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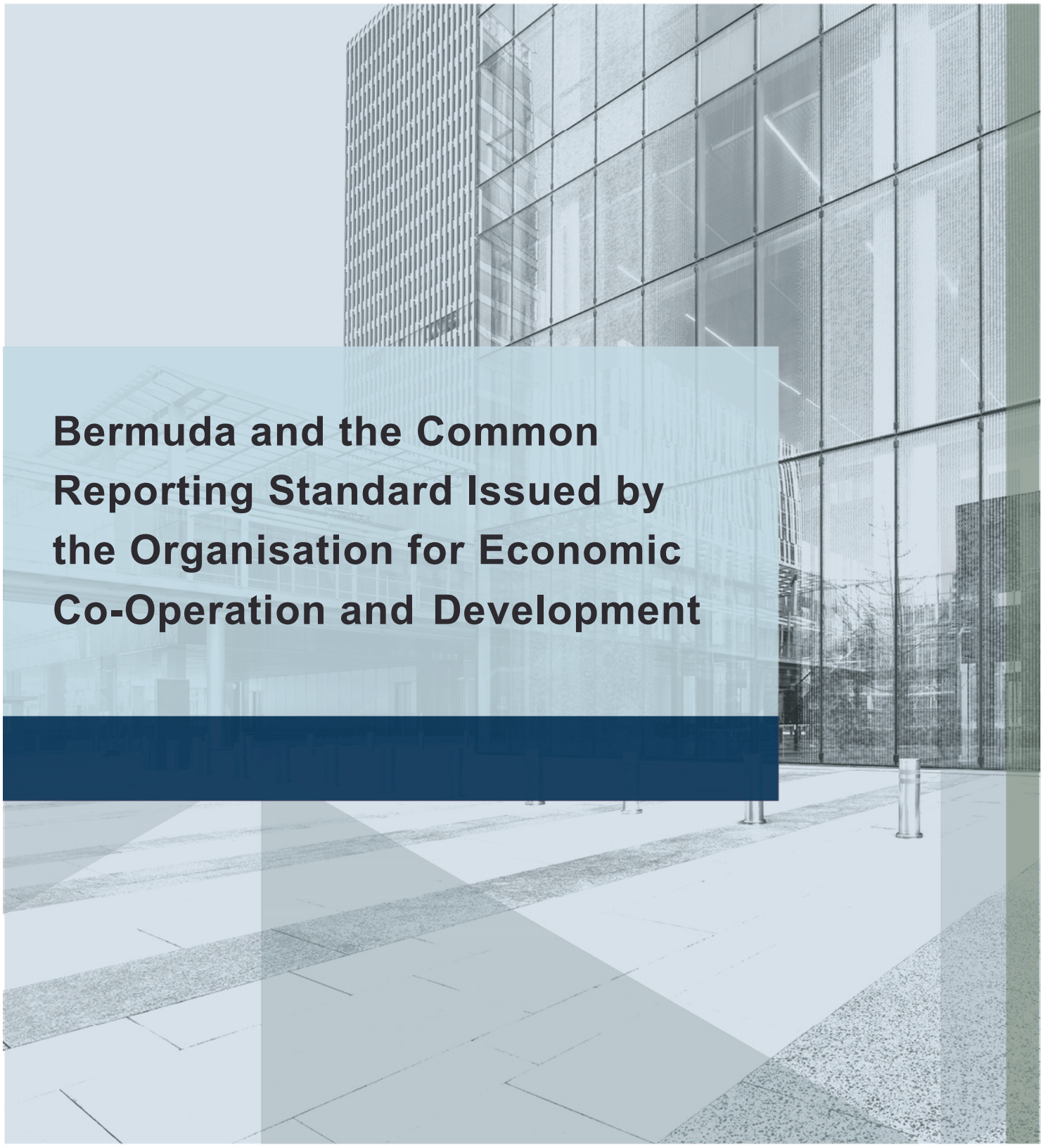

Bermuda and the Common Reporting Standard Issued by the Organisation for Economic Co-Operation and Development

Preface

This publication has been prepared to provide an overview of the common reporting standard issued by the Organisation for Economic Co-Operation and Development ("**OECD**"). It deals in broad terms with the implementation of the common reporting standard in Bermuda. It is not intended to be exhaustive, or to be a substitute for legal advice or a legal opinion, but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Persons are also advised to consult their tax, legal and other professional advisers in their respective jurisdictions as necessary.

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1. INTRODUCTION

The OECD Standard for Automatic Exchange of Financial Account Information (commonly known as the Common Reporting Standard or "**CRS**") is a global information exchange regime developed to facilitate and standardise the automatic exchange of information ("**AEOI**") on residents' assets and income between participating jurisdictions on an annual basis.

Bermuda has implemented the CRS into local legislation through the International Cooperation (Tax Information Exchange Agreements) Common Reporting Standard Regulations 2017 (as amended) (the "**CRS Regulations**") pursuant to the International Cooperation (Tax Information Exchange Agreements) Act 2005, as amended by the International Cooperation (Tax Information Exchange Agreements) Amendment (No. 2) Act 2017 (the "**TIEA Act**" and, together with the CRS Regulations, the "**CRS Legislation**").

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the "**Convention**") was extended to Bermuda by the United Kingdom with effect from 1 January 2014 and permits participating countries to enter into agreements that provide for the AEOI with respect to certain tax matters. Through the operation of the Convention, Bermuda, along with more than 100 other countries, have signed or committed to sign a Multilateral Competent Authority Agreement providing the legal basis through which countries can agree to the CRS.

Bermuda was one of the first countries to agree to implement the AEOI under the CRS (referred to as the "**Early Adopter Group**"), with the first exchanges of information between competent authorities of participating having taken place on 30 September 2017. The United States ("**U.S.**"), although an OECD member, is not part of the Early Adopter Group and will instead continue to rely on the provisions of the U.S. Internal Revenue Code commonly known as the Foreign Account Tax Compliance Act ("**FATCA**") and related intergovernmental agreements regarding the AEOI in relation to tax matters.

2. HOW DOES THE CRS AFFECT BERMUDA ENTITIES?

Similarly to FATCA, CRS (as implemented by the CRS Legislation) requires certain Bermuda reporting financial institutions ("**Reporting FIs**") to identify the tax residency of their account holders and then to report certain information on reportable accounts maintained for such account holders, being both new and pre-existing accounts held by individuals and entities (which includes trusts and foundations) or, if they have no reportable accounts in respect of the previous calendar year, to file a nil return. In the case of any non-individual account holder that is a "passive non-financial entity" ("**Passive NFE**"), a Reporting FI is also required to gather information and report on the individuals that ultimately control or beneficially own such entities (i.e. "**controlling persons**").

"**Financial Institution**" is a broad concept and covers "custodial institutions", "depository institutions", "specified insurance companies" and "investment entities". The latter category includes entities whose income is primarily attributable to (re)investing or trading in financial assets, if the relevant entity is "managed by" another Financial Institution (a "**Managed Investment Entity**"). In some cases, organisations that have been unaffected by FATCA may find they are required to comply with the CRS. Bermuda entities should therefore check their CRS classification. In particular, some of the specific exemptions to Reporting FI status for certain low-risk entities under FATCA do not appear in the CRS.

Pre-existing accounts are those maintained by a Reporting FI as of 31 December 2015, with new accounts being those maintained by a Reporting FI opened on or after 1 January 2016.

The overall identification and reporting process under the CRS is similar to that under FATCA. However there are some key differences. In particular:

- **The CRS is based on tax residency.** The CRS is based on tax residency rather than citizenship, to reflect the fact that the U.S. is unusual in taxing the worldwide income of its citizens.
- **More Bermuda entities will be treated as Reporting FIs under CRS.** The narrower scope of exemptions under CRS is expected to result in a greater number of Bermuda entities being treated as Reporting FIs than under FATCA.
- **The volume of reportable data for Bermuda RFIs is also likely to increase substantially under the CRS.** To date, the impact of FATCA on entities with little or no nexus with the US may have been relatively light. However, the expected number of participating jurisdictions under CRS means that, for many Reporting FIs, the CRS will result in an increased compliance burden requiring preparation and management.
- **The thresholds for *de minimis* Financial Accounts are significantly reduced under CRS, compared to FATCA.** There are no *de minimis* thresholds applicable to any individual accounts under the CRS, whether pre-existing or new. However, Reporting FIs may be able to leverage information obtained under existing AML/CDD procedures in the case of pre-existing accounts. Pre-existing entity accounts with an aggregate balance of US$250,000 or less are exempted as *de minimis* – although if that threshold is exceeded in future years, the account will become reportable. For new accounts (for individuals or entities), there are no *de minimis* thresholds, so every new entity or individual account opened on or after 1 January 2016 will require self-certification to be obtained (and validated against the Reporting FI's records).
- **The CRS does not impose withholding tax.** Unlike FATCA, which imposes a 30% withholding tax on US-source income and other US-related payments made to or by a non-participating foreign financial institution in the event of non-compliance, the CRS does not impose a back-up withholding tax regime. Instead, penalties for non-compliance are specified under the TIEA.

3. WHAT ARE THE KEY DATES FOR BERMUDA REPORTING FIS?

- **30 April 2021** – All Reporting FIs must register with/notify the Ministry of Finance of Bermuda (the "**MoF**"), as the jurisdiction's competent authority for CRS purposes, on or before the next 30 April after the entity became a Reporting FI;
- **31 May 2021** – Reporting FIs must complete their reporting/filing of returns to the MoF on or before 31 May in each year following the calendar year to which the return relates.[1]

[1] Regulation 6(2) of the CRS Regulations required Reporting FIs to provide a nil report to the MoF where they have no reportable accounts.

4. WHAT STEPS DO BERMUDA REPORTING FIS NEED TO TAKE?

Reporting FIs are required to establish and maintain written policies and procedures to comply with and apply the CRS.[2] Again, similarly to FATCA, Reporting FIs will need to adapt their onboarding procedures for new investors in order to capture the requisite information that needs to be reported in order to be compliant with the CRS.[3]

The MoF has issued sample self-certification forms to assist Reporting FIs with their CRS reporting requirements. Self-certifications should be obtained and validated as part of a Reporting FI's account opening procedures. Where it is not possible to obtain and validate a self-certification on "day one" of the account opening process, one should be obtained as soon as practicable, and in any event, no later than 90 days after the account has been opened.

5. WHAT INFORMATION NEEDS TO BE NOTIFIED?

A Reporting FI is required to register with/notify the MoF no later than 30 April in the first calendar year in which the Reporting FI is required to comply with the reporting obligations with the following information:

(a) The institution's name and any employer tax number for payroll tax purposes given to it by the MoF;

(b) Its type or types of classification under the CRS;

(c) The full name, address, business entity, position and contact details (including an electronic address) of an individual the institution has authorised to be its principal point of contact for CRS compliance.

The Reporting FI must notify the MoF immediately of any change to the information provided.

6. WHAT INFORMATION NEEDS TO BE REPORTED?

On or before 31 May in each year, a Reporting FI will be required to report the following information to the MoF in respect of each "reportable account":

- The name, address, jurisdiction(s) of tax residence, tax identification number(s), date and place of birth of each account holder that is a "reportable person" (and each of its controlling persons, in the case of an account holder that is a Passive NFE);
- Account number (or functional equivalent);
- Name and identifying number (if any) of the Reporting FI; and

[2] See section 4A(1B) of the TIEA Act.

[3] Due diligence procedures should capture the tax residency of account holders – so for instance, new account holders may be provided with self-certification forms; and, in the case of funds and other collective investment vehicles, for example, the constitutional documents, offering documents and subscription documents may be updated to incorporate CRS requirements to obtain self-certification and generally to ensure that the relevant entity is able to comply with CRS.

- Certain financial information (e.g. account balance or value and certain gross amounts paid or credited to the account during the relevant reporting period).

Reporting FIs which did not maintain "reportable accounts" are required to file a nil return with the MoF.

7. REPORTING INFORMATION

The requisite reporting by Reporting FIs is done by Reporting FIs through a Bermuda web-based tax information reporting portal (the "**Bermuda Electronic Portal**"). Information provided by a Reporting FI to the MoF via the Bermuda Electronic Portal will be exchanged automatically by the MoF to the relevant tax authorities in each participating jurisdiction. The MoF is required to publish periodically a list of jurisdictions to be treated as participating jurisdictions for the purposes of CRS. All information exchanged is required to be subject to confidentiality and other data safeguards.

8. OFFENCES

In the event that the TIEA Act and CRS Regulations are contravened, persons and reporting FIs, as applicable, risk committing various offences. The range of offences is extensive an the penalties and fines associated with breach are significant.

A person commits an offence if a person makes a self-declaration that is false in any material particular. For this purpose, it does not matter if the self-certification was made outside of Bermuda, the person did not know, or had no reason to know that the self-certification was false, or that the self-certification was given to the institution by someone else.

Further, a person commits an offence, *inter alia*, if (i) it contravenes any regulation in Part 2 of the CRS Regulations (dealing with application of the CRS), (ii) in complying with an obligation under Regulation 6 of the CRS Regulations (Obligation to make a return), the person gives the MoF inaccurate information (the "**Act**") and (a) the inaccuracy is due to a failure to comply with the due diligence requirements of Part 2 of the CRS Regulations or is deliberate, (b) the person knew of the inaccuracy when the act was done but did not inform the MoF at the time, or (c) the person discovered the inaccuracy after doing the act, but did not take reasonable steps to inform the MoF.

A person is liable to a civil penalty not exceeding $5,000 if that person contravenes or fails to comply with section 4A(1B) or (1C) of the TIEA Act (obligation to comply with CRS and the CRS avoidance arrangements) with any obligation under the CRS Regulations.

9. FURTHER GUIDANCE

For further guidance on the CRS please contact us or your primary tax advisers.