, Bank-HK is required to aggregate the accounts to determine whether the account held by C is a high value account.

(b) **Example 2 (Accounts held by different passive NFEs with a common controlling person)**: Same facts as Example 1. In addition, another passive NFE, PNFE-2, holds a depository account with Bank-HK. C is also one of PNFE-2's controlling persons. PNFE-2's account is not associated with C nor with PNFE-1's and C's accounts by reference to Bank-HK's internal identification number. As the accounts are associated by a relationship manager, Bank-HK is required to aggregate the accounts held by PNFE-1, PNFE-2 and C to determine whether the account held by C is a high value account.

**Amounts read to include equivalent in other currencies**

23. Where accounts are denominated in a currency other than Hong Kong dollars, then either the threshold limits must be converted into the currency in which the accounts are denominated before determining if they apply, or the balance shown in the accounts must be converted into Hong Kong dollars before applying the threshold limits.

24. This should be done using a published spot rate for 31 December of the year being reported or in the case of an insurance contract or annuity contract, the date of the most recent contract valuation.

25. In the case of closed accounts, the spot rate to be used is the rate on the date the account was closed.

# CHAPTER 15
# REQUIRED INFORMATION

## Introduction

The regime for AEOI requires specific information to be reported in respect of account holders who are identified by financial institutions as holding reportable accounts.

2. The following information is required from financial institutions in respect of any person identified as holding reportable accounts:

(a) name;
(b) address;
(c) TIN(s);
(d) date of birth (for individuals);
(e) place of birth (for individuals);
(f) jurisdiction(s) to which the information is reportable;
(g) the account number (or a functional equivalent in the absence of an account number);
(h) the name and identifying number of the reporting financial institution;
(i) the account balance or value as of the end of the calendar year or other appropriate period.

3. There are also additional reporting requirements depending on the type of account that is being reported. The additional items for custodial accounts are dealt with at paragraphs 48 to 52, depository accounts at paragraph 53 and other types of account at paragraphs 54 to 57.

## Reportable account holders

4. The objective of defining reportable person under the AEOI regime is to identify whether the account holder is linked to the jurisdiction receiving the information in a way that indicates that he may be subject to taxation in that jurisdiction or, for an entity that has no residence for tax purposes, the jurisdiction in which its place of effective management is situated.

5. The definition of reportable person is, however, subject to a list of exclusions. This covers corporation, the stock of which is regularly traded on an established securities market (and its affiliate), governmental entity, international organization, central bank and financial institution.

**Reportable account holders: residence**

***Individuals***

6. In most circumstances, an individual will be tax resident in the jurisdiction where they live and work. If an individual files a tax return or pays tax in a jurisdiction, including direct payment of employment taxes, then the individual is likely to be a tax resident there.

7. However, in special cases where an individual has ties to more than one jurisdiction that individual may be "dual resident", a tax resident of more than one jurisdiction. For example, the US, always treats their citizens as tax resident regardless of where they live. This means that a US citizen is always a US tax resident, even if they are living and working in Hong Kong and also Hong Kong tax resident. Where an individual is tax resident in more than one reportable jurisdiction, then any accounts will be reportable accounts for each jurisdiction where they are tax resident.

***Entities***

8. In most circumstances, an entity will be tax resident where it is incorporated and is managed and controlled (although this will depend on the domestic legislation of that jurisdiction).

9. If an entity is not managed and controlled in the same place that it is incorporated, then the entity may be "dual resident", a tax resident of more than one jurisdiction.

10. A reportable entity also includes entity that is typically tax transparent (partnership, trust, etc.). For reporting purposes, an entity will be held to be "tax resident" in the jurisdiction in which its place of effective management is situated, e.g. a partnership managed and controlled in the UK will be "tax resident" in the UK even though the taxable persons are the partners rather than the partnership itself.

11. If an individual or entity is not certain where they are tax resident then they should ask their tax adviser. The OECD has also developed a portal which contains information of tax residency rules of all committed jurisdictions. The website is as follows:

> https://web-archive.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/index.htm

**Address**

***Individual account holders***

12. Where the reportable person is an individual who is an account holder or is a controlling person of an entity, the address to be reported is the individual's current residence address. If the financial institution does not hold this address in its records then it should report the mailing address it has on file for that person.

13. In general, an "in-care-of" address or a post office box is not a residence address. A post office box that forms part of an address that also includes details such as a street, apartment or suite number or a rural route such that a place of residence can be clearly identified can be accepted as a residence address. In special circumstances such as that of military personnel an "in-care-of" address may constitute a residence address.

***Entity account holders***

14. Where the reportable person is an entity, the address to be reported is the address that the financial institution holds on file for that entity.

**TIN**

15. TIN is the unique identifier assigned to the account holder by the tax administration in the account holder's jurisdiction of tax residence. It is a unique combination of letters and/or numbers used to identify an individual or entity for the purposes of administering the tax laws of that jurisdiction.

16. Any identifier assigned by a jurisdiction of source, for example, for identifying a person whose income has been subject to withholding tax at source, should not be reported.

17. Some jurisdictions do not issue a TIN, or do not issue a TIN to all residents, and where no TIN has been issued there will be nothing to report unless they use other high integrity numbers with an equivalent level of identification. For individuals these include:

(a) Social security number;

(b) National insurance number;

(c) Citizen or personal identification code or number; and

(d) Resident registration number

18. For entities, jurisdictions may use a business/company registration code or number where no TIN has been issued.

19. Some jurisdictions that issue TINs have domestic law that do not require the collection of the TIN for domestic reporting purposes. In such cases the reporting financial institution is not required to collect the TIN for those jurisdictions.

20. In its portal, the OECD has provided a guide to the structure and form of TINs used by tax administrations including those where domestic collection of the TIN is not required. The website is as follows:

> https://web-archive.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/index.htm

21. The TIN, or TIN equivalent, must be reported for all new accounts where issued. For pre-existing accounts, the TIN is reportable to the extent that it is already held in records maintained by the reporting financial institution or the reporting financial institution is otherwise obliged to collect it. Where the TIN is not held in respect of pre-existing accounts, the reporting financial institution must use reasonable efforts to obtain it by the end of the second calendar year following the year in which the accounts are identified as reportable accounts. Not all jurisdictions issue a TIN, or functional equivalent, to all individuals or entities; where a TIN has not been issued to an individual or entity there is an exception from the requirement to report a TIN. If and when a jurisdiction starts issuing TINs the exception no longer applies and the TIN would be required to be reported if the financial institution obtains a self-certification that contains such a TIN, or otherwise obtains such a TIN.

22. As reportable persons may be resident in more than one jurisdiction, they may have two or more TINs that the financial institution must report.

***Jurisdiction of residence***

23. The legislation for AEOI authorizes the wider approach that requires financial institutions to retain data on the jurisdiction of residence of account holders, irrespective of whether or not that jurisdiction is a reportable jurisdiction.

24. Financial institutions must carry out the due diligence procedures required and where a person is identified as a reportable person information include the jurisdiction of residence must be reported to the IRD. Where a reportable person is identified as having more than one reportable jurisdiction of residence, the financial institution is required to report all of the identified reportable jurisdictions to the IRD.

25. The jurisdictions of residence identified as a result of carrying out the due diligence procedures are without prejudice to any residence determination made by the financial institution for any other tax purpose.

26. Reportable account data is to be sent to the IRD where the account holder is a resident of a reportable jurisdiction. A list of reportable jurisdictions can be found at Part 1 of Schedule 17E to the IRO.

***Account number***

27. The account number to be reported is the unique identifying number or code that the reporting financial institution has assigned to the reportable account. This will include identifiers such as bank account numbers and policy numbers for insurance contracts as well as other non-traditional unique identifiers. The unique identifier should be sufficient to enable the financial institution to identify the reportable account in future.

28. Where there is no unique identifying number or code, the financial institution should report any functional equivalent that they use to identify the account. This may include non-unique identifiers that relate to a class of interests, which, along with the name of the account holder, enable the account to be identified.

29. Exceptionally, if the reportable account does not have any form of identifying number or code, the financial institution should report a description of the account sufficient to identify the account held by the named account holder in future.

***Identifying information of reporting financial institution***

30. The reporting financial institution must report its name and identifying number. This is to enable the jurisdiction receiving the information to easily identify the source of it in the event that they have any follow-up questions in respect of the data reported. The financial institution will need to report an AEOI ID issued by the IRD upon its registration via the IRD AEOI Portal.

***Account balance or value***

31. The reporting financial institution must report the balance or value of reportable financial accounts as of the end of the reporting period for each calendar year. This will be 31 December in each year unless it is not possible or usual to value an account at that date. If that is the case then that value at the normal valuation point for the account that is nearest to 31 December should be used. The reporting financial institution may also report the balance or value as of the end of other appropriate reporting period of 12 months ending on 31 March, 30 June and 30 September. The value of the account should be reported in the currency in which the account is denominated.

32. In general, the balance or value to be reported is that which the financial institution calculates for the purpose of reporting to the account holder. Where the

balance or value of an account is nil or a negative amount, for example where an account is overdrawn, the financial institution must report the balance or value as nil.

33. For cash value insurance contracts or annuity contracts, the amount to be reported is the cash value or surrender value of the contract.

34. For an equity interest in an investment entity, the amount to be reported is the value calculated by the financial institution for the purpose that requires the most frequent determination of value.

35. For a debt interest in an investment entity, the balance or value is the principal amount of the debt.

36. The balance or value of an account must not be reduced by any liabilities or obligations incurred by an account holder with respect to the account or any of the assets held in the account.

*Joint accounts*

37. Each holder of a jointly held account is attributed the entire balance or value of the joint account as well as the entire amounts paid or credited to the account.

38. For example, where a jointly held account has a balance or value of $600,000 and one of the account holders is resident in Jurisdiction A (a reportable jurisdiction), the amount attributable to that person in the report to Jurisdiction A will be $600,000.

39. If both account holders in the above example were resident in Jurisdiction A then each would be attributed $600,000 in the report to Jurisdiction A.

*Multiple jurisdictions*

40. Where a reportable person is either an account holder or the controlling person of a passive NFE and is identified as having more than one jurisdiction of residence, the entire balance or value of the reportable account, as well as the entire amount paid or credited to the reportable account must be reported to each jurisdiction of residence of the account holder or controlling person.

*Account closure*

41. An account is regarded as closed according to the normal operating procedures of the reporting financial institution that are consistently applied for all accounts that it maintains. For example, an equity interest in an investment entity would be considered closed when that interest is terminated by the transfer, surrender, redemption or cancellation of the interest or the liquidation of the entity.

42. An account with a balance or value equal to zero or which is negative will not be a closed account solely by reason of such a balance or value.

43. When an account is closed the reporting financial institution must report the fact of the closure but is not required to report the balance or value of the account at closure. Any reportable amounts paid or credited to the account in the reporting period up to the date of closure remain reportable.

***Account ceases to be reportable***

44. If, as a result of a change of circumstances, an account holder ceases to be a reportable person then the account will cease to be a reportable account in the year in which the change of circumstance is identified by the reporting financial institution.

45. As reporting is based on the status of accounts in existence at the end of the reportable period such accounts will not be reportable for the period in which the change of circumstances occurs. This is different to the reporting required when an account held by a reportable person is closed during a reportable period.

***Place of Birth***

46. The place of birth to be reported is the town or city and the country of birth of the reportable account holder. Reporting financial institutions are encouraged to collect place of birth as from the experience of our treaty partners, the collection of such information is necessary and proportionate for the purpose of enabling tax administrations to correctly and unequivocally identify the taxpayers concerned.

***Date of Birth***

47. The date of birth is reportable for all new accounts. It is only reportable for pre-existing accounts to the extent that it is already held in records maintained by the reporting financial institution or the reporting financial institution is otherwise obliged to collect it. Where the date of birth is not held in respect of pre-existing accounts the reporting financial institution must use reasonable efforts to obtain it by the end of the second calendar year following the year in which the accounts are identified as reportable accounts.

***Custodial account***

48. In addition to the general reporting requirements, where the reportable account is a custodial account the information to be reported for each reporting period is:

(a) the total gross amount of interest paid or credited to the account;

(b) the total amount of dividends paid or credited to the account;

(c) the total gross amount of other income generated with respect to the assets held in the account paid or credited to the account; and

(d) the total gross proceeds from the sale or redemption of financial assets paid or credited to the account.

*Gross proceeds*

49. A custodial institution is required to report the total gross proceeds from the sale or redemption of financial assets held in a custodial account during the reporting period. This is without regard to whether or not the account holder would be subject to tax in Hong Kong on the sale or redemption of the financial asset.

50. The total gross proceeds from the sale or redemption of a financial asset is the total amount credited to the account of the person entitled to the payment without regard to any sums netted off against the payment to satisfy outstanding liabilities. For example, a loan used to fund acquisition of the asset may be repaid from the proceeds of sale. This must not be deducted from the amount reportable.

51. Commissions and fees paid with respect to the sale or redemption of the asset may be taken account of in arriving at the gross proceeds of sale.

52. Where the financial asset that is sold or redeemed is an interest bearing debt obligation, the gross proceeds should include any interest that has accrued between interest payment dates.

***Depository accounts***

53. In addition to the general reporting requirements, where the reportable account is a depository account, the information to be reported for each reportable period is the gross amount of interest paid or credited to the account during that period.

***Other accounts***

54. In addition to the general reporting requirements, in the case of any account other than a depository account or a custodial account the information to be reported for each reporting period is the total gross amount of income paid or credited to the account holder in the reporting period with respect to which the reporting financial institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the account holder during the reporting period.

55. For cash value insurance contracts, this will include any part surrenders taken throughout the policy year.

56. For a purchased life annuity, it will include any amounts paid or credited to the policy holder.

57. Where a deferred annuity is not converted into a purchased life annuity at the end of the accumulation phase and the account holder takes the surrender value of the contract instead, the amount paid as the surrender value is the amount to be reported.

***Currency***

58. All amounts to be reported by the reporting financial institution must identify the currency in which they are denominated.

***Paper and electronic records***

59. The records of a financial institution include both paper and electronic records that the financial institution maintains for the purpose of keeping account holder information available for use in the business. This includes information such as the customer master file necessary to maintain contact with the account holder and information for satisfying AML/KYC procedures.

60. Information is not regarded as maintained by the financial institution if it has been archived and is not used by the business, for example there may be regulatory requirements that documents are kept for a minimum period before they can be destroyed but are otherwise not used by the business. Only when such information is retrieved by the financial institution from the archive so that it can be used by it will the information be regarded as maintained.

61. Electronic records are available for use by the financial institution to the extent that they are electronically searchable. This means information maintained by the financial institution that is stored in the form of an electronic database against which standard queries in programming languages, such as Structured Query Language, may be used. Information, data or files are not electronically searchable merely because they are stored in an image retrieval system such as portable document format (pdf.) or as scanned documents.

62. Financial institutions should rely on the IT systems they have in place at the time the electronic searches are carried out, they are not expected to build systems to carry out electronic searches solely for the purpose of reporting under their automatic exchange of information obligations.

***Reasonable efforts to obtain***

63. Where a financial institution does not hold information in its records on either the account holder's TIN or date of birth it is expected to make reasonable efforts to obtain the information by the end of the second calendar year following the year in

which the account is identified as reportable.

64. Reasonable efforts require genuine attempts to obtain the information and would include all or any of the following:

(a) contacting the account holder by mail, in-person or telephone and could include requests made as part of other documentation;

(b) electronic contact such as facsimiles or e-mail;

(c) reviewing electronically searchable information maintained by a related entity in accordance with the aggregation principles.

65. Reasonable efforts do not require the closing, blocking or transferring of an account, nor conditioning or otherwise limiting its use, simply because the account holder does not comply with a request for this information.

66. Reasonable efforts may continue to be made after the above mentioned period if the financial institution so chooses.

# CHAPTER 16
# COLLECTIVE INVESTMENT SCHEME

## Identification of accounts held by CIS

The definition of investment entity is wide and includes CIS, as well as fund managers, investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts as all of these entities could be investing, administering or managing financial assets of a CIS. However, in any such case, the entity will only have reporting obligations if it maintains financial accounts.

2. Paragraph (c) of the definition has put it beyond doubt that any CIS authorized under the Securities and Futures Ordinance (Cap. 571) (SFO) will fall under the category of an investment entity. Paragraphs (d) and (e) of the definition, however, would be appropriate to a CIS which is not authorized under the SFO. If the CIS is resident in Hong Kong or the non-resident CIS has a branch located in Hong Kong, it will be a reporting financial institution.

3. The only financial accounts that are relevant to CIS are the equity and debt interests in the CIS. An entity within the definition of investment entity, by virtue of investing, administering or managing financial assets of a CIS but which does not itself maintain financial accounts is not required to identify or report the accounts it administers or manages. For example, a transfer agent who provides services to a CIS on a third party basis, would not typically have a direct obligation to identify or report the accounts of the CIS. It may agree to provide additional services to the CIS to assist with the CIS's obligations, but the CIS in this case would be the reporting financial institution with responsibility for compliance with the obligations.

4. Where the interests in the CIS are held directly by the investors, the CIS is the only financial institution that will be regarded as a reporting financial institution in relation to the CIS. Where the CIS's interests are held through intermediaries, those intermediaries are responsible for identifying their own direct account holders.

5. An entity which is regarded as an investment entity and therefore a financial institution solely because it administers or manages the financial assets of a CIS will not be regarded as a reporting financial institution with reportable accounts merely because of its management or administration activities. The definition of financial account excludes equity or debt interest of an advising manager where it is an investment entity solely because it (a) renders investment advice to, and acts on behalf of, or (b) manages portfolios for, and acts on behalf of, a customer for the purpose of investing, administering, or managing financial assets deposited in the name of the customer with a financial institution other than the advising manager. As such, an advising manager who only provides services to a CIS and does not maintain any

financial account on its own, will not normally have any reporting obligations. This interpretation equally applies to fund managers, investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts.

6. Where a CIS is a reporting financial institution, the person responsible for ensuring compliance with the obligations under sections 50B, 50C and 50D of the IRO are as follows:

(a) For a CIS constituted as a corporation, that corporation and its directors are responsible for ensuring its compliance with the obligations; and

(b) For a CIS that is not constituted as a corporation, the person who acts for the CIS to maintain financial accounts.

A service provider may be appointed to carry out due diligence and reporting obligations under the IRO. The appointment may be made by the corporation or person who acts for the CIS to maintain financial accounts. To avoid doubt, even if a service provider has been engaged, the corporate CIS or person who acts for the CIS to maintain financial accounts is not relieved from its obligations under the IRO.

**Platforms and other fund distributors**

7. Fund distributors, which may include financial advisers, fund platforms, wealth managers, brokers (including execution-only brokers), banks and insurance companies, may fall within the definition of investment entity because of their role in distributing a CIS.

8. There are two different types of fund distributors: those that act as an intermediary in holding the legal title to the CIS (i.e. as nominee) and those that act on an advisory-only basis.

9. Where a customer appears on a CIS's register, the responsibility to report on that customer lies with the CIS. However, if a customer invests in a CIS via a fund platform, the responsibility to report may lie with the platform. For example, fund platforms typically hold legal title to interests in CISs as nominees on behalf of their customers (the investors). The customers access the platform in order to buy and sell investments and to manage their investment portfolio. The platform will back the customers' orders with holdings in the CISs, and possibly other assets, but only the platform will appear on the shareholders' register of the CISs. Where this is the case the platform will be responsible for the reporting on its financial accounts.

10. On the other hand, most but not all financial advisers act in an advisory-only capacity. They advise their customers on a range of investments, and may intermediate between the CIS, or in some cases fund platform, and the customer. However, they will not hold legal title to the assets, instead the customer appears on

the share register of the CIS or as a direct customer to a fund platform. Financial advisers acting in this manner will not be regarded as the financial institution that maintains the financial accounts.

11. A platform may have a "mixed business" where it acts as an adviser or "pure intermediary" between the investor and the underlying financial institution on behalf of some customers. In addition, it also holds legal title to interests on behalf of other customers. In the case where legal title is held, the platform will be a financial institution with a reporting obligation in respect of those interests.

12. From the platform's perspective, it will not be treated as maintaining those accounts where it acts as an adviser or "pure intermediary".

***Fund nominees - Distributors in the chain of legal ownership***

13. 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 will be custodial institutions because they will be holding assets on behalf of others.

14. Normally, the primary business of a fund nominee, fund intermediary or fund platform will be to hold financial assets for the account of others. As such, 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 investment entity.

15. In some cases there may be uncertainty over whether such a distributor meets the condition requiring 20% of the entity's gross income to derive from holding financial assets and from related financial services. This may be the case if, for example, the income derived from acting as nominee arises in another group company, or where income is derived from commission, discounts or other sources where it is not clear whether the gross income test is met.

16. Where this condition is not met, fund nominees, fund intermediaries and fund platforms will nevertheless still be financial institutions because they would otherwise be within the definition of investment entity. In this case, the financial accounts will be the accounts maintained by the distributor and the distributor will be responsible for ensuring it meets its obligations in respect of those accounts.

17. In the rare case, if the fund nominees, fund intermediaries and fund platforms do not fall within the definition of financial institution, the CIS will be responsible for identifying the ultimate investors (i.e. the account holders) and ensuring compliance with the due diligence and reporting obligations in respect of these accounts. When a fund nominee, fund intermediary or fund platform starts to maintain an account with a CIS, the CIS has to make sure that it is a financial institution before the CIS can be

relieved of its due diligence and reporting obligations.

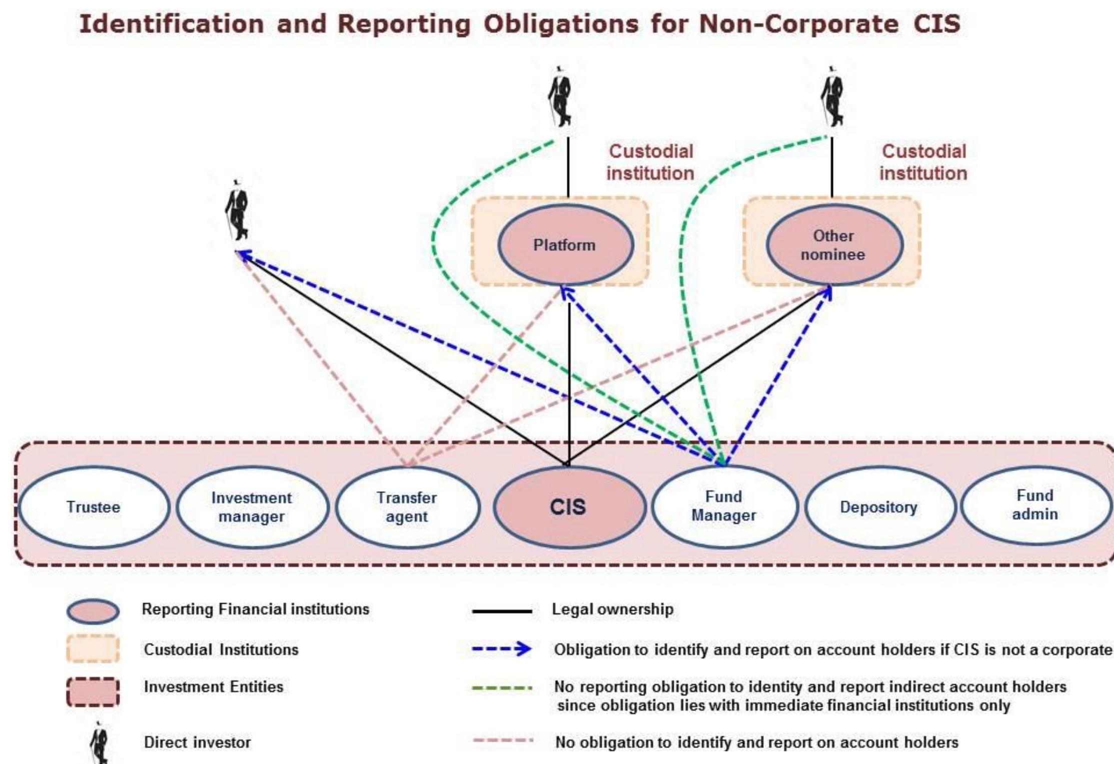
18. For the purpose of aggregating accounts to determine whether any pre-existing custodial accounts are high value accounts, a custodial institution will need to consider all the financial accounts held with them by each customer even though the underlying interests are in different CISs.

*Advisory-only distributors*

19. Distributors that act in an advisory-only capacity and are not in the chain of legal ownership of a CIS will normally not be regarded as a financial institution in respect of any accounts they advise on. Such distributors, which may include some financial advisers, may nevertheless be asked by financial institutions to provide assistance in identifying account holders and obtaining self-certifications. For example, financial advisers will often have the most in- depth knowledge of the investor and direct access to the customer and so will be best placed to obtain self-certifications. However, advisory-only distributors will not normally be regarded as financial institutions and they will only have obligations pursuant to contractual agreements with those financial institutions where they act as a third party service provider in relation to those accounts.

**Identification and reporting on interest in a non-corporate CIS**

20. The diagram below illustrates how the IRD believes the account identification and reporting obligations under the IRO should work for non-corporate CISs.



21. Depending on how the CIS is structured, various entities may fall within the definition of investment entity. The CIS itself will need to determine which entity carries out the obligations to identify, verify and report on account holders that are reportable, by reference to its own governance structure and contractual arrangements.

22. Authorized CISs in Hong Kong may have a fund manager who is the product provider and has assigned responsibility for fulfilling the legal and regulatory obligations of the CIS, including the anti-money laundering regulatory obligations. Since the provisions in section 50E of the IRO applies to the particular facts of this case, the fund manager will be regarded as the person who acts for the CIS to maintain financial accounts and is responsible for compliance with the due diligence and reporting obligations in relation to the financial accounts of the CIS.

23. A fund manager may use a third party service provider such as a transfer agent to provide fund administration services including maintaining records of investors, account balances and transactions. In these cases, the fund manager might appoint the third party service provider to fulfill account identification and reporting requirements as they will have the necessary records.

24. The CIS's account due diligence and reporting obligations apply only to its registered account holders. It is required to identify all direct individual account holders pursuant to the due diligence obligations set out in Schedule 17D to the IRO. To the extent that indirect individual accounts are held through a reporting financial institution (e.g. platforms or other nominees), the CIS's obligation is to identify the direct account holder (i.e. the financial institution) only. In turn, the intermediary financial institution will have its own obligation to identify and report on its own account holders.

25. In the diagram above, the fund manager, who acts for the CIS to maintain financial accounts, would need to identify any direct individual account holders (left hand side) and the financial institutions on the share register only. It would be required to report information on any of these that are reportable persons.

26. In turn the custodial institutions that act as distributors (and not the fund manager) would be required to identify and report on their direct account holders. The CIS has no obligation to identify and report on accounts held indirectly through other financial institutions.

# CHAPTER 17
# TREATMENT OF TRUSTS

The due diligence and reporting obligations for AEOI generally apply to trusts in two circumstances: (a) when a trust is a reporting financial institution; and (b) when a trust is an NFE that maintains a financial account with a reporting financial institution.

2. This Chapter outlines the basic features of a trust which are relevant to AEOI. It describes the application of the steps discussed in Chapter 1 to a trust that is a reporting financial institution, in which case the trust reports the financial accounts held in the trust. This Chapter then describes the application of the steps discussed in Chapter 1 by a reporting financial institution to a trust that is an NFE account holder, in which case the reporting financial institution may have reporting obligations regarding the account held by the trust and its controlling persons. This Guidance may also apply to other similar legal arrangements, to the extent the application of such Guidance is appropriate.

## Basic features of a trust

3. In general terms, a trust is a fiduciary relationship, rather than an entity with its own separate legal personality. The trust arrangement commences when a person (the settlor, or also called the grantor) transfers specific property to the trustee, with the intention that it is to be applied for the benefit of others (the beneficiaries). A settlor may place any kind of transferrable property into a trust.

4. A trustee holds the legal title to the trust property and has a duty to administer and deal with the trust property in the interests of the beneficiaries. The terms on which the trustee must act for the beneficiaries are determined by the settlor. These terms may be recorded in a written document (the trust deed), or may be given orally. The terms may be very specific, or leave broad discretion to the trustee.

5. The parties to a trust must include a settlor, a trustee and at least one beneficiary, and there may be more than one of each. These parties may be natural persons or entities.

6. Depending on the nature of the settlor's continuing interest in a trust, the trust may be revocable or irrevocable. A trust is irrevocable where the settlor has disposed of all of its interest in the trust property. For example, where the settlor no longer has any right to revoke the trust, vary the terms of the trust, or to have the trust property revert to the settlor. A trust is revocable where the settlor has retained some interest or rights over the trust, such as the right to revoke the trust or to have all or a portion of the trust property return to the settlor.

7. The beneficiaries may be named individually or for members of a described group of people (a class of beneficiaries). An example of a class of beneficiaries is "the grandchildren of A". Describing the beneficiaries as a class does not make the trust invalid provided that at some point members of the class are able to be specifically identified.

8. A beneficiary may have a right to receive mandatory distributions, or may receive discretionary distributions. In general terms, a mandatory beneficiary has an entitlement to a set amount of property at a set time (e.g. "B will receive $50,000 each year"). If the trustee refused to make the distribution, a mandatory beneficiary could enforce their right against the trustee and obtain the property.

9. A discretionary beneficiary does not have an enforceable right to a certain amount of property at any set time. Rather, a discretionary beneficiary is dependent on the trustee to exercise its discretion in the beneficiary's favour. For example, "C will receive a distribution of property from the trust if and when the trustee sees fit." If the trustee refused to make a distribution, a discretionary beneficiary could only sue the trustee to consider exercising its discretion in the beneficiary's favour. For purposes of AEOI, a contingent beneficiary is treated like a discretionary beneficiary. A contingent beneficiary does not have an enforceable right to the trust property until a certain event or set of circumstances occurs.

10. A protector may also be appointed in connection with a trust. This is not a compulsory requirement of a trust, but may be included in some jurisdictions. A protector enforces and monitors the trustee's actions, such as overseeing investment decisions or authorizing a payment to a beneficiary.

**Determining whether the trust is a reporting financial institution or an NFE**

11. As a trust is considered to be an entity for the purpose of AEOI, it may be a financial institution or an NFE. The most likely scenario in which a trust will be a financial institution is if it falls within the definition of investment entity as described in paragraph (e) of the definition of investment entity. This is the case when a trust has gross income primarily attributable to investing, reinvesting, or trading in financial assets and is managed by another entity that is a financial institution. This would also include trusts that are CISs or other similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

12. If a trust is not a financial institution, it will be an NFE. NFEs are either active NFEs or passive NFEs depending on their activities. It is possible that, despite perhaps less common in practice, a trust could qualify as an active NFE, such as a trust that is a charity or a trading trust carrying on an active business.

13. If a trust is not an active NFE, it will be a passive NFE. In addition, if a trust is

holding a financial account with a reporting financial institution, such reporting financial institution must treat the trust as a passive NFE if it is an investment entity described in paragraph (e) of the definition of investment entity and is not a financial institution resident or located in a participating jurisdiction (i.e. a jurisdiction with which an agreement is in place pursuant to which it will provide financial account information to Hong Kong and which is identified in Part 2 of Schedule 17E to the IRO).

**The treatment of a trust that is a reporting financial institution**

14. The five steps of identification and reporting of reportable accounts maintained by reporting financial institutions are applicable to a trust: (a) reporting financial institutions (b) review their financial accounts (c) to identify their reportable accounts (d) by applying the due diligence rules and (e) then report the relevant information.

***Determining if the trust is a reporting financial institution***

15. A trust that is a financial institution will be a reporting financial institution if it is resident in Hong Kong and does not qualify as a non-reporting financial institution. A trust may be a non-reporting financial institution where the trustee itself is a reporting financial institution, and that trustee undertakes all information reporting in respect of all reportable accounts of the trust (and all such reports are exchanged with the relevant jurisdictions concerned).

16. A trust is resident in Hong Kong if it is constituted under the laws of Hong Kong, or if constituted outside Hong Kong, it is normally managed or controlled in Hong Kong. A trust will also be considered to be resident where the trustee(s) is resident. If there is more than one trustee, the trust will be a reporting financial institution in all participating jurisdictions in which a trustee is resident. In other words, if the trustees are each resident in different jurisdictions, the trust would be a reporting financial institution in each of those participating jurisdictions, and would each separately report in respect of their reportable accounts.

17. As explained above, if a trustee of a trust is resident in Hong Kong, the trust would be a reporting financial institution in Hong Kong. However, where the trust is also considered to be resident for tax purposes in another jurisdiction with which Hong Kong automatically exchanges financial account information, and the trust reports all the information required to be reported with respect to reportable accounts maintained by the trust to that jurisdiction, that will relieve the trust from reporting in Hong Kong. In order to obtain such relief, each trustee should be able to demonstrate that all necessary reporting by the trust is actually taking place.

***Identifying the financial accounts of a trust that is a reporting financial institution***

18. Where a trust is a reporting financial institution, it must review its financial accounts. If the trust is an investment entity, its financial accounts are defined as the

debt and equity interests in the entity.

19. Debt interest is not defined for the purpose of AEOI, and therefore what is considered a debt interest is determined under the laws of Hong Kong. In general, a debt interest is any interest created when a lender lends money to a borrower. For the purpose of paragraphs (c) and (d) of the definition of financial account, any loan by a lender to a financial institution creates a debt interest in the financial institution. The debt interest can arise through, for example, a simple loan, a bond issue or note issue.

20. The equity interests are held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. The reference to any other natural person exercising ultimate effective control over the trust, at a minimum, includes the trustee as an equity interest holder. Further, a discretionary beneficiary is only treated as an account holder in the years in which it receives a distribution from the trust. If a settlor, beneficiary or other person exercising ultimate effective control over the trust is itself an entity, that entity must be looked through, and the ultimate natural controlling person(s) behind that entity must be treated as the equity interest holder. Currently, it is the understanding of the IRD that the term "entity" used here does not include a person excluded from the definition of reportable person.

*Identifying the reportable accounts of a trust that is a reporting financial institution*

21. The debt and equity interests of the trust are reportable accounts if they are held by a reportable person. For example, if a settlor or beneficiary is resident in a reportable jurisdiction, their equity interest is a reportable account.

*Applying the due diligence rules*

22. The trust applies the due diligence rules in Schedule 17D to the IRO in order to determine the identity and residence of its account holders.

23. Where an equity interest (such as the interest held by a settlor, beneficiary or any other natural person exercising ultimate effective control over the trust) is held by an entity, the equity interest holder is instead the controlling persons of that entity. As such, the trust is required to look through a settlor, trustee, protector or beneficiary that is an entity to locate the relevant controlling person. It is the current understanding of the IRD that the term "entity" used above does not include a person excluded from the definition of reportable person. The look through obligation should correspond to the obligation to identify the beneficial owner of a trust under AML/KYC procedures. In respect of pre-existing accounts, reporting financial institutions may rely on the information collected in connection with the account pursuant to their AML/KYC procedures. In respect of new accounts, reporting financial institutions, in addition to other due diligence procedures, can rely on AML/KYC procedures to determine the identity of the controlling persons exercising ultimate control if these procedures are in

accordance with the 2012 FATF Recommendations.

***Reporting the relevant information***

24. A trust that is a reporting financial institution is required to report the account information and the financial activity for the year in respect of each reportable account. The account information includes the identifying information for each reportable person (such as name, address, jurisdiction of residence, TIN, date of birth and account number), and the identifying information of the trust (name and identifying number of the trust). It is possible that a trust that is a financial institution may not have an account number for each of the equity interest holders. The trust should in that case assign a unique identifying number that will enable the trust to identify the subject of the report in the future.

25. The financial activity includes the account balance or value, as well as gross payments paid or credited during the year.

26. The account balance is the value calculated by the reporting financial institution (the trust) for the purpose that requires the most frequent determination of value. For settlors and mandatory beneficiaries, for example, this may be the value that is used for reporting to the account holder on the investment results for a given period. If the financial institution has not otherwise recalculated the balance or value for other reasons, the account balance for settlors and mandatory beneficiaries may be the value of the interest upon acquisition or the total value of all trust property period.

27. Where an account is closed during the year, the fact of closure is reported (in addition to any distributions made prior to closure). A debt or equity interest in a trust could be considered to be closed, for example, where the debt is retired, or where a beneficiary is definitely removed.

28. The financial information to be reported depends on the nature of the interest held by each account holder. Where the trust does not otherwise calculate the account value held by each account holder, or does not report the acquisition value, the account balance or value to be reported is as shown in the table below. Note that where a settlor or beneficiary is an entity (also refer to paragraph 23 above), the account holders are the controlling persons of that entity.

***The financial activity to be reported where a trust is a financial institution that does not otherwise calculate the account value***

| ***Account holder*** | ***Account balance or value*** | ***Gross payments*** |
|---|---|---|
| Settlor | Total value of all trust property | The total gross amount paid or credited to the settlor in reporting period (if any) |
| Beneficiary: mandatory | Total value of all trust property | The total gross amount paid or credited to the beneficiary in reporting period |
| Beneficiary: discretionary (in a year in which a distribution is received) | Nil | The total gross amount paid or credited to the beneficiary in reporting period |
| Any other person exercising ultimate effective control (including trustee and protector) | Total value of all trust property | The total gross amount paid or credited to the settlor in reporting period (if any) |
| Debt interest holder | Principal amount of the debt | The total gross amount paid or credited in reporting period (if any) |
| Any of the above, if account was closed | The fact of closure | The total gross amount paid or credited until the date of account closure to any of the above mentioned Account Holder(s) |

**The treatment of a trust that is a passive NFE**

29. If an NFE holds an account with a reporting financial institution, the reporting financial institution is required to report the trust for purposes of AEOI. This part describes how the relevant provisions apply to a trust that is a passive NFE.

30. In instances where the trust is an active NFE, the trust itself may have a reportable account with the financial institution, which needs to be determined in light of the relevant due diligence procedures.

31. The following five steps applies: (a) reporting financial institutions; (b) review their financial accounts; (c) to identify their reportable accounts; (d) by applying the due diligence rules; and (e) then report the relevant information. Assuming here that the first two steps are met (a trust has a financial account with a reporting financial institution), the following paragraphs set out the determination of whether the trust is a reportable person, the due diligence rules that are applied by the reporting financial institution to the trust, and the information to be reported by the reporting financial institution about the trust.

***Identifying whether the account held by the trust is a reportable account***

32. The account held by a trust that is an NFE is a reportable account if: (a) the trust is a reportable person; or (b) the trust is a passive NFE with one or more controlling persons that are reportable persons.

33. The trust is a reportable person only if it is subject to taxation as a resident in a reportable jurisdiction and is not excluded from the definition of reportable person. In many cases, a trust would not be subject to taxation on its income in any territory (i.e. it has no residence for tax purposes). In that case, it is necessary to identify the territory in which the effective management of the trust is situated.

34. The account held by a trust is also reportable if the trust is a passive NFE with one or more controlling persons that are reportable persons.

35. Where the beneficiaries are not individually named but are identified as a class, it is not required to treat all possible members of the class as reportable persons. Rather, when a member of a class of beneficiaries receives a distribution from the trust or intends to exercise vested rights in the trust property, this is a change of circumstances, prompting additional due diligence and reporting as necessary. This reflects a similar obligation contained in the 2012 FATF Recommendations (see Interpretive Note to Recommendation 10, at footnote 31).

36. A settlor is reported regardless of whether it is a revocable or irrevocable trust. Likewise, both mandatory and discretionary beneficiaries are included within the definition of controlling persons. Unlike the case of an equity interest in a trust that is a reporting financial institution, discretionary beneficiaries would be reported regardless of whether a distribution is received in a given year. However, reporting financial institutions may align the scope of the beneficiaries of a trust reported as controlling persons of the trust[1] with the scope of the beneficiaries of a trust treated as reportable persons of a trust that is a financial institution. In such case the reporting financial institution would only need to report discretionary beneficiaries in the year they receive distributions from the trust. Where financial institutions make use of this option, they must ensure that appropriate procedures must be in place to identify when a distribution is made to a discretionary beneficiary of the trust in a given year that enables the trust to report such beneficiary as a controlling person to the financial institution. For instance, the reporting financial institution requires a notification from the trust or trustee that a distribution has been made to that discretionary beneficiary.

37. In the event that a controlling person of a trust that is a passive NFE is not a resident for tax purposes of any reportable jurisdiction, that controlling person would not be considered a reportable person.

[1] Definition of "Controlling Persons" can be found in Chapter 18 (Miscellaneous) of this Guidance.

***Applying the due diligence rules***

38. The reporting financial institution must apply the due diligence rules to determine if the account held by the trust is a reportable account.

39. Reporting financial institutions may rely on information collected pursuant to AML/KYC procedures to identify the controlling persons. In respect of pre-existing entity accounts, reporting financial institutions may rely on the information collected in connection with the account pursuant to their AML/KYC procedures to determine if the account holder is resident in a reportable jurisdiction. In addition, reporting financial institutions may also rely on information collected pursuant to AML/KYC procedures to identify the controlling persons. In respect of new entity accounts, reporting financial institutions can only rely on AML/KYC procedures to identify controlling persons if these procedures are in accordance with the 2012 FATF Recommendations.

***Reporting the relevant information***

40. Where a trust is a reportable person, the reporting financial institution is required to report the account information and the financial activity for the year with respect to the account of the trust. The account information includes the identifying information of the trust (such as the name of the trust, address, jurisdiction of residence, TIN, and account number), and the identifying information of the reporting financial institution (name and identifying number).

41. In respect of a trust that is a passive NFE, in addition to the information mentioned above, the reporting financial institution must report the controlling persons of the trust that are reportable persons. Where the reporting financial institution has information available that identifies the type of each controlling person (i.e. whether it is the settlor, trustee, protector or beneficiary), this information is also expected to be reported. Including this information in reports will significantly increase the usefulness of the data to the receiving jurisdiction and benefit the controlling persons themselves due to the increased clarity in relation to their status. With respect to new entity accounts, given that the AML/KYC procedures require the identification of the settlor, trustees, beneficiaries, protectors and any other natural person exercising ultimate effective control of the trust, reporting financial institutions should have this information available.

42. The financial information to be reported is the account balance or value of the account held by the trust and payments made or credited to such account. Each controlling person is attributed the entire value of the account, as well as the entire amounts paid or credited to the account, as shown in the table below.

43. Where the financial account held by the trust is closed during the year, both the fact of closure of the account and the gross payments made or credited to the account until the date of account closure are to be reported.

***The financial activity to be reported where a trust is a passive NFE***

| *Account Holder* | *Account Balance or Value* | *Gross Payments* |
|---|---|---|
| Settlor | Total account balance or value | Gross payments made or credited to the account as per section 50F of the IRO |
| Trustee | Total account balance or value | Gross payments made or credited to the account as per section 50F of the IRO |
| Beneficiary: mandatory | Total account balance or value | Gross payments made or credited to the account as per section 50F of the IRO |
| Beneficiary: discretionary (if the option at paragraph 35 is exercised) | Total account balance or value | Gross payments made or credited to the account as per section 50F of the IRO |
| Protector (if any) | Total account balance or value | Gross payments made or credited to the account as per section 50F of the IRO |
| Any of the above, if account was closed | The fact of closure | Gross payments made or credited to the account until the date of account closure as per section 50F of the IRO |

44. Consider a trust that is a passive NFE with one or more controlling person. The controlling persons of the trust are all reportable persons: (a) settlor resident in Jurisdiction A; (b) trustee resident in Jurisdiction B; and (c) beneficiary resident in Jurisdiction C. The reporting financial institution is resident in Jurisdiction X and will send the reportable information to its tax authority. The tax authority will then exchange the following reports (assuming that in Jurisdiction X, each of Jurisdictions A, B and C are reportable jurisdictions):

| ***Reportable jurisdiction*** | ***Subject of information report*** |
|---|---|
| A | The settlor resident in Jurisdiction A as a controlling person of a passive NFE |
| B | The trustee resident in Jurisdiction B as a controlling person of a passive NFE |
| C | The beneficiary resident in Jurisdiction C as a controlling person of a passive NFE |

# CHAPTER 18
# MISCELLANEOUS

## Related entity

An entity is regarded as being related to another entity if –

(a) one entity controls the other or the two entities are under common control ("the Related Entity Group"). For this purpose, control is taken as including the direct or indirect ownership of more than 50 per cent of the voting rights and value of the shares in an entity; or

(b) the two entities are investment entities as described in paragraph (e) of the definition of investment entity and:

  (i) the entities are under common management; and

  (ii) the management fulfills the due diligence requirements for the entities under Schedule 17D to the IRO.

2. Whether an entity is a related entity to another entity is relevant for the account balance aggregation rules, for applying the definition of pre-existing account and for determining if an NFE can meet the criteria for being an active NFE.

## Investment entities

3. Investment entities which have received seed capital from a member of a group to which the investment entity belongs is not considered a related entity.

4. In general a seed capital investment is an initial capital contribution (that is intended as a temporary investment), made to an investment entity. This is generally for the purposes of establishing a performance record before selling interests in the entity to unrelated investors, or for purposes otherwise deemed appropriate by the manager.

5. Specifically, an investment entity is not considered a related entity as a result of a contribution of seed capital by a member of the group if:

(a) the member of the group that provides the seed capital is in the business of providing seed capital to investment entities that it intends to sell to unrelated investors;

(b) the investment entity is created in the course of its business;

(c) any equity interest in excess of 50% of the total value of stock of the investment entity is intended to be held for no more than three years from the date of acquisition; and

(d) in the case of an equity interest that has been held for over 3 years, its value is less than 50% of the total value of the stock of the investment entity.

**Passive income**

6. In determining whether or not an NFE is an active NFE (see paragraph 10 below) or a passive NFE it is necessary to consider the nature of the income that the entity receives as it is one of the requirements that less than 50% of the gross income of an NFE can be passive income for the entity to be regarded as an active NFE.

7. As the term suggests, passive income is derived from investing in assets rather than from activities carried on in the normal course of a trade or business. Passive income includes the portion of income that consists of:

(a) dividends and other distributions of income;

(b) interest;

(c) income equivalent to interest;

(d) rents and royalties, other than rents and royalties derived in the active conduct of a trade or 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 property that gives rise to 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;

(j) amounts received under cash value insurance contracts.

8. The context in which the income described above is received is important. For

example, where the NFE is a dealer in financial assets any such income as described above may be income from a trading activity. Where the income described above is received by an NFE and is accounted for, or is taxable as, income from trading activities it should not be included in gross income as passive income.

**Non-financial entity (NFE)**

9. An NFE is any entity that is not a financial institution. NFEs are then divided into two categories: active NFEs and passive NFEs. The passive NFE category is effectively a default category, any NFE that does not meet the criteria to be an active NFE is a passive NFE.

10. An NFE can be an active NFE if it meets any of the following criteria:

(a) it is active by reason of income and assets. This requires less than 50% of its gross income for the preceding calendar year or other appropriate reporting period to be passive income and less than 50% of its assets held in the same period to be assets that produce or are held for the production of passive income;

(b) its stock is regularly traded on an established securities market or it is a related entity of such an entity;

(c) it is a governmental entity, international organization, central bank or a wholly owned subsidiary of such an entity;

(d) it is a holding company for NFEs that are members of a non-financial group. It does not qualify as an active NFE where these holdings are part of a business as an investment fund or vehicle whose purpose is to acquire or fund companies and then hold interests as capital assets for investment purposes;

(e) it is a start-up NFE which is not yet operating a business and has no prior operating history, but is investing capital into assets with the intention of operating a business other than that of a financial institution. This category only applies during the first 24 months after the date that the NFE was first formed;

(f) it is an NFE that has not been a financial institution in the last 5 years and which is in the process of liquidating its assets or is reorganizing with a view to continuing or recommencing business operations other than as a financial institution;

(g) it is a treasury centre of a non-financial group engaging in financing and hedging transactions with or for related entities;

(h) it is a not-for-profit organization set up for religious, charitable, scientific, artistic, cultural, athletic or educational purposes; or it is established and operated as a professional organization, business league, chamber of commerce, labour organization, agricultural or horticultural organization, civic league or an organization operated for the promotion of social welfare. In all cases the organization must be exempt from income tax and its income and assets cannot be applied other than for the express purposes for which the organization is established.

**Documentary evidence**

11. There are a number of instances where a reporting financial institution is required to review or obtain documentary evidence in determining whether or not an account holder is a reportable person.

12. A reporting financial institution (or the third party service provider acting on behalf of the financial institution) can accept documentary evidence to support an account holder's status provided the documentation (in original or certified copy form) meets any of the following criteria:

(a) a Certificate of Residence issued by an appropriate tax official of the jurisdiction in which the account holder claims to be resident, for example, a Certificate of Resident Status in relation to a person's Hong Kong tax residence issued by the IRD;

(b) any valid identification issued by an authorized government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes, for example, a passport or driving licence;

(c) with respect to an entity, documentation issued by an authorized government body that includes the name of the entity and either the address of its principal office in the jurisdiction in which it claims to be resident or the jurisdiction in which the entity was incorporated or organized;

(d) any audited financial statement, third party credit report, bankruptcy filing, or securities regulator's report.

13. Examples of valid documentary evidence include the following:

(a) for natural persons: passport, identity card or driving licence;

(b) for corporations: a copy of the Certificate of Incorporation, the

Memorandum and Articles of Association or Business Registration Certificate;

(c) for partnerships: a copy of the partnership agreement or Business Registration Certificate;

(d) for trusts: either a copy of the trust deed and any subsidiary deed evidencing the appointment and powers of trustees, or certified copies of extracts from the deeds.

***Validity of Documentation***

14. Documentary evidence, including a self-certification, used to establish an account holder's status remains valid indefinitely subject to a change in circumstance which results in a change of the account holder's status. When reviewing documentary evidence, a financial institution is expected to give preference to more recent documents, or those with more specific information, than another document.

**Retention of documents**

15. A reporting financial institution or a third party undertaking due diligence procedures for a financial institution must retain records of the documentary evidence, or a notation or record of the documents reviewed and used to support an account holder's status for a period of 6 years beginning on the date on which the procedures are completed.

16. The documentary evidence can be retained as originals, photocopies or in an electronic format.

17. A reporting financial institution that is not required to retain copies of documentation reviewed under AML due diligence procedures is treated as having retained a record of such documentation if it retains a record in its files noting:

(a) the date the documentation was reviewed;

(b) each type of document;

(c) the document's identification number where present (for example, a passport number); and

(d) whether any indicia of residence in a reportable jurisdiction were identified.

18. For high value pre-existing accounts where a relationship manager enquiry is required, records of electronic searches, requests made and responses to relationship

manager enquiries should also be retained for 6 years beginning on the date on which the procedures are completed.

**Document Sharing**

19. Documentation is required to support the status of each financial account held. However in the following circumstances documentation obtained by a reporting financial institution can be used in relation to more than one financial account.

***Single Branch System***

20. A reporting financial institution may rely on documentation furnished by a customer where an existing customer opens a new financial account with the same financial institution and where both accounts are treated as a single account or obligation for due diligence and reporting purposes.

***Universal account systems***

21. A reporting financial institution may rely on documentation furnished by a customer for an account held at another location of the same financial institution or at a location of a related entity of the financial institution if the financial institution treats all accounts that share documentation as a single account for due diligence and reporting purposes, and the financial institution and the other location or related entity are part of a universal account system that uses a customer identifier that can be used to retrieve systematically all other accounts of the customer.

22. In this scenario a reporting financial institution must be able to produce to the IRD the necessary records and documentation relevant to the status claimed (or a notation of the documentary evidence reviewed, if the financial institution is not required to retain copies of the documentary evidence for AML purposes).

***Shared account systems***

23. A reporting financial institution may rely on documentation provided by a customer for an account held at another location of the same financial institution, or at a location of a member of the Related Entity Group of the financial institution, if:

(a) the financial institution treats all accounts that share documentation as consolidated accounts; and

(b) the financial institution and the other location or the Related Entity Group member share an information system, electronic or otherwise, that is described below.

24. A shared account system must allow the reporting financial institution to easily

access data about the nature of the documentation, the information contained in the documentation (including a copy of the documentation itself), and the validity status of the documentation.

25. If the reporting financial institution becomes aware of any fact that may affect the reliability of the documentation, the information system must allow the financial institution to easily record this data in the system.

26. Additionally the financial institution must be able to show how and when it transmitted data regarding such facts into the information system and demonstrate that any data it has transmitted to the information system has been processed and the validity of the documentation subjected to appropriate due diligence.

27. A reporting financial institution that opts to rely upon the status designated for the account holder in the shared account system, without obtaining and reviewing copies of the documentation supporting the status, must be able to produce upon request by the IRD all documentation (or a notation of the documentary evidence reviewed, if the financial institution is not required to retain copies of the documentary evidence for AML purposes) relevant to the status claimed.

**Mergers and bulk acquisitions**

28. Where a reporting financial institution acquires accounts by way of a merger or bulk acquisition, the reporting financial institution can rely on the status of account holders as determined by the predecessor financial institution, provided that the predecessor financial institution had met its due diligence obligations.

29. The reporting financial institution may continue to rely on the status of the account holder as long as it has no reasonable cause to believe that the status is unreliable or incorrect.

30. The IRD would expect that the reporting financial institution undertake a sample review of the acquired accounts to determine that the account holders' status, assigned by the predecessor financial institution, is reliable. An account holder's status needs to be verified by the acquiring financial institution in accordance with the due diligence procedures should the acquirer have reason to know that it is incorrect or if there is a change in circumstances.

31. The reporting financial institution may treat accounts acquired in a merger or bulk acquisition that takes place after 31 December 2016 as pre-existing accounts for the purposes of applying the identification and documentation procedures.

**Merger of investment entities**

32. Mergers of investment entities can be different to mergers of custodial

institutions or depository institutions. The financial accounts of investment entities are its equity and debt interest, so the merger of two such entities creates a series of new accounts in the surviving entity.

33. Mergers of investment entities normally involve a surviving fund taking over the assets of the merging fund in exchange for issuing shares or units to the investors of the merging fund. The shares or units in the merging fund are then extinguished. The new shares in the surviving fund are new accounts except where both funds were previously administered by the same person, for example the fund manager, who reported on behalf of the investment entities or the merged fund takes over and holds the information on the reportable status of the debt and equity holders in the merged fund and can, therefore, continue to report on the basis of that information.

**Controlling persons**

34. Sections 50A(1) and (6) of the IRO contain the definition of controlling persons and requirements to identify them. A controlling person, in relation to an entity, means an individual who exercises control over the entity.

35. For an entity that is a corporation or partnership, a reporting financial institution must identify:

(a) any individual who ultimately has a controlling ownership interest (i.e. more than 25% (if an entity is a corporation) or 0% (if an entity is a partnership) of the capital or profits) in the entity;

(b) any individual exercising control (i.e. more than 25% (if an entity is a corporation) or 0% (if an entity is a partnership) of the voting rights) over the entity; and

(c) any individual exercising ultimate control over the management of the entity.

Where no individual is identified as exercising control of the entity, the reporting financial institution must identify the individual who holds the position of senior managing official of the entity.

36. For an entity that is a trust, the term "controlling person" is explicitly defined to mean the settlor, trustee, protector (if any), enforcer (if any), beneficiary or a member of a class of beneficiaries, of the trust and any individual who has ultimate effective control over the entity. If the settlor, trustee, protector, enforcer, or the beneficiary or the member of the class of beneficiaries, of the trust is another entity, the reporting financial institution must identify the controlling persons of such entity. The settlor, trustee, protector, enforcer, or the beneficiary or the member of the class of beneficiaries must always be treated as controlling persons of a trust, regardless of whether or not

any of them exercises control over the trust.

37. For an entity that is equivalent or similar to a trust (covering legal person and legal arrangement), a reporting financial institution must identify any individual in equivalent or similar positions to a controlling person of a trust as stated above.

38. The term "Controlling Persons" corresponds to the term "beneficial owner" as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the FATF Recommendations (as adopted in February 2012), and must be interpreted in a manner consistent with the FATF Recommendations.

# ABBREVIATIONS

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| AEOI | Automatic Exchange of Financial Account Information in Tax Matters |
| AML/KYC | Anti-Money Laundering/Know-Your-Customer |
| CIS | Collective Investment Scheme |
| CRS | Common Reporting Standard contained in the Standard for Automatic Exchange of Financial Account Information in Tax Matters, published by the OECD |
| FATCA | Foreign Account Tax Compliance Act enacted by the United States |
| FAQ | Frequently Asked Question |
| FATF | Financial Action Task Force |
| Hong Kong | Hong Kong Special Administrative Region of the People's Republic of China |
| IRD | Inland Revenue Department |
| IRO | Inland Revenue Ordinance (Cap. 112) |
| NFE | Non-Financial Entity |
| OECD | Organisation for Economic Co-operation and Development |
| TIN | Taxpayer Identification Number |