

FATCA and Common Reporting Standards ("CRS") regimes in UAE

Background

Do you know that UAE signed the Convention on Mutual Administrative Assistance in Tax Matters ("MAC"), the Declaration of Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information ("MCAA") and the Unilateral Declaration in April 2017?

The CRS was developed in response to the G20 request by the OECD during the Global Forum held in Berlin and came into force in October 2014.

Both the MAC and MCAA form the legal basis for the implementation of The Standard for Automatic Exchange of Financial Account Information ("AEOI") in Tax Matters, Second Edition ("OECD Standard") in the UAE. The MAC was ratified by the UAE according to Federal Law No. 54 of 2018 and the MCAA according to Federal Law No. 48 of 2018.

The OECD Standard sets out the required information to be exchanged, the types of entities required to report, the different types of financial accounts and account holders in scope and the common due diligence procedures to be followed by Reporting Financial Institutions ("RFIs"). The CRS went live in the UAE with an effective go-live date of 1 January 2017. UAE Regulatory Authorities and the UAE MoF have issued UAE CRS legislation (collectively referred to as "UAE CRS Regulations").

FATCA is a United States ("US") federal law with a global outreach aimed at curbing offshore tax evasion by US persons. It was enacted by the US in 2010. FATCA requires Financial Institutions outside the US referred to as Foreign Financial Institutions ("FFIs") to report information on financial accounts held by US persons.

The UAE signed an Intergovernmental Agreement with the United States of America on 17 June 2015 with an effective ("go-live") date of 1 July 2014 ("UAE-US IGA"). The UAE-US IGA is a Model 1B IGA and accordingly does not provide for reciprocal information sharing by the US.

Who is impacted by CRS?

Under the CRS, UAE RFIs are required to identify Financial Accounts that are held by an Account Holder that is a Reportable Person or by a Passive NFE with one or more Controlling Persons who are Reportable Persons, and report certain financial account information on an annual basis to the Regulator or UAE MoF (for unregulated entities).

What types of entities are Financial Institutions under CRS?

FIs for the purposes of CRS are broadly defined as:

- a) Custodial Institutions.
- b) Depository Institutions.
- c) Investment Entities.
- d) Specified Insurance Companies

These include banks, custodians, investment traders, asset/wealth managers, funds and life insurance companies but are not limited to these types of entities.

What is a UAE Reporting Financial Institution ("UAE RFI")?

An UAE RFI means any FI that is not a Non-Reporting FI



What is a Non-Reporting Financial Institution?

Non-Reporting FIs for the purposes of CRS are broadly defined as:

- a) a Governmental Entity, International Organization or Central Bank, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution;
- b) a Broad Participation Retirement Fund; a Narrow Participation Retirement Fund; a Pension Fund of a Governmental Entity, International Organization or Central Bank; or a Qualified Credit Card Issuer;
- c) any other Entity that presents a low risk of being used to evade tax, has substantially similar characteristics to any of the Entities described in a) and (b) above;
- d) an Exempt Collective Investment Vehicle

What is a Non-Financial Entity ("NFE")?

An NFE is any Entity which is not an FI. An NFE can be classified as either an Active or Passive NFE. Any NFE that does not meet the criteria to be an Active NFE will be a Passive NFE.

What is the difference between Active NFE and Passive NFE?

The term "NFE" means any Entity that is not a Financial Institution.

The term "Passive NFE" means any: (i) NFE that is not an Active NFE; or (ii) an Investment Entity described below that is not a Participating Jurisdiction Financial Institution.

(The term "Participating Jurisdiction Financial Institution" means (i) any Financial Institution that is resident in a Participating Jurisdiction, but excludes any branch of that Financial Institution that is located outside such Participating Jurisdiction; and (ii) any branch of a Financial Institution that is not resident in a Participating Jurisdiction, if that branch is located in such Participating Jurisdiction.)

1. 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 an Investment Entity described below.
2. that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:
 - a. 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;
 - b. individual and collective portfolio management; or
 - c. otherwise investing, administering, or managing Financial Assets or money on behalf of other persons; or



The term "Active NFE" means any NFE that meets any of the following criteria:

- a) less than 50% of the NFE's gross income for the preceding calendar year is passive income and less than 50% of the assets held by the NFE during the preceding calendar year are assets that produce or are held for the production of passive income;
- b) the stock of the NFE is regularly traded on an established securities market or the NFE is a Related Entity of an Entity the stock of which is regularly traded on an established securities market;
- c) the NFE is a Governmental Entity, an International Organisation, a Central Bank, or an Entity wholly owned by one or more of the foregoing;
- d) substantially all of the activities of the NFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution, except that an Entity does not qualify for this status.
if the Entity functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;
- e) the NFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFE does not qualify for this exception after the date that is 24 months after the date of the initial organisation of the NFE;
- f) the NFE was not a Financial Institution in the past five years, and is in the process of liquidating its assets or is reorganising with the intent to continue or recommence operations in a business other than that of a Financial Institution;
- g) the NFE primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution; or
- h) the NFE meets all of the following requirements:
 - i. it is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organisation, civic league or an organisation operated exclusively for the promotion of social welfare;
 - ii. it is exempt from income tax in its jurisdiction of residence;
 - iii. it has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
 - iv. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents do not permit any income or assets of the NFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFE has purchased; and
 - v. the applicable laws of the NFE's jurisdiction of residence or the NFE's formation documents require that, upon the NFE's liquidation or dissolution, all of its assets be distributed to a Governmental Entity or other non-profit organisation, or escheat to the government of the NFE's jurisdiction of residence or any political subdivision thereof.



What could be termed as passive income?

Passive income includes the portion of income that consists of:

- Dividends and other distributions of income;
- Interest;
- Income equivalent to interest;
- Rents and royalties, other than rents and royalties derived in the active conduct of a trade or business conducted, at least in part, by employees of the NFE;
- Annuities;
- The excess of gains over losses from the sale or exchange of property that gives rise to passive income described previously;
- The excess of gains over losses from transactions (including futures, forwards, options and similar transactions) in any Financial Assets;
- The excess of foreign currency gains over foreign currency losses;
- Net income from swaps;
- Amounts received under Cash Value Insurance Contracts.

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

Do Active Non-Financial Entities ("NFEs") or Passive NFEs have reporting obligations under CRS?

Under CRS, a UAE FI includes any entity that:

- i. accepts deposits in the ordinary course of a banking or similar business (a Depository Institution);
- ii. holds financial assets for the account of others as a substantial portion of its business (a Custodial Institution);
- iii. is engaged primarily in the business of investing, reinvesting, trading securities, partnership interests, commodities or similar financial instruments (an Investment Entity); or
- iv. issues or makes payments in respect of insurance or annuity contracts (a Specified Insurance Company).

Entities which are not UAE FIs are considered NFEs for the purposes of CRS. This could be an Active NFE or Passive NFE as defined under the CRS regulations.

Active or Passive NFEs do not have reporting (or nil return) filing obligations under the CRS regulations.



What are the obligations of a Reporting UAE RFI under CRS?

UAE RFIs are required to comply with the UAE CRS Regulations. Broadly, UAE RFIs must:

- a) Register with their Regulator or UAE MoF (in the case of unregulated entities) for CRS purposes
- b) Perform due diligence on all financial accounts that it maintains
- c) Annually report all reportable accounts that it maintains or file a nil return if it does not maintain any reportable accounts to the Regulator or UAE MoF (in the case of an unregulated entity);
- d) Continuously monitor for changes in circumstances that results in the change of an Account Holder's CRS status
- e) Annually report information to the Regulator or MoF (in the case of unregulated entities) about certain individual accounts that are "undocumented account"

Please note this is not an exhaustive list and the UAE CRS Regulations must be consulted.

Are UAE RFIs required to submit nil returns?

If a Reporting UAE FI has carried out due diligence on Account Holders and identified that it does not maintain any reportable accounts, the UAE RFI is required to submit a nil return(s) via its Regulator or the UAE MoF for unregulated entities. This must be completed through the portal you are registered with for CRS reporting by the deadline.

How are joint accounts treated for CRS reporting purposes?

With respect to a jointly held account, each joint holder is treated as an Account Holder for purposes of determining whether the account is a Reportable Account. Thus, an account is a Reportable Account if any of the Account Holders is a Reportable Person or a Passive NFE with one or more Controlling Persons who are Reportable Persons.

When more than one Reportable Person is a joint holder, each Reportable Person is treated as an Account Holder and is attributed the entire balance of the jointly held account, including for purposes of applying the aggregation rules.

How is information exchanged under CRS?

UAE RFIs must report the details of Reportable Accounts by the stipulated deadline each year (30 June, unless the reporting deadline has been extended). Information will be transmitted to the UAE MoF which will in turn exchange the information with foreign Exchange Partner Jurisdictions.

What penalties are imposed on Financial Institutions for failure to obtain a valid self-certification and/or validate such self-certification?

A fine in the amount of Dirhams (1,000) one thousand shall be imposed on any FI who opens a New Account without obtaining a valid self-certification and/or failing to validate such self-certification.



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What penalties are imposed on Account Holders for the provision of a false self-certification?

A fine in the amount of Dirhams (20,000) twenty thousand shall be imposed on any Account Holder or Controlling Person, as the case may be, if the self certification that is required to be submitted by such Account Holder or Controlling Person to the FI contains any inaccurate or incorrect information and the Account Holder or Controlling Persons knows or should have known that the information provided is inaccurate or incorrect.

For detailed list of FAQs issued by Ministry of Finance ("MOF"), please refer below link,

<https://www.mof.gov.ae/en/StrategicPartnerships/Documents/CRS%20ENGLISH.pdf>

For information on regulations issued with respect to CRS and FATCA in UAE, please refer below link of MOF,

<https://www.mof.gov.ae/en/StrategicPartnerships/Pages/CRS.aspx>

UAE FATCA/CRS portal is live now and can be accessed at below link,

<https://fatcacrs.mof.gov.ae/#/>

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