

# Implementing Guidelines on Automatic Exchange of Financial Account Information.

(S.L. 123.127 and S.L. 123.156)

Issued in terms of Article 96(2) of the  
Income Tax Act.



OFFICE OF  
THE COMMISSIONER  
FOR REVENUE

The Information provided shall be read and construed as one with the applicable legislation and shall have effect to the extent that such guidelines, explanations or instructions are not in conflict with Malta's international commitments.

While every effort has been made to ensure that the above information is consistent with existing policies and practice, should there be any changes, the Commissioner for Revenue reserves the right to vary its position accordingly.

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## Abbreviations

Commissioner for Revenue	<b>CfR</b>
Common Reporting Standard	<b>CRS</b>
EU Council Directive 2014/107/EU	<b>DAC II</b>
Foreign Financial Institution	<b>FFI</b>
Foreign Account Tax Compliance Act	<b>FATCA</b>
Inter-Governmental Agreement	<b>IGA</b>
Malta Financial Institution	<b>MFI</b>
Non-Financial Entity (CRS / DAC II)	<b>NFE</b>
Non-Foreign Financial Entity (FATCA)	<b>NFFE</b>
Organisation for Economic Co-operation and Development	<b>OECD</b>
Reporting Malta Financial Institution	<b>RMFI</b>
United States of America	<b>U.S.</b>

## 1. Introduction

Automatic exchange of financial account information is one of the legislative tools implemented in pursuance of Malta's international commitments to combat cross-border tax fraud and tax evasion. This automatic exchange of financial account information was pioneered through the enactment of the FATCA, a 2010 United States legislation which required foreign financial institutions to pass information on their U.S. customers to the U.S. tax authorities or be subject to a punitive 30% withholding tax on U.S. withholdable source income. In this regard, on 16<sup>th</sup> December 2013, Malta concluded a reciprocal Model 1A IGA to facilitate the automatic exchange of information of financial account information with the United States in line with the requirements of the Maltese legislative framework. In line with Article 3(6) of the IGA, a bilateral Competent Authority Agreement was also finalized to provide for a mechanism of transmission of this financial information.

Similarly, the OECD developed the Common Reporting Standard in 2014 and legal force was attained through the multilateral Amended Convention on Mutual Administrative Assistance in Tax Matters, an instrument which Malta ratified on 29<sup>th</sup> May 2013. Subsequently, the Council of the European Union adopted EU Council Directive 2014/107/EU. This extended the cooperation between EU tax authorities to automatic exchange of financial account information (hereinafter referred to as 'DAC II'). The extension effectively incorporated the Common Reporting Standard within EU Council Directive 2011/16/EU as regards administrative cooperation in the field of taxation. This is because in order to minimise costs and administrative burdens, both for tax administrations and for economic operators, it was crucial to ensure that the expanded scope of automatic exchange of information within the Union is in line with international developments.

### 1.1. Common Aspects

The primary scope of these instruments is to prevent abuse of the voluntary tax compliance system and to address the use of financial accounts as vehicles for foreign tax evasion. In this regard, these instruments identify Maltese Financial Institutions as being in the best position to identify and report information pertaining to its reportable account holders.

Primarily, these instruments define Financial Institutions to include custodial institutions, depository institutions, investment entities and specified insurance companies. The financial information to be reported depends on the type of financial account maintained.

The due diligence procedures to be performed by the reporting Malta financial institutions for the identification of reportable accounts are intended to supplement and not replace due diligence requirements already undertaken for AML/CFT purposes. The rules distinguish between individual accounts and entity accounts, and further distinguish between pre-existing and new accounts. This recognizes the reality that it is more difficult and costly for Malta Financial Institutions to obtain information from pre-existing financial account holders.

## **1.2. Implementation of the FATCA IGA, CRS and DAC II**

### **1.2.1. Reciprocal FATCA IGA**

The Model 1A IGA entered into force on 26th June 2014 and was given the force of law in Malta through L.N. 78 of 2014 entitled the 'Exchange of Information (United States of America) (FATCA) Order.' This was subsequently amended through L.N. 30 of 2015 which brings into force further concessions from the U.S. Government through letters dated 1 July 2014 and 3 October 2014 in terms of Article 7(2) of the IGA.

Malta has also entered into a Competent Authority Agreement with the United States of America in order to onward transmit the data collected in pursuance of the IGA. This arrangement was agreed on the basis of article 26 of the Convention between the Government of the United States of America and the Government of Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income. Meanwhile, the administrative provisions implementing the IGA were incorporated in the Cooperation with Other Jurisdictions on Tax Matters Regulations through L.N 408 of 2014 as subsequently amended by L.N. 384 of 2015.

### **1.2.2. CRS / DAC II**

The DAC2 and CRS have been implemented into Maltese legislation by virtue of LN 384 of 2015 entitled the Cooperation with Other Jurisdiction on Tax Matters (Amendment) Regulations, 2015, which entered into effect from 1st January 2016. In line with regulation 45 of the afore-mentioned regulations, the DAC2 and CRS were implemented uniformly into Maltese legislation.

The OECD CRS Commentaries and the OECD CRS FAQs form an important source in interpreting Maltese legislation on the CRS.

## **1.3. Special Authorisations (FATCA IGA only)**

In terms of the FATCA IGA, Malta may permit Malta Financial Institutions to use a definition in the relevant U.S. Treasury Regulations in lieu of the corresponding definitions found in the agreement, provided that such application would not frustrate the purposes of the agreement. In this light, interested parties may contact the Commissioner for Revenue for an authorisation for such a dispensation, in line with article 4(7) of the IGA.

Similarly, the FATCA IGA also incorporates a most favoured nation clause whereby interested parties are granted the benefit of more favourable terms under other FATCA Model 1 bilateral treaties negotiated between the United States and other third countries. In this situation, interested parties may similarly seek an authorisation for such an interpretation in terms of article 7(1) of the IGA and Section V.E, Annex II of the IGA.

Requests for special authorisations shall be addressed to the International & Corporate Tax Unit through the electronic mailing address: [ca-eoi.cfr@gov.mt](mailto:ca-eoi.cfr@gov.mt) and must include the extract of the relevant U.S. Treasury Regulation or FATCA Model 1 bilateral treaties as the case maybe, together with the relevant technical considerations. Unless prescribed otherwise, only special authorisations which aim to reach convergence with the Common Reporting Standard will be issued in line with article 6(3) of the IGA.

## **1.4. Context of these Implementing Guidelines.**

Unless specified otherwise or the context requires otherwise, in line with regulation 23, 36 and 45 of S.L. 123.127, the FATCA IGA, CRS and DAC II shall be implemented and interpreted in accordance with these consolidated guidelines. These consolidated guidelines will be regularly reviewed and if necessary updated to reflect any changes or other clarifications that the Commissioner for Revenue deems necessary for the purposes of a more correct application of the FATCA IGA, CRS and/or DAC II. Furthermore, these implementing guidelines supersede and revoke previously issued guidelines supplementing the instruments.

In the case of any changes, the revised version of the guidelines will be published on the Cfr's website. Thus, it is within the interest of the reader to ensure that the most recent published implementing guidelines are being viewed.

Version 4 of the Guidelines was published in March 2021 and includes changes Section 12.2

## **1.5. The role of the Commissioner for Revenue**

The Competent Authority is appointed in terms of Regulation 8 of the Cooperation with other Jurisdictions on Tax Matters Regulations (S.L. 123.127). All information exchanged pursuant to the instruments remains strictly subject to confidentiality and other safeguards as delineated in the relevant international instruments.

All information exchanged between the Commissioner for Revenue and the Malta Financial Institutions remains subject to the General Data Protection Regulation as implemented by the Data Protection Act (Chapter 586 of the Laws of Malta) and as circumscribed by regulation 21 of the Cooperation with other Jurisdictions on Tax Matters Regulations.

To ensure the proper implementation of the above-mentioned instruments, clarifications may be sought from the Commissioner for Revenue on specific implementing guidelines. These requests for clarifications shall be addressed to the International & Corporate Tax Unit through the electronic mailing address: [ca-eoi.cfr@gov.mt](mailto:ca-eoi.cfr@gov.mt) and must include the following aspects to be considered:

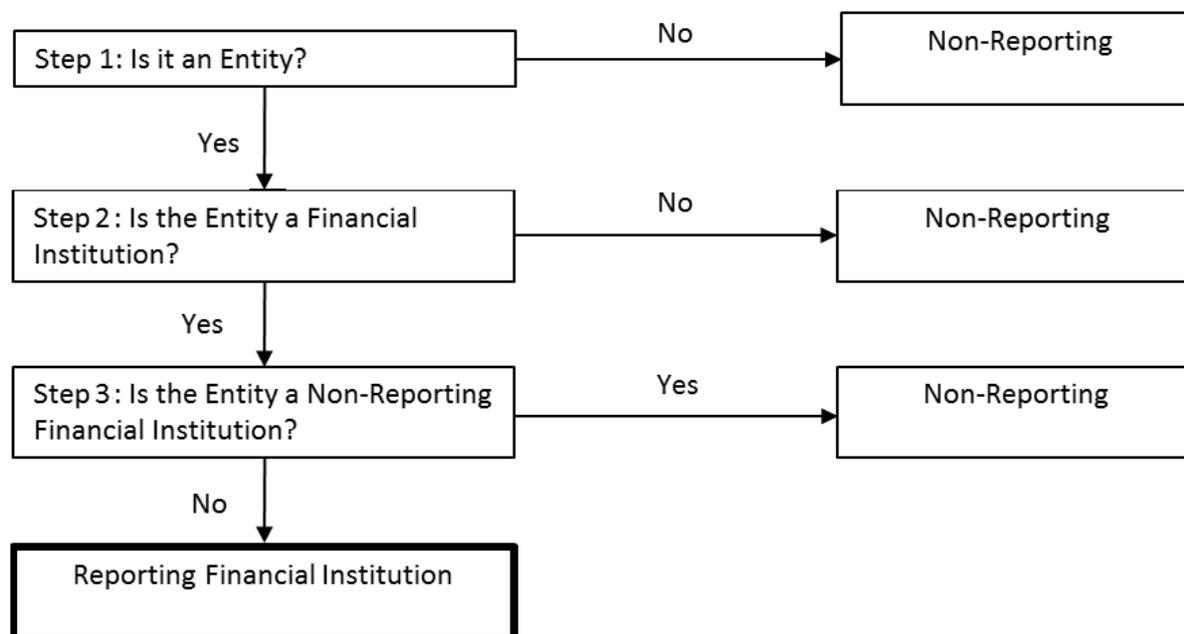
1. The merits of the case,
2. The applicable legislative provisions, if any,
3. The applicable implementing guidelines, if any,
4. Why the legislative provisions or/and implementing guidelines as set out hereunder do not give certainty to the merits of the case.

## **2. Entity Classification**

Entity classification forms the first core requirement in order to determine the obligations of entities in Malta in terms of these instruments. Please note that entity classifications in terms of

the mentioned instruments are similar, but there are important differences.

Below is a breakdown providing more detail and guidance to Malta's Financial Institutions in terms of entity classification.



## 2.1. Is it an Entity?

Only Entities can be Reporting Malta Financial Institutions. The definition of Entity is broad and means “a legal person or a legal arrangement, including a trust”. By way of clarification a limited liability company, partnership, or a legal organisation such as an association or a foundation are also deemed to be entities for the purposes of the law (e.g. a condominium association would also constitute an entity). Nevertheless, individuals are excluded from being a Reporting Malta Financial Institution by virtue of the definition of ‘Entity’.

A distinction would need to be drawn between incorporated cell companies and other cell companies. In this light, incorporated cells are treated as entities in their own right, whilst other cell companies are not treated as separate entities from their overarching structure. By way of example, securitisation cell companies [hereinafter referred to as ‘SCCs’] which are governed by the Securitisation Cell Companies Regulations S.L. 386.16 provide for the segregation of different sets of assets and risk instruments within a single special purpose vehicle. Notwithstanding such ring-fencing of assets and liabilities into various cells, the cells do not have a separate legal personality, and as such, each cell transacts through the SCC. In terms of Regulation 4(3) of the Securitisation Cell Companies Regulations, the SCC is a single legal entity and thus, for purposes of the instruments, entity classification must be made with reference to the activities of the SCC. This applies uniformly to Protected Cell Companies [hereinafter referred to as ‘PCCs’], established under the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations [S.L. 386.10].

## 2.2. Is the Entity a Financial Institution?

Article 1(o) of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VIII, Part A 1. of Annex I to the Cooperation with Other Jurisdiction on Tax Matters

Regulations provide that:

The term “**Reporting Financial Institution**” means *any Malta Financial Institution that is not a Non-Reporting Malta Financial Institution.*

Furthermore, Article 1(l) of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VIII, Part A (1) of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations provide that:

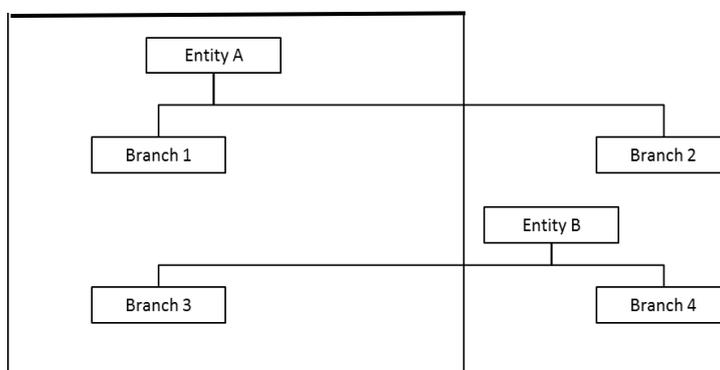
The term “**Malta Financial Institution**” means

- (i) Any Financial Institution [that is] resident in Malta, but excludes/excluding any branch of that/such Financial Institution that is located outside Malta, and*
- (ii) Any branch of a Financial Institution [that is] not resident in Malta, if that/such branch is located in Malta.*

Therefore, for a Financial Institution to be a RMFI it first needs to be a Malta Financial Institution (hereinafter referred to as ‘MFI’). Subsequently the MFI must **not** fall in any of the categories of a Non- Reporting Malta Financial Institution (hereinafter referred to as ‘NRMFI’).

### Resident in Malta

A MFI is “resident” in Malta if it is subject to the jurisdiction of Malta i.e. Malta is able to enforce reporting. Generally, a FI is a ‘Malta Financial Institution’ if Malta is the jurisdiction of its tax residence and in the case of FATCA also where the FI would be subject to the jurisdiction of Malta. This is the reporting nexus. In the case of trusts, if any of the trustees are resident in Malta for tax purposes then the trust is to be considered as Malta resident.



When it comes to branches, a “branch” is a unit, business, or office of a FI that is treated as a branch under the regulatory regime of a jurisdiction or that is otherwise regulated under the laws of a jurisdiction as separate from other offices, units or branches of the FI. A branch includes a unit, business, or office of a FI located in a jurisdiction in which the FI is resident, and a unit, business, or office of a FI located in the jurisdiction in which the FI is created or organised.

All units, businesses, or offices of a FI in a single jurisdiction shall be treated as a single branch. Therefore, a branch which is located outside Malta will not be a Maltese FI. On the other hand, if the branch is located in Malta it will be a Maltese FI, despite the fact that the FI of which it is a branch of is not located in Malta. In many cases whether or not a FI is resident in Malta or whether

a branch of a FI is located in Malta will be clear, but there may be situations where this is less obvious. In such cases the Financial Institution will need to seek confirmation of its status from the Commissioner for Revenue.

In the case of trusts, foundations and other similar organisations please make reference to Section 11 of these Guidelines.

## **Types of Financial Institutions**

*The term “Financial Institution” means a Custodial Institution, a Depository Institution, an Investment Entity or a Specified Insurance Company.*

Whether an Entity is subject to the financial laws and regulations of Malta or is subject to supervision and examination by agencies having regulatory oversight of financial institutions, is relevant to, but not necessarily determinative of, whether that Entity qualifies as a Financial Institution. The instruments provide a definition of each of the above-mentioned Financial Institutions.

### **A. Custodial Institution**

The term “Custodial Institution” means any Entity that holds, as a substantial portion of its business, Financial Assets for the account of others.

The definition of a ‘custodial institution’ establishes the “substantial portion” test i.e. an Entity holds Financial Assets for the account of others as a substantial portion of its business if the Entity’s gross income attributable to the holding of Financial Assets and related financial services equals or exceeds 20% of the Entity’s gross income during the shorter of:

- (i) The three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or
- (ii) The period during which the Entity has been in existence.

An entity with no operating history as of the date of the determination is considered to hold financial assets for account of others as a substantial portion of its business if the entity expects to meet the gross income threshold based on its anticipated functions, assets and employees, with due consideration given to any purpose or functions for which the entity is licensed or regulated (including those of any predecessor).

“Income attributable to the holding of Financial Assets and related financial services” means:

- custody, account maintenance, and transfer fees;
- commissions and fees earned from executing and pricing securities transactions with respect to Financial Assets held in custody;
- income earned from extending credit to customers with respect to Financial Assets held in custody (or acquired through such extension of credit);
- income earned on the bid-ask spread of Financial Assets held in custody; and
- fees for providing financial advice with respect to Financial Assets held in (or potentially to be held in) custody by the entity; and for clearance and settlement services.

**Clarification 1:** Entities that safe keep Financial Assets for the account of others, such as custodian banks, brokers and central securities depositories, would generally be considered Custodial Institutions. Entities that do not hold Financial Assets for the account of others, such as insurance brokers, will not be Custodial Institutions.

**Clarification 2:** Executing brokers which simply execute trading instructions, or receive and transmit instructions to another executing broker will not generally be considered to be Custodial Institutions as long as they do not safe keep Financial Assets for the account of others.

**Clarification 3:** Entities that provide fiduciary services not with a direct business motive but rather in an ancillary function to other businesses providing professional services (e.g. company services providers, accounting and tax services) and that do not charge for such ancillary services shall not be considered to be Custodial Institutions.

**Clarification 4:** The Commissioner for Revenue will treat fund nominees, fund intermediaries and fund platforms 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 will be to hold financial assets for the account of others.

**Clarification 5:** The participation of a lender in a syndicated loan, where a Malta Financial Institution Agent acts for and on behalf of a syndicate of lenders which includes that lender, does not lead to the Agent being a Custodial Institution.

**Clarification 6:** In the case of EMIs and PSPs, one would have to consider whether a PSP, which for instance holds money until clearance, or an EMI which is authorized to issue e-money and transfer this to third parties, could fall to be defined as a Custodial Institution. As a point of note, if merchant services payments simply flow through systems but were not retained in an account, then such payments are not to be considered as a Financial Account.

## **B. Depository Institution**

*The term "**Depository Institution**" means any Entity that accepts deposits in the ordinary course of a banking or similar business.*

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, checks, bills of exchange, acceptances, or other evidences of indebtedness;
- c) issues letters of credit and negotiates drafts drawn there under;
- d) provides trust or fiduciary services;
- e) finances foreign exchange transactions; or
- f) enters into, purchases, or disposes of finance leases or leased assets.

**Clarification 1:** An Entity is not considered to be engaged in a banking or similar business if the Entity solely accepts deposits from persons as a collateral or security pursuant to a sale or lease

of property or pursuant to a similar financing arrangement between such Entity and the person holding the deposit with the Entity (e.g. factoring or invoice discounting business). Similarly, entities that facilitate money transfers by instructing agents to transmit funds (but do not finance the transactions) are not to be considered to be engaged in banking or similar business as this is not considered as accepting deposits.

**Clarification 2:** Entities that issue payment cards that can be pre-loaded with funds to be spent later, such as a pre-paid credit card or “e-money” are considered to be Depository Institutions. Provided that a pre-loaded payment card such as a transportation card on a use-and-go basis, which does not allow a withdrawal or a transfer back of the funds to the card-holder will not be considered a deposit in the ordinary course of banking or similar business.

**Clarification 3:** Electronic Money Institutions [EMIs] regulated by the Financial Institutions Act, which transposes the EU Electronic Money Directive (2009/110/EC) into local legislation, are not deposit-takers for the purposes of the EU Capital Requirements Directive (2013/36/EU). Issuing electronic money (e-money) in exchange for funds, i.e. providing an e-money account in which to hold funds, does not constitute deposit-taking. Consequently, EMIs will not fall within the definition of Depository Institution, which requires deposits to be accepted in the ordinary course of a banking or similar business.

**Clarification 4:** Payment Service Providers [PSPs] regulated by the Financial Institutions Act, which transposes the EU Payment Services Directive (2007/64/EC), are not deposit-takers for the purposes of the CRD. Any funds received by Payment Institutions from payment service users, with a view to the provision of payment services, does not constitute deposit-taking. Consequently, PSPs will not fall within the definition of Depository Institution, which requires deposits to be accepted in the ordinary course of a banking or similar business.

### C. Investment Entity

Whilst, the definition of Investment Entity in the FATCA IGA is the least prescriptive, the definition can be read consistently for all instruments. The definition of Investment Entity has to be interpreted in a manner that is consistent with similar language set forth in the definition of “financial institution” in the Financial Action Task Force Recommendations.<sup>1</sup>

1. The first type of “Investment Entity” is explained as an entity which primarily conducts as a business one or more of the following activities or operations on behalf of a customer:

- (i) Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- (ii) Individual and collective portfolio management; or
- (iii) Otherwise investing, administering, or managing Financial Assets or money on behalf of other persons.

An entity would generally be considered an Investment Entity if it functions or holds itself out as of its motion 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

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<sup>1</sup> FATF/OECD (2013), *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, the FATF Recommendations February 2012, FATF/OECD, Paris, available on [https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations\\_2012.pdf](https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf)

established with an investment strategy of investing, reinvesting, or trading in Financial Assets.

2. A second type of “Investment Entity” is explained as that which has its gross income primarily attributable to investing, reinvesting, or trading in Financial Assets, if the Entity is managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment Entity described in the first type of investment entity above.

However, an entity managed by a Reporting Financial Institution that is dedicated to the investment, management or administration of the wealth of a limited number of related shareholders shall not be considered to be an Investment Entity but a NFE/NFFE. In order to ensure proper disclosure for the instruments, such a NFE/NFFE shall in all cases be classified as a Passive NFE/NFFE. The word ‘related’ shall be taken to mean an individual and his/her spouse, descendants and ascendants in the direct line and their relative spouses, as well as the brothers and sisters of such individual, but in all cases, shall not be more than 7 individual shareholders. A related shareholder shall also include a maximum of 3 entities which are controlled by the same maximum 7 individual legal owners. In this regard, interests in the related entity which are less than 25% of the entity’s capital shall not be taken into consideration for the purpose of this determination.

The provisions of the immediately preceding paragraph shall be subject to the following conditions, the Entity must not:

- (a) operate or present itself as an investment fund in the market, and
- (b) have raised or raise capital in the market offered to the public.
- (c) The entity must not have any reason to believe that the managing Reporting Financial Institution is not being, for any reason whatsoever, compliant with the instruments.

The provisions of this paragraph shall be interpreted in a manner that does not frustrate the purposes of the instruments. Similarly, a change in the ultimate individual shareholder / participant of such entities is to be considered as a change in circumstances. If there is any reason for the entity to believe that the managing financial institution is not a participating Financial Institution in terms of the instruments, the entity shall register in terms of the instruments to undertake the obligations of a Malta Reporting Financial Institution.

### **Definitions**

#### **“Managed By”**

An Entity is “managed by” another Entity if the managing Entity performs, either directly or through another service provider, any of the activities or operations described in (i) to (iii) for the first-type investment entity above on behalf of the managed Entity. However, an Entity does not manage another Entity if it does not have discretionary authority to manage the Entity’s assets (in whole or part). Where an Entity is managed by a mix of Financial Institutions, NFEs/NFFEs or individuals, the Entity is considered to be managed by a Financial Institution described in the first type of investment entity above, if any of the managing Entities is such another Entity.

For example, a private trust company that acts as a registered office or registered agent of a trust or performs administrative services unrelated to the financial assets or money of the trust, does not conduct the activities and operations on behalf of the trust and thus the trust is not “managed by” the private trust company within the meaning of these guidelines.

Also, an Entity that invests all or a portion of its assets in a mutual fund, exchange traded fund, or

similar vehicle will not be considered “managed by” the mutual fund, exchange traded fund, or similar vehicle.

In both of these examples, a further determination needs to be made as to whether the Entity is managed by another Entity for the purpose of ascertaining whether the first-mentioned Entity falls within the definition of Investment Entity as set out in these guidelines.

“Primarily conducts as a business / primarily attributable to investing, reinvesting or trading in financial assets”

An Entity is treated as primarily conducting as a business one or more of the activities described above in the first type of Investment Entity, or an Entity’s gross income is primarily attributable to investing, reinvesting, or trading in Financial Assets for the purposes of the second type of Investment Entity, if the Entity’s gross income attributable to the relevant activities equals or exceeds 50% of the Entity’s gross income during the shorter of:

- (i) The three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or
- (ii) The period during which the Entity has been in existence.

An entity with no operating history as of the date of the determination is treated as primarily conducting as a business one or more of the activities described in the first type of Investment Entity described above, if such entity expects to meet the gross income threshold based on the anticipated functions, assets, and employees, with due consideration given to any purpose or functions for which the entity is licensed or regulated (including those of any predecessor).

**Clarification 1:** A trust or a foundation will be an MFI if it falls within the definition of an Investment Entity. This will be the case when a trust/foundation has gross income primarily attributable to investing, reinvesting, or trading in Financial Assets and is managed by another Entity that is an MFI. This would also include trusts/foundations that are collective investment vehicles or other similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in Financial Assets.

**Clarification 2:** Securitisation structures are in many instances legally remote from the Financial institution 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. The principles as to whether an entity meets the definition of an Investment Entity should be applied to all entities within a securitisation structure. Typically, on the basis of their activities, issuing entities are likely to be classified as Investment Entities.

#### **D. Holding Company and Treasury Centres (FATCA / CRS / DAC II)**

Whether a holding company or treasury centre has the status of Financial Institution depends on the facts and circumstances, and in particular on whether it engages in the specified activities or operations of a Financial Institution even if those activities or operations are engaged in solely on behalf of Related Entities or its shareholders. An entity is a Related Entity of another entity if either entity controls the other entity, or the two entities are under common control. For this purpose, control includes direct or indirect ownership of more than 50 percent of the vote and value of such entity. For the purposes of FATCA only, control includes direct or indirect ownership of more than 50 percent of the vote or value in an Entity.

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, will meet the definition of Financial Institution provided that the other requirements of the Investment Entity definition are met. A holding company will also meet 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.

### **E. Specified Insurance Company**

The term “Specified Insurance Company” means any Entity that is an insurance company that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.

For CRS/DAC II only, an insurance company shall also satisfy the following criteria:

- (i) The gross income of which (for example, gross premiums and gross investment income) arising from insurance, reinsurance, and Annuity Contracts for the immediately preceding calendar year exceeds 50% of total gross income for such year; or
- (ii) The aggregate value of the assets of which associated with insurance, reinsurance, and Annuity Contracts at any time during the immediately preceding calendar year exceeds 50% of total assets at any time during such year.

An “insurance company” is an Entity that is regulated as an insurance business and is authorised in terms of article 7 of the Insurance Business Act. The reserving activities of an insurance company will not cause the company to be a Custodial Institution, a Depository Institution, or an Investment Entity.

### **Non-Life Insurance Companies**

A company that solely carries out business of a general insurance should not be treated as a Maltese Financial Institution but will instead be classified as a NFE/NFFE unless such an insurance company has Financial Accounts. Inversely, most life insurance companies would generally be considered Specified Insurance Companies.

Entities that do not issue Cash Value Insurance Contracts or Annuity Contracts and are not obliged to make payments with respect to them, such as most non-life insurance companies, most holding companies of insurance companies, and insurance brokers, will not be Specified Insurance Companies. Insurance brokers are normally part of the payment chain and therefore they should not be classified as a Specified Insurance Company. This will not be case however where insurance brokers are obliged to make payments under the terms of the Insurance or Annuity Contracts.

### **F. The Definition of “Financial Assets”**

The definitions of ‘Custodial Institution’ and ‘Investment Entity’ above make reference to ‘Financial Assets.’ Unlike CRS/DAC II, the FATCA IGA does not incorporate a definition for financial assets. To ensure consistency, Malta is adopting a consistent approach between the different instruments. Thus, the term “Financial Asset” includes:

- o a security (for example, a share of 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),

- o partnership interest, commodity, swap (for example, interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, and similar agreements),
- o Insurance Contract or Annuity Contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, swap, Insurance Contract, or Annuity Contract.

### **Direct Interest in Real Property**

As already mentioned, the definition is interpreted to not refer to assets of every kind. An Entity 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 will meet the definition of Investment Entity as implemented in these guidelines.

### **Distributed Ledger Technology Assets**

Distributed Ledger Technology Assets such as crypto-tokens can serve a multitude of different functions, from granting the holders access to a service to entitling such holders to a company dividend. In order to determine if such assets are financial assets, reference needs to be made to the Guidelines on Income Tax Treatment in Relation to Distributed Ledger Technology (DLT) issued in terms of article 96(2) ITA.

## **2.3. Is the Entity a Non-Reporting Financial Institution?**

With reference to the definition of ‘Reporting Malta Financial Institution’ (see above), a FI will be deemed to be a Reporting Financial Institution if it is a Malta Financial Institution – provided it is not a Non-Reporting Malta Financial Institution. “Non-Reporting Malta Financial Institution” do not have any reporting obligations in relation to any Financial Accounts that they maintain. Annex II to the IGA includes several categories of Entities that are treated as Non-Reporting Financial Institutions which are not included in the CRS/DAC II. This divergence is due to the differing context or approach of the multilateral CRS/DAC II compared to that of the bilateral FATCA IGA.

### Category 1: Government Entity, International Organisation or Central Bank

How the instruments apply to a Central Bank, International Organisation or Governmental Entity will depend on the facts. The definition of NFFE/NFE specifically excludes Financial Institutions. The first test will therefore be whether the Central Bank, International Organisation or Governmental Entity qualifies as a Financial Institution. This is a functional test and depends on the facts. Where the Central Bank, International Organisation or Governmental Entity is determined to be a Financial Institution then it can be classified as a Non-reporting Financial Institution, provided it meets the requirements to be such. Where the Central Bank, International Organisation or Governmental Entity does not meet the requirements to be classified as a Financial Institution then it will be a NFFE/NFE and will be consequently classified as an Active NFFE/NFE.

Once Central Bank, International Organisation or Governmental Entity identify themselves as such to a Reporting Malta Financial Institution and there is no reason to doubt otherwise, the Reporting Malta Financial Institution is not required to review or report on accounts held by these entities. Entities that fall within the following categories are considered to be non-reporting Financial Institutions:

- Foreign Government and any political sub-divisions of a Foreign Government or any wholly owned agency or instrumentality of such;
- Governments of U.S. Territories;
- Foreign Central Bank of Issue;
- International Organisations or any wholly owned agency or Instrumentality of such.

### **Clarifications**

**Governmental Entity:** The Malta Government (including any Local Council, any Government Authority or Agency established under the laws of Malta and any Entity that is wholly owned by the Malta Government or by the above-mentioned authorities or agencies will be treated as a Non-Reporting Financial Institution if it functions as a financial institution.

**International Organisation:** Any Malta office of the following international organisations is a Non-Reporting Financial Institution to the extent they qualify as financial institutions:

- European Union Institutions;
- EC-LAS Liaison Office;
- IMO International Maritime Law Institute;
- International Institute on Ageing – UN;
- Parliamentary Assembly of the Mediterranean;
- Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea – IMO / UNEP;
- The World Islamic Call Society;
- United Nations High Commissioner for Refugees;
- International Organisation for Migration;
- International Ocean Institute.

**Central Bank:** Reference to the ‘Central Bank of Malta’ shall mean the Central Bank of Malta as defined in the Central Bank of Malta Act and any of its wholly owned subsidiaries.

In the case of CRS / DAC II, a Central Bank will only be a non-reporting financial institution to the extent that it not in receipt of 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.

### **Category 2: Treaty-Qualified Funds (FATCA IGA only)**

These are funds established in Malta entitled to benefit under the Malta / US Double Taxation Agreement (S.L. 123.123) on income that it derives from sources within the United States (or would be entitled to such benefits if it derived any such income) as residents of Malta that satisfy any applicable limitation on benefits requirement and is operated principally to administer or provide pension or retirement benefits. Under the Malta/ US Double Taxation Agreement a “pension fund” is defined as any person (including a trust) established in Malta that is: i) a licensed fund or scheme subject to tax only on income derived from immovable property situated

in Malta; and ii) Operated principally either: a) To administer or provide pension or retirement benefits; or b) To earn income for the benefit of one or more persons meeting the requirements of subparagraph i) and clause a) of this subparagraph.

#### Category 3: Broad Participation Retirement Funds

These are retirement funds that are established in Malta which are licensed, registered or otherwise authorised under the Retirement Pensions Act to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that the fund satisfies all the conditions set out in Annex II, Section II.B of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VIII, Part B (5) of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations.

#### Category 4: Narrow Participation Retirement Funds

These are retirement funds established in Malta 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, provided that the fund has fewer than 50 participants and the requirements of Annex II, Section II.C of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VIII, Part B (6) of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations.

#### Category 5: Pension Funds

These are funds established in Malta by a Central Bank, International Organisation or Governmental Entity to provide retirement, disability, or death benefits to beneficiaries or participants that are current or former employees of the Central Bank, International Organisation or Governmental Entity (or persons designated by such employees), or that are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the Central Bank, International Organisation or Governmental Entity.

#### Category 6: Investment Entity wholly owned by exempt beneficial owners (FATCA IGA only)

An entity that is a Malta Financial Institution solely because it is an Investment Entity, provided that each direct holder of an Equity Interest in the Entity is an exempt beneficial owner, and each direct holder of a debt interest in such Entity is either a Depository Institution (with respect to a loan made to such Entity) or an exempt beneficial owner.

These entities are treated as Non-Reporting Financial Institutions on the basis of the fact that none of their direct account-holders are persons that trigger any reporting obligation. As a result, even without these exceptions such Investment Entities would have no reporting obligations.

#### Category 7: Local Client Base Financial Institutions (FATCA IGA only)

There are ten criteria which need to be met before a Financial Institution can be treated as a Local Client Base Financial Institution. A Financial Institution should self-assess whether it meets these criteria and maintain appropriate records to support its assessment. The criteria are set out in Annex II, Section III.A of Schedule I to the Exchange of Information (United States of America) (FATCA) Order.

In terms of the relevant FATCA Competent Authority Agreement, in order for a Local Client Base Financial Institution to be deemed-compliant in terms of the IGA, such an entity would be required to register for a GIIN.

#### Category 8: Local Bank (FATCA IGA only)

Non-registering local banks are generally small regulated local banks, credit unions and similar entities that are primarily Depository Institutions; they may operate without a profit. They must not have a fixed place of business outside of Malta; this does not include a location that is not advertised to the public and from which the Financial Institution performs solely administrative support functions. Non-registering local banks must have policies and procedures prohibiting the solicitation of customers outside Malta. There is also a limit on the total assets that can be held of \$175 million in assets for single entity and (\$500 million total for a group of Related Entities). Any Related Entities of the non-registering local bank must also satisfy these requirements. The criteria are set out in Annex II, Section III.B of Schedule I to the Exchange of Information (United States of America) (FATCA) Order.

#### Category 9: Financial Institutions with only Low-Value Accounts (FATCA IGA only)

This category relies on the \$50,000 threshold in the FATCA IGA which is not present in the CRS/DAC II. The Financial Institution must not be an Investment Entity, and must not have any Financial Accounts exceeding \$50,000 (applying the aggregation rules). At the end of the most recent accounting year, the Financial Institution must not have more than \$50 million in assets on its balance sheet and must not have more than \$50 million in assets on its consolidated or combined balance sheet where it is in a group with related entities.

#### Category 10: Qualified Credit Card Issuer

A qualified credit card issuer is an entity that is a Financial Institution solely because it is an issuer of credit cards that accepts deposits only when the customer makes a payment in excess of the outstanding balance on the card due and does not immediately return the overpayment to the customer; and beginning on or before July 1, 2014 (FATCA IGA) / January 1, 2016 (CRS / DAC II), implements policies and procedures to either prevent a customer deposit in excess of \$50,000, or to ensure that any customer deposit in excess of \$50,000, in each case applying the rules set forth in paragraph C in Section VII / Annex I of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VII, Paragraph C of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations for account aggregation and currency translation, is refunded to the customer within 60 days. For this purpose, a customer deposit does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns.

#### Category 11: Trustee-Documented Trust

A Malta resident Investment Entity Trust or entity of a similar nature as explained in Section 11 may qualify as a non-reporting Financial Institution where the trustee carries out such functions is a RMFI and complies with the requirements of Guidelines 12.3.3. The Malta resident Investment Entity Trust will a non-reporting Financial Institution where the RMFI reports all the required information pertaining to all Reportable Accounts of the Trust.

The RMFI must not report the information with respect to a Reportable Account of the Trustee-Documented Trust as if it were a Reportable Account of the RMFI. The RMFI must report such

information as the Trustee-Documented Trust would have reported and identify the Trustee-Documented Trust with respect to which it fulfils the reporting and due diligence obligations.

In terms of the relevant FATCA Competent Authority Agreement, for a Trustee-Documented Trust to be deemed-compliant in terms of the IGA, the trustee would be required to register for a GIIN.

#### Category 12: Sponsored Investment Entities & Controlled Foreign Corporations (FATCA IGA only)

A sponsored investment entity is an entity that has a contractual arrangement for its due diligence and reporting responsibilities to be carried out by a sponsoring entity. A sponsored controlled foreign corporation is an entity which is owned as detailed in Annex II, Section IV.B of Schedule I to the Exchange of Information (United States of America) (FATCA) Order. The sponsoring entity must agree to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting Malta Financial Institution.

In terms of the relevant FATCA Competent Authority Agreement, for a sponsored entity to be deemed-compliant in terms of the IGA, the sponsoring entity on behalf of the sponsored entity would be required to register for a GIIN.

#### Category 13: Sponsored closely held Investment Vehicles (FATCA IGA only)

A sponsored closely held Investment vehicle is similar to a sponsored investment entity but crucially, Sponsored Closely Held Investment Vehicles must not hold themselves out as an investment vehicle for unrelated parties and must have 20 or fewer individuals that own debt and equity interests (disregarding interests owned by Participating Financial Institution, Deemed Compliant Financial Institutions and an equity interest owned by an entity that is 100 per cent owner and itself a Sponsored Closely Held Investment Vehicle).

In terms of the relevant FATCA Competent Authority Agreement, the Sponsoring Entity will have to register with the IRS as a Sponsoring Entity but it does not need to register the sponsored entities. The Sponsoring Entity will, however, be required to report on the Sponsored Entity.

#### Category 14: Investment Advisors and Investment Managers (FATCA IGA)

Financial Institutions that are not maintaining any financial accounts have no reporting responsibilities. This may be contrasted with the CRS / DAC II whereby such financial accounts are excluded from the outset (see: Section VIII, Part C (1(a)) of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations.)

These are Investment Entities established in Malta that are Financial Institutions solely because they: (1) render investment advice to, and act on behalf of, or (2) manage portfolios for, and act on behalf of, a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a Financial Institution other than a Non-Participating Financial Institution. Investment advisors will often have the most in-depth knowledge of the investor and direct access to the customer so will be best placed to obtain self-certifications. However, the Commissioner for Revenue does not regard such investment advisors 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 Financial Accounts.

#### Category 15: Qualified / Exempt Collective Investment Schemes

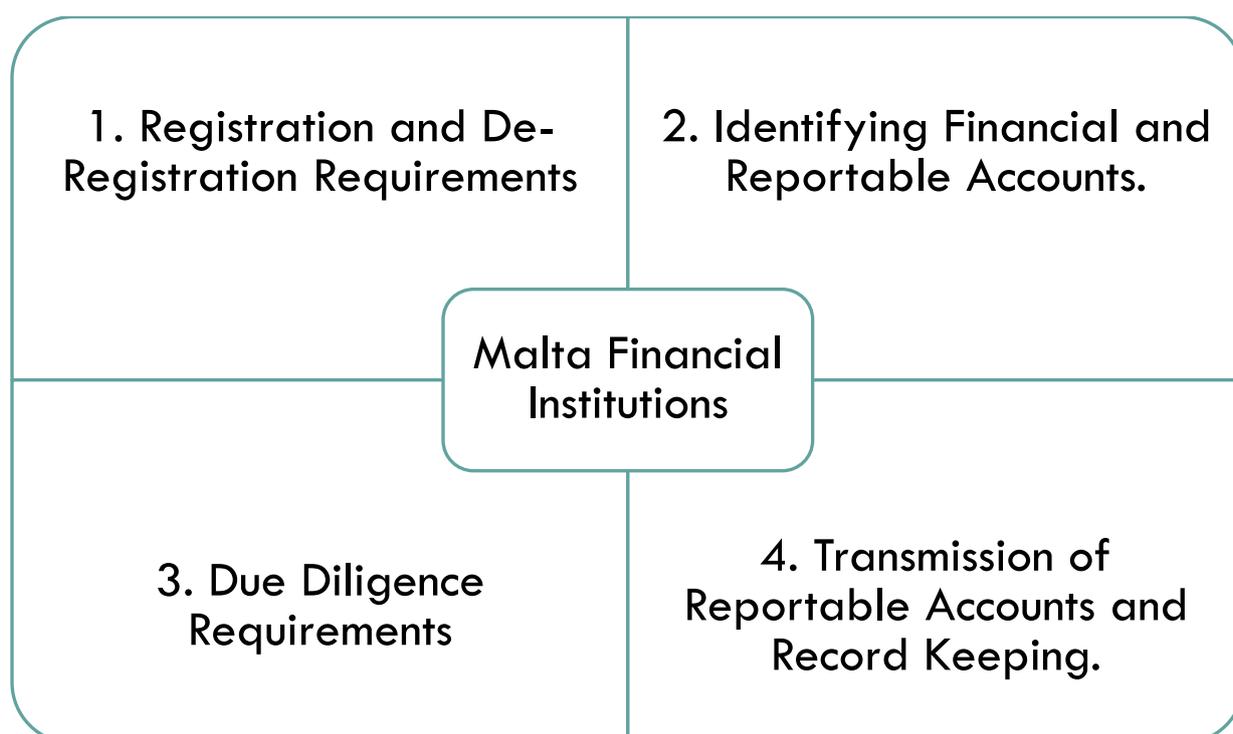
To qualify for this classification, the entity must be an investment entity, must be regulated as an investment fund, and each equity holder of the entity must fall into certain permissible categories as delineated in Annex II, Section IV.E/F of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VIII, Part B (9) of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations .

The conditions for qualifying as a Collection Investment Vehicle as set out in Section IV, E and F of Annex II of Schedule I to the Exchange of Information (United States of America) (FATCA) Order were slightly amended in the CRS / DAC II to take into perspective the multilateral context and to remove U.S. Specificities and consequential changes to the definition of Reportable Persons.

Category 16: Low-Risk Financial Institution (CRS / DAC II only)

This is a category recognised for CRS / DAC II purposes which allows Malta to specifically identify low-risk Financial Institutions as Non-Reporting Financial Institutions, under certain conditions. Malta's specific list of Non-Reporting Financial Institutions published by the Commissioner can be found as an Appendix 5 to these guidelines which list is also published in the Official Journal of the European Union.

# Malta Financial Institutions



### **3. Registration / De-Registration for Malta Financial Institutions**

Compliance requirements form the first core requirement for Malta Financial Institution in terms of these instruments. Therefore, it is important that proper compliance is ensured.

## **Step 1: U.S. IRS FATCA Registration (FATCA IGA only)**

Each Malta Reporting Financial Institution or a Paragraph 1.1.2 Financial Institution as per the Competent Authority Agreement will be required to register and obtain a Global Intermediary Identification Number (GIIN) from the U.S. Internal Revenue Service (IRS). This may be obtained by registering through the FATCA Foreign Financial Institution Registration Online facility. This facility and the corresponding FATCA Registration User Guidelines are available on the website of the U.S. IRS.

## **Step 2: Domestic Registration**

Malta Financial Institutions also need to register with the Commissioner for Revenue for CRS/ DAC II/ FATCA purposes even if they are non-Reporting Malta Financial Institutions. However, trusts which are subject to consolidated reporting as detailed in Guidelines 12.4. only do **not** require a domestic registration.

Registration needs to be done within 30 days following which an entity shall be classified as a Malta Financial Institution in terms of the instruments.

A Malta Financial Institution needs to be in possession of a Maltese TIN prior to proceeding with such registration. In the event, that a single legal entity or arrangement is in possession of more than one Maltese TIN in view of Maltese tax simplifications, it is the Maltese TIN of the cell company, umbrella fund or other overarching structure which will need to be reported on behalf of its underlying structures. Conversely, if the applicant is not in possession of a Maltese TIN, this number would need to be obtained from the Office of the Commissioner for Revenue by email to [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt). Furthermore, to the extent that the GIIN is newly issued, a Maltese Financial Institution would need to inform the Commissioner for Revenue prior to registration by sending the newly acquired GIIN to [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt) for insertion in the Maltese database, together with the Maltese TIN for validation. This will later be cross-checked with the information received from the U.S. IRS in terms of Paragraph 2.3. of the Competent Authority Agreement.

Once the pre-registration requirements are satisfied and acknowledged, the Malta Financial Institution may proceed to the formal registration. This registration is to be accomplished through the online registration process that can be accessed on the AEOI reporting portal of the website of the Commissioner for Revenue ([www.cfr.gov.mt](http://www.cfr.gov.mt)) and clicking on E-Services > Exchange of Information > Automatic Exchange of Financial Account Information > New Registration Form.

The applicant Maltese financial institution will be asked to provide details concerning its identification, type of entity, type of financial institution, whether it is a reporting or non-reporting Malta Financial Institution, types of financial accounts maintained, elections to be made (if any) in relation to the relevant thresholds for the purposes of the instruments, GIIN Number as well as contact details.

After submitting the registration form, the Financial Institution will be asked to print the system generated document, sign the declaration section, scan, and send the scanned copy by e-mail to [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt). The Commissioner for Revenue shall then communicate with those Financial Institutions that are not yet registered as data providers indicating the assigned data provider number and a PIN Number.

### **Step 3: Modifications to details given on Domestic Registration**

A Malta Financial Institution needs to notify the Commissioner for Revenue of any changes to the details given on registration not later than 30 days from when such change has occurred or till the deadline of the respective reporting period as the case maybe.

Details given on registration may be modified through the AEOI Portal after logging in as a data provider. This AEOI Portal may be accessed on the website of the Commissioner for Revenue ([www.cfr.gov.mt](http://www.cfr.gov.mt)) and by clicking on E-Services > Exchange of Information > Automatic Exchange of Financial Account Information > Login to Reporting Portal. A list of all GIINs belonging to the data provider is given and the user may modify such registration details. In view that non-reporting financial institution do not have a Data Provider and PIN number, such entities can enter the barcode number and update the FATCA data without the need to login into the AEOI Portal. This may be accessed on the website of the Commissioner for Revenue ([www.cfr.gov.mt](http://www.cfr.gov.mt)) and by clicking on E-Services > Exchange of Information > Automatic Exchange of Financial Account Information > Modification to Registration Form.

Users should note that the information to be reported corresponds to the latest information which is inputted at the end of the reporting period. In case of difficulties or in need of assistance, please contact [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt) for further information. It is presumed that the details on original registration are correct unless a modification is undertaken thereon. It is the responsibility of the user to ensure that details are maintained up-to-date.

### **Step 4: Cancellation of Domestic Registration and GIIN.**

In the event that a Malta Financial Institution no longer qualifies as Malta Financial Institution during a relevant reporting period in view of a change of economic activity or winding up, the Malta Financial Institution may obtain de-registration from domestic registration. Please note that such a de-registration needs to be preceded with a cancellation of the GIIN from the IRS. The user also needs to login to the portal and accordingly change to 'Non-Reporting' status for FATCA / CRS / DAC II purposes in order to remove report submission obligations during the reporting period of de-registration.

De-registration shall be effective from the relevant reporting period during which the Malta Financial Institution no longer qualifies as a Malta Financial Institution and this information shall be transacted through a notification to [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt).

## **4. Identifying Financial Accounts**

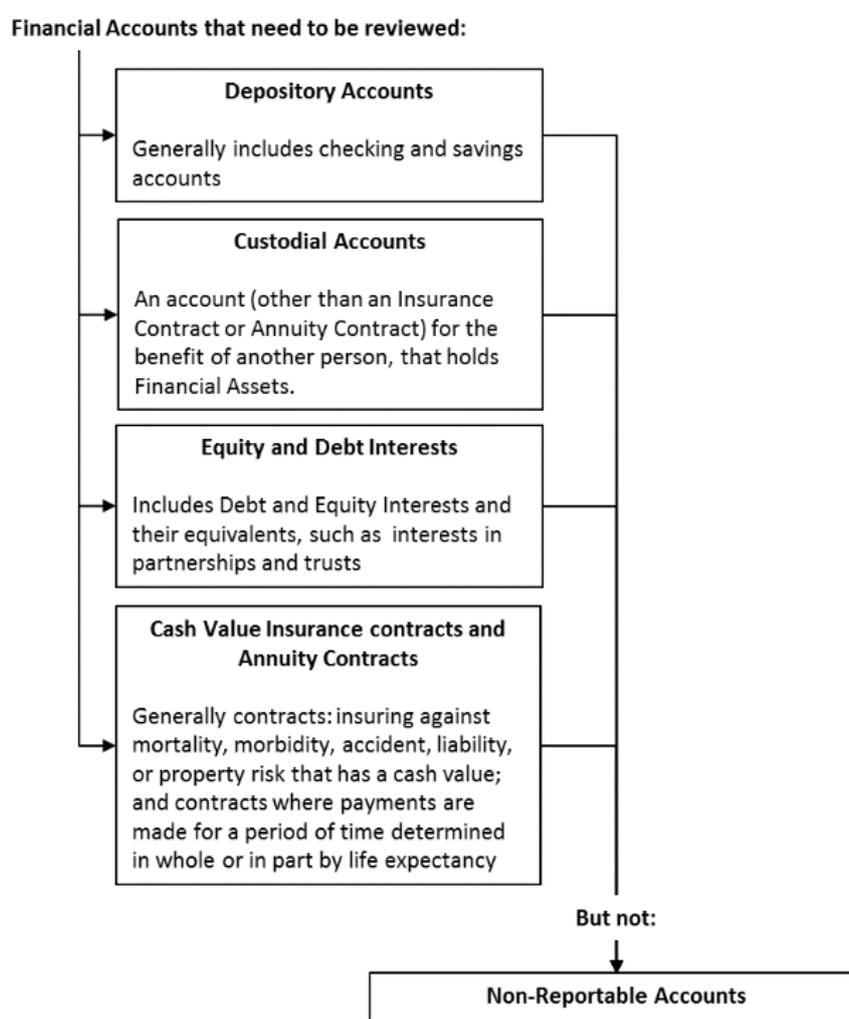
Preliminarily, a RMFI needs to identify its Financial Accounts. This is then followed by an exercise wherein the RMFI excludes certain Financial Accounts on the basis of the definition of excluded

accounts. The latter accounts are excluded from needing to be reviewed or reported.

#### 4.1. When are Financial Accounts Recognised?

An account will be created when the Financial Institution is required to recognize the account based on existing operating procedures in line with the regulatory or legal requirements of the Malta. Where a customer exercises their cancellation rights (i.e. they cancel the account within the “cooling off” period) a Financial Account still created and the value to be reported, if reportable, is the closing value. Where some or all of the proceeds of a maturing fixed term product are rolled over, automatically or with the account holder’s interaction, into a new fixed term product this shall not be deemed to be the creation of a New Account.

#### 4.2. Types of Financial Accounts.



A Financial Account is any account maintained by a Financial Institution. However, not all accounts will be Financial Accounts for the purposes of the instruments. The term “Financial Account” is broadly defined and therefore may include products and obligations that would not normally be regarded as financial accounts in either other Malta legislation or in everyday commercial use. Article 1(1)(s) of Schedule 1 to the Exchange of Information (United States of

America) (FATCA) Order / Section VIII of Annex I of the of the Cooperation with Other Jurisdiction on Tax Matters Regulations defines the term “Financial Account” as “an account maintained by a Financial Institution”. It is further clarified that this term includes:

- Depository Accounts;
- Custodial Accounts;
- Equity and debt interest in certain Investment Entities’;
- Cash Value Insurance Contracts; and
- Annuity Contracts.

A Financial Institution may maintain more than one type of Financial Account. For example, a Depository Institution may also maintain Custodial Accounts as well as Depository Accounts.

#### **4.2.1. Depository Account**

As per Article 1(1)(t) of Schedule 1 to the Exchange of Information (United States of America) (FATCA) Order / Section VIII of Annex I of the of the Cooperation with Other Jurisdiction on Tax Matters Regulations, the term “Depository Account” includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business.

A Depository Account also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon. An account that is evidenced by a passbook would generally be considered a Depository Account. Negotiable debt instruments that are traded on a regulated market or over-the-counter market and distributed and held through Financial Institutions would not generally be considered Depository Accounts, but Financial Assets.

**DAC II / CRS only:** Depository Accounts held by a Central Bank for current or former employees (and the spouse and children of such employees) will not be considered held in connection with a commercial financial activity and thus the Central Bank will be a Non-Reporting Financial Institution with respect to such Financial Accounts.

#### **4.2.2. Custodial Account**

A custodial account is a financial account (other than an Insurance Contract or Annuity Contract) for the benefit of another person that holds any financial asset for investment purposes.

The definition includes all accounts which are maintained for the benefit of another, or arrangements pursuant to which an obligation exists to return cash or assets to another. Transactions which include the collection of margin or collateral on behalf of counterparty may fall within the definition of Custodial Account. The exact terms of the contractual arrangements will be relevant in applying this interpretation. However, any obligation to return equivalent collateral at conclusion of the contract, and potentially make interim payments (such as interest) to counterparties during the contract term will constitute Custodial Account for the purposes the instruments.

#### **4.2.3. Equity and Debt Interests**

The definition of the term “Equity Interest” specifically addresses interests in partnerships and

trusts. In the case of a partnership that is a Financial Institution, either a capital or profits interest in the partnership. A “Debt Interest” refers to any interest created when a lender lends to a borrower, which can arise from arrangements such as a simple loan, bond issue or note issue.

#### **Clarification 1: The Inter-play between Custodial Institutions and Investment Entities.**

Where Equity Interests are held through a Custodial Institution, the Custodial Institution is responsible for reporting, not the Investment Entity. By way of example, a Reportable Person / U.S. Specified Person Mr. B holds shares in investment fund L. Mr. B holds the shares in custody with custodian Y. Investment Fund L is an investment entity and from its perspective, its shares are Financial Accounts [i.e. equity interests in an Investment Entity]. L must treat its custodian Y as its account holder. However, since Y is a Financial Institution in its own right [i.e. a Custodial Institution] such shares are not subject to be reported by the investment fund L, since financial institutions are not Reportable Persons. Thus, as a custodial institution, Y is responsible for reporting the shares it is holding on behalf of Mr. B.

#### **Clarification 2: Regularly traded on an established securities market. (FATCA IGA only)**

FATCA excludes equity and debt interests that are regularly traded on an established securities market from the definition of a Financial Account. However, the exclusion does not apply if the holder of the equity and debt interest (other than a Financial Institution acting as an Intermediary) is registered on the books of the Investment Entity (except for interests first registered on the books of the Investment Entity prior to 1 July 2014).

Any Equity or Debt Interest will be considered “regularly traded” if it is listed on a recognised stock exchange. The term “recognised stock exchange” includes –

- (i) The Malta Stock Exchange;
- (ii) Any stock exchange recognised under the Financial Markets Act, (Chapter 345 of the Laws of Malta);
- (iii) Any stock exchange included in the list of regulated markets for the purposes of the Markets in Financial Instruments Directive (Directive 2014/65/EU);
- (iv) Any stock exchange that is a member of the World Federation of Exchanges; and
- (v) Any recognised stock exchange for the purposes of the Malta/US Double Taxation Convention.

#### **4.2.4. Cash Value Insurance Contracts and Annuity Contracts**

A Cash Value Insurance Contract is a contract, other than an Annuity Contract, under which the issuer agrees to make payments upon the occurrence of a specified contingency. The definition of Cash Value in Article 1(1)(z) of the Schedule 1 to the Exchange of Information (United States of America) (FATCA) Order is different from the equivalent definition in CRS/DAC II. In this regard, due care should be ensured in order that the divergences are respected.

An Annuity Contract is a contract under which the Financial Institution 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.

#### **4.2.5. Excluded Accounts**

The term “Financial Account” however, does not include any account that is an Excluded Account

and which thus is not subject to the due diligence procedures that apply for the purposes of identifying Reportable Accounts. These certain accounts are seen to be low risk of being used to evade tax and are therefore specifically excluded from reporting.

These Excluded Accounts are found in Annex II, Section V of Schedule 1 to the Exchange of Information (United States of America) (FATCA) Order/ Section VIII, C (17) of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations. Broadly these include:

- retirement and pension accounts;
- non-retirement tax-favoured accounts;
- term life insurance contracts;
- estate accounts;
- escrow accounts;
- Depository Accounts due to not-returned overpayments; and
- Low-risk excluded accounts.

### **Category 1: Retirement and Pension Accounts**

The instruments provide for the exclusion of certain tax-favoured savings accounts regulated as personal retirement accounts or that part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits).

To ensure a consistent approach between the instruments, Malta elects to adopt the rollover provisions in the FATCA regulations to bring it in line with the CRS/DAC II. This means that a Financial Account will not fail to satisfy such requirements in terms of the annual contributions limits / maximum contributions limit solely because such Financial Account may receive assets or funds transferred from one or more Financial Accounts that are excluded retirement and pension accounts; or excluded non-retirement savings accounts or from one or more retirement or pension funds that are identified as non-reporting financial institutions.

### **Category 2: Non-Retirement Tax-Favoured Accounts**

The instruments provide for the exclusion of certain tax-favoured savings vehicles for purposes other than for retirement. In the case of CRS / DAC II this measure is made applicable also to tax-favoured investment vehicles regularly traded on an established securities market.

To ensure a consistent approach between the instruments, Malta elects to adopt the rollover provisions in the FATCA regulations to bring it in line with the CRS/DAC II. This means that a Financial Account will not fail to satisfy such requirements in terms of the annual contributions limits solely because such Financial Account may receive assets or funds transferred from one or more Financial Accounts that are excluded retirement and pension accounts; or excluded non-retirement savings accounts or from one or more retirement or pension funds that are identified as non-reporting financial institutions.

### **Category 3: Term-Life Insurance Contracts**

This has to do with a life insurance contract maintained in Malta with a coverage period that will end before the insured individual attains age 90, provided that the contract satisfies the requirements in Annex II, Section V.B of Schedule 1 to the Exchange of Information (United States

of America) (FATCA) Order/ Section VIII, C (17)(c) of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations.

#### **Category 4: Estate Accounts**

This is an account maintained in Malta that is held solely by an estate or is held in the name of a deceased person if the documentation for such account includes a copy of the deceased's will or death certificate. Such an account will not be reportable in the year of the account's holder's death and subsequent years.

#### **Category 5: Escrow Accounts**

Annex II, Section V.D of Schedule 1 to the Exchange of Information (United States of America) (FATCA) Order/ Section VIII, C (17)(e) of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations provide for the exclusion for certain accounts which are created for specific purposes and pose a low-risk. This includes accounts established in connection with any of the following: 1. A court order or judgement; 2. A sale, exchange or lease of real or personal property provided it satisfies all the requirements as set out in the law. 3. An obligation of a Financial Institution servicing a loan secured by real property (immovable property as defined in article 310 of the Civil Code) to set aside a portion or payment solely to facilitate the payment of taxes or insurance related to the real property at a later time. 4. An obligation of a Financial institution solely to facilitate the payment of taxes at a later time.

#### **Category 6: Depository Accounts due to not-returned overpayments**

This category of excluded account is included under CRS / DAC II, and it effectively allows for the exclusion of deposit accounts that meet certain requirements including that the Financial Institution implements policies and procedures either to prevent the customer from making an overpayment in excess of USD 50,000, or to ensure that any customer overpayment in excess of USD 50,000 is refunded to the customer within 60 days.

Despite this category is not included in FATCA, Annex I, Section II, B (4)/ Section IV, A / Section V.A of Schedule 1 to the Exchange of Information (United States of America) (FATCA) Order excludes from review, identification, and reporting on the basis of thresholds resulting in some instances in the same results.

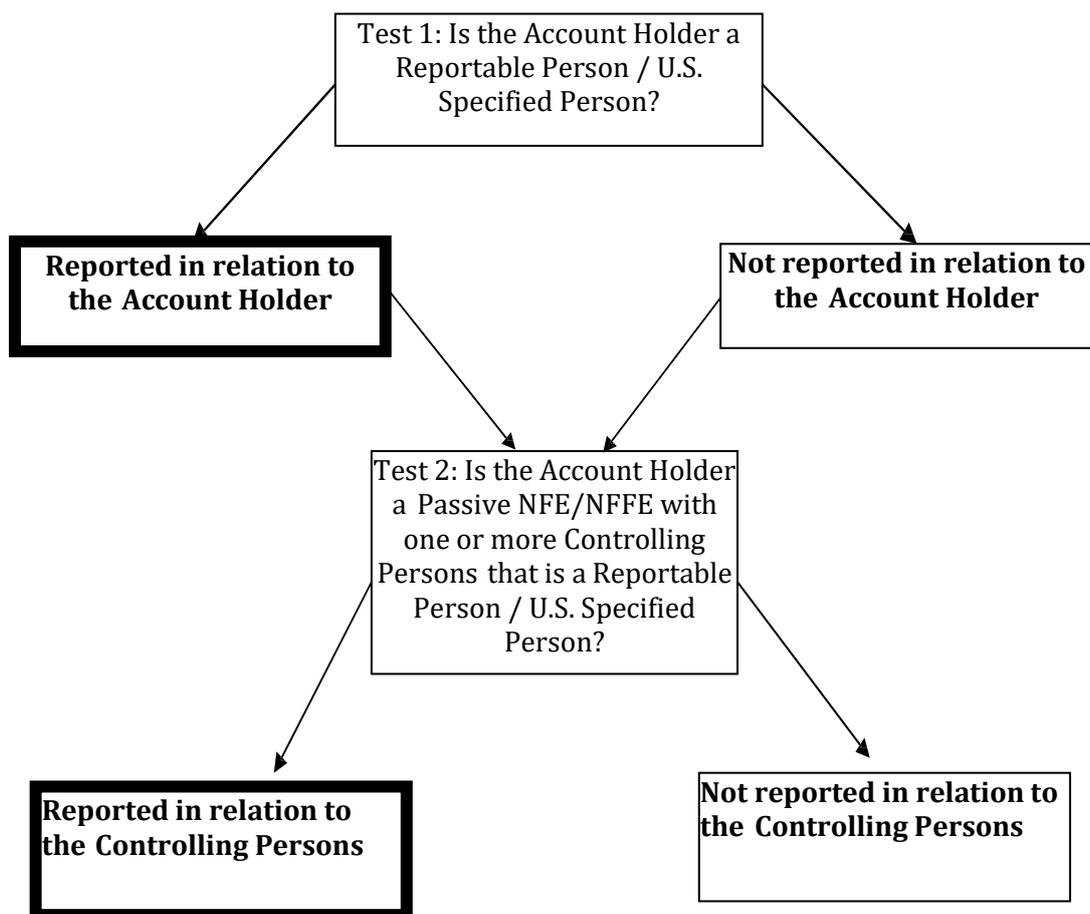
#### **Category 7: Low-Risk Excluded Accounts (CRS / DAC II)**

This category includes the additional general category of low-risk excluded accounts to be determined in accordance with domestic law. Malta's specific list of Excluded Accounts published by the Commissioner can be found as an Appendix 6 to these guidelines which list is also published in the Official Journal of the European Union.

## **5. Identifying Reportable Accounts**

The definition of a Reportable Account' is found in article 1(1)(cc) of Schedule 1 of the Exchange of Information (United States of America) (FATCA) Order / Annex I, Section VIII, Part D of the Cooperation with Other Jurisdiction on Tax Matters Regulations.

Establishing whether a financial account is Reportable Account requires two tests:



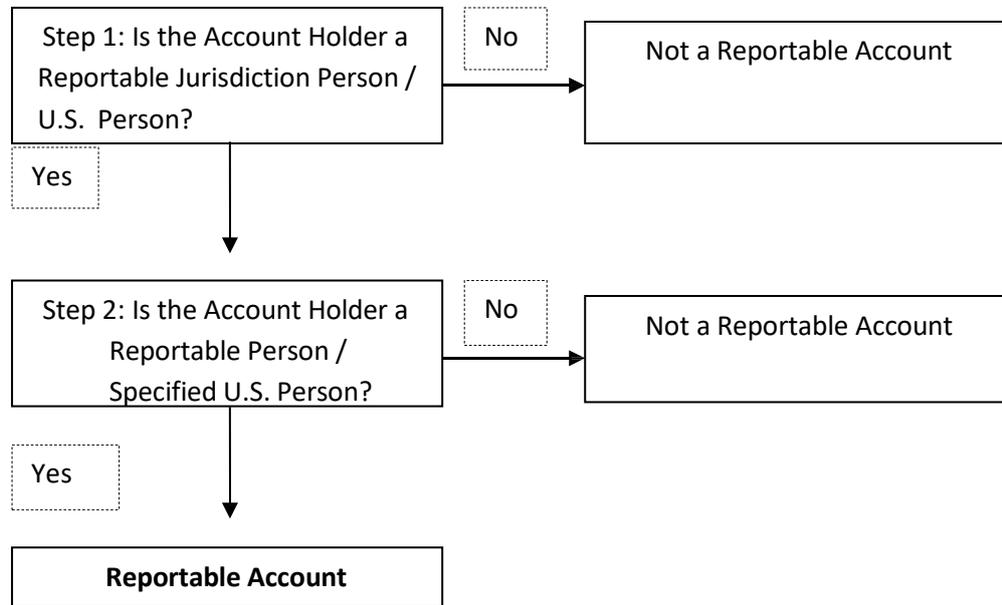
### 5.1. Reportable Accounts by virtue of the Account Holder

The first test establishes whether a Financial Account is a Reportable Account by virtue of the Account Holder.

The “Account Holder” means the person listed or identified as the holder of a Financial Account by the Malta Financial Institution that maintains the account. A person, other than a MFI, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for these purposes, and such other person is treated as holding the account. For the purposes of FATCA only, an account-holder shall include a Financial Institution organized or incorporated in a U.S. Territory.

In the case of a Cash Value Insurance Contract or an Annuity Contract, the Account Holder is any person entitled to access the Cash Value or change the beneficiary of the contract (for example, through a loan, withdrawal, surrender or otherwise). If no person can access the Cash Value or change the beneficiary, the Account Holder is any person named as the owner in the contract and any person with a vested entitlement to payment under the terms of the contract. Upon the maturity of a Cash Value Insurance Contract or an Annuity Contract, each person entitled to receive a payment under the contract is treated as an Account Holder.

Where joint life second death Cash Value Insurance Contracts are taken (such policies insure both parties but do not pay out on the death of the first person while the policy remains in force under the other person has died or the policy is surrendered) then – where one of the policyholder whose life is assured is a U.S. Specified Person / Reportable Person (and the other is not a U.S. Specified Person / Reportable Person) this will be a Reportable Account which is reported annually; and if the U.S. Specified Person / Reportable Person dies during the term of the insurance it will cease to be a Reportable Account.



### 5.1.1. Is the Account Holder a Reportable Jurisdiction Person / U.S. Person?

For the purposes of FATCA, A “U.S. Person is defined in article 1(1)(ee) of Schedule 1 of the Exchange of Information (United States of America) (FATCA) Order.

For the purposes of CRS / DAC II: A “Reportable Jurisdiction Person”, is an individual or Entity resident in the reportable jurisdiction for tax purposes under the tax laws of that jurisdiction. As an exception to this rule, an Entity that has no residence for tax purposes (example: because it is treated as fiscally transparent) is resident in the jurisdiction in which such Entity has its place of effective management situated. However, in order to avoid duplicate reporting (given the wide scope of “Controlling Persons” in the case of trusts) a trust that is a Passive NFE may not be considered a similar legal arrangement, for the scope of the definition of an Entity.

Tax residence is determined under the domestic laws of each jurisdiction. There might be situations where a person qualifies as a tax resident under the tax residence rules of more than one jurisdiction, and therefore is a tax resident in more than one jurisdiction. For the purposes of the CRS, the Account Holder (or Controlling Person) must disclose all its tax residences in the required self-certification. It is imperative to note that the mere right to reside in a given jurisdiction (on permanent or temporary basis) or the fact of holding citizenship of a given jurisdiction does not automatically mean that a person shall be considered a tax resident in such a jurisdiction or that, upon obtaining residency or citizenship, the tax residency is extinguished in the former jurisdiction(s) of tax residence. In the case of a Reportable Person that is identified as having more than one jurisdiction of residence, the jurisdictions of residence to be reported by the RMFI are all the jurisdictions of residence so identified.

## Obligations under the Wider Approach (CRS only)

The 'wider approach' is intended to enable RMFIs to collect and maintain information on the tax residence of Account Holders irrespective of whether that Account Holder is a Reportable Person for any given Reportable Period.

Unless this wider approach is adopted, the due diligence procedures outlined in the Cooperation with Other Jurisdictions on Tax Matters Regulations would be designed to identify accounts which are held by residents of jurisdictions with which Malta has an obligation to exchange information. However, the number of these jurisdictions is not fixed and there is an expectation that Malta will be exchanging information with more jurisdictions as these become signatories to the Multilateral Competent Authority Agreement and thus become participating and reportable jurisdictions for the purpose of the Cooperation with Other Jurisdictions on Tax Matters Regulations. RMFIs will need to cater for such changes on an ongoing basis. It may be therefore that RMFIs will find themselves in a position where their systems could not be updated in time to carry out the required due diligence procedures following the addition of new jurisdictions with which Malta has to exchange information. Consequently, the regulations applying the due diligence rules have been extended to adopt a wider approach to recording the territory in which a person is tax resident, irrespective of whether that territory is a Non-EU Reportable Jurisdiction at the time that the Regulations come into force. In this way, RMFIs will have the necessary information so as to enable them to meet these obligations relating to the due diligence procedures when new jurisdictions are added to the list of Non-EU Reportable Jurisdictions.

Under this wider approach, RMFIs are required to identify the territory in which an Account Holder or a Controlling Person is resident for tax purposes and to maintain this information for a period of five years starting from the end of the year in which the information relates, in line with Regulation 21 of the Cooperation with Other Jurisdictions on Tax Matters Regulations. **It is important to note that the RMFIs will be obliged to collect and maintain such information but shall not report this information to the Commissioner for Revenue.** The information for the relevant years will be subsequently reported by the RMFI to the Commissioner once the relevant jurisdiction becomes a reportable jurisdiction and there is a basis for exchange of information.

### 5.1.2. Is the Account Holder a Reportable Person / U.S. Specified Person?

The next step is to determine whether the Reportable Jurisdiction Person / U.S. Person is a Reportable Person / U.S. Specified Person. This will be the case unless specifically excluded. In general, **the exclusions are the following:**

#### Category 1: Regularly Traded Stock Corporations

Whether a corporation that is a Reportable Jurisdiction Person / U.S. Person is a Reportable Person / U.S. Specified Person can depend on the stock of that corporation being regularly traded on one or more established securities market. **For FATCA purposes**, stock of a corporation is regularly traded on one or more established securities markets for a calendar year if:

(1) one or more classes of stock of the corporation that, in the aggregate, represent more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote and of the total value of the stock of such corporation are listed on such market or markets during the prior calendar year; and

(2) with respect to each class relied on to meet the more-than-50 percent listing requirement

above:

- (i) trades in each such class are completed, other than in de minimis quantities, on such market or markets on at least 60 days during the prior calendar year; and
- (ii) the aggregate number of shares in each such class that are traded on such market or markets during the prior year are at least 10 percent of the average number of shares outstanding in that class during the prior calendar year.

**For CRS/ DAC II purposes**, stock is “regularly traded” if there is a meaningful volume of trading with respect to the stock on an on-going basis. There is “a meaningful volume of trading with respect to the stock on an on-going basis” if:

- i.** trades in each such class are transacted, other than in de minimis quantities, on one or more established securities markets on at least 60 business days during the prior calendar year; and
- ii.** the aggregate number of shares in each such class that are traded on such market or markets during the prior year are at least 10% of the average number of shares outstanding in that class during the prior calendar year.

A class of stock would generally be treated as meeting the “regularly traded” requirement for a calendar year if the stock is traded during such year on an established securities market and is regularly quoted by dealers making a market in the stock. A dealer makes a market in a stock only if the dealer regularly and actively offers to, and in fact does, purchase the stock from, and sell the stock to, customers who are not related persons with respect to the dealer in the ordinary course of a business.

## **Category 2: Related Entities to Regularly Traded Stock Corporations**

The definition of related entities has been defined in Guidelines 2.2. (D).

## **Category 3: Governmental Entities**

Governmental Entities fall outside the purview of the scope of the instruments. In the case of FATCA, this is described at a federal level as the United States or any wholly owned Agency or instrumentality thereof. It is also described at the level of the individual States as any State of the United States, any U.S. Territory, and any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing.

## **Category 4: Specific Entities (FATCA IGA only)**

Article 1(1)(ff) of Schedule 1 of the Exchange of Information (United States of America) (FATCA) Order lists a number of entities which fall outside the purview of the scope of the instruments and which are defined in relation to U.S. legislation. The onus of proof to show that that such a specific entity falls within any of the category as stated therein falls with the account holder.

## **Category 5: International Organisation and a Central Bank**

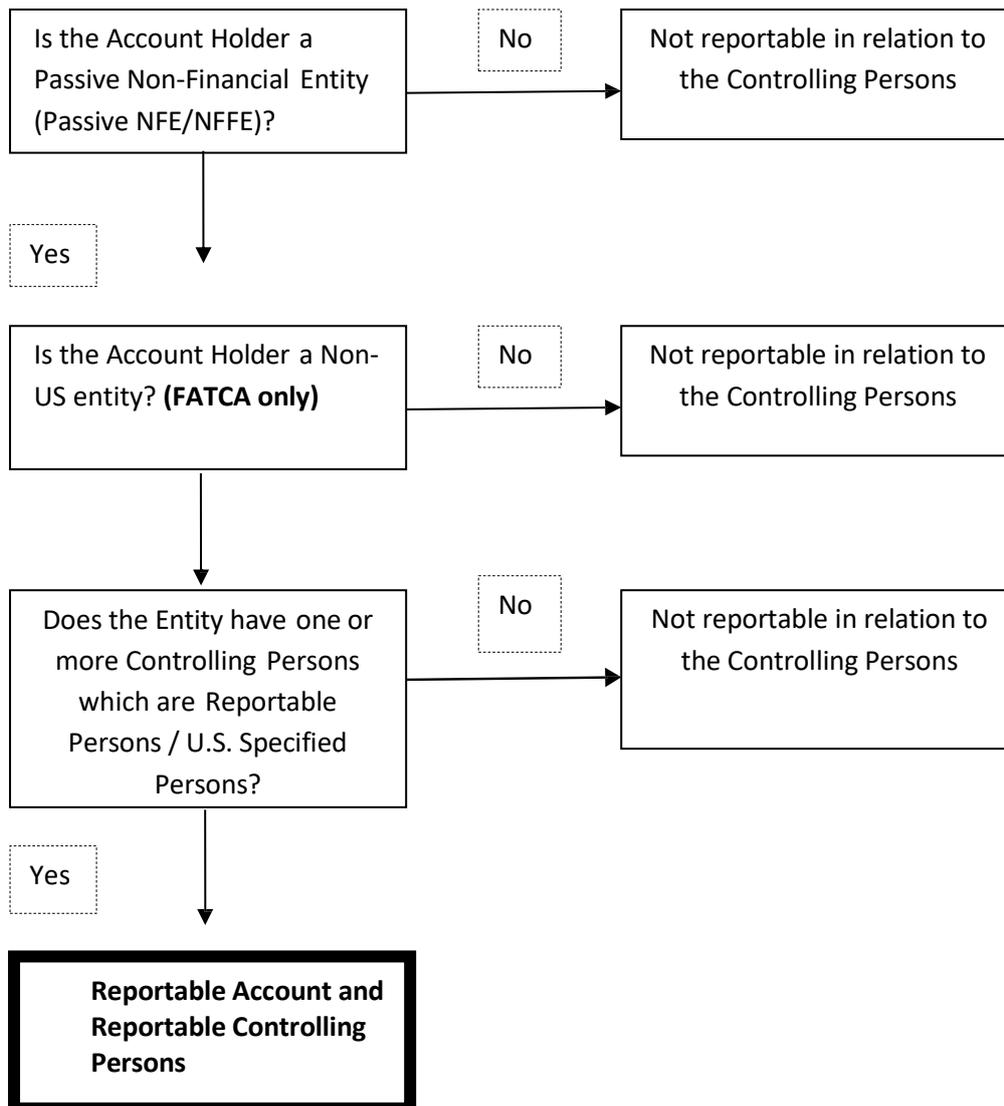
The definition in Guidelines 2.3. for an International Organisation and a Central Bank shall apply by making necessary alterations while not affecting the main point at issue.

## **Category 6: A Financial Institution (CRS / DAC II only)**

All instruments exclude Financial Institution through the definition of an “Account Holder,” however, in the case of CRS/ DAC II, this is also explicitly excluded in terms of being a reportable account.

## 5.2. Reportable Accounts by virtue of the Account Holders' Controlling Persons

There is then a second test in relation to the Controlling Persons of certain Entity Account Holders. This means that additional information is required to be reported in relation to an already Reportable Account or a previously Non-Reportable Account which becomes a Reportable Account by virtue of the Controlling Persons. In the case of FATCA only, this additional information is only required if this pertains to a non-US entity.



### 5.2.1. Is the Account Holder a Passive NFE/NFFE?

Non-Financial (Foreign) Entities are referred to by their acronym, NFEs (CRS/DAC II) /NFFEs (FATCA). An NFE/NFFE is essentially any Entity that is not a Financial Institution. NFEs/NFFEs are then split into Passive NFEs/NFFEs or Active NFEs/NFFEs with additional procedures required in relation to Passive NFEs/NFFEs (reflecting the greater tax evasion risks they pose).

The general rule is that a Passive NFE/NFFE is:

- a) An NFE/NFFE that is not an Active NFE/NFFE as defined in Annex 1, Section VI.B.4 of Schedule 1 of the Exchange of Information (United States of America) (FATCA) Order / Annex I, Section VIII, Part D.8 of the Cooperation with Other Jurisdiction on Tax Matters Regulations.
- b) In the case of CRS/DAC II ONLY, an Investment Entity that is not a Participating Jurisdiction Financial Institution.

The definition of Active NFE/NFFE essentially excludes Entities that receive substantial passive income or hold substantial amounts of assets that produce passive income (such as dividends, interest, rents etc.), and includes entities that are publicly traded (or related to a publicly traded Entity), Governmental Entities, International Organisations, Central Banks, or a holding NFEs/NFFEs of nonfinancial groups.

### **Clarification 1: Assets which produce Passive Income.**

An Entity is an Active NFE/NFFE if less than 50% of its income is passive income and less than 50% of its assets produce or are held for the production of passive income. The test of whether an asset is held for the production of passive income does not require that passive income is actually produced in the period concerned. Instead, the asset must be of the type that produces or could produce passive income. For example, cash should be viewed as producing or being held for the production of passive income (interest) even if it does not actually produce such income.

### **Clarification 2: Passive Income**

Unless the context requires otherwise, in determining what is meant by “passive income”, reference must be made to the principles of Income Taxation in Malta, including Badges of Trade. Passive income should not be construed to mean ‘passive interest and royalties’ as defined in Article 2 of the Income Tax Act. However, passive income shall not include any income from interest, dividends, rents, or royalties that is received or accrued from a related person to the extent such amount is properly allocable to income of such related person that is not passive income.

In the case of Specified Insurance Companies, in determining whether income from the investment of the capital of insurance companies is passive, it is necessary to consider the nature of the income that the insurance business receives. 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. Because of the nature of the income received on assets held as business or regulatory reserves of an insurance business, the income in this specific case can be treated as active rather than passive income. However, investment income arising from capital in excess of the amount of capital required to be maintained by the company for regulatory purposes will not be deemed to be active income unless the nature of the income is conducive to such classification.

### **Clarification 3: Holding Active NFEs: “Substantially All” Test**

In the case of holding NFEs/NFFEs of nonfinancial groups, “substantially all” means 80% or more. If, however, the NFEs/NFFEs holding or group finance activities constitute less than 80% of its activities but the NFE/NFFE receives also trading income, it qualifies for the Active NFE/NFFE status, provided that the total sum of activities meets the “substantially all test”.

### **5.2.2. Reportable Persons / U.S. Specified Persons: Controlling Persons?**

If the Entity Account Holder is a Passive NFE/NFFE then the Financial Institution must “look-through” the Entity to identify its Controlling Persons. The term Controlling Persons corresponds to the term ‘beneficial owner’ as described in the Financial Action Task Force Recommendation and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.

If the Controlling Persons are U.S. Specified Persons / Reportable Persons, then information in relation to the Financial Account must be reported, including details of the Account Holder and each reportable Controlling Person. In the case of CRS / DAC II, the Controlling Persons of Passive NFE are reportable regardless of whether they are resident of the same jurisdiction as the Passive NFE. In the case of FATCA, only U.S. Controlling Persons are reportable.

#### **Clarification 1: Control Ownership Interest**

For an Entity that is a legal person, “Controlling Persons” means the natural person(s) who exercises control over the Entity. “Control” over an Entity is generally exercised by the natural person(s) who ultimately has a controlling ownership interest in the Entity.

A “control ownership interest” depends on the ownership structure of the legal person and is identified on the basis of a threshold applying a risk-based approach (i.e. any person(s) owning more than 25% of the legal person).

#### **Clarification 2: Cascading Test**

To the extent that there is doubt that the person with the controlling ownership interest is the beneficial owner or where no natural person that exerts control through ownership interests can be identified, the Controlling Person of the Entity is the natural person (if any) that is exercising control of the Entity through other means. Where no Controlling Persons can be identified by applying the two steps above, Financial Institutions should identify natural person(s) who holds the position of senior managing official in the Entity as the Controlling Person. These three steps are not alternative options, but are cascading measures, with each to be used where the previous measure has been applied and has not resulted in identification of Controlling Persons.

## **6. General Procedural Concepts**

The due diligence rules further distinguish between accounts held by individuals and entities, pre-existing and new accounts, low-value accounts and high-value accounts.

### **6.1. Principle 1: Split-Year Regime**

Once an account is a Reportable Account, such status is maintained until the date it ceases to be a Reportable Account – even if the account balance or value is equal to zero or is negative, or there was not any amount paid or credited to the account (or with respect to the account).

Where an account is identified as a Reportable Account based on its status at the end of the calendar year or reporting period, information with respect to that account must be reported as if it were a Reportable Account through the full calendar year or reporting period in which it was identified as such. This is illustrated by the examples below:

### **Account that becomes a Reportable Account**

An account opened on 28 May 2016 is identified as a Reportable Account on 3 December 2017. Because the account was identified as a Reportable Account in calendar year 2017, information with respect to that Reportable Account must be reported in calendar year 2018 with respect to the full calendar year 2017 and on an annual basis thereafter.

### **Account that ceases to be a Reportable Account**

The facts are the same as Example 1. However, on 24 March 2018, the Account Holder ceases to be a Reportable Person / U.S. Specified Person and, as a consequence, the account ceases to be a Reportable Account. Because the account ceased to be a Reportable Account on 24 March 2018, information with respect to that account is not required to be reported in calendar year 2019 nor afterwards, unless the account once again becomes a Reportable Account in calendar year 2019 or any subsequent calendar year.

## **6.2. Principle 2: Pre-Existing vs. New Accounts**

The instruments distinguish between four different types of financial accounts; namely pre-existing individual accounts, new individual accounts, pre-existing entity accounts and new entity accounts.

<b>Pre-Existing Individual Account</b>		New Individual Accounts and New Entity Accounts are to be interpreted a contrario sensu to Pre-Existing Individual Accounts and Pre-Existing Entity Accounts respectively.
FATCA	Pre-July 2014	
CRS / DAC II	Pre-January 2016	
<b>Pre-Existing Entity Account</b>		
FATCA	Pre-January 2015	
CRS / DAC II	Pre-January 2016	

Having determined the correct classification, a Malta Reporting Financial Institution may apply the procedures for new accounts to pre-existing accounts. As the due diligence procedures for new accounts will satisfy the due diligence for pre-existing accounts.

## **6.3. Principle 3: Jointly Held Accounts**

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 joint account (or with respect to the joint account).

The same is applicable with respect to:

- an account held by a Passive NFE/NFFE with more than one Controlling Person that is a Reportable Person / U.S. Specified Person, where each Controlling Person is attributed the entire balance or value of the account held by the Passive NFE/NFFE, as well as the entire amounts paid or credited to the account;
- an account held by an Account Holder that is a Reportable Person and is identified as having more than one jurisdiction of residence, where the entire balance or value of the account, as well as the entire amount paid or credited to the account, must be reported with respect to each jurisdiction of residence of the Account Holder (CRS/ DAC II only);
- an account held by a Passive NFE with a Controlling Person that is a Reportable Person and is identified as having more than one jurisdiction of residence, where the entire balance or value of the account held by the Passive NFE, as well as the entire amount paid or credited to the account, must be reported with respect to each jurisdiction of residence of the Controlling Person (CRS/ DAC II only); or
- an account held by a Passive NFE/NFFE that is a Reportable Person / U.S. Specified Person with a Controlling Person that is a Reportable Person / U.S. Specified Person, where the entire balance or value of the account held by the Passive NFE/NFFE, as well as the entire amount paid or credited to the account, must be reported with respect to both the Passive NFE/NFFE and the Controlling Person.

*Real Rights on Property: Usufructuary, Usus etc.*

In the case financial assets are held on the basis of real rights; the bare owner is deemed to be a joint account holder e.g. where an account holder maintains the financial account as a usufructuary; the bare owner and the usufructuary are deemed to be joint account holders.

#### **6.4. Principle 4: Aggregation of Balance and Value of Reportable Account**

The instruments prescribe aggregation of reportable accounts. The main thrust of this aggregation mechanism is to act as an anti-abuse mechanism to prevent fragmentation if account balance solely aimed to evade reporting. It should be noted that the application of this regime, is only applicable if the computerised systems of the entity links Financial Accounts by reference to common data elements such as client number or taxpayer identification number. Where a computer system links accounts across related entities, irrespective of where the related entity is located, the Financial Institution will need to aggregate accordingly for reporting purposes. Nevertheless, once aggregation has taken place and it is determined that the accounts are reportable, the accounts should be reported individually. A Financial Institution should not consolidate the accounts for reporting purposes and the actual account balance remains reportable.

Malta interprets the Account Balance Aggregation rules to incorporate aggregation between individual and entity accounts only in the case of the involvement of Passive NFE/ NFFE's. This in light that it is only in the case of passive NFE/ NFFEs that the controlling persons will be identified, reviewed and in certain instances be reportable. In the case of active NFFEs, due to the low risk, there is no aggregation between individual and entity accounts.

#### **6.5. Principle 5: Currency Translation**

Malta allows its RFIs to apply the dollar threshold amounts described in the instruments along

with the equivalent amounts in Euro. This allows FIs that operate in several jurisdictions to apply the threshold amounts in the same currency in all the jurisdictions in which they operate.

Where accounts are denominated in a currency other than US dollars then the threshold limits must be converted into the currency in which the accounts are denominated before determining if they apply. This should be done using a published spot rate for the 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. In the case of closed accounts, the spot rate to be used is the rate on the date the account was closed.

Alternatively, a Financial Institution could convert non-US dollar balances into US dollars and then apply the thresholds. Regardless of the method of conversion, the rules for determining the spot rate apply. The method of conversion must be applied consistently.

Examples of acceptable published exchange rates include, Reuters, Bloomberg, Financial Times and exchange rates published on the Central Bank of Malta website.

## **6.6. Principle 6: Documentary Evidence**

Annex 1, Part VI.D of the Schedule I to the Exchange of Information (United States of America) (FATCA) Order/ Section VIII, Part E.6. of the Cooperation with Other Jurisdictions on Tax Matters Regulations provides a non-exhaustive list of the most important accepted documentary evidence which a RMFI must collect in line with its due diligence obligations. The documentary evidence collected has an important function in determining the classification of a financial account.

Each Malta Financial Institution is free to design and use its own self-certification forms, but as a minimum a Financial Institution should collect the mandatory data detailed in the instruments as implemented by these guidelines and be in line with the obligations emanating from the General Data Protection Regulation. OECD sample CRS self-certificates may be used as a source of guidance for the formulation of self-certificate forms. Withholding certificates issued by the U.S. IRS such as the W-8 and W-9 series are also acceptable for FATCA purposes in establishing an account holder's status. A Financial Institution may rely upon a pre-FATCA W-8 form, where one is required to establish the account holder's status, in lieu of obtaining an updated version of the form until such time that the W-8 is required to be renewed.

## **6.7. Principle 7: AML / CDD Documentation**

Where a RMFI relies on information collected and maintained pursuant to AML/KYC Procedures for purposes of determining the Controlling Persons of an Account Holder of a New Entity Account, such AML/KYC Procedures must be consistent with the 2012 FATF Recommendations as well as the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01]. For the purposes of determining the Controlling Persons of an Account Holder of a Pre-existing Entity Account, a RMFI may rely on information collected and maintained pursuant to the RMFI's AML/KYC Procedures.

While likely to be rare in practice, there may be accounts that were opened at a time where there were no AML/KYC requirements in place and the RMFI therefore was not obliged to review any Documentary Evidence in the initial on boarding process, or since the opening of the account. Even for accounts opened before the introduction of such requirements and 'grandfathered' under the rules, there is a requirement to apply customer due diligence measures to existing customers on the basis of materiality and risk.

## **6.8. Principle 8: Mergers and Divisions of Legal Entities**

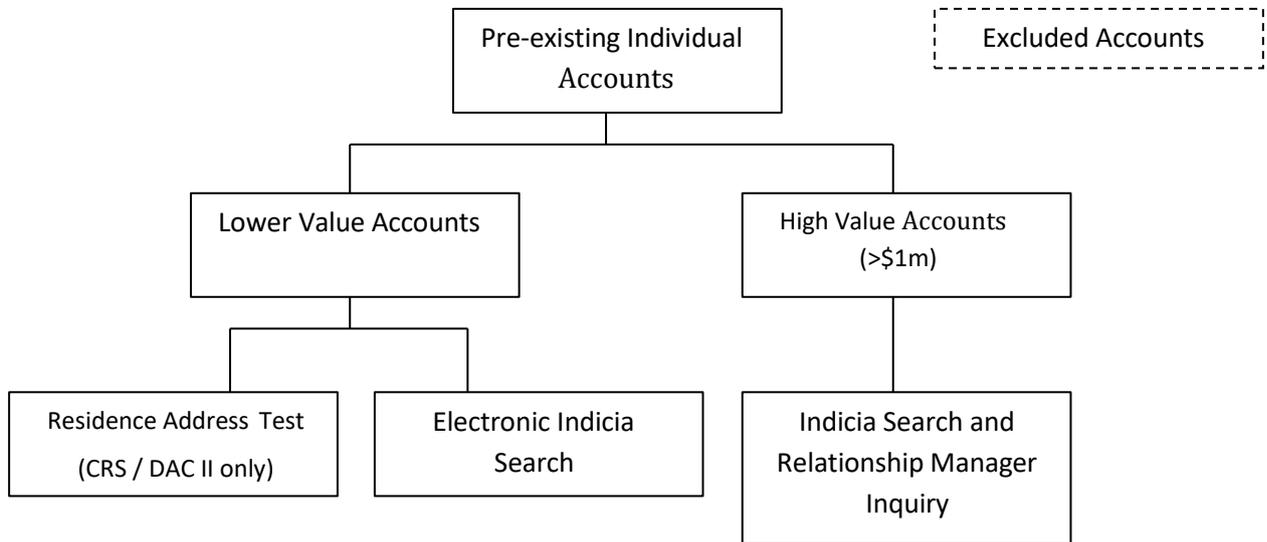
Where a RMFI acquires accounts by way of a merger or bulk acquisition, the RMFI can rely on the status of the account holders as determined by the predecessor RMFI as long as it has no reasonable cause to believe that this the status is unreliable or incorrect. Thus, Financial Institutions need to undertake a sample review of the acquired accounts to determine that the account holders' status, assigned by the predecessor RMFI is reliable.

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. In view of the burden of the creation of new accounts, the surviving fund can rely on the account identification and documentation performed by the predecessor RMFI to the extent this is still applicable.

## **7. Due Diligence Requirements: Pre-Existing Individual Accounts**

To the extent a Malta Reporting Financial Institution maintains pre-existing individual accounts, it would be required to review the documentary evidence in order to undertake due diligence procedures. Pre-existing Individual Accounts will fall into one of four categories depending on the balance or value of the account. These are:

- Financial Accounts below the threshold exemption limit (**FATCA only**);
- Market Access Rule (**FATCA / CRS only**);
- Lower Value Accounts;
- High Value Accounts.



### 7.1. Threshold Exclusions and Ad Hoc Exclusions (FATCA only)

Malta elects to implement the threshold exclusions for FATCA purposes as contemplated for pre-existing individual accounts. A Malta Reporting Financial Institution may elect to remove such thresholds and such an election can apply to all applicable Pre-existing Individual Accounts or to a clearly identifiable group of such accounts (such as by a line of business or by reference to the location where the account is maintained).

Unless an election referred to above is made, the following accounts should not be reviewed, identified and reported to the Commissioner for Revenue -

- Any Depository Accounts with a balance or value of \$50,000 or less;
- Pre-existing Individual Accounts with a balance not exceeding \$50,000 at the 30 June 2014, unless the account becomes a High Value Account as of 31 December 2015 or any subsequent year;
- Pre-existing Individual Accounts that qualify as Cash Value Insurance Contracts or Annuity Contracts with a balance or value of \$250,000 or less at the 30 June 2014, unless the account becomes a High Value Account as of 31 December 2015 or any subsequent year.

**De-fragmentation rule:** If the aggregated account balance or value allocated to an account holder following the aggregation exercise on the basis of Guidelines 6.4 or in line with the special aggregation rules as detailed in Guidelines 7.4., exceeds the threshold exclusions, the threshold exclusions would not be applicable to all individual reportable accounts maintained by the RMFI irrespective of the account balance of the individual account.

Furthermore, a Malta Financial Institution that has previously established an account holder's status in order to meet its obligations under a Qualified Intermediary, Withholding Partnership or Withholding Trust Agreement, or to fulfil its reporting obligations as a US payor, can rely on that status for the purposes of the FATCA Agreement where the account holder has received a reportable payment under those regimes. The Financial Institution is not required to perform the electronic search in relation to those accounts. Nevertheless, it will have to apply the appropriate due diligence procedures to all other Pre-existing Individual Accounts it maintains.

## **7.2. Cash Value Insurance Contracts and Annuity Contracts (Market Access Rule)**

Pre-existing Cash Value Insurance Contracts or Annuity Contracts that are unable to be sold because of legal or regulatory restrictions do not need to be reviewed identified or reported.

There is no existing Maltese law which prevents the sale of Cash Value Insurance products or Annuity Contracts to third-country residents. However, the sale of such contracts will be considered effectively prevented if the issuing Specified Insurance Company (not including any third-country branches) is not licensed to sell insurance in any state of the third-country and the products are not registered with the U.S. Securities and Exchange Commission or the third-country equivalent regulatory supervisory authority.

Typically, in terms of Maltese tax law there will be final withholding tax on such Pre-existing Individual Contracts if they fall under the Investment Income Provisions of the Income Tax Act. For the avoidance of any doubt, in view that Malta is part of the European Union single market, this rule does not apply for the purposes of DAC II.

## **7.3. Lower-Value Accounts**

A balance or value of \$1m or less following aggregation (See Guidelines 6.4) means that the account is a Lower Value Account. The due diligence procedures for Lower Value Accounts are less stringent and a greater flexibility in this approach is provided. Typically, a Malta Reporting Financial Institution would be required to search for indicia through an electronic record search. However, for CRS / DAC II purposes only, it is permitted to use a residence address test.

### **7.3.1. Residence Address Test (CRS / DAC II only)**

For Lower Value Accounts Malta allows Reporting Malta Financial Institution must have policies and procedures in place to verify the residence address based on documentary evidence. This test is an alternative to the electronic indicia search for establishing residence. If the residence address test cannot be applied for some reason (e.g. the only address on file is an "in-care-of" address) the RMFI must perform the electronic indicia search.

For purposes of determining whether an individual Account Holder is a Reportable Person, the RMFI may treat such individual as being a resident for tax purposes of the jurisdiction in which an address is located if:

#### **a) The RMFI has in its records a residence address for the individual Account Holder.**

This first requirement entails that the RMFI has in its records a residence address for the individual Account Holder. In general, an "in-care-of" address or a post office box is not a residence address. However, a post office box would generally be considered a residence address where it forms part of an address together with, e.g., a street, an apartment or suite number, or a

rural route, and thus clearly identifies the actual residence of the Account Holder.

**b) Such residence address is current.**

The second requirement is that the residence address in the RMFI's records is current. A residence address is considered to be 'current' where it is the most recent residence address that was recorded by the RMFI with respect to the individual Account Holder. However, a residence address is not considered to be 'current' if it has been used for mailing purposes and mail has been returned undeliverable-as-addressed (other than due to an error).

**c) Such residence address is based on Documentary Evidence**

The third requirement is that the current residence address in the RMFI's records is based on Documentary Evidence. This requirement is satisfied if the RMFI'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).

Notwithstanding this, if the 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 RMFI records is the same address, or in the same jurisdiction, as that on recent documentation issued by an authorised government body or a utility company.

Acceptable documentation issued by an authorised 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.

***Multiple Residence Addresses (CRS / DAC II only)***

Provided all the conditions for applying the residence address test are met, then it would be possible for the residence address test to result in two addresses being found. For example, with respect to a bank account maintained in Country A, a bank could have two addresses meeting the requirements in a case where a resident of Country B is working and living half her time in Country B and Country C. In this case a self-certification could be sought, or the account could be reported to all Reportable Jurisdictions where there is a residence address.

**7.3.2. Electronic Search Indicia**

Under the electronic record search, the RMFI must review its electronically searchable data for any of the following indicia (these are a series of factors that indicate where an Account Holder is resident). If none of the above-mentioned indicia are discovered in the electronic search, no further action is required until there is a change in circumstances that results in one or more indicia being associated with the account, or the account becomes a High Value Account.

**Searchable Indicia**

**(a) Category 1: Identification of the Account Holder as a resident of a Reportable Jurisdiction(s), U.S. Citizen or a U.S. Resident.**

This indicium is an identification of the Account Holder as a resident of a Reportable Jurisdiction/ U.S.A. This indicium is met if the RMFI's electronically searchable information contains a

designation of the Account Holder as a Reportable Jurisdiction's resident for tax purposes / U.S. Citizen or U.S. Resident.

**(b) Category 2: Unambiguous indication of a US place of birth. (FATCA only)**

This indicium is required to be verified for FATCA purposes, in line with the adoption of *jus soli* in the United States. This refers to the birth right citizenship in the U.S.A. This indicium is essential in view that under US tax law, a US tax resident includes US citizens as well as US residents.

**(c) Category 3: Current mailing or residence address (including a post office box) in a Reportable Jurisdiction(s) / U.S.;**

The notes for the residence address test shall apply *mutatis mutandis*.

**(d) Category 4: Current U.S. Telephone Number (FATCA) / One or more current or most recent telephone numbers in a Reportable Jurisdiction(s) and no telephone number in the jurisdiction of the RMFI (CRS / DAC II);**

The telephone number(s) in a Reportable Jurisdiction / U.S. is only required to be treated as an indicium of residence of the Account Holder where it is a 'current' telephone number(s) in a Reportable Jurisdiction / the U.S. For these purposes, a telephone number(s) is 'current' where it is the most recent telephone number(s) that was recorded by the RMFI with respect to the individual Account Holder.

Where the RMFI has recorded two or more telephone numbers with respect to the Account Holder and one of such telephone numbers is that of a service provider of the Account Holder (e.g., external asset manager, investment advisor, or attorney), the RMFI is not required to treat the service provider's telephone number as an indicium of the Account Holder.

**(e) Category 5: Standing instructions to transfer funds to an account maintained in the United States (FATCA) / Current standing instructions (other than with respect to a Depository Account) to repeatedly transfer funds to an account maintained in a Reportable Jurisdiction(s) (CRS / DAC II);**

The term 'standing instructions to transfer funds' means current payment instructions provided by the account holder, or an agent of the account holder, that will repeat without further instructions being provided by the account holder. Therefore, for example, a transfer instruction to make an isolated payment is not a standing instruction to transfer funds, even if the instructions are given one year in advance. However, an instruction to make payments indefinitely is a standing instruction to transfer funds for the period during which such instructions are in effect, even if such instructions are amended after a single payment.

The carve out for depository accounts for the purposes of CRS /DAC II was necessary to reduce burdens for Financial Institutions associated with the application of the indicia search in a multilateral context.

**(f) Category 6: Currently effective power of attorney or signatory authority granted to a person with an address in a Reportable Jurisdiction(s) / U.S. address;**

This indicium identifies a person with an effective power of attorney or signatory authority. This will need to be determined on the basis of the policies of the Malta Reporting Financial Institution.

**(g) Category 7: Effective Power of Attorney or Signatory Authority/ “in care” or “hold mail” address**

A “hold mail” instruction is a current instruction by the Account Holder, or an agent of the Account Holder, to keep the Account Holder’s mail until such instruction is amended. Where such an instruction is in place and the RMFI does not have any address on file for the Account Holder, the indicium is met. An instruction to send all correspondence electronically is not a “hold mail” instruction. Where the RMFI holds an “in-care-of” address in a Reportable Jurisdiction and does not have any other address on file for the Account Holder, the indicium is also met.

**FATCA Only:** In the case of the pre-existing individual account lower value accounts, an “in-care-of” address outside the United States or “hold mail” address shall not be treated as U.S. indicia in line with the bilateral context of FATCA.

**CRS / DAC II Only:** Where the indicia search is completed and the only indicia found is a “hold mail” or “in-care-of” address and no other address, then special procedures may apply (the **undocumented account procedures**). In this regard, please refer to Guidelines 14.1.

If indicia are found suggesting that the account holder is potentially reportable, then the Financial Institution must treat the account as a Reportable Account. However, if the Financial Institution obtains self-certification from the account holder confirming their non-reportable status, then the account would not be treated as reportable if certain records are obtained. The relevant provisions for self-certifications are found in Annex I, Part B.4. of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section III, Part B.6. of the Cooperation with Other Jurisdictions on Tax Matters Regulations. To ensure consistency between the instruments, in no case are verbal self-certifications or verbal positive affirmations acceptable.

#### **7.4. High-Value Accounts**

High-Value Accounts are Pre-existing Individual Accounts with an aggregated balance or value that exceeds \$1,000,000 after aggregating all financial accounts (See Guidelines 6.4). In addition, special aggregation rules are also applicable to relationship managers as per Annex I, Part VI.C.3. of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / subparagraph C (3), Section VII of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations. Thus, an enhanced review would need to be undertaken through the electronic record search, the paper record search and the relationship manager inquiry. For CRS/DAC II purposes, a residence address test may not be utilised in this situation.

##### **7.4.1. Electronic and Paper Record Indicia Search**

The instruments mandate that in addition to the electronic search indicia procedure as detailed in the case of the lower-value accounts, a paper record search would need to be undertaken. To the extent that the electronic search indicia already contains enough information as detailed in Annex I, Part D.3. of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section III, Part C.3. of the Cooperation with Other Jurisdictions on Tax Matters Regulations, a paper record search is not required.

When the RMFI is required to perform the ‘paper record search’ with respect to a High Value Account (by reason of the fact that the electronically searchable databases do not capture the necessary information), the RMFI must also review the current customer master file for indicia and, to the extent not contained in the current customer master file, the documents listed in

Annex I, Part D.2. of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section III, Part C.2. of the Cooperation with Other Jurisdictions on Tax Matters Regulations and records associated with the account and obtained by the RMFI within the last five years for any of the indicia described for the electronic search indicia above.

#### **7.4.2. Relationship Manager Inquiry**

For High-Value Accounts, the relationship manager inquiry is required in addition to any electronic or paper record searches. The RMFI must treat as a Reportable Account any High Value Account assigned to a relationship manager (including any Financial Accounts aggregated with that High Value Account) if the relationship manager has actual knowledge that the Account Holder is a Reportable Person / U.S. Specified Person.

A 'relationship manager' is an officer / other employee of a RMFI who is assigned responsibility for specific account holders on an on-going basis (including as an officer or employee that is a member of a RMFI's private banking department), advises account holders regarding their banking, investment, trust, fiduciary, estate planning, or philanthropic needs, and recommends, makes referrals to, or arranges for the provision of financial products, services, or other assistance by internal or external providers to meet those needs.

Relationship management must be more than ancillary or incidental to the job function of a person for the person to be considered a relationship manager. As such, a person whose functions do not involve direct client contact or which are of a back office, administrative or clerical nature is not considered a relationship manager. It is recognized that regular contact can exist between an Account Holder and an employee of a RMFI without causing the employee to be a relationship manager. For example, a person at a RMFI who is largely responsible for processing transactions/orders or ad hoc requests may end up knowing an Account Holder well. However, the person is not considered a relationship manager unless that person is ultimately charged with managing the Account Holder's affairs at the RMFI.

#### **7.5. Finding Indicia**

If none of the indicia listed are discovered in the Review of Low-Value Accounts and the enhanced review of High Value Accounts, and the account is not identified as held by a Reportable Person in a Reportable Jurisdiction / U.S. Specified Person, then further action is not required until there is a change in circumstances that results in one or more indicia being associated with the account.

If any of the indicia are discovered in the Review of Low-Value Accounts and the enhanced review of High Value Accounts, or if there is a subsequent change in circumstances that results in one or more indicia being associated with the account, then the RMFI must treat the account as a Reportable Account with respect to each Reportable Jurisdiction / the U.S. for which an indicium is identified unless it elects to apply the curing procedure and one of the exceptions in applies with respect to that account.

#### *Conflicting Indicium*

An indicium discovered in one review procedure such as the paper record search or the relationship manager inquiry, cannot be used to cure an indicium identified in another review procedure such as the electronic record search. E.g. a current residence address in a Reportable Jurisdiction / the U.S. within the knowledge of the relationship manager cannot be used to cure a different residence address currently on file with the RMFI discovered in the paper record search.

### *Due Diligence Regime*

The RMFI must complete the enhanced review for High Value Accounts with respect to such account within the calendar year following the year in which the account becomes a High Value Account. If based on such review such account is identified as a Reportable Account, the RMFI must report the required information about such account with respect to the year in which it is identified as a Reportable Account and subsequent years on an annual basis, unless the Account Holder ceases to be a Reportable Person.

**CRS / DAC II Only:** Where the indicia search is completed and the only indicia found is a “hold mail” or “in-care-of” address and no other address, then special procedures may apply (the **undocumented account procedures**). In this regard, please refer to Guidelines 14.1.

#### **7.6. Timing of Review**

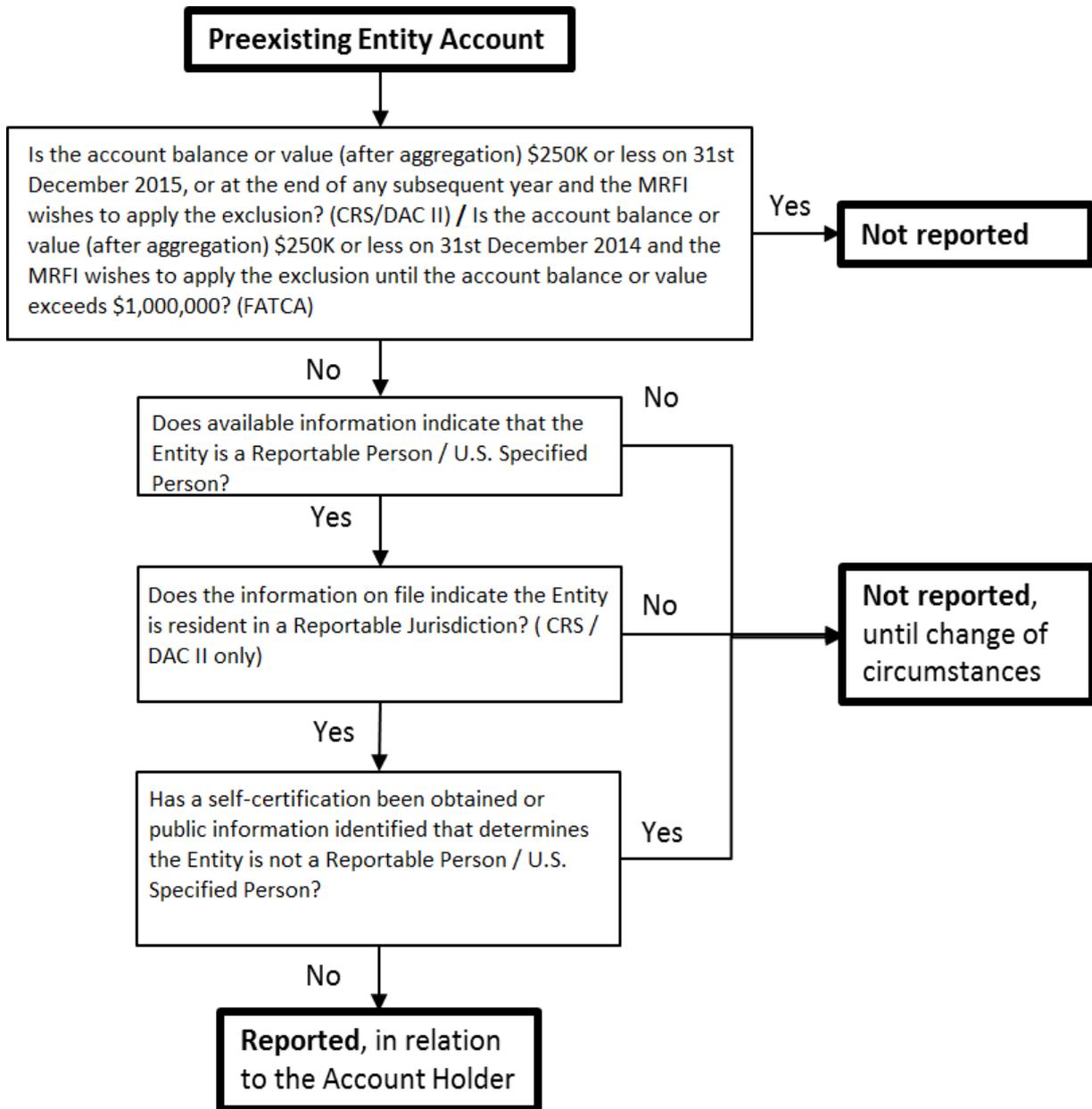
For FATCA purposes, the review of pre-existing Individual Accounts that were Lower Value Accounts as at 30 June 2014 should have been completed by 30 June 2016. The review of Pre-existing Individual Accounts that were High Value Accounts as at 30 June 2014 should have been completed by 30 June 2015.

For CRS/DAC II purposes, the review of pre-existing Individual Accounts for Lower Value Accounts should have been completed by 31 December 2017. The review of Pre-existing Individual Accounts for High Value Accounts should have been completed by 31 December 2016.

## **8. Due Diligence Requirements: Pre-Existing Entity Accounts**

To the extent a Malta Reporting Financial Institution maintains pre-existing entity accounts, it would be required to review in order to undertake due diligence procedures. Pre-existing entity Accounts will fall into one of two categories: These are:

- Reportable Accounts reportable by virtue of their account holder.
- Reportable Accounts reportable by virtue of their controlling person.



### 8.1. Obtaining Information from the Account Holders

Malta elects to implement the threshold exclusions as detailed in the figure above for the purposes of pre-existing entity accounts. This provides RMFIs with an optional exemption with respect to reviewing certain Pre-existing Entity Accounts. The RMFI may elect to apply this exemption to all Pre-existing Entity Accounts or to a clearly identified group of accounts.

A RMFI must review information maintained for regulatory or customer relationship purposes, including information collected for AML/KYC purposes (this includes place of incorporation, address, or address of one or more of the trustees of a trust). Indications of residence for different types of Entity are set out in the Table below.

<b>Entity type</b>	<b>Indication of residence</b>
Most taxable entities	Place of incorporation or organisation
Fiscally transparent entities excluding trusts	Address (which could be indicated by the registered address, principal office or place of effective management)
Trusts	The address of one or more trustees

If the information indicates that the Account Holder is resident in a Reportable Jurisdiction / U.S. Specified Person., then the RMFI must treat the account as a Reportable Account, unless it obtains a self-certification from the Account Holder, or reasonably determines based on information in its possession or that is publicly available (including information published by an authorised government body or standardised industry coding systems), that the Account Holder is not a Reportable Person / U.S. Specified Person.

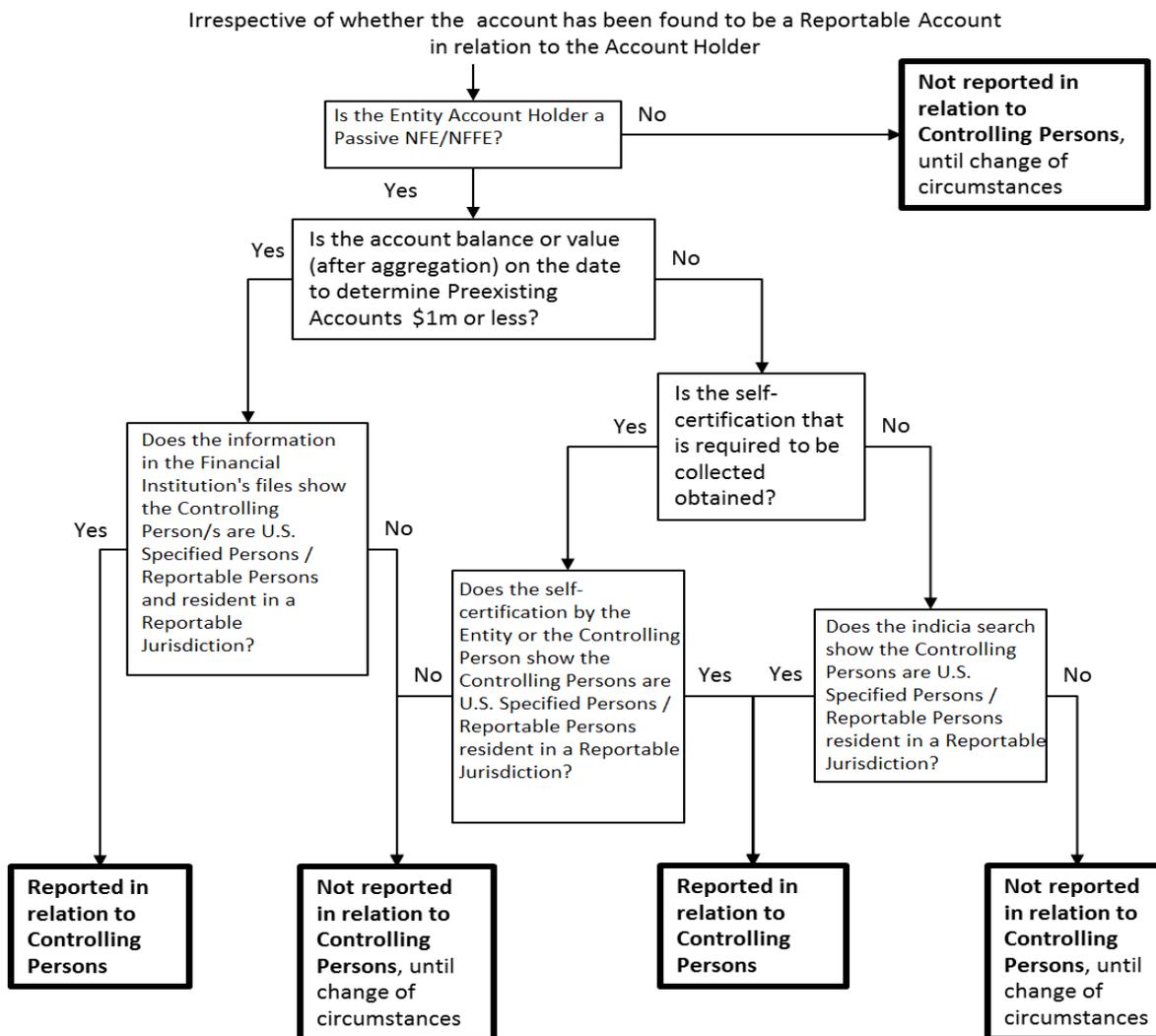
For the self-certification to be valid it must be signed (or otherwise positively affirmed, i.e. involving some level of active input or confirmation) by a person authorised to sign on behalf of the Entity, be dated, and must include the Account Holder’s details including the relevant TIN/s. The self-certification may also contain information on the Account Holder’s status, such as the type of Financial Institution or the type of NFE/NFFE it is. For FATCA purposes, a participating financial institution are also identified through a GIIN. In all cases, the positive affirmation needs to be captured by the Financial Institution in a manner that it can credibly demonstrate that self-certification can be credibly be demonstrated. However, for the purposes of FATCA only, verbal self-certification or verbal positive affirmation are not allowed.

## **8.2. Obtaining Information from the Controlling Persons of Passive NFE/NFFE**

For the purposes of determining whether the Account Holder is a Passive NFE/NFFE the RMFI may use any of the following information with which it can reasonably determine that the Account Holder is an Active NFE/NFFE or a Financial Institution:

1. Information in its possession (such as information collected pursuant to AML/KYC procedures); or
2. Information that is publicly available (such as information published by an authorised government body or a standardised industry coding system).

Otherwise the RMFI must obtain a self-certification from the Account Holder to establish its status.



### 8.3. Timing of Review

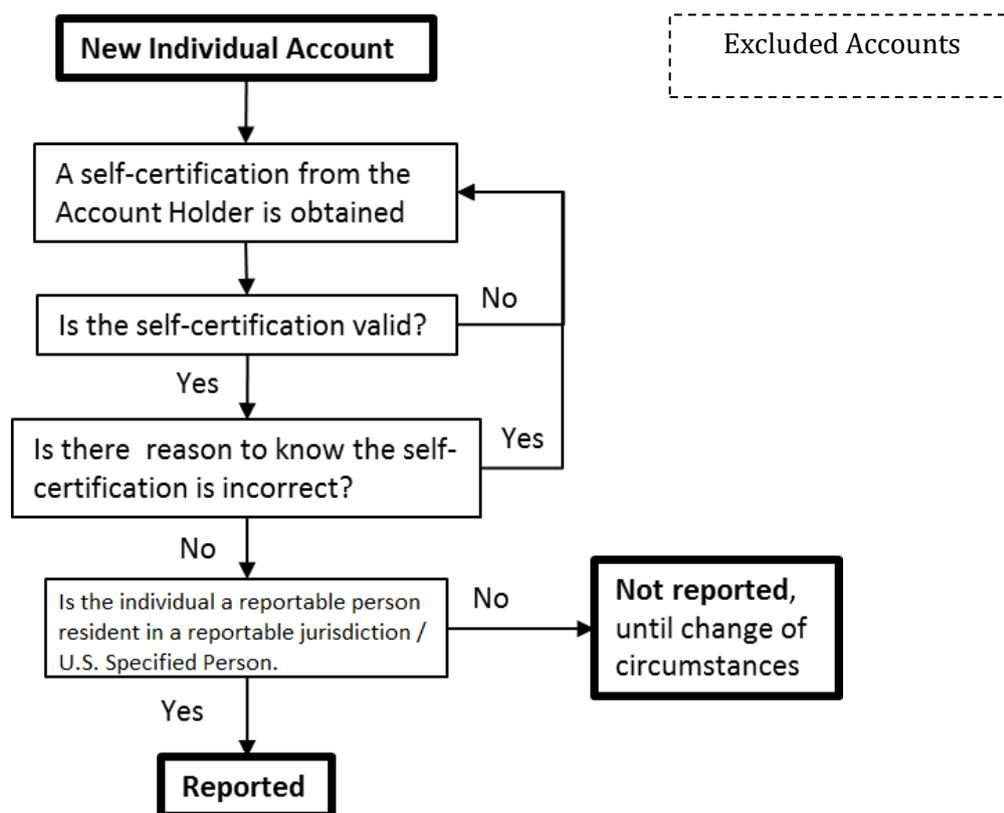
For FATCA purposes; the review of Pre-existing Entity accounts with an account balance or value that exceeds \$250,000 at 1 January 2015 should have been completed by 30 June 2016. The review of pre-existing entity account with a balance or value that does not exceed \$250,000 at 1 January 2015, exceeds \$1,000,000 at 31 December 2015 or 31 December of any subsequent calendar year, must be completed by 30 June of the following year. Pre-existing Entity accounts that are identified as reportable are only reportable from the year in which they are identified as such.

For CRS / DAC II purposes; the review of Pre-existing Entity accounts with an account balance or value that exceeds \$250,000 at 31 December 2015 should have been completed by 31 December 2017. The review of pre-existing entity account with a balance or value that does not exceed \$250,000 at 31 December 2015 but exceeds that amount as of 31 December of a subsequent year, must be completed within the calendar year following the year in which the aggregate account balance or value exceeds such amount. Pre-existing Entity accounts that are identified as reportable are only reportable from the year in which they are identified as such.

## 9. Due Diligence Requirements: New Individual Accounts

While the due diligence for Pre-existing Accounts relies mainly on information the MFI already has on file, the opening of a New Account requires the MFI to request additional information relevant to tax compliance. New Individual Accounts will fall into one of two categories depending on the balance or value of the account. These are:

- Financial Accounts below the threshold exemption limit (FATCA only);
- Reportable Accounts.



### 9.1. Threshold Exclusions (FATCA only)

Malta elects to implement the threshold exclusions for FATCA purposes as contemplated for new individual accounts. A Malta Reporting Financial Institution may elect to remove such thresholds and such an election can apply to all applicable new Individual Accounts or to a clearly identifiable group of such accounts (such as by a line of business or by reference to the location where the account is maintained).

Unless an election referred to above is made, the following accounts should not be reviewed, identified and reported to the Commissioner for Revenue -

- Any Depository Accounts with a balance or value of \$50,000 or less;
- Cash Value Insurance Contracts should not be reported unless the cash value exceeds \$50,000.

**De-fragmentation rule:** If the aggregated account balance or value allocated to an account holder following the aggregation exercise on the basis of Guidelines 6.4 or in line with the special aggregation rules as detailed in Guidelines 7.4., exceeds the threshold exclusions, the threshold exclusions would not be applicable to all individual reportable accounts maintained by the RMFI irrespective of the account balance of the individual account.

## 9.2. Self-Certification

Once the RMFI has obtained a self-certification it must confirm its reasonableness based on the information obtained in connection with the opening of the account, including any documentation collected pursuant to AML/KYC procedures (the reasonableness test). In no case is the RMFI required to provide customers with tax advice or to perform a legal analysis to determine the reasonableness of self-certification.

A RMFI is considered to have confirmed the reasonableness of a self-certification if it does not know or have reason to know that the self-certification is incorrect or unreliable. Where a self-certification fails the reasonableness test the RMFI is expected to either obtain a valid self-certification or a reasonable explanation and documentation as appropriate supporting the reasonableness of the self-certification.

The positive affirmation is expected to be captured by the Financial Institution in a manner such that it can credibly demonstrate that the self-certification was positively affirmed (e.g., voice recording, digital footprint, etc.). The approach taken by the Financial Institution in obtaining the self-certification is expected to be in a manner consistent with the procedures followed by the Financial Institution for the opening of the account. The Financial Institution will need to maintain a record of this process for audit purposes, in addition to the self-certification itself. However, for the purposes of FATCA only, verbal self-certification or verbal positive affirmation are not allowed.

### *Tax Identification Numbers*

A RMFI will have reason to know that a self-certification is unreliable or incorrect if the self-certification does not contain a TIN and the Reportable Jurisdiction issues TINs to all tax residents.

RMFIs may wish to enhance the quality of the information collected and minimise the administrative burden associated with any follow-up concerning reporting of an incorrect TIN. RMFIs may use regional and national websites providing a TIN check module for the purpose of further verifying the accuracy of the TIN provided in the self-certification. Additionally, the following electronic link provides jurisdiction-specific information:

<https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-identification-numbers/>

### *Electronic Portals*

A Malta Financial Institution may onboard an individual through its the website/ mobile app in line with the MFI's normal account opening procedures. On the account opening web page, along with information about the individual such as name and address, the individual is asked to select the appropriate country or countries in which they are tax resident and whether he is a U.S. citizen or U.S. resident.

## *Day Two Process*

The instruments provide that a Financial Institution must obtain a self-certification upon account opening. Where a self-certification is obtained at account opening stage, but validation of the self-certification cannot be completed because it is a 'day two' process undertaken by a back-office function, the self-certification should be validated within a period of 90 days. There are a limited number of instances, where due to the specificities of a business sector 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. 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. Given that obtaining a self-certification for New Accounts is a critical aspect of ensuring that the instruments are effective, it is expected that self-certifications are always obtained for New Accounts and RMFIs shall 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. To this end, RMFIs must establish procedures for when the 90-day deadline is not met. These include:

- making the opening of the account conditional on the receipt of a valid self-certification;
- closure or freezing of the account until a valid self-certification is obtained;
- blocking access to the account until a valid self-certification is received.

In all cases, Reporting Financial Institutions shall 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.

### **9.3. Residence/Citizenship by Investment Schemes**

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

#### **9.3.1. What are CBI/RBI schemes?**

"Citizenship by Investment" (hereinafter referred to as 'CBI') and "Residence by Investment" (hereinafter referred to as 'RBI') schemes are being offered by a substantial number of jurisdictions and allow foreign individuals to obtain citizenship or temporary or permanent residence rights on the basis of local investments or against a flat fee.

Individuals may be interested in these schemes for several legitimate reasons, including the wish to start a new business in the jurisdiction, greater mobility thanks to visa-free travel, better education and job opportunities for children, or the right to live in a country with political stability. At the same time, information released in the market place, highlights the abuse of CBI/RBI schemes to circumvent reporting under the instruments.

### **9.3.2. How can CBI/RBI schemes be misused to circumvent reporting?**

CBI/RBI schemes can be misused to undermine the due diligence procedures. This may lead to inaccurate or incomplete reporting under the instruments, in particular when not all jurisdictions of tax residence are disclosed to the Financial Institution. Such a scenario could arise where an individual does not actually or not only reside in the CBI/RBI jurisdiction but claims to be resident for tax purposes only in such jurisdiction and provides his Financial Institution with supporting documentation issued under the CBI/RBI scheme, for example a certificate of residence, ID card or passport. It is fundamental to note that such schemes grant a right of citizenship of a jurisdiction or a right to reside in a jurisdiction, either on a permanent or temporary basis. They generally however do not provide automatically and necessarily a tax residence in the jurisdiction and do not by themselves extinguish tax residency in the previous or other jurisdictions of tax residence. The concept of reporting is based on tax residence, which is not altered per se by acquiring a residence permit or citizenship of another jurisdiction.

### **9.3.3. Which CBI/RBI schemes present a potentially high risk?**

Not all RBI/CBI schemes present a high risk of being used to circumvent the instruments. Schemes that are potentially high-risk for these purposes are those that give a taxpayer access to a low personal income tax rate of less than 10% on offshore financial assets and do not require significant physical presence of at least 90 days in the jurisdiction offering the CBI/RBI scheme. This is based on the premise that most individuals seeking to circumvent reporting via CBI/RBI schemes will wish to avoid income tax on their offshore financial assets in the CBI/RBI jurisdiction and would not be willing to fundamentally change their lifestyle by leaving their original jurisdiction of residence and relocating to the CBI/RBI jurisdiction.

### **9.3.4. What should Financial Institutions do?**

Under Annex 1, Part VI.A of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section VII C (1) of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations, a MFI may not rely on a self-certification or documentary evidence if it knows or has reason to know, that the self-certification or documentary evidence is incorrect or unreliable. The same applies with respect to Pre-existing High-Value Accounts where a relationship manager has actual knowledge that the self-certification or documentary evidence is incorrect or unreliable.

In making the determination whether a MFI has reason to know that a self-certification or documentary evidence is incorrect or unreliable, it should take into account all relevant information available to the MFI, including information collected and maintained for AML/KYC purposes. As a result, where, taking into account all relevant information, the facts and circumstances would lead the MFI to have doubts as to the tax residency/ies of an Account Holder or Controlling Person, it should take appropriate measures to ascertain the tax residency/ies of such persons. To this end, MFIs may consider raising further questions, especially when there is doubt as to whether residence being claimed is not the person's actual tax residence, including:

- Did you obtain residence rights under an CBI/RBI scheme?
- Do you hold residence rights in any other jurisdiction(s)?
- Have you spent more than 90 days in any other jurisdiction(s) during the previous year?
- In which jurisdiction(s) have you filed personal income tax returns during the previous year?

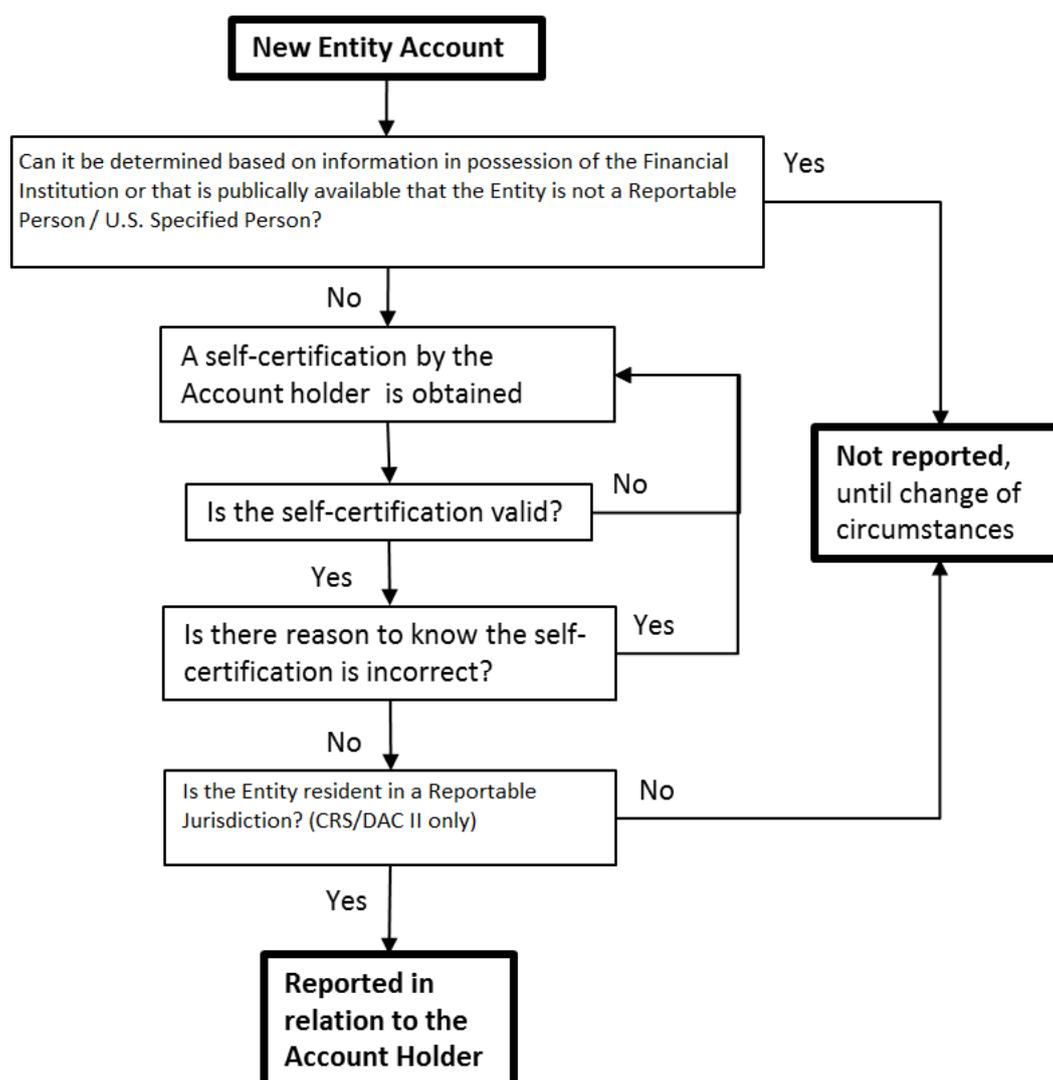
The responses to the above questions should assist MFIs in ascertaining whether the provided

self- certification or documentary evidence is incorrect or unreliable in this regard. It is pertinent to note that MFIs are required to instruct Account Holders [with special attention during account opening procedures] to include all jurisdictions of tax residence in their self-certification, in order to ensure that there is a correct application of existing due diligence procedures.

## 10. Due Diligence Requirements: New Entity Accounts

To the extent a Malta Reporting Financial Institution maintains new entity accounts, it would be required to review in order to undertake due diligence procedures. New Entity Accounts will fall into one of two categories: These are:

- Reportable Accounts reportable by virtue of their account holder.
- Reportable Accounts reportable by virtue of their controlling person.



### 10.1. Self-Certification

The notes on self-certification applicable to individuals as provided in Guidelines 9.2. apply mutatis mutandis to new entity accounts.

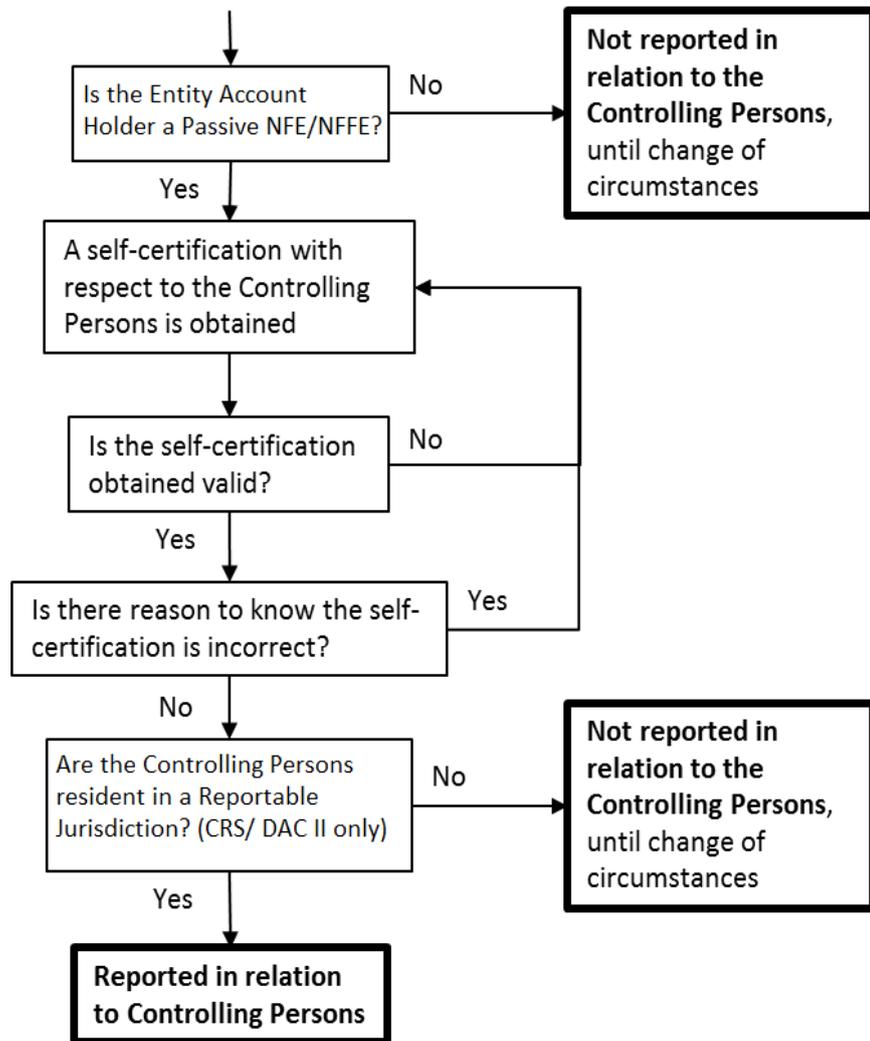
### 10.2. Controlling Persons

In the case of new entity accounts, further information would need to be reviewed to verify

whether the entity is a reportable person / U.S. Specified Person on the basis of its controlling persons. Guidelines 9.3. apply mutatis mutandis to reviewing information on the controlling persons of a Passive NFE/NFFE.

**Additional Procedure for Passive NFE/NFFE:**

Irrespective of whether the account has been found to be a Reportable Account in relation to the Account Holder



## 11. Trusts, Foundations and Entities of a Similar Nature

### 11.1. Basic Features

Trusts, foundations and organisations of a similar nature need to be accorded specific guidelines in view of their legal form and structure. These legal institutes are invoked for the primary purpose of constituting a fiduciary relationship to protect and conserve property for the benefit of an identified or identifiable persons or class of persons. In this regard, the parties to such an arrangement must involve as a minimum a settlor, founder or any other promoter capable of alienating property. Secondly, the arrangement must involve a fiduciary (trustee, administrator, director, committee member or any person who carries out such functions) owing a duty to protect the interests of another person. Thirdly, the arrangement must involve beneficiaries which may be named individually or named as members of a described group of people (a class of beneficiaries).

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 of time. If the fiduciary refused to make the distribution, a mandatory beneficiary could enforce their right against the fiduciary and obtain the property;
- 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 fiduciary to exercise its discretion in the beneficiary's favour in accordance with the wishes of the settlor, founder or any other promoter. If the fiduciary refused to make a distribution, a discretionary beneficiary could only institute a case against the fiduciary to *consider* exercise its discretion in the beneficiary's favour.
- For the purposes of these Guidelines, a contingent beneficiary is treated like a discretionary. A contingent beneficiary does not have an enforceable right to the property until a certain event or set of circumstances occur.

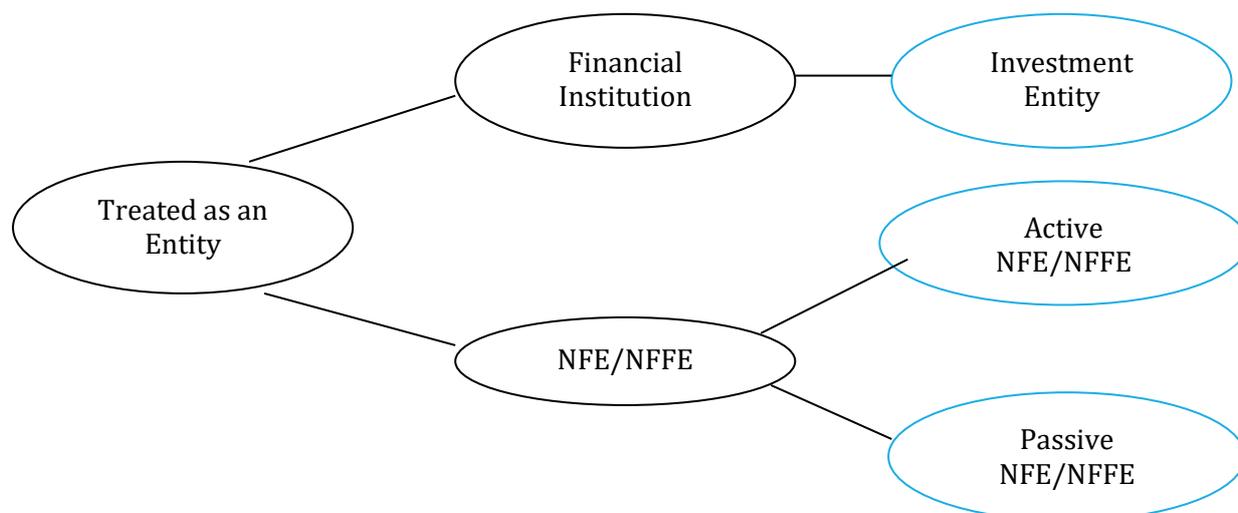
### 11.2. Entity Classification

As detailed in Section 2 to these Guidelines, Trusts, foundations and organisations of a similar nature need to initially determine if they are Malta Financial Institutions. As stated in Section 2.1. to these Guidelines, legal institutes which do not have a separate juridical personality (e.g. trusts) will by legal fiction to be entity for the purposes of the instruments. Therefore, a separate entity classification would need to be undertaken for the trust independently from the entity classification of the fiduciary.

By way of clarification, a trust will be a resident of Malta if any trustee is a resident of Malta, irrespective whether the trustee is a legal entity or an individual and independent of whether the trust is managed professionally or otherwise. If co-trustees are also located in other jurisdictions, a trust may be deemed to be resident in another jurisdiction provided it is shown that the same level of reporting will take place in that jurisdiction for the purposes of all the instruments.

In the case where a trust, foundation or an organisation of a similar nature is a financial institution, it will have reporting obligations in Malta like other Malta Financial Institutions. The most likely scenario in which the trust, foundation or an organisation of a similar nature will be

an MFI is if it falls within the definition of an Investment Entity.



### 11.2.1. Trusts classified as Malta Financial Institutions

*i. Determination*

A trust, foundation or an organisation of a similar nature classified as a Malta Financial Institution in terms of Section 2 will be a Malta Reporting Financial Institution to the extent it is not a Non-Reporting Financial Institution. The applicable categories of Non-Reporting Financial Institutions in Section 2.3. of the Guidelines apply *mutatis mutandis* to the trust, foundation or an organisation of a similar nature.

*ii. Identifying the Financial Accounts*

In the case of a trust, foundation or an organisation of a similar nature that is a Financial Institution, an Equity Interest is held by:

- a. any person treated as a settlor, founder or a promoter or
- b. beneficiary of all or a portion of the trust, foundation or an organisation of a similar nature, or
- c. any other natural person exercising ultimate effective control.

A Reportable Person / U.S. Specified Person will be treated as being a beneficiary if such Reportable Person / U.S. Specified Person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution.

For these purposes, a beneficiary who may receive a discretionary distribution will only be treated as a beneficiary if such person receives a distribution in the calendar year (i.e. either the distribution has been paid or made payable). The treatment for contingency beneficiaries is equivalent to that of discretionary beneficiaries, i.e. it is only during the calendar year where the contingency arises where the equity interest arises in favour of the contingency beneficiary. The same is applicable with respect to the treatment of a Reportable Person / U.S. Specified Person as a beneficiary of a foundation.

iii. Identifying the Reportable Jurisdiction (CRS / DAC II only)

The debt and equity interests are Reportable Accounts if they are held by a Reportable Person who is tax resident in a Reportable Jurisdiction.

iv. Applying the Due Diligence Rules

The trust, foundation or other similar organisation will need to identify the individuals exercising effective control over the trust. As such, the trust, foundation or other similar organisation will be required to look through account holders which are entities. This look-through obligation should correspond to the obligation to identify the beneficial owner of a trust, foundation or other similar organisation under AML/KYC Procedures.

In respect of Pre-existing Accounts, RMFIs may rely on the information collected in connection with the account pursuant to their AML/KYC procedures. In respect of New Accounts, RMFIs may in addition to other due diligence procedures rely on AML/KYC procedures to determine the identity of the Controlling Persons exercising ultimate control in line with the minimum requirements of the 2012 FATF Recommendations.

v. Reporting the relevant information

Reference is made to Section 12 below with respect to the information to be reported which will depend on the nature of the interests held by each U.S. Specified Person / Reportable Person. The financial activity includes *inter alia* the account balance or value, as well as gross payments paid or credited during the reporting year.

### **11.2.2. Trusts classified as NFE/NFFEs**

If a trust, foundation or other similar organisation is classified as a Passive NFE/NFFE and holds an account with a RMFI; the RMFI will be required to report the entity in accordance the requirements of the instruments.

i. Determination

A RMFI will need to determine if a trust, foundation or other similar organisation would be liable to be classified as a Active NFE/NFFE or a Passive NFE/NFFE. To the extent the trust, foundation or other similar organisation is classified as a Passive NFE/NFFE, the RMFI will also need to make additional determinations.

ii. Identifying the Financial Accounts

Where a trust, foundation or other similar organisations are account holders, the RMFI would need to determine if:

1. The trust, foundation or similar organisation are Reportable Persons / U.S. Specified Persons. (Active NFE / NFFE and Passive NFE/NFFE)
2. The trust, foundation or similar organisation has one or more Controlling Person that Reporting Persons / U.S.. Specified Persons (Passive NFE/NFFEs only)

In the event the trust, foundation or similar organisation is not tax resident in any jurisdiction shall not be considered to be a Reportable Person / U.S. Specified Person.

iii. Identifying the Reportable Jurisdiction (CRS / DAC II only)

Account Holders are Reportable Accounts if they are held by a Reportable Person who is tax resident in a Reportable Jurisdiction.

iv. Passive NFE/NFFEs – Controlling Persons

In the case of passive NFE/NFFEs, the controlling persons are also reportable if they are Reportable Persons in a Reportable Jurisdiction / U.S. Specified Persons. The concept of controlling persons used in the instruments is drawn from the 2012 FATF Recommendations on beneficial ownership and the definition of 'beneficial owner' as contained in Regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01]. As such, the Controlling Persons of a trust, foundation or other similar organisation shall be:

- settlor, founder or any other promoter;
- trustee, administrator, director, committee member or any person who carries out such functions;
- beneficiary/ies;
- protector(s);
- any other natural person exercising ultimate effective control<sup>2</sup>.

The definition of Controlling Persons excludes the need to inquire as to whether any of these persons can exercise practical control. In the case of CRS/ DAC II, in the event that a Controlling Person is a resident in Malta, that Controlling Person would not be considered as a Reportable Person.

Where the beneficiaries are not individually named but are identified as a class, the instruments do not require that all possible members of the class to be treated as Reportable Persons. Rather it is only when a member of a class of beneficiaries receives a distribution or intends to exercise vested rights in the property, this will be deemed to be a change of circumstances, prompting additional due diligence and reporting as necessary. This reflects a similar obligation contained in the 2012 FATF Recommendations<sup>3</sup>.

A settlor, founder or any other promoter will be reported regardless of whether the property settled / endowed are revocable or irrevocable. Likewise, both mandatory and discretionary beneficiaries are included within the definition of Controlling Persons. Unlike the case of an Equity Interests as explained above, discretionary beneficiaries would be reported regardless of whether a distribution is received in a given year.

The Controlling Person shall in all cases of be a natural person. Thus, were the above persons are entities; the RMFI must identify the natural person(s) exercising control over the entity. Although the natural person may be exercising ultimate control through the chain of ownership, only the ultimate natural controlling person(s) would be treated as a Controlling Person, and not the intermediary entities in the chain of ownership. The requirement to identify the natural persons will apply consistent with the 2012 FATF Recommendations and Regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01].

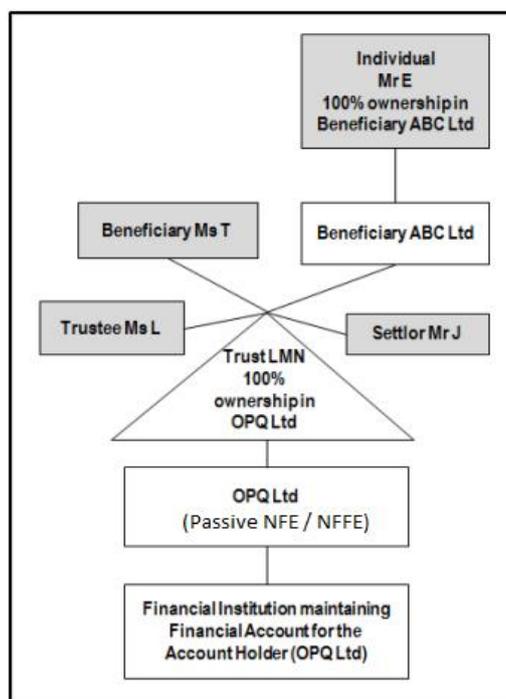
Examples of different scenarios identifying Controlling Persons are outlined below.

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<sup>2</sup> As per Interpretative Note 10 of the 2012 FATF Recommendations, a ownership threshold of 25% is an exemplary threshold of an ultimate effective control.

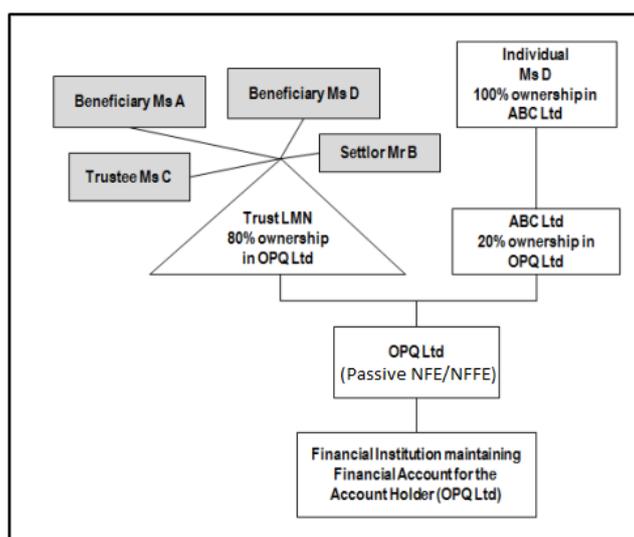
<sup>3</sup>Refer to the Interpretive Note to Recommendation 10, at footnote 31.

### Example 1



In the example above, the FI maintaining the Financial Account will need to identify the Controlling Person of the Passive NFE/NFFE OPQ Ltd (that are natural persons) by determining the beneficial owners of the Trust LMN Ltd, as LMN Ltd holds a controlling ownership interest amounting to 100% ownership of OPQ Ltd. For the purposes of reporting, the RMFI is required to treat Ms. L. (trustee), Ms. T. (Beneficiary), Mr. J (settlor) and Mr. E. (having a 100% controlling ownership interest in a corporate beneficiary ABC Ltd) as Controlling Persons of the Passive NFE/NFFE OPQ Ltd.

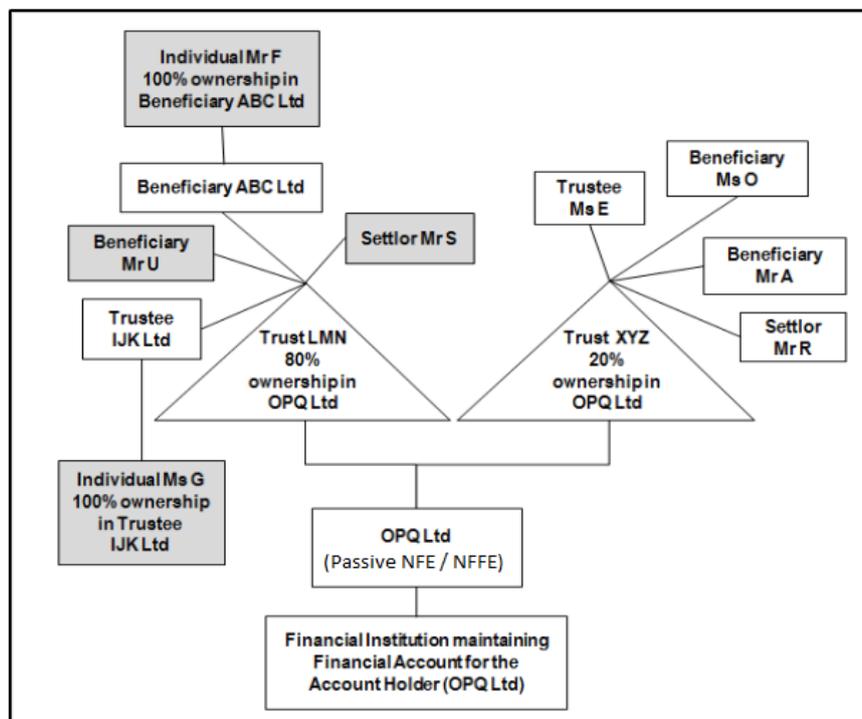
### Example 2



In the example above, only Trust LMN exceeds the indicative 25% threshold of controlling

ownership interest in the legal person OPQ Ltd, as per the exemplary threshold set out in the previous example. Trust LMN has 80% ownership interest in the Passive NFE/NFFE OPQ Ltd, while ABC Ltd has 20% ownership interest. Accordingly, for the purposes of reporting, the RMFI is required to treat Ms. C (trustee), Ms. A (individual beneficiary), Mr. B (settlor) and Ms. D (individual beneficiary) as Controlling Persons of Passive NFE/NFFE OPQ Ltd, as the trustee, the settlor and the beneficiaries of the trust are considered beneficial owners of that trust pursuant to FATF Recommendation 10 and Regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01].

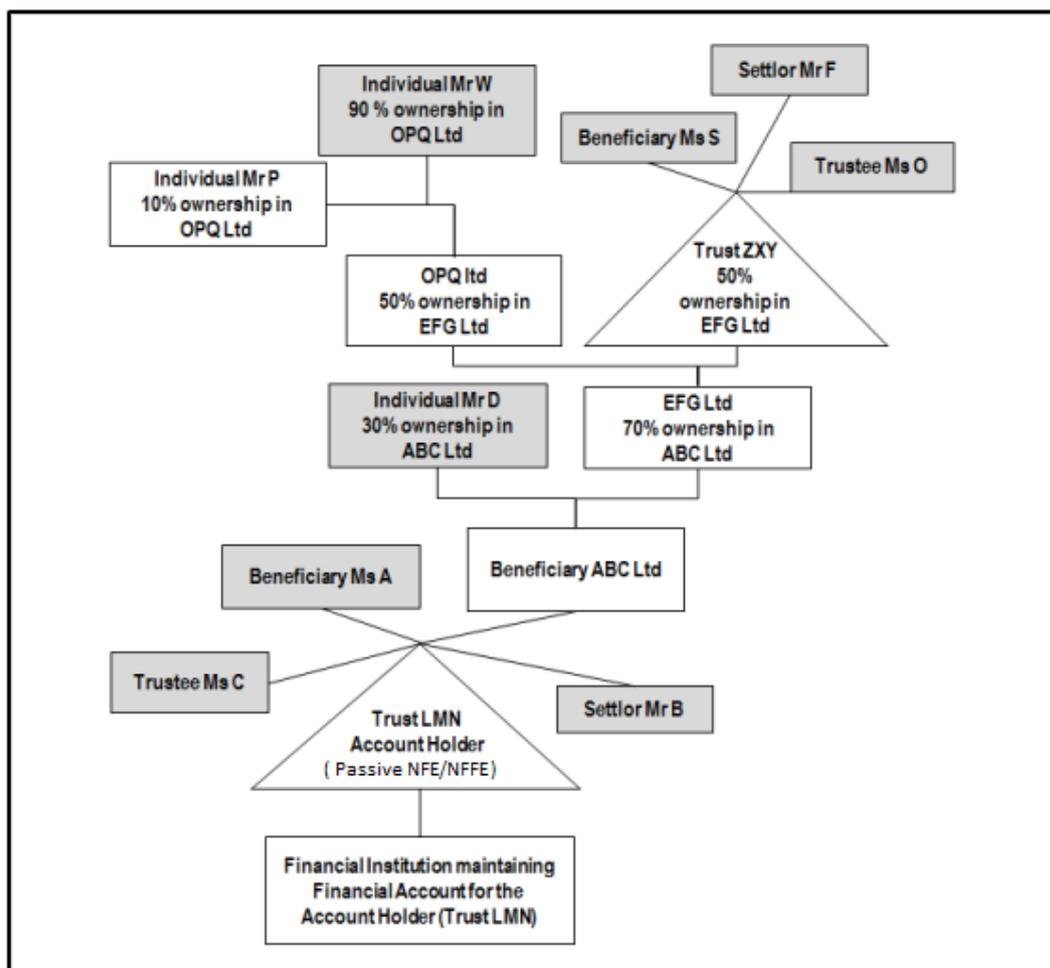
### **Example 3**



In the example above, only Trust LMN exceeds the indicative 25% threshold of controlling ownership interest in the legal person OPQ Ltd. Trust LMN has 80% ownership interest in the Passive NFE /NFFE OPQ Ltd while Trust XYZ has 20% ownership interest. Thus, for the latter it is not required to determine beneficial owners based on the threshold.

In order to determine beneficial owners of Trust LMN, the RMFI is required to apply the same logic as that applicable to the corporate beneficiary ABC Ltd and the corporate trustee IJK Ltd. As the corporate beneficiary ABC Ltd is 100% owned by the individual Mr. F, he is considered to have ultimate controlling interest in ABC Ltd and shall therefore be treated as its beneficial owner. The same principle applies to the corporate trustee IJK Ltd and Ms. G, who shall be identified as its beneficial owner. As a consequence, for the purpose of reporting, the RMFI is required to treat as Controlling Persons of the Passive NFE/NFFE OPQ Ltd: Ms. G (100% owner of the corporate trustee IJK Ltd), Mr. U (beneficiary), Mr. S (settlor) and Mr. F (100% owner of the corporate beneficiary ABC Ltd).

#### Example 4



In the Example above, the Account Holder is a Trust LMN that is a Passive NFE/NFFE, and thus a look through approach needs to be applied in order to determine its Controlling Persons. The instruments define that Controlling Persons of a trust are its trustee(s), settlor(s), protector(s) (if any), and beneficiary(ies). Thus, the trustee Ms. C, the beneficiary Ms. A and the settlor Mr. B are easily identifiable Controlling Persons of Trust LMN. Regarding the corporate beneficiary ABC Ltd, beneficial owners have to be determined in the same way as described in the previous examples.

The individual Mr. D has 30% ownership interest in ABC Ltd, therefore qualifying as Controlling Person and in application of the rules for identifying the beneficial owners of legal persons under FATF Recommendation 10 and Regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01]. The beneficial owners of legal person EFG Ltd are determined on the basis of ownership structure where OPQ Ltd has equal percentage of ownership interest as Trust ZXY, i.e. 50% each. Based on that, a further determination is needed to identify the natural persons that are the beneficial owners of the both OPQ Ltd and Trust ZXY. For the legal person OPQ Ltd, the ownership structure is split between individual Mr. P and Mr. W who hold respectively 10% and 90% of the ownership interests in OPQ Ltd. In application of the rules of FATF Recommendation 10 and Regulation 2 of the Prevention of Money Laundering

and Funding of Terrorism Regulations [S.L. 373.01] with respect to legal persons, it is only Mr. W that passes the indicative threshold of 25% ownership interest, and thus he should be considered as the Controlling Person of Trust LMN.

For Trust ZYX, its beneficiaries, settlor and trustee should be identified as its beneficial owners, again in accordance with the rules for legal arrangements set out in FATF Recommendation 10 and Regulation 2 of the Prevention of Money Laundering and Funding of Terrorism Regulations [S.L. 373.01]. Accordingly, Ms. S (beneficiary of ZYX), Mr. F (settlor of ZYX) and Ms. O (trustee of ZYX) are identified as Controlling Persons of Trust LMN and shall be treated as Reportable Persons by the RMFI.

v. Applying the due diligence rules.

During the collection of the above-mentioned information, RMFIs may rely on the information collected pursuant to AML/KYC procedures to identify the Controlling Persons.

- In respect of Pre-Existing Entity Accounts, RMFIs may rely on the information collected in connection with the account pursuant to their AML/KYC procedures;
- In respect of New Entity Accounts, RMFIs can rely only on AML/KYC procedures to determine the identity of Controlling Persons if these procedures are in accordance with the 2012 FATF Recommendations.

vi. Reporting the relevant information

Reference is made to Section 12 below with respect to the information to be reported which will depend on the account information and the financial activity for the year with respect to the account of the trust, foundation or other similar organisation.

## 12. Reporting and Transmission of Information

### 12.1. Reporting Obligations

Once a RMFI has applied the procedure and due diligence in respect of the accounts it holds and has identified Reportable Accounts then it must report information in relation to those accounts to the Commissioner for Revenue through the AEOI Portal which may be accessed via the website of the Commissioner for Revenue ([www.cfr.gov.mt](http://www.cfr.gov.mt)) and clicking on E-Services > Exchange of Information > Automatic Exchange of Financial Account Information > Login to Reporting Portal.

This is the information that the competent authority of Malta would have agreed to exchange with its automatic exchange partners in terms of the instruments. Access to the AEOI Portal may be via web browser or Secure File Transfer Protocol (SFTP) as requested by the RMFI and as approved by the Commissioner for Revenue. Files are to be compressed using the standard DEFLATE compression method and uploaded in ZIP format in UTF-08 encoding.

Article 2 of Schedule I to the Exchange of Information (United States of America) (FATCA) Order / Section I, Part A of Annex I of the Cooperation with Other Jurisdiction on Tax Matters Regulations provides the information to be obtained and exchanged. This will include:

- Information required for the automatic exchange partner jurisdiction to identify the Account Holder concerned (**Identification information**);
- Information to identify the account and the Financial Institution where the account is held (**Account Information**); and
- Information in relation to the activity taking place in the account and the account balance (**Financial Information**).

Together, this information should be enough to identify the account holder and then to establish a picture of the compliance risk of the account holder in question.

**N.B.** It is important to note that where a RMFI has no Financial Accounts to report, a nil return is still required through the AEOI Portal or SFTP accordingly.

#### 12.1.1. Deadlines

In line with regulations 30, 41 and 45 of the Cooperation with other Jurisdictions on Tax Matters Regulations, Reporting Malta Financial Institutions must report the information specified below as from Reporting Year 2019 and subsequent years as follows:

1. By not later than 30<sup>th</sup> April after the end of the year to which such information relates if the Malta Reporting Financial Institution will be reporting through XML Reporting.
2. By not later than 30<sup>th</sup> March after the end of the year to which such information relates if the Malta Reporting Financial Institution will be reporting through alternative reporting (excel spreadsheet) or will be submitting a nil return.

In view of the international commitments, no extensions are being authorised. Therefore, it is within the responsibility of the Malta Reporting Financial Institution to submit the required information within ample of time prior to the deadline to ensure a successful submission.

However, it is pertinent to note that the AEOI portal does allow for test files to be loaded more than once by selecting the “test” option. However, please note that only the latest successful “actual” submission is considered for exchange. Following submission of an “Actual” file, the AEOI portal performs initial validations and returns a successful notification or a list of errors as appropriate. Please note that an “Actual” submission is subject to additional validations which are performed later by the Commissioner.

### **12.1.2. Format of Transmission of Information**

Each RMFI will need to identify, review and report its reportable accounts separately. This means that RMFI will need to ensure that there is **NO** pool reporting for all instruments.

#### **XML Reporting**

1. Reporting Malta Financial Institutions are to report the information required for the purposes of the FATCA IGA using the FATCA XML Schema 2.0 and User Guidelines published by the U.S. Internal Revenue Service (IRS) to the extent it is applicable to the Model 1A IGA. The schema and guidelines are available at the following Internet Address:

<https://www.irs.gov/businesses/corporations/fatca-xml-schemas-and-business-rules-for-form-8966>

2. RMFIs are to report the information required for the purposes of CRS/ DAC II using the XML Schema issued by OECD. The schema and related user guide are available at the following Internet Address:

<https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/schema-and-user-guide/>

#### **Alternative Reporting (Excel Spreadsheet)**

Where RMFIs are not able to transmit information using the XML schema, they are requested to apply to the Commissioner for Revenue at [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt) with the applicable reasons. For the purposes of CRS / DAC II, the request must state whether the RMFI has any financial accounts which are reportable by virtue of its controlling persons and if this is the case, whether the corresponding reportable account holders are also within a reportable jurisdiction.

After an application is accepted, the RMFI will be provided with alternative means to transmit the information to the Commissioner for Revenue for onward forwarding to other competent authorities. Please note that consolidated reporting in terms of Guidelines 12.4 is not possible through Alternative Reporting (Excel Spreadsheet). In this case, each Trustee-Documented Trust / Sponsored Entity will be so required to register as an FI with the Commissioner for Revenue and will be required to obtain a Maltese TIN for each trust / sponsored entity as provided in Section 3. Thus, trustees / sponsoring entities (FATCA), would need to submit a new individual excel spreadsheet for each individual trust / sponsored entity (FATCA). However, alternative Reporting (Excel Spreadsheet) is not permissible for Depository Institutions and RMFIs with more than one hundred account holders.

### **12.1.3. Notification on Transmission of Information**

The AEOI Portal will generate automatic reports of successful submissions to Reporting Malta Financial Institutions. This report will contain high-level information about the files, when the

files were sent, and the result of the transmissions. The reports will be sent via unsecure, free-text email and will not contain personal information.

## 12.2. Completion of Data Elements

The following includes a breakdown of the data elements and corresponding explanations in regards to the reporting obligations of the RMFI which are mandatory unless otherwise specified:

### IDENTIFICATION INFORMATION

<b>Information required to be reported in the identification of the Report. (MessageSpec)</b>	
<b>XML Element</b>	<b>Comment</b>
SendingCompanyIN	FATCA: This data element identifies the sender's 19-character identifying number. If the sender is an RMFI, or a Sponsoring Entity, enter the assigned GIIN with appropriate punctuation (period or decimal). The field is mandatory and the submission will not be accepted without a valid IRS-approved GIIN.  CRS/DAC II: Financial Institution's Malta Tax Identification Number (i.e. 9-digit income tax number).
TransmittingCountry	This data element identifies the tax jurisdiction as a 2-character alphabetic country code specified in ISO 3166-1 Alpha 2 standard. In the case of a Reporting Malta Financial Institution this should be set "MT".
ReceivingCountry	This data element identifies the jurisdiction of the receiving entities' tax administration (TA) and uses the 2-character alphabetic country code specified in the ISO-3166-1 Alpha 2 standard. In the case of a Reporting Malta Financial Institution this should be set "MT".
MessageRefId	This data element is a free text field to capture the unique identifier number of the sender's message. It allows both the sender and the receiver to identify and correlate a specific message. This must be in the following format:  ISO Code of the Transmitting Country (Report "MT"); Year to which the data relates; ISO Code of the Receiving Country (Report "MT") SendingCompanyIN Unique Identifier (e.g. GUID)*  e.g. MT2016MT98Q96B.00000.LE.250a02de3-0b17-4b58-adff-f0e3ca33030d (FATCA) / MT2016MT99311282616a02de3-0b17-4b58-adff-f0e3ca33030d (CRS / DAC II)  *As a GUID is used to help ensure the uniqueness of this element's value, the use of a random GUID generator such as <a href="https://www.guidgenerator.com">https://www.guidgenerator.com</a> would be sufficient.

CorrMessageRefID	<p><b>As a rule, not applicable. However, in the case of amended, corrected or voided messages:</b></p> <p>Enter the MessageRefId from the original transmission. This field may also reference the latest corrected, voided or amended message.</p> <p>The CorrMessageRefId identifies a previous message to be amended, corrected or voided.</p>
ReportingPeriod	<p>This data element identifies the reporting year for the current message in YYYY-MM-DD format reflecting the basis year of the reporting period.</p> <p>e.g. 2017-12-31</p>
Timestamp	<p>This data element identifies the date and time the message was created and may be automatically populated by the host system.</p> <p>e.g. 2017-03-15T09:45:30</p>

**Information required to be reported in the identification of the financial institution (FI) and the individual Account Report. (DocRefId)**

<b>XML Element</b>	<b>Comment</b>
Financial Institution DocRefId	<p><b>FATCA (IRS Guidelines 4.2.2.):</b></p> <p>The Reporting FI GIIN: the GIIN for the reporting FI associated with the reporting group;            Period Character (.);            Unique Identifier: (e.g. GUID).*</p> <p>e.g. 98Q96B.00000.LE.250.122291cc2-37cb-42a9-ad74-06bb5746b60b</p> <p><b>CRS / DAC II:</b></p> <p>Country Code of the sending country ("MT");            Year to which the data relates;            Financial Institution's Malta Tax Identification Number (i.e. 9-digit income tax number);            "FI" indicator;            Unique identifier (e.g. GUID);*            Country Code of the receiving country ("MT").</p> <p>e.g. MT2016993112826FI_e0e86c93-122291cc2-37cb-42a9-ad74-06bb5746b60bMT</p> <p>*As a GUID is used to help ensure the uniqueness of this element's value, the use of a random GUID generator such as <a href="https://www.guidgenerator.com">https://www.guidgenerator.com</a> would be sufficient.</p>

AccountReport DocRefId	<p><b>FATCA:</b> The Reporting FI GIIN: the GIIN for the reporting FI associated with the reporting group; Period Character (.); Unique identifier (e.g. GUID);*</p> <p>e.g. 98Q96B.00000.LE.250.f10c9098-bf33-421c-a3b5-557a535c2365</p> <p><b>CRS / DAC II:</b> Country Code of the sending country (“MT”); Year to which the data relates; Financial Institution’s Malta Tax Identification Number (i.e. 9-digit income tax number); "AR" indicator; Unique identifier (e.g. GUID);* Country Code of the receiving country (“MT”).</p> <p>e.g. MT2016993112826AR_f10c9098-bf33-421c-a3b5- 557a535c2365MT</p> <p>*As a GUID is used to help ensure the uniqueness of this element’s value, the use of a random GUID generator such as <a href="https://www.guidgenerator.com">https://www.guidgenerator.com</a> would be sufficient.</p>
CorrDocRefId	<p><b>As a rule, not applicable. However, in the case of amended, corrected or voided records:</b></p> <p>Enter the DocRefId associated with the original record in the message referenced in CorrMessageRefId. This field may also reference the latest corrected, voided or amended message.</p> <p>The CorrDocRefId identifies a previously filed record to be amended, corrected or voided. Use the same DocRefId format.</p>

<b>Information required to be reported in relation to Individual and Entity Account Holders that are Reportable Persons / U.S. Specified Persons, Entities with Controlling Persons that are Reportable Persons / U.S. Specified Persons and the Controlling Persons themselves.</b>	
<b>Information</b>	<b>Further description (as applicable)</b>
Name	<p>This refers to the name of the Reportable Person. If an individual’s legal name is a mononym or single name, the first name data element should be completed as “NFN” (No First Name) and the last name should be completed with the account holder’s mononym. In the case of entities with multiple names, only one name element is required.</p> <p>In the case of alternative reporting (Excel submission), in the case of organisations, the first name shall be completed as “NFN” and the last name should be completed with the organisation’s name.</p>

Address	The address recorded for the Account Holder pursuant to the due diligence procedures. For individuals this will be the current residence address (or the mailing address if no current residence address is held).
Jurisdiction(s) of residence (CRS / DAC II only)	For Pre-existing Accounts this will be based on the residency test or the indicia search and for New Accounts this will be based on a self-certification. In addition to Member States of the European Union, please make reference to appendices 1-4 of these Guidelines for Reportable Jurisdictions.
TIN(s)	<p>FATCA:</p> <p>Only the U.S. TIN of each Specified U.S. Person is required.</p> <p>In the case of pre-existing accounts, if the U.S. TIN is not in the records of the FI for the reporting year, the following codes are to be reported in the TIN field code:</p> <p>222222222 – Pre existing individual account with only U.S. indicia being a U.S. place of birth.</p> <p>444444444 – Pre-existing individual and entity account that (1) has U.S. indicia other than a U.S. place of birth, and (2) either:</p> <p>(a) has a change in circumstances, causing the self-certification or other documentation originally obtained to be incorrect or unreliable, and a new self-certification or other documentation has not been obtained, or</p> <p>(b) was below the threshold for documenting and reporting the account at the time of account opening and subsequently exceeded the threshold, and a self-certification or other documentation has not been obtained.</p> <p>666666666 – Preexisting entity account with account balance exceeding \$1,000,000 held by a passive NFFE with respect to which no self-certifications have not been obtained, and no U.S. indicia have been identified in relation to its controlling persons.</p> <p>777777777 – Preexisting accounts where no TIN is available and the account has been dormant or inactive but remains above the reporting threshold. This is also know as a “dormant account” (refer to the U.S. Treasury Regulations §1.1471-4(d)(6)(ii)).</p>

TIN(s)	<p>FATCA:</p> <p>In the case of New Individual accounts, if the U.S. TIN is not in the records of the FI for the reporting year, the following codes are to be reported in the TIN field code:</p> <p>333333333 – New individual account that (1) has indicia of a U.S. place of birth, and (2) either:</p> <ul style="list-style-type: none"> <li>(a) has a change in circumstances causing the self-certification originally obtained at account opening to be incorrect or unreliable, and a new self-certification has not been obtained, or</li> <li>(b) was below the threshold for documenting and reporting the account at the time of account opening and subsequently exceeded the threshold, and a self-certification has not been obtained.</li> </ul> <p>555555555 – New individual and entity account that has a U.S. indicia other than a U.S. place of birth, and (2) either:</p> <ul style="list-style-type: none"> <li>(a) has a change in circumstances causing the self-certification or other documentation originally obtained to be incorrect or unreliable, and a new self-certification or other documentation has not been obtained, or</li> <li>(b) was below the threshold for documenting and reporting the account at the time of account opening and subsequently exceeded the threshold, and a self-certification or other documentation has not been obtained.</li> </ul> <p>In the case of a Passive NFFE which is reportable only by virtue of its Controlling Persons, the Non-U.S. TIN should not be reported and may be left blank.</p> <p>CRS/DAC II:</p> <p>The TIN to be reported with respect to an account is the TIN assigned to the Account Holder by its jurisdiction of residence (i.e. not by a jurisdiction of source).</p> <p>The TIN is not required to be reported with respect to Pre-existing Accounts if it is not in the records of the Reporting Financial Institution (subject to reasonable efforts to obtain the information). In the case of no TIN, “000000000” may be reported.</p>
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**Additional information required to be reported in relation to Individuals/ Controlling Persons only**

<b>Information</b>	<b>Further description (as applicable)</b>
Date of birth	<p><b>FATCA:</b></p> <p>Date of birth is <u>not</u> required for FATCA purposes. However if the U.S. TIN is not in the records of the FI for an individual account holder or a controlling person for the reporting year, <u>the Date of Birth must be reported</u>. The format for the date of birth shall be: YYYY-MM-DD.</p> <p><b>CRS/DAC II:</b></p> <p>Date of birth is required for CRS / DAC II purposes. However, the date of birth is not required to be reported with respect to Pre-existing Accounts if it is not in the records of the Reporting Financial Institution (subject to reasonable efforts to obtain the information). The format for the date of birth shall be: YYYY-MM-DD.</p>
Place of birth	<p><b>FATCA:</b></p> <p>Place of birth is not required for FATCA purposes.</p> <p><b>CRS / DAC II:</b></p> <p>The place of birth is not required to be reported for both Pre-existing and New Accounts unless it is available in the electronically searchable data maintained by the Reporting Financial Institution.</p>

**ACCOUNT INFORMATION**

<b>Information required with respect to all Reportable Accounts</b>	
<b>Information</b>	<b>Further description (as applicable)</b>
The account number (or functional equivalent)	<p>The identifying number of the account or, if no such number is assigned to the account, a functional equivalent (i.e. a unique serial number, contract number or policy number, or other number).</p> <p>If exceptionally, there is no account number report: "NANUM"</p>
The name and identifying number (if any) of the Reporting Financial Institution	<p>The Reporting Financial Institution must report its name and identifying number (if any) to allow the recipient State to easily identify the source of the information reported and subsequently exchanged.</p>

## FINANCIAL INFORMATION

<b>Information required with respect to all Reportable Accounts</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
<p>The account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value)</p>	<p>An account with a balance or value that is negative must be reported as having an account balance or value equal to zero.</p> <p>In general, the balance or value of a Financial Account is the balance or value calculated by the Financial Institution for purposes of reporting to the Account Holder. In the case of an equity or debt interest in a Financial Institution, the balance or value of an Equity Interest is the value calculated by the Financial Institution for the purpose that requires the most frequent determination of value, and the balance or value of a debt interest is its principal amount.</p>
<p>Closure of Account</p>	<p><b>FATCA:</b> In the case of the closure of account during a reporting year, the account balance or value shall be reported as at immediately before closure.</p> <p>The process for closing accounts will differ between institutions and between different products and accounts. The intention is to capture the amount withdrawn from the account in connection with the closure process, as opposed to the account balance at the point of closure given there is an expectation the balance will be reduced prior to point of closure. For these purposes it is acceptable for the Financial Institution to record the balance or value within five business days of when they receive instructions from the account holder to close the account; or record the most recent available balance or value that is obtainable following receipt of instructions to close the account, where a Financial Institution is unable to record the balance or value at the time of receiving instructions to close the account. This may include a balance or value that predates the instructions to close the account if this is the balance or value that is the most readily available.</p> <p><b>CRS / DAC II :</b> In the case of an account closure, the Reporting Financial Institution must only report that the account was closed. The Account Balance must be zero if it is indicated as closed.</p>
<p>The currency of the account.</p>	<p>The information reported must identify the currency in which each amount is denominated.</p>

<b>Information required with respect to Depository Accounts only</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount of interest paid or credited to the account	

<b>Information required with respect to Custodial Accounts only</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount of interest paid or credited to the account.	
The total gross amount of dividends paid or credited to the account	
The total gross amount of other income generated with respect to the assets held in the account paid or credited to the account	
The total gross proceeds from the sale or redemption of Financial Assets paid or credited to the accounts.	

<b>Information required with respect to Other Accounts only (i.e. not Depository or Custodial Accounts)</b>	
<i>Information</i>	<i>Further description (as applicable)</i>
The total gross amount paid or credited to the Account Holder with respect to the account with respect to which the Reporting Financial Institution is the obligor or debtor	Such 'gross amount' includes, for example, the aggregate amount of: any redemption payments made (in whole or part) to the Account Holder; and any payments made to the Account Holder under a Cash Value Insurance Contract or an Annuity Contract even if such payments are not considered Cash Value.

### 12.3. Special Rules for Trusts, Foundations and other Similar Organisations

Trusts, foundations and other similar organisations may be RMFI themselves and account holders, typically as Passive NFE/NFFEs.

#### 12.3.1. Trust classified as a Malta Reporting Financial Institution

<b>Account Holder</b>	<b>Account Balance or Value</b>	<b>Gross payments</b>
Settlor / Founder / Promoter:	Total value of all property	The total gross amount paid or credited to the settlor / founder / promoter in reporting period (if any)
Beneficiary: (mandatory)	Total value of all 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 the trustee, administrator, director, committee member or any person who carries out such functions and protector)	Total value of all property	The total gross amount paid or credited to such person 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	<b>FATCA:</b> Any of the above, just before closure.  <b>CRS / DAC II:</b> 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)

### 12.3.2. Trust classified as a Passive NFE/NFFE

Controlling Person	Account Balance or Value	Gross payments
Settlor / Founder / Promoter	Total account balance or value	Gross payments made or credited
Trustee, Administrator, Director, Committee Member or any person who carries out such functions	Total account balance or value	Gross payments made or credited
Beneficiary	Total account balance or value	Gross payments made or credited
Protector	Total account balance or value	Gross payments made or credited
Any of the above, if account was closed	<b>FATCA:</b> Any of the above, just before closure. Notes on closure of accounts above apply <i>mutatis mutandis</i> .  <b>CRS / DAC II:</b> The fact of closure	Gross payments made or credited until the date of closure

### 12.3.3. Trustee Return

In order to enable the Commissioner for Revenue to make a proper assessment as to any action that he may deem necessary in order to monitor the level of compliance in relation to the obligations under these instruments, trustees that are licensed by the Malta Financial Services Authority shall provide the Commissioner for Revenue on an annual basis with the following return irrespective whether the individual trusts are classified as RMFI or otherwise:

- A. A list of trusts as at 31st December;
- B. A list of trusts created during the year;
- C. A list of terminated trusts in relation to which the trustee submitting this list was no longer in office during the year.

For each trust featuring in the list above, the trustee needs to provide the following information –

- (i) the name of the trusts or any other identifying feature. Where such other identifying feature is provided, this needs to be a unique identifier reference and an explanation of such unique identifying reference needs to be included. Vague references are not acceptable for this purpose. Where a trust has a name and a unique identifier reference cannot be found, the name must be entered;
- (ii) the date of its creation;
- (iii) the date when it first had a Trustee that was resident in Malta;
- (iv) the date of its termination (where applicable).

The form must be submitted as an email attachment to [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt) in such form as the Commissioner for Revenue shall determine and publish on the CfR website, together with a hard copy addressed to: e-Business Section, Office of the Commissioner for Revenue, Vincenzo Dimech Street, Floriana FRN0170. Both the soft-copy and the hard-copy shall reach the Office of the Commissioner for Revenue by the reporting deadline of 30<sup>th</sup> January after the end of the year to which such information relates. The Commissioner reserves the right to cross-check this information with the information received based on Article 5(7) of the Cooperation with Other Jurisdictions on Tax Matters Regulations.

### 12.4. Consolidated Reporting

Both instruments allow for consolidated reporting in certain specified scenarios. This includes in the case of the Trustee-Documented Trust regime and in the case of FATCA only in the case of sponsorship as seen in the categories of non-reporting financial institutions in Guidelines 2. 3.

Consolidated reporting will only be supported through the upload of XML data file using the CfR's Secure File Transfer Protocol (SFTP) Server. Trustees / Sponsoring Entities wishing to use this service are requested to apply to the Commissioner for Revenue at [cfrdata.mfin@gov.mt](mailto:cfrdata.mfin@gov.mt). After an application is accepted, the RMFI contact person will be provided with the required information to access the SFTP server.

The following illustrates an example of consolidated reporting by a Trustee for Trustee-Documented Trusts in the case of CRS / DAC II:

```
<crs:MessageSpec>
  <crs:SendingCompanyIN>Identification of the Trustee</crs:SendingCompanyIN>
  <crs:Contact>Can Include the Trustee Name Here</crs:Contact>
</crs:MessageSpec>
```

```
<crs:CrsBody>
  <crs:ReportingFI>
    ..... <crs:Name>Name of Trust A</crs:Name>
  </crs:ReportingFI>
  <crs:ReportingGroup>
    ..... <crs:AccountReport>
    ..... </crs:AccountReport>
  </crs:ReportingGroup>
</crs:CrsBody>
```

**Trust 1 reporting information**

```
<crs:CrsBody>
  <crs:ReportingFI>
    ..... <crs:Name">Name of Trust B</crs:Name>
  </crs:ReportingFI>
  <crs:ReportingGroup>
    ..... <crs:AccountReport>
    ..... </crs:AccountReport>
  </crs:ReportingGroup>
</crs:CrsBody>
```

**Trust 2 reporting information**

## **13. Record-Keeping and Diligence**

### **13.1. Reasonable Efforts**

The RMFI needs to confirm that by reporting its information it has made reasonable efforts in collecting the information it is obliged to collect. 'Reasonable efforts' means genuine attempts to acquire such information i.e. actual, legitimate and valid attempts. This includes a record being kept by the RMFI describing the steps that were undertaken and evidence as to how the requisite policies and procedures were followed. Examples of reasonable efforts include contacting the Account Holder (e.g., by mail, in-person or by phone), including a request made as part of other documentation or electronically (e.g., by facsimile or by e-mail); and reviewing electronically searchable information maintained by a Related Entity of the RMFI, in accordance with the aggregation principles. However, reasonable efforts do not necessarily require closing, blocking, or transferring the account, nor conditioning or otherwise limiting its use.

Notwithstanding the foregoing, reasonable efforts may continue to be made after the abovementioned period. It is always advisable that the RMFI keeps a record of the steps it undertook and any evidence it relied upon in the performance of its obligations.

### **13.2. Retention Period**

All the documentation and other evidence that the RMFI or the third party undertaking the obligations for the RMFI, collects in the course of meeting their obligations need to be retained by the RMFI or the third-party service provider for a minimum period of five years starting from the end of the year in which the information relates as per Regulations 29, 40 and 45 of the Cooperation with other Jurisdictions on Tax Matters Regulations. They 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.

Such evidence does not have to be in original and may be a certified copy, a photocopy or at least contains a notation of:

- The type of documentation reviewed;
- Each type of document;
- The date the documentation was received;
- The document's identification number (if any) (e.g. passport number) and
- Whether any indicia were identified.

For High Value pre-existing accounts where a relationship manager enquiry is required, records of electronic searches, requests made and response to Relationship Manager Enquiries should also be retained for the same period.

### **13.3. RMFI's obligation to inform Reportable Persons / U.S. Specified Persons**

Each RMFI is obliged to inform each individual Reportable Person / U.S. Specified Person concerned that the information relating to him will be collected and transferred in accordance with the instruments. This will need to be checked by the Commissioner, who is also required to ensure that the RMFI provides to that individual all information that he/she is entitled to under

the General Data Protection Regulation and the Data Protection Act in sufficient time for the individual to exercise his data protection rights and, in any case, before the RMFI concerned reports the information to the Office of the Commissioner for Revenue. It is important to note that the method chosen to inform account holders is at the discretion of the RMFI, so long as there is a systematic process and account holders are duly informed.

#### **13.4. Service Providers**

Malta allows RMFIs to use service providers to fulfil the reporting and due diligence obligations imposed on such RMFI. This allows Maltese RMFIs to use a service provider that is resident in Malta or in another jurisdiction.

If the RMFI opts to do so, the RMFI must satisfy the requirements contained in Maltese legislation and remain responsible for its reporting and due diligence obligations i.e. the service provider's actions are imputed to the RMFI, including their obligations under domestic law on confidentiality and data protection. Also, this reliance does not modify the time and manner of the reporting and due diligence obligations, which remain the same as if they were still being fulfilled by the RMFI itself.

Nevertheless, please note that Malta does not of date have a electronic facility which allows service providers to login on the AEOI Portal on behalf of a RMFI.

#### **13.5. The Application of the Anti-Avoidance Mechanism**

The instruments incorporate an anti-avoidance mechanism to ensure that any scheme will be re-characterised to ensure that the purposes of the instruments are not frustrated. This broad power afforded to the Commissioner for Revenue allows for the re-characterisation of a scheme to ensure that the economic reality is reflected.

## 14. Investigations and Imposition of Penalties

Regulations 33, 44 and 45 of the Cooperation with Other Jurisdiction on Tax Matters Regulations set out the penalties in terms of the obligations emanating from the instruments. These dissuasive penalties are mostly targeted at RMFIs which:

- Signs or otherwise positively affirms false self-certification
- Fails to maintain the information required;
- Fails to apply the due diligence procedures as specified in the instruments;
- Fails to report the information within the timeframe as implemented;
- Fails to report the information due to minor errors;
- Fails to report the information due to significant non-compliance;
- Fails to cooperate with the Commissioner for Revenue;
- Fails to cooperate with the Commissioner for Revenue in a repeated manner.

### 14.1. Recalcitrant Accounts / Undocumented Accounts

#### *Recalcitrant Accounts (FATCA only)*

A recalcitrant account holder is any account holder which fails to comply with reasonable efforts by the RMFI that maintains the account for:

- (a) information that is necessary to determine the account holder's FATCA status; and/or
- (b) information that needs to be reported about the account for FATCA purposes.

The US- Malta IGA provides that RMFIs will need to report recalcitrant accounts just like any other U.S. Reportable Account (i.e. treating the account holder or, where applicable, controlling person, as a Specified U.S. Person). This includes the RMFI reporting the following identity information for these accounts. The RMFI would be also required to report financial information (such as the balance of the account, and income and payments to the account) about these accounts and other prescribed information, just like any other U.S. Reportable Account. Subject to IRS Notice 2017-46, this reportable information includes the account holder's (or, where applicable, controlling person's) U.S. TIN.

Whilst there is no legal obligation to close financial accounts which are recalcitrant as provided in Article 4(2) of Schedule I to the Exchange of Information (United States of America) (FATCA) Order, a RMFI which does not maintain and report the information set forth in subparagraph 2(a) of Article 2 of the Malta-U.S. IGA may be held to be in significant non-compliance.

Furthermore, following the end of the transition relief provided for under IRS Notice 2017-46, in making a determination for significant non-compliance due to missing TINs for pre-existing accounts, the U.S. IRS will take into account the facts and circumstances leading to the absence of such TINs, such as the reasons why the TIN could not be obtained, whether the FI has adequate procedures in place to obtain TINs and the efforts made by the FI to obtain them.

#### *Undocumented Accounts (CRS / DAC II only)*

In the case of CRS / DAC II, an undocumented account may arise when a Financial Institution is unable to obtain information from an account holder during the due diligence process of

pre-existing accounts. This is usually the case when the only indicia found is a “hold mail” instruction or “in-care-of” address in a reportable jurisdiction, and there is no other address and none of the other indicia are identified for the Account Holder. This would mean that the special procedure applies i.e. **the undocumented account procedure**, wherein the RMFI must obtain from such Account Holder a self-certification or Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder. If the RMFI cannot obtain such self-certification or Documentary Evidence or the procedure does not successfully establish the Account Holder’s residence for tax purposes, the RMFI must report the account as an undocumented account until such account ceases to be undocumented. RMFIs with a disproportionate number of undocumented accounts will be subject to a compliance review by the Commissioner for Revenue.

#### Pre-Existing Lower-Value Accounts

Where the indicia search is completed and the only indicia found is a “hold mail” or “in-care-of” address and no other address is found, then special undocumented accounts procedures apply. In the order most appropriate, the Reporting Financial Institution must:

- complete a paper record search;
- or obtain Documentary Evidence or a self-certification from the Account Holder.

If neither of these procedures successfully establishes the Account Holder’s residence for tax purposes, then the RMFI must report the account to the Commissioner for Revenue as an undocumented account. Once a RMFI determines that a Lower Value Account is an undocumented account, the RMFI is not required to re-apply the procedure set forth above in any subsequent year until there is a change in circumstances that results in one or more indicia being associated with the account, or the account becomes a High Value Account. However, the RMFI must report the Lower Value Account as an undocumented account until such account ceases to be undocumented.

#### Pre-Existing High-Value Accounts

Where during the enhanced review of High Value Accounts the only indicia found is a “hold mail” instruction or “in-care-of” address in a reportable jurisdiction, and there is no other address and none of the other electronic indicia are identified for the Account Holder, then, the special procedure applies i.e. the undocumented account procedure, wherein the RMFI must obtain from such Account Holder a self-certification or Documentary Evidence to establish the residence(s) for tax purposes of the Account Holder. If the RMFI cannot obtain such self-certification or Documentary Evidence or the procedure does not successfully establish the Account Holder’s residence for tax purposes, the RMFI must report the account as an undocumented account until such account ceases to be undocumented.

### **14.2. Compliance Review**

The Commissioner for Revenue takes an active approach to ensure diligent compliance with the instruments in line with Malta’s respective international commitments. In this regard, the Commissioner for Revenue encourages ongoing training to ensure that the impacted industry is informed and aware of the implications and potential obligations under these instruments.

In the event of non-compliance, a defaulting RMFI would be notified of such non-compliance and will need to rectify the situation irrespective of the imposition of the penalties. In this event, the

relevant RMFI will be requested to report on implementing measures taken to ensure that these obligations are not defaulted on again. The Competent Authority will keep the involved foreign competent authority, that would have communicated such non-compliance to the competent authority of Malta, of any updates in the case.

### **14.3. Imposition of Penalties**

In all cases, the imposition of penalties by the Commissioner shall be subject to all safeguards as provided by the Maltese domestic legislative framework. It is within the interest of defaulter to obtain legal advice if it is aggrieved with the decision of the Commissioner for Revenue.

Additionally, in the case of the FATCA, a Malta Reporting Financial Institution which remains in significant non-compliance for more than eighteen months may be subject to the removal from the U.S. IRS FFI list making the now non-participating Malta Financial Institution subject to 30% withholding tax on all U.S. Source Withholdable payments. The detailed procedure is laid out in paragraph 4 of the Competent Authority Agreement.

## **Appendix 1: List of Non-EU Reportable Jurisdictions (CRS)**

In terms of Regulation 45 of the Cooperation with Other Jurisdiction on Tax Matters Regulations, the list of Non-EU Reportable Jurisdictions includes the following jurisdictions:

Jurisdiction		Intended First Information Exchange	Reportable Period
1	Andorra	2018	2017
2	Antigua and Barbuda	2019	2018
3	Argentina	2017	2016
4	Australia	2018	2017
5	Azerbaijan	2019	2018
6	Barbados	2019	2018
7	Bonaire, St. Eustatius and Saba [Netherlands]	2018	2017
8	Brazil	2018	2017
9	Canada	2018	2017
10	Chile	2018	2017
11	China (People's Republic)	2018	2017
12	Colombia	2017	2016
13	Cook Islands	2020	2019
14	Costa Rica	2021	2020
15	Curaçao	2021	2020
16	Faroe Islands	2017	2016
17	Gibraltar	2017	2016
18	Greenland	2018*	2017
19	Guernsey	2017	2016
20	Hong Kong (China)	2019	2018
21	Iceland	2017	2016
22	India	2017	2016
23	Indonesia	2018	2017
24	Isle of Man	2017	2016
25	Israel	2019	2018
26	Japan	2018	2017
27	Jersey	2017	2016
28	Korea	2017	2016
29	Liechtenstein	2017	2016
30	Malaysia	2019	2018
31	Mauritius	2018	2017
32	Mexico	2017	2016
33	Monaco	2018	2017
34	New Zealand	2018	2017
35	Norway	2017	2016
36	Pakistan	2018	2017
37	Panama	2019	2018
38	Peru	2021	2020
39	Russia	2018	2017
40	Saint Lucia	2020	2019
41	San Marino	2017	2016
42	Saudi Arabia	2018	2017
43	Seychelles	2017	2016
44	Singapore	2018	2017
45	South Africa	2017	2016
46	Switzerland	2018	2017
47	Turkey	2020	2019
48	United Kingdom	2017	2016
49	Uruguay	2018	2017

## **Appendix 2: List of Participating Jurisdictions (CRS)**

The list of jurisdictions with which Malta has an agreement in place pursuant to which it will provide information [referred to as 'Participating Jurisdictions' in line with the definition in D.4. of Section VIII of Annex I to the Cooperation with Other Jurisdiction on Tax Matters Regulations] include the following jurisdictions:

Participating Jurisdictions							
1	Albania	31	Denmark	61	Liberia	91	Saint Vincent and the Grenadines
2	Andorra	32	Dominica	62	Liechtenstein	92	Samoa
3	Anguilla	33	Ecuador	63	Lithuania	93	San Marino
4	Antigua and Barbuda	34	Estonia	64	Luxembourg	94	Saudi Arabia
5	Argentina	35	Faroe Islands	65	Macau (China)	95	Seychelles
6	Aruba	36	Finland	66	Malaysia	96	Singapore
7	Australia	37	France	67	Maldives	97	Sint Maarten
8	Austria	38	Germany	68	Marshall Islands	98	Slovak Republic
9	Azerbaijan	39	Ghana	69	Mauritius	99	Slovenia
10	Bahamas	40	Gibraltar	70	Mexico	100	South Africa
11	Bahrain	41	Greece	71	Monaco	101	Spain
12	Barbados	42	Greenland	72	Montserrat	102	Sweden
13	Belgium	43	Grenada	73	Morocco	103	Switzerland
14	Belize	44	Guernsey	74	Nauru	104	Turkey
15	Bermuda	45	Hong Kong (China)	75	Netherlands	105	Turks and Caicos Islands
16	Bonaire, St. Eustatius and Saba	46	Hungary	76	New Zealand	106	United Arab Emirates
17	Brazil	47	Iceland	77	Nigeria	107	United Kingdom
18	British Virgin Islands	48	India	78	Niue	108	Uruguay
19	Bulgaria	49	Indonesia	79	Norway	109	Vanuatu
20	Canada	50	Ireland	80	Oman		
21	Cayman Islands	51	Isle of Man	81	Pakistan		
22	Chile	52	Israel	82	Panama		
23	China (People's Republic of)	53	Italy	83	Peru		
24	Colombia	54	Japan	84	Poland		
25	Cook Islands	55	Jersey	85	Portugal		
26	Costa Rica	56	Kazakhstan	86	Qatar		
27	Croatia	57	Korea	87	Romania		
28	Curaçao	58	Kuwait	88	Russian Federation		
29	Cyprus	59	Latvia	89	Saint Kitts and Nevis		
30	Czech Republic	60	Lebanon	90	Saint Lucia		

## Appendix 3: Territorial Scope for DAC II

The territorial scope of Council Directive 2011/16/EU as amended by Council Directive 2014/107/EU extends to not only EU Member States but also to Member States' territorial or administrative subdivisions. To this effect, the following sections outline the treatment of overseas territories or municipalities of France, the Netherlands, Spain, UK, Portugal and Finland.

### France

The French départements and Mayotte are considered as being an integral part of France as regards to the territorial scope of the Directive. Therefore, information will have to be exchanged with France. The residence will be shown as FR for reporting purposes.

For Saint-Barthélemy, its status changed on 1 January 2012 and it is no longer part of the EU, however France will represent Saint-Barthélemy in its relations with EU MS. Therefore, information will be exchanged with France but the Saint-Barthélemy ISO code (BL) is to be used for reporting purposes.

Both Saint-Barthélemy and Saint-Martin are territories which have tax autonomy. The relevant rules about Saint-Barthélemy and Saint-Martin residence are determined by the local authorities. For tax purposes, Saint-Barthélemy and Saint-Martin residents are not French residents, however separate Competent Authority Agreements will not be negotiated.

### The Netherlands

The Kingdom of the Netherlands is composed of 4 constituent countries:

- the Netherlands itself composed of its European mainland – provinces – plus the overseas municipalities of Bonaire, Sint Eustatius, and Saba, sometimes referred to as Caribbean Netherlands or BES islands,
- Aruba,
- Curaçao and
- Sint Maarten.

The overseas municipalities of Bonaire, Sint Eustatius and Saba are not part of the territorial scope of the Directive. For AEOI of financial account information, the Netherlands signed the CRS on the behalf of these overseas municipalities and they will represent them. As the Netherlands will represent them in their relations with EU Member States, messages will be exchanged with Netherlands but in order to identify specifically these exchanges, the specific ISO country code of these BES municipalities (BQ) will be used for reporting purposes.

Aruba (AW), Curacao (CW) and Sint-Marteen (SX) are not part of the territorial scope of the Directive. With regard to the AEOI of financial account information, these jurisdictions signed the CRS in their own capacity.

The overseas municipalities of Bonaire, Sint Eustatius and Saba, as well as Aruba, Curacao and Sint- Marteen are all separate tax jurisdictions with their own tax laws. For tax purposes, residents of these regions are not Dutch residents. Malta will be signing separate Competent Authority Agreements with these municipalities.

## **Spain**

The Canary Islands are an integral part of Spain and consequently should not be treated in a different manner from the rest of Spain. The ISO country code for reporting purposes will always be ES.

## **United Kingdom**

Gibraltar is part of the territorial scope of DAC and is represented by UK for its relations with the other EU Member States. The territorial scope of DAC will continue until the withdrawal of the UK from the European Union. Therefore, information will be exchanged with the UK but using the GI ISO code for reporting purposes.

However, Gibraltar is a separate jurisdiction from United Kingdom and has its own tax laws. For tax purposes, the residents of Gibraltar are not residents of United Kingdom.

## **Portugal**

The Azores and Madeira are autonomous regions but an integral part of Portugal and consequently should not be treated in a different manner from the rest of Portugal. The ISO country code for reporting purposes will always be PT.

## **Finland**

Åland Islands is an autonomous region of Finland. For exchange of information purposes it should not be treated in a different manner from the rest of Finland. The ISO country code to use for reporting purposes will always be FI.

## Appendix 4: Summary Table

Further to the above, the following table summarizes how account holder's resident in the below territories should be treated:

		DAC Territorial Scope	Part of Member State for CRS Purposes	Tax Residence Country Code
<b>France</b>	Guadeloupe	Yes	Yes	FR
	French Guiana	Yes	Yes	FR
	Martinique	Yes	Yes	FR
	Réunion	Yes	Yes	FR
	Sint-Maarten	Yes	Yes	MF
	Mayotte	Yes	Yes	FR
	Saint-Barthélemy	Yes	Yes	BL
<b>Netherlands</b>	Bonaire	No	No - Separate CAA	BQ
	Saint Eustatius	No	No - Separate CAA	BQ
	Saba	No	No - Separate CAA	BQ
	Aruba	No	No - Separate CAA	AW
	Curacao	No	No - Separate CAA	CW
	Saint-Maarten	No	No - Separate CAA	SX
<b>Spain</b>	Canary Islands	Yes	Yes	ES
<b>UK</b>	Gibraltar	Yes	No - Separate CAA	GI
<b>Portugal</b>	Azores	Yes	Yes	PT
	Madeira	Yes	Yes	PT
<b>Finland</b>	Åland Islands	Yes	Yes	FI

## **Appendix 5: Specific List of Non-Reporting Financial Institutions**

Malta has no financial institution that is to be treated as a Non-Reporting Financial Institution for the purposes of B.1(c) of Section VIII of Annex I of the Cooperation with other Jurisdictions on Tax Matters Regulations (S.L. 123.127).

## **Appendix 6: Specific List of Excluded Accounts**

Malta has no account that is to be treated as an Excluded Account for the purposes of C.17(g) of Section VIII of Annex I of the Cooperation with other Jurisdictions on Tax Matters Regulations (S.L. 123.127).

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