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20 questions on the Common Reporting Standard

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The Common Reporting Standard regime, which many jurisdictions around the world (including the UK) have already implemented under local law with effect from 1 January 2016, imposes complex due diligence and reporting obligations on affected financial institutions. It also has implications for individuals and entities that are not financial institutions, as they may be requested to provide self-certifications about their tax residence and status under the regime to affected financial institutions in which they hold accounts. Financial institutions in jurisdictions that have implemented the regime should already have compliance programmes in place, whilst others in jurisdictions that have committed to implementing the regime in future should be preparing now.



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1. What is the Common Reporting Standard?

The Common Reporting Standard (CRS) is a cross border automatic exchange of information regime developed by the Organisation for Economic Cooperation and Development (OECD) at the behest of the G20, against the backdrop of public pressure to tackle tax evasion by wealthy individuals and corporations in the wake of the financial crisis.

It was inspired by the US Foreign Account Tax Compliance Act (FATCA) regime, which imposes reporting obligations on non-US financial institutions to assist the US Internal Revenue Service to identify US taxpayers evading US tax on their offshore financial accounts.

The OECD was tasked with developing a single global standard for governments to annually exchange financial account information which had been reported to them by their local financial institutions. The resulting CRS regime, which was first released and endorsed by the G20 in February 2014, has been aptly dubbed the 'global FATCA'; it imposes similar obligations on financial institutions as they face under FATCA, but on a much more global scale.

CRS essentially requires reporting financial institutions in participating jurisdictions to conduct due diligence to identify financial accounts held directly or indirectly by residents of other jurisdictions that are reportable jurisdictions. They must annually report certain information about such account holders and accounts to the tax or other competent authorities in the financial institution's own jurisdiction, for exchange with each of the other reportable jurisdictions.

A consolidated version of the CRS (www.bit.ly/1rwOhee) was released by the OECD on 21 July 2014. It includes an overview, commentary and guidance for implementation by governments and financial institutions, and detailed bilateral and multilateral model Competent Authority Agreements (which are based on the FATCA Model 1 intergovernmental agreement to ease implementation and minimise the associated costs for financial institutions). It also includes standards for harmonised technical and information technology solutions (including a standard XML schema format) and requirements for the secure transmission of data.

In addition, the OECD has published a *CRS Implementation Handbook* (Aug 2015) (www.bit.ly/1VMgieI) and CRS-related FAQs (Nov 2015) (www.bit.ly/1UDZ2XE); and created an automatic exchange portal on the OECD website that includes CRS materials and tracks how CRS is being implemented globally (www.bit.ly/228neBf).

A summary of key aspects of the CRS rules and a discussion of some of the related practical issues is set out below. Due to the global nature of the regime and the variation of implementing rules between jurisdictions, the discussion below is based on the OECD CRS and is only jurisdiction specific where expressly stated.

2. Which jurisdictions are participating in the CRS?

To date, 101 jurisdictions have committed to adopting the CRS (www.bit.ly/1ixyRkV), with a view to commencing the exchange of information with partner jurisdictions from either 2017 (these are the so-called 'early adopter' jurisdictions) or 2018. Most notably, this list does not include the United States.

As at 12 May 2016, 82 jurisdictions (www.bit.ly/1plT68V), including each EU jurisdiction, had signed a multilateral Competent Authority Agreement.

At EU level, a Directive was adopted in December 2014 to extend the scope of mandatory automatic exchange of information between EU tax authorities under the existing EU Directive on Administrative Cooperation (2011/16/EU) (the DAC). Those amendments require the consistent implementation of the CRS by each EU member state under local law with effect from 1 January 2016, although Austria is allowed a further year to implement the CRS.

The UK and most other 'early adopter' jurisdictions have already implemented the CRS under local law with effect from 1 January 2016, with other jurisdictions committed to first exchanges of information in 2018 planning to implement the CRS with effect from 1 January 2017.

The CRS/DAC and FATCA are implemented in the UK by The International Tax Compliance Regulations,

SI 2015/878 (the 'UK regulations'). UK CRS guidance has been issued by HMRC. The UK equivalent regime to FATCA (known as 'UK FATCA' or 'CDOT'), which applies to financial institutions resident in the UK and in the British Crown Dependencies and Overseas Territories and took effect at the same time as FATCA (i.e. from 1 July 2014), has effectively been superseded by CRS, but subject to transitional provisions (see Q18 below).

Early adopter jurisdictions committed to first information exchanges by 2017 (55)

Anguilla, Argentina, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Cayman Islands, Colombia, Croatia, Curaçao, Cyprus, Czech Republic, Denmark, *Dominica*, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montserrat, Netherlands, Niue, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, South Africa, Spain, Sweden, *Trinidad and Tobago*, Turks and Caicos Islands, United Kingdom

Jurisdictions committed to first information exchanges by 2018 (46)

Albania, Andorra, Antigua and Barbuda, Aruba, Australia, Austria, *The Bahamas*, Bahrain, Belize, *Brazil*, *Brunei Darussalam*, Canada, Chile, China, Cook Islands, Costa Rica, Ghana, Grenada, *Hong Kong (China)*, Indonesia, Israel, Japan, *Kuwait*, Lebanon, Marshall Islands, *Macao (China)*, Malaysia, Mauritius, Monaco, Nauru, New Zealand, Panama, *Qatar*, Russia, Saint Kitts and Nevis, Samoa, Saint Lucia, Saint Vincent and the Grenadines, *Saudi Arabia*, *Singapore*, Sint Maarten, Switzerland, *Turkey*, *United Arab Emirates*, *Uruguay*, *Vanuatu*.

Note: The jurisdictions yet to sign a CRS Competent Authority Agreement are italicised.

A jurisdiction implementing CRS treats as participating jurisdictions each other jurisdiction with which it has an agreement to exchange CRS information and which it publishes on a list of participating jurisdictions. In view of the time it may take for such agreements to be put in place and/or to implement CRS under local law, a participating jurisdiction is permitted to treat other jurisdictions committed to implementing CRS by 2018, or that have signed such agreement but not yet implemented it, as a participating jurisdiction for a transitional period on the assumption that they will deliver on their commitments. The UK has, for example, adopted this approach under the UK regulations. This treatment is helpful for reporting financial institutions, which are required to 'look through' certain financial institution account holders to their 'controlling persons' where such account holders are in a non-participating jurisdiction (see Q6 below).

3. What are financial institutions under CRS?

The CRS due diligence and reporting obligations apply to reporting financial institutions in CRS participating jurisdictions from the applicable implementation date.

There are four main types of financial institution under CRS, as there are under the FATCA intergovernmental agreements. Financial institution includes:

- an investment entity;
- a depositary institution;
- a custodial institution; and
- a specified insurance company.

A financial institution is in a CRS participating jurisdiction if it is tax resident in a participating jurisdiction. A financial institution with no tax residence (such as partnerships and other transparent entities) should generally be a participating jurisdiction financial institution if it is incorporated, effectively managed or subject to fiscal supervision in a participating jurisdiction; or, in the case of a trust, if the trustees are resident there. Where a financial institution has a branch located in another participating jurisdiction, that branch is treated as a financial institution governed by the CRS rules of the other jurisdiction.

Certain holding companies of financial groups and treasury centres can be financial institutions under US FATCA regulations, but under CRS they will only be financial institutions if they fall within any of the definitions of the above four categories of financial institution.

'Investment entity' includes two types of entities: entities that primarily conduct as a business investment activities or operations on behalf of other persons; and entities that invest in financial assets and are managed by other financial institutions. Most discretionary investment managers and funds/collective investment vehicles, capital markets issuer SPVs, as well as some trusts and other entities investing or trading in financial instruments will fall to be treated as an investment entity financial institution.

The first type of 'investment entity' is any entity that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- 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;
- individual and collective portfolio management; or
- otherwise investing, administering, or managing financial assets or money on behalf of other persons.

Broadly, the above will be a primary activity of the entity if the majority of its gross income is attributable to such activities over the relevant period. The provision of investment advice is not caught by such activities/operations.

The second type of 'investment entity' includes any entity the gross income of which is 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 the first type of investment entity. 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 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). However, under UK rules, the test of being managed by another financial institution is met in relation to a trust (making it a financial institution) where the trust *or* its activities are being managed by a financial institution. 'Financial assets' includes a broad range of interests in securities, partnerships, derivative contracts, insurance and annuity contracts, etc., but does not include

non-debt interests in real estate.

A 'custodial institution' is any entity that holds, as a substantial portion of its business, financial assets for the account of others. Such activity constitutes a 'substantial portion' of the entity's business if (broadly) its gross income attributable to the holding of financial assets and related financial services equals or exceeds 20% of the entity's gross income over the relevant period. Generally, custodian banks, brokers and central securities depositories should fall within this category, although central securities depositories may not have due diligence and reporting obligations under local implementing rules. It can also include fund nominees, intermediaries and platforms that hold interests in funds and other assets for their clients.

A 'depositary institution' is an entity that accepts deposits in the ordinary course of a banking or similar business. This should include most savings banks, commercial banks, savings and loan associations and credit unions.

A 'specified insurance company' is an entity that is an insurance company (or holding company of an insurance company) that issues, or is obligated to make payments with respect to, a product that is classified as a cash value contract or an annuity contract. This will generally include most life companies.

4. Are any financial institutions in a CRS participating jurisdiction exempt from the CRS obligations?

Financial institutions in a CRS participating jurisdiction that fall within a category of non-reporting financial institution are exempt from the CRS due diligence and reporting obligations. These include the following, where the relevant detailed conditions are met:

- government entities;
- international organisations;
- central banks;
- pension funds of each of the above;
- certain retirement funds (broad and narrow participation retirement funds);
- qualified credit card issuers;
- exempt (regulated) collective investment vehicles;
- trustee documented trusts (where the trustee does the CRS reporting for the trusts); and
- other financial institutions designated as at low risk of being used to evade tax under the local law of a participating jurisdiction.

The EU Commission has published in the *Official Journal of the European Union* a list of the non-reporting financial institutions in the low risk category received from each member state, which it will update as necessary. The UK has not notified any specific types of UK financial institutions that it considers should fall within this category.

5. Which 'financial accounts' fall within the scope of the CRS obligations for reporting financial institutions?

A reporting financial institution is required to review the 'financial accounts' it maintains and to identify whether any such accounts are held by reportable persons (i.e. are reportable accounts); and to annually report certain information on such reportable accounts and reportable persons to its local tax or other competent authorities. There are five categories of financial accounts:

- depositary accounts (such as checking and savings accounts);
- custodial accounts (accounts in which financial assets are held for the benefit of others);
- equity and debt interests (and their equivalents, such as for partnerships and trusts) in certain investment entity financial institutions;
- cash value insurance contracts (broadly contracts insuring against mortality, morbidity, accident, liability or property risk that has a cash value); and
- annuity contracts (contracts where payments are made for a period of time determined in whole or part on life expectancy).

Equity and debt interests held in investment managers who are solely financial institutions because of their investment management activities are specifically carved out of the definition of 'financial accounts'.

The list of financial accounts is subject to certain exemptions. These include (if the relevant conditions are met) certain:

- retirement and pension accounts;
- non-retirement tax favoured products;
- term life insurance contracts;
- accounts held solely by estates;
- escrow accounts;
- depositary accounts that exist due to unreturned overpayments; and
- other low risk accounts designated as such under the local law of a participating jurisdiction.

The EU Commission has published in the *Official Journal of the European Union* a list of excluded accounts in the low risk category received from each member state, which it will update as necessary. The UK nominated and set out in the UK regulations a broad range of financial accounts as low risk 'excluded accounts', including tax favoured products such as ISAs and Junior ISAs, premium bonds, immediate needs annuities, HMRC approved company share option plans, fixed interest and index linked savings certificates issued by UK National Savings and Investments, HMRC registered pension schemes and low value dormant accounts.

Unlike under FATCA, equity and debt interests 'regularly traded on an established securities market' are not exempt accounts (see Q19 below).

6. Which financial accounts are reportable accounts?

The due diligence processes that a reporting financial institution is required to carry out (detailed further below) are aimed at identifying the following types of 'reportable accounts' they maintain:

- financial accounts held by individuals resident in reportable jurisdictions;
- financial accounts held by non-financial entities (NFEs) (i.e. entities that are not financial institutions) resident in reportable jurisdictions, whether such entities are 'passive NFEs' or 'active NFEs', unless such persons are excluded from being reportable persons (see below);
- financial accounts held by 'passive NFEs' with one or more natural 'controlling persons' who are resident in a reportable jurisdiction, even if the passive NFE is not itself resident in a reportable jurisdiction; and
- undocumented accounts.

'Resident in a reportable jurisdiction' means resident under the tax laws of a jurisdiction with which an agreement is in place to report CRS information and is identified on a list of reportable jurisdictions published by the reporting financial institution's jurisdiction. A legal arrangement such as a partnership with no tax residence is

treated as resident in the place of its effective management. Jurisdiction specific guidance on when a person is considered resident under domestic law is available on the OECD Automatic Exchange Portal.

The definition of a 'reportable jurisdiction' is similar to that of a 'participating jurisdiction', except that it effectively excludes a participating jurisdiction that has entered into a non-reciprocal agreement under which it agrees to send but not receive CRS information.

A reportable jurisdiction in relation to a reporting financial institution should generally not include its own jurisdiction.

Financial accounts held by financial institutions are not generally reportable, wherever the financial institution is resident (or located if a branch). An exception to this is where the financial account is held by an investment entity financial institution resident (or located if a branch) in a non-participating jurisdiction that is managed by another financial institution (e.g. a US fund), in which case it is treated as a 'passive NFE' that is required to be looked through to its natural 'controlling persons' to identify if one or more of them is resident in a CRS reportable jurisdiction.

Financial accounts held by certain categories of entities who are resident in a reportable jurisdiction, which overlaps with some categories of active NFE (see below), are also excluded from being reportable accounts. These are:

- corporations whose stock is regularly traded on one or more established securities markets, and related entities of such companies (entities are related if one controls the other or both are under common control, with control including direct or indirect ownership of over 50% of vote and value in an entity);
- government entities;
- international organisations; and
- central banks.

A 'passive NFE' is essentially an NFE that is not an 'active NFE', or is deemed to be a passive NFE by virtue of being an investment entity financial institution resident in a non-participating jurisdiction that is managed by another financial institution.

'Active NFEs' include (amongst other things) any NFEs that meet the relevant conditions to be:

- active NFEs by reason of income and assets;
- publicly traded NFEs;
- governmental entities, international organisations, central banks or their wholly owned entities;
- holding NFEs that are members of a non-financial group;
- start-up NFEs;
- NFEs that are liquidating or emerging from bankruptcy;
- treasury centres that are members of a non-financial group; or
- non-profit NFEs.

An 'undocumented account' arises when a reporting financial institution is unable to obtain information from an account holder in respect of a pre-existing account. This could either be the result of inadequate procedures being implemented by a reporting financial institution to obtain the necessary information or where the account holder is recalcitrant.

7. What are the key deadlines for reporting financial institutions in early adopter jurisdictions?

The deadlines for the key CRS due diligence and reporting obligations in the early adopter jurisdictions are summarised in the table below.

Obligation	Deadline
Implement CRS compliant on-boarding procedures for new accounts opened on or after 1 January 2016	1 January 2016
Complete due diligence on high value (>US$1m) pre-existing individual accounts open as at 31 December 2015	31 December 2016
Complete due diligence on all other pre-existing accounts open as at 31 December 2015 (i.e. pre-existing entity accounts with an account balance or value that exceeds US$250,000 (in aggregate) as at 31 December 2015 and low value individual accounts)	31 December 2017
File first annual report (for the 2016 calendar year) with local tax or other competent authority, and complete any related tax authority notification/ portal registration	By 2017 deadline applicable in local jurisdiction (examples of reporting deadlines include 31 May in the UK and Cayman Islands, 30 June in each of the British Crown Dependencies, Luxembourg and Ireland)
The CRS information received by the local tax or other competent authority is required to be exchanged for the first time with each other reportable jurisdiction with which a suitable instrument is in place	30 September 2017

Some participating jurisdictions require reporting financial institutions to notify their status. For example, the Cayman Islands (which is an early adopter jurisdiction) requires that the Cayman Tax Information Authority is provided with a one-off notification from reporting Cayman financial institutions by 30 April of the first year of them being required to report – i.e. by 30 April 2017 for reporting Cayman financial institutions in existence during 2016.

Reporting financial institutions may be required to notify individual account holders before any report is made about them to any tax or other competent authorities. This is a specific requirement of the DAC and therefore is mandatory for EU financial institutions under their local law implementing the DAC. Other jurisdictions such as Guernsey also have such a requirement.

Under the UK regulations, the account holder notification deadline is 31 January following the calendar year in which the account is first identified as reportable. In practice, the HMRC CRS guidance suggests that a direct communication to account holders that will be reported on is not needed and instead this requirement could be met through a one-off general paper or electronic communication, such as by way of an update to terms and conditions, and could be included in the self-certification or account opening documents.

Separately to this process, HMRC will require financial

intermediaries (which includes financial institutions) and tax advisers to write to customers to tell them about automatic exchange of information, disclosure opportunities and penalties for failing to declare liabilities relating to offshore financial accounts.

8. Are there any optional variations to the due diligence requirements that could impact on timing?

The CRS provides for various options, any number of which a participating jurisdiction may permit reporting financial institutions in its jurisdiction to apply. This could have an effect on the type and timing of due diligence processes applied and timing of reporting relevant accounts. Some of these potential options include allowing reporting financial institutions to elect to:

- apply the more stringent due diligence procedures for new accounts to all or a clearly identified group of pre-existing accounts (although the rules otherwise applicable to pre-existing accounts still apply);
- apply the more stringent due diligence procedures for pre-existing high value individual accounts to all or a clearly identified group of pre-existing low value individual accounts, so as to avoid the requirement to monitor whether the account balance or value of low value individual accounts subsequently exceeds the $1m threshold at the end of each calendar year;
- apply a de minimis threshold to all or a clearly identified group of pre-existing entity accounts, such that accounts with an aggregate account balance or value of $250,000 or less (or local currency equivalent) as at 31 December 2015 (or relevant later date in 'later adopter' jurisdictions) are not subject to review, unless and until the $250,000 threshold is exceeded at the end of a later calendar year; and/or
- treat new accounts opened by holders of pre-existing accounts as pre-existing accounts, with the benefit of a potentially longer period in which to complete the due diligence process and the ability to rely on information already collected in relation to such account holders for AML/KYC and other regulatory purposes, provided certain conditions are met (see question 10 below).

Each EU member state is permitted under the DAC to provide any of the above options under its local CRS implementing legislation.

A jurisdiction offering such options may require formal elections to be made for a reporting financial institution to benefit.

9. What is the wider approach and what impact does it have on the account holder data that can be collected?

The wider approach is intended to enable reporting financial institutions to collect and maintain information on the tax residence of account holders, even where the account holder is not resident in a reportable jurisdiction during the reporting period. This is especially helpful given that further jurisdictions are expected to become reportable jurisdictions in future. Where the wider approach is adopted, it gives reporting financial institutions comfort from a data protection law compliance perspective because they are obliged to collect and retain information on where account holders are resident. Many jurisdictions, including the UK, are taking such a wider approach, as indicated on the OECD Automatic Exchange Portal, although for some (such as Ireland) it only applies for a transition period. The due diligence obligations described below, which relate to identifying reportable accounts, should be read in light of the wider approach of generally identifying the tax residence of account holders.

Reporting is still limited to information on accounts held by residents of reportable jurisdictions, although jurisdictions may allow wider reporting at local level for even greater efficiency.

10. What are the due diligence procedures for new accounts?

Reporting financial institutions are required to carry out different due diligence procedures on financial accounts, depending upon whether the financial accounts are new or pre-existing accounts, individual or entity accounts.

For new accounts, there is generally an obligation to obtain self-certifications to determine the tax residence of the account holder (and, where applicable, the controlling persons) from the outset, whereas for pre-existing accounts reporting financial institutions can generally rely on information they already hold on file.

For reporting financial institutions in 'early adopter' jurisdictions, new account opening procedures should be applied to all financial accounts opened on or after 1 January 2016, unless a new account is treated as a pre-existing account.

If the reporting financial institution is in a participating jurisdiction that applies a wider definition of 'pre-existing account' to allow new accounts opened by an account holder that holds a pre-existing account with the reporting financial institution to be treated as pre-existing accounts, it may exercise such an option, provided that the relevant conditions applicable under local law are met.

Where the account is held by joint or multiple individual account holders, the procedures should be applied to each account holder.

New individual accounts

The procedures that should be applied to new individual accounts:

- Obtain upon account opening a valid self-certification, which may be part of the account opening documentation. The self-certification may be any form but must be signed or positively affirmed by the account holder, be dated, and must include the account holder's name, address, jurisdiction(s) of tax residence, tax identification number(s) (TIN(s)) and date of birth.
- Carry out a completeness check on the self-certification. Reject an incomplete self-certification and make a further request for a valid self-certification.
- Check and confirm the reasonableness of such self-certification based on consistency with the information that was obtained in connection with the account opening, including documentation collected pursuant to AML/KYC procedures. The reasonableness can only be confirmed if the reporting financial institution does not know or have reason to know that the self-certification is incorrect or unreliable. If there is reason to believe that the self-certification is incorrect or unreliable, then a valid self-certification or reasonable explanation and documentation supporting the reasonableness of the self-certification should be obtained.
- If the self-certification establishes that the account holder is tax resident in any reportable jurisdiction(s), then the account should be treated as reportable.
- Monitor the account for any changes of circumstances that might affect the tax residence of the account and obtain a valid self-certification if there is a change that causes the reporting financial institution to know, or

have reason to know, that the original self-certification is incorrect or unreliable.

New entity accounts

The due diligence procedures to be applied to new entity accounts have two parts:

1. Establish if the account is held by one or more entities tax resident in a reportable jurisdiction.
2. If the new entity account is held by a passive NFE, establish whether the entity is controlled directly or indirectly by one or more natural persons who are resident in a reportable jurisdiction.

New accounts opened by holders of pre-existing accounts may potentially be treated as pre-existing accounts instead of new accounts in certain circumstances (see above).

- The starting point for the due diligence process for a new entity account could be to obtain a self-certification from the new entity account holder(s). The self-certification must be signed or positively affirmed by the account holder, be dated, and must include the account holder's name, address, jurisdiction(s) of tax residence, and TIN(s).
- Alternatively, the OECD CRS Implementation Handbook suggests that the starting point could be to establish whether, based on publicly available information and/or information in its possession, it could be reasonably determined that the account holder is not a reportable person and therefore the account is not reportable in relation to the account holder (e.g. see question 5 above for a discussion of which financial accounts are reportable or non-reportable).
- If, using such alternative approach, it cannot be reasonably determined that the new entity account holder is not a passive NFE or is not otherwise reportable, then a valid self-certification would need to be obtained from the entity. If such reasonable determination is made, then no self-certification is required unless there is a change of circumstances.
- Although self-certifications should always be provided by account holders who are or may be passive NFEs, self-certifications relating to the natural controlling persons of a passive NFE account holder can be obtained either from the account holder or the natural controlling persons themselves. Such self-certifications should include the same details relating to the natural controlling persons as described above in relation to new individual account holders.
- The completeness and reasonableness checks described above need to be completed in relation to any self-certification form(s) obtained.
- If the account holder is determined to be resident in a reportable jurisdiction, then the account should be treated as a reportable account. If the account holder is a passive NFE with one or more natural controlling persons resident in a reportable jurisdiction, then the account must be treated as reportable (even if the passive NFE is not itself resident in a reportable jurisdiction).
- The account should be monitored for any change of circumstances. If there is a change that causes the reporting financial institution to know or have reason to know that the self-certifications(s) or other account documentation is incorrect or unreliable, then a fresh self-certification should be obtained within 90 days of becoming aware of the change (or, if later, the end of the reporting period).

Timing of obtaining self-certifications

The OECD CRS suggests that the self-certification must be obtained on 'day one', as a condition precedent to opening the new account. However, the OECD FAQs allows for the possibility of a participating jurisdiction relaxing this position by allowing for a 90-day grace period in certain circumstances. The OECD FAQs (FAQ 20) provide that where a self-certification is obtained at account opening, 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. The FAQ acknowledges that 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.

OECD FAQ 20 also expresses the OECD's expectation that jurisdictions have strong measures in place to ensure that valid self-certifications are always obtained for new accounts, given that obtaining a self-certification for new accounts is a critical aspect of ensuring that the CRS is effective. 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.

However, UK HMRC CRS guidance provides that such a 'grace period' can be applied, but suggests that if a UK reporting financial institution has used proper endeavours but failed to obtain a self-certification within 90 days of opening the account then the account does not need to be closed but should be reported if there are any indicia of residence in a reportable jurisdiction.

11. What are the due diligence procedures for pre-existing accounts?

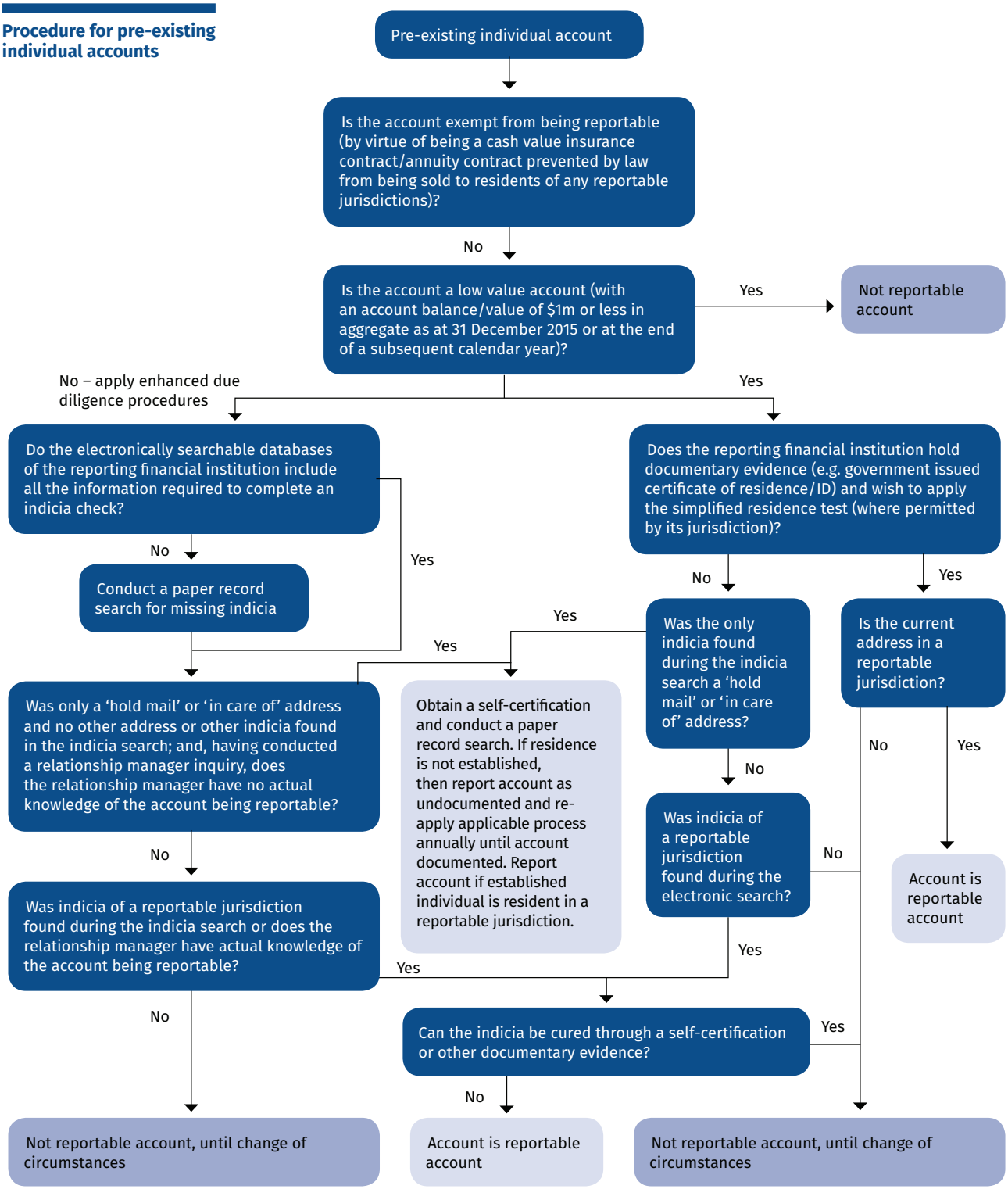
The due diligence procedures applicable to pre-existing accounts are complex and vary depending upon whether the account is a high or low value individual account or an entity account. High value individual accounts are subject to enhanced review procedures compared to those applicable to low value individual accounts.

A reminder of the due diligence deadlines applicable in relevant early adopter jurisdictions are below.

Type of pre-existing account holder	Category of account as at 31 December 2015	Deadline
Individual	High value (>$1m in aggregate)	31 December 2016
Individual	Low value (≤$1m in aggregate)	31 December 2017
Entity	All accounts, subject to a $250,000 de minimis, where applicable	31 December 2017

New accounts may in certain circumstances be treated as pre-existing accounts (see Q10 above).

Procedure for pre-existing individual accounts



The relevant indicia are:

1. Identification of the account holder as resident in a reportable jurisdiction.
2. Current mailing or residence address in a reportable jurisdiction.
3. One or more telephone numbers in a reportable jurisdiction and none in the jurisdiction of the reporting financial institution.
4. Current standing instructions (other than for depositary accounts) to repeatedly transfer funds to a reportable jurisdiction(s).
5. Current effective power of attorney or signatory authority granted to a person with an address in a reportable jurisdiction.
6. A current 'hold mail' instruction or 'in-care-of' address where there is no other address of the account holder on file.

The due diligence procedures should be applied to each holder of a joint account, although the account balance or value should not be split between them for the purposes of applying any threshold tests.

Pre-existing individual accounts

Where pre-existing individual accounts are low value (i.e. have an aggregate balance or value of $1m or less as at 31 December 2015 (or a relevant later date in 'later adopter' jurisdictions)), the account balance or value as at 31 December of each subsequent year must be reviewed; and, where the $1m threshold is exceeded, the procedures for high value accounts must be carried out within the next calendar year.

The diagram opposite summarises the procedure in relation to pre-existing individual accounts.

Pre-existing entity accounts

The procedures that should be applied to pre-existing entity accounts are as follows:

- If the reporting financial institution can benefit from applying the $250,000 de minimis, then pre-existing accounts with an account balance or value of $250,000 or less do not need to be reviewed. Such a reporting financial institution that elects to apply such a de minimis threshold must review the account balance at 31 December each year to determine if the balance has exceeded the $250,000 threshold and review any account where the threshold is exceeded, completing the due diligence procedures for pre-existing entity accounts within the next calendar year.
- The information maintained for regulatory or customer relationship purposes (including information collected pursuant to AML/KYC procedures) should be reviewed to determine whether the information indicates that the account holder is resident in a reportable jurisdiction (e.g. through place of incorporation or address). If the information indicates that the account holder is resident in a reportable jurisdiction, the reporting financial institution must treat the account as reportable in relation to the account holder unless: it obtains a self-certification from the account holder; or it reasonably determines, based on information in its possession or that is publicly available, that the account holder is not a reportable person.
- If it cannot be reasonably determined on the basis of such information that the entity account holder is not a passive NFE, then a valid self-certification would need to be obtained from the entity in relation to its own status and tax residence.
- Where the entity account holder is, or is deemed to be, a passive NFE, the reporting financial institution may, for the purposes of establishing whether the passive NFE has one or more natural controlling persons resident in a reportable jurisdiction, rely on:
  - information collected and maintained pursuant to AML/KYC procedures in the case of a pre-existing entity account held by one or more NFEs with an aggregate account balance or value that does not exceed $1m, and perform an indicia search on that information to determine if any controlling persons are resident in a reportable jurisdiction(s); or
  - a self-certification from the account holder or such controlling person(s) of the jurisdiction(s) in which the controlling person(s) is resident for tax purposes.
- If any natural controlling persons of a passive NFE are identified as resident in a reportable jurisdiction(s), they and the passive NFE itself are reportable.
- Where any self-certifications are obtained, those self-certifications should contain certain information, and completeness and reasonableness checks must be carried out, as described above in relation to new entity accounts and (in the case of controlling persons) new individual accounts. Changes of circumstances must also be monitored and self-certifications obtained if necessary, as described above.

12. Who are the natural controlling persons of a passive NFE?

If an entity account holder is a passive NFE, then the financial institution must 'look through' that entity to identify its controlling persons. If the controlling persons are resident in any reportable jurisdiction(s), then information in relation to the financial account must be reported, including details of the account holder and each reportable controlling person.

The term 'controlling persons' is interpreted in a manner consistent with the Financial Action Task Force (FATF) recommendations, under which 'controlling person' corresponds to the term 'beneficial owner'. For an entity that is a legal person, the term 'controlling persons' means the natural person(s) who exercises control over the entity, generally the natural person(s) with a controlling ownership interest (in terms of vote or value) in the entity. Determining a controlling ownership interest will depend on the ownership structure of the entity; and control over the entity may be exercised by direct or indirect ownership (or shareholding) of one or more intermediate entities. For example, controlling persons could include any natural person that holds directly or indirectly more than 25% of the shares or voting rights of an entity as a beneficial owner. If no such person exists, then any natural person that otherwise exercises control over the management of the entity (e.g. the senior managing official of the company) is deemed to be the controlling person.

In the case of a partnership and similar arrangements, 'controlling person' means, consistent with 'beneficial owner' as described in the FATF recommendations, any natural person who exercises control through direct or indirect ownership of the capital or profits of the partnership, who has voting rights in the partnership, or who otherwise exercises control over the management of the partnership or similar arrangement. The natural persons controlling a partnership may be difficult to establish, especially for example where a US limited partnership fund is treated as a passive NFE by virtue of being managed by a financial institution and in a non-CRS participating jurisdiction. It may be difficult for such a US fund to establish whether it has natural controlling persons, especially where limited partnership interests are held by different types of entities.

In the case of a trust, the term 'controlling persons' means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust. If the settlor, trustee, protector or beneficiary is an entity, the reporting financial institution must identify the controlling persons of such entity. The CRS due diligence and reporting obligations relating to trusts are complex.

The above principles under the FATF recommendations do not entirely sit comfortably with CRS principles,

particularly that of 'no duplicative reporting', if the requirement to 'look through' a chain of legal entities described above might include looking through other reporting financial institutions in the chain. The OECD is considering this point.

13. Can reporting financial institutions delegate their CRS obligations?

Yes. Reporting financial institutions can delegate their CRS due diligence and reporting obligations to service providers. However, the financial institution remains ultimately responsible for fulfilling the obligations. Therefore, any local law financial penalties or other sanctions for breaches of the applicable CRS rules will be imposed on the financial institution, not the service provider. Reporting financial institutions should document their arrangements with their service providers and include suitable contractual protections against liabilities suffered by the financial institutions as a result of breaches by the service provider.

Unlike with the FATCA and UK FATCA regimes, there is no formal 'sponsoring entity' regime.

What information is reportable?

Account type	Information reportable
All ● accounts identified as held by individuals or entities resident in a reportable jurisdiction(s) ● accounts held by passive NFEs with one or more natural controlling persons resident in a reportable jurisdiction(s)	● name; ● address; ● jurisdiction of residence; ● Tax Identification Number (TIN); ● date of birth (individuals); ● place of birth (individuals); ● account number or functional equivalent; ● name and identifying number (if any) of reporting financial institution; and ● account balance or value (including the cash value/ surrender value of cash value insurance contracts and annuity contracts) at the end of the calendar year or other reporting period (with negative balances reported as nil), or the fact of the closure of the account (if closed during the year).
Custodial accounts	● total gross amount of interest; ● total gross amount of dividends; ● total gross amount of other income paid or credited to the account; and ● the total gross proceeds from the sale or redemption of property paid or credited to the account.
Depositary accounts	The total amount of gross interest paid or credited to the account in the calendar year or other reporting period.
Other accounts	The total gross amount paid or credited to the account, including the aggregate amount of redemption payments made to the account holder during the calendar year or other appropriate reporting period.

14. What form(s) of self-certifications should be used?

There is no prescribed form of self-certification and therefore no industry wide approach to self-certifications. To be valid, self-certifications must be signed (or otherwise positively affirmed) by the account holder, dated at the latest at the date of receipt and collect the bare minimum information required (as discussed above in relation to the due diligence procedures at Q10 and Q11).

Versions of self-certification forms have been released by the Business and Industry Advisory Committee to the OECD. There are also various versions issued by industry bodies and also versions drafted for Cayman Islands financial institutions approved by the Cayman authorities. Many service providers and large financial institutions use their own template forms. The approach taken in these forms vary – some use a three form approach for individual account holders, entity account holders and controlling persons; others use a two form approach dealing with the collection of controlling person information on an individual or entity form. Some forms, such as the Cayman Islands approved forms, seek to collect FATCA, UK FATCA and CRS information but can be adapted easily for use in relation to any combination of those regimes.

The self-certification forms do not expire, unlike certain US tax forms used for FATCA purposes. They should be replaced following a change of circumstances that makes relevant information included on the forms incorrect.

15. What information is reportable for a calendar year or other reporting period?

A summary of the information to be reported is set out in the adjacent table. For participating jurisdictions that are early adopters, this applies to the calendar years from 2016 onwards.

In relation to accounts identified as held by passive NFEs with one or more natural controlling persons resident in a reportable jurisdiction(s), the passive NFE *and* each controlling person resident in a reportable jurisdiction is reported, even if the passive NFE is not itself resident in a reportable jurisdiction.

The TIN and date of birth are not required to be reported in respect of pre-existing accounts if they are not in the reporting financial institution's records and not required by domestic law to be collected (subject to reasonable efforts to obtain it). Place of birth is not required to be reported in respect of new and pre-existing accounts unless it is required to be obtained and reported under local law and contained in the reporting financial institution's electronically searchable data.

Information reported should be in the currency in which the account is denominated, with any currency conversions, to or from US Dollars, such as in relation to thresholds, being calculated based on the spot rate on the last day of the year.

Some jurisdictions (not including the UK) may opt to phase in gross proceed reporting.

Comparison of FATCA and CRS

Issue	FATCA	CRS
Registration	Non-US financial institutions are required to register with the US Internal Revenue Service and obtain a GIIN, unless an exemption applies. An FFI agreement with the US is required, unless located in a Model 1 jurisdiction.	There is no such registration requirement or equivalent to a GIIN. Registration on electronic portals for CRS reporting may be required. There is no contractual nexus between financial institutions (FIs) and any government.
Responsible officer requirement	Yes, to effect registration and act as a point of contact for the US IRS queries in relation to registration only. An authorised person is required instead if in a Model 1 jurisdiction.	No
Sanctions for non-compliance	Potential FATCA withholdings at 30% from payments to non-compliant non-US FIs. Financial penalties and other potential sanctions (civil and/or criminal) under local law implementing an intergovernmental agreement.	No withholding tax; only financial penalties and other potential sanctions (civil and/or criminal) under local law implementing CRS.
The entities are treated as reporting FIs and therefore within the scope of the obligations	FATCA applies to non-US investment entities, depositary institutions, custodial institutions and specified insurance company FIs, subject to exemptions for certain deemed compliant/non-reporting categories.	The four main types of entities treated as FIs are essentially the same. However, FATCA includes some additional exemptions, such as in relation to 'local client base' FIs not contained in the CRS. Therefore, there are potentially entities not subject to FATCA which are or will be within the scope of CRS obligations. Another example is where charities fall within the definition of FI: they may potentially benefit from deemed compliant/non-reporting FI status as 'non-profit organisations' under FATCA, but they would be 'reporting FIs' under CRS.
Who are reportable persons?	Certain US citizens/green card holders/residents are reportable. US financial institutions are reportable, unless exempt.	Residents of reportable jurisdictions (participating jurisdictions receiving CRS information from, as well as providing CRS information to, other jurisdictions). Citizenship is not relevant. This difference is also reflected in the indicia for pre-existing account due diligence purposes. FIs in reportable jurisdictions are not reportable. An investment entity FI in a non-CRS participating jurisdiction that is managed by another FI (e.g. a US fund) is treated as a passive NFE and 'looked through' to its natural controlling persons. The account is reportable if such controlling persons are resident in any reportable jurisdictions.
Account balance/value thresholds below which financial accounts do not need to be reviewed	$50,000 de minimis for depositary accounts. Pre-existing accounts de minimis thresholds of $50,000 for individual and $250,000 for entity accounts.	Only a $250,000 de minimis for pre-existing entity accounts applies. Under FATCA such an account does not need to be reviewed until the $1m threshold is exceeded at the end of a subsequent calendar year. Under CRS, once the $250,000 threshold is exceeded at the end of a subsequent calendar year, the account needs to be reviewed. This could result in FATCA reporting being brought forward if the account is identified before the $1m threshold is exceeded.
Financial accounts	Financial accounts subject to due diligence and reporting include equity and debt interests in investment entity financial institutions, custodial accounts, depositary accounts, cash value contracts and annuity contracts, subject to certain exemptions. Equity and debt interests 'regularly traded on an established securities market' are not financial accounts.	The categories of financial account are essentially the same but some of the exemptions are different to those under FATCA. Most notably, there is no exemption for equity and debt interests 'regularly traded on an established securities market'. Although most listed equity and debt interests should be held by non-reportable FIs, this approach potentially gives rise to additional due diligence burdens and practical challenges for reporting FI issuers of such interests (e.g. listed funds), given the lack of any real nexus with the investors in such interests and the potential for interests to quickly change hands on the secondary market. The practical 'solution' in the UK, under draft HMRC CRS guidance, is that uncertificated interests held in CREST do not need to be reviewed or reported on by a UK financial institution issuer of the interests, as that responsibility should fall on CREST members or sponsors. However, such UK issuers would need to conduct pre-existing account and periodic new account due diligence on the certificated equity/debt interests traded on the secondary market, as well as due diligence on primary market issuances of equity/debt interests. Other jurisdictions may take a different approach. For example, Jersey treats such regularly traded interests as exempt 'low risk' accounts.
Reporting in first year of regime	Only account balance and value reported in addition to account holder information for 2014.	Account balance and value, income paid on the account and gross proceeds paid to the account reported in addition to account holder information for 2016.
Sponsoring entity regime	Yes	No, but (as under FATCA) delegation of obligations to service providers is permitted.
Status and obligations of investment managers	Most investment managers are certified deemed compliant/non-reporting FIs with no due diligence or reporting obligations, by virtue of their investment activities being their sole activity that makes them a financial institution.	Investment managers who are treated as certified deemed compliant/non-reporting FIs and technically reporting FIs but are not treated as having financial accounts. The effect is there is nothing to report, but any tax authority notification or nil reporting obligations applicable in the investment manager's jurisdiction will need to be complied with.

Some jurisdictions, such as the UK, will not require reporting financial institutions with no reportable accounts to file nil reports. Where accounts are reportable accounts for a particular year but the account balances/values and amounts of gross proceeds are nil, nil reports are required to be filed.

16. When does an account holder become reportable?

CRS reports should contain information on financial accounts identified through the due diligence procedures as reportable accounts during the previous calendar year; and any reportable accounts identified in previous years unless a change of circumstances means that such account ceased to be reportable.

Therefore, the first CRS report for reporting financial institutions in relevant early adopter jurisdictions should cover (at least) new accounts opened in 2016 and high value (>US$1m) pre-existing individual accounts identified as reportable (given the 31 December 2016 deadline). Pre-existing entity and individual low value accounts will either be reported in 2017 or 2018, depending upon when the reporting financial institution identifies the reportable accounts.

The due diligence process could be completed in respect of financial accounts on a date that falls in an earlier calendar year than required and therefore could be reportable earlier than perhaps envisaged. This could occur, for example, where the due diligence process used for FATCA and/or (where relevant) UK FATCA compliance purposes generally identifies the tax residence of the reporting financial institution's account holders, given that the pre-existing entity and low value individual account due diligence processes will have to be completed under those regimes by 30 June 2016 but not until 31 December 2017 under CRS. Many reporting financial institutions will have been collecting self-certification forms that request information on the jurisdiction of residence of the account holder and controlling persons of passive NFEs, not just whether such persons are specified/reportable persons under FATCA/UK FATCA.

17. What is the required format of the CRS reports to be filed?

The CRS includes an XML schema format for CRS reporting. However, participating jurisdictions may require reporting in a jurisdiction specific prescribed format on an electronic portal, which may be based on the OECD CRS XML schema. The OECD Automatic Exchange Portal includes information on which jurisdictions are using the OECD CRS schema and which are adopting their own domestic electronic reporting formats.

Advance registration by a reporting financial institution on the local electronic portal may be required, although this process may already have been completed if it registered for FATCA reporting purposes. Jurisdictions where nil reporting is optional, such as the UK, generally do not require portal registration where no reports are going to be filed.

18. What is the interaction between CRS and other automatic exchange of information regimes?

For the moment at least, the US is sticking with FATCA, so the FATCA and CRS regimes sit side by side with non-US financial institutions having to navigate the various differences between the two regimes. (See Q19 for a high level summary of some of the key differences.)

Both the UK FATCA (a regime applicable to financial institutions in the UK, British Crown Dependencies and Overseas Territories) and the 'EU Savings Directive' (applicable to financial institutions in the EU and certain third countries) have effectively been superseded by the CRS, subject to transitional measures. On 10 November 2015, the EU Savings Directive measures were repealed, with effect from 1 January 2016 for each EU jurisdiction, except for Austria, which retains the EU Savings Directive and delays CRS implementation until 1 January 2017 because of the broader scope of the CRS regime.

UK FATCA will be phased out and should be fully repealed by affected jurisdictions by 2017. It is expected that financial institutions in affected jurisdictions will have both CRS and UK FATCA reporting obligations in 2017 for the 2016 calendar year. HMRC intends to ensure the reporting of certain financial account information, which is reportable under UK FATCA in 2017 but is not required to be reported under CRS, such as in relation to pre-existing entity and low value individual accounts required to be due diligenced by 30 June 2016 under UK FATCA but not until 31 December 2017 under CRS. Duplicate reporting should not however be required in the transitional year of 2017. It remains to be seen how this will work from a practical perspective for Bermudan financial institutions required to report to HMRC on financial accounts held by UK residents under UK FATCA and required to report to the Bermudan authorities on financial accounts held by residents of reportable jurisdictions (including, in theory, the UK).

UK resident non-domiciled individual holders of accounts in financial institutions in British Crown Dependencies and Overseas Territories already benefit on an elective basis from the special alternative reporting regime (ARR), which is based on UK tax year rather than calendar year reporting. They will effectively lose the ARR benefits after the 2014 and 2015 reporting periods, as there is no similar regime under CRS.

19. What are some of the key differences between the FATCA and CRS regimes?

Although CRS is modelled on FATCA, particularly the Model 1 intergovernmental approach to FATCA compliance, there are some significant differences between the two regimes. (For high level differences between the two regimes, see the table on the previous page.)

20. Final thoughts?

Reporting financial institutions should already have CRS compliance programmes in place but, as identified above, there remain a great many practical issues, as well as differences between FATCA and CRS and jurisdictional variations in CRS rules to grapple with.

Reporting financial institutions should ensure that, if they have not already done so, their account holder terms and conditions and offering documents are updated to contain CRS related protections, such as the ability to request, process and disclose required account holder information without liability and to be able to close accounts and impose economic sanctions on recalcitrant account holders who may cause the financial institution to suffer financial penalties under local law. ■