

FATCA & CRS update: CBDT issues updated Guidance Note for implementation of rules for FATCA & CRS reporting in India

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In brief

During 2015, the Indian Revenue Authorities had amended the Income-tax Rules, 1962 to introduce the system of Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) reporting in India (for the notified rules on FATCA reporting you may refer to our [news alert dated 11 August 2015](#)), and subsequently, had released guidance note for the same on 31 August 2015.

Further, on 31 December 2015 the Indian Revenue authorities have now issued a more detailed guidance note on implementation of FATCA and CRS reporting requirements as prescribed under the Indian income-tax rules. The objective of this guidance note is to provide more clarity on the specific definitions and related implementation guidelines with illustrative examples for the benefit of Indian Financial Institutions.

The guidance note endeavours to explain FATCA and CRS reporting requirements in a simple manner in order to assist Indian Financial Institutions support in complying with the reporting requirements. This news alert provides an overview of key issues clarified by the Indian Revenue authorities in the guidance note.

In detail

The guidance note¹ reiterates that reporting obligations under FATCA and CRS apply only to entities treated as Reporting Financial Institutions. The term Financial Institution is defined to mean:

Custodial institution – entities such as central depositories, custodians, banks, brokers, depository participants, etc. From an international perspective, it may be noted that all banks or brokers may not qualify as custodial

institutions under global CRS interpretations as certain institutions view brokers (especially “pure” execution brokers) as investment entities. Therefore, it would be important to carry out a proper analysis of the business model of the financial institutions to ascertain their status.

- Depository institution - entities such as saving banks, commercial banks, credit unions, etc.
- Investment entity – entities such as mutual funds, collective investment vehicles,

exchange traded funds, private equity funds, venture capital funds, etc.

- Specified insurance company – insurance company which is obligated to make payment with respect to cash value insurance contract or annuity contract.

Some of the key issues clarified in the updated guidance note include:

- **Financial institution which is involved in more than one category of activity**

Where a reporting entity qualifies for more than one

¹ First Guidance Note released by the CBDT on 31 August 2015

category of financial institution [e.g., (i) Depository Institution and (ii) Custodial Institution], in that case, while the reporting entity would register with U.S. IRS under a single GIIN, it would need separate registrations for each categories with the Indian Tax Authorities. On a related note, such entity would also

need to submit separate Form 61B for each categories of registration with the Indian tax authorities.

This Guidance note also envisages a situation where a reporting entity qualifies as a financial institution under a specific category. However, the entity maintains multiple categories of reportable accounts such as depository

accounts, custodial accounts, etc. In such a scenario, the Guidance note specifies while that the reporting entity would need to only register itself under the specific category of financial institution, it would however need to report both category of accounts under this registration.

• **Specific inclusions specified under the Financial Institution categories**

Depository Institutions includes	<ul style="list-style-type: none"> Non-Banking Financial Companies
Specified Insurance Company excludes	<p>Excludes insurance companies providing following products:</p> <ul style="list-style-type: none"> General Insurance & Term Life Insurance; Indemnity reinsurance contracts & Specified single premium life insurance contracts
Investment Entity includes	<ul style="list-style-type: none"> Collective Investment Vehicles Mutual Fund, Exchange Traded Fund, Hedge Fund, Venture Capital Fund, Private Equity, Leveraged Buyout Fund
Custodial Account includes	<ul style="list-style-type: none"> Mutual Fund held in demat form

• **Identification of Controlling persons through Beneficial Owners**

During the process of identification of reportable accounts, details of controlling persons are required in case of passive non-financial entities (NFE) and entities which are not based in U.S.A. A passive NFE means

(i) any non-financial entity which is not an active non-financial entity; or

(ii) an investment entity the gross income of which is primarily attributable to investing, reinvesting, or trading in financial assets, if the entity is managed by another RFI; or

(iii) a withholding foreign partnership or withholding foreign trust

The due diligence criteria for entities includes the requirement to identify the Beneficial Owners or controlling persons of the entities in certain instances.

An entity account is treated as a Reportable Account where the entity has one or more controlling persons who are specified US persons (under FATCA) or Reportable persons (under CRS). For different types of entities, Beneficial Owners are described below:

Entity	Beneficial Owner is natural person(s) who whether acting alone or together, or through one or more juridical person
Company	<p>a. Has a controlling ownership interest (>25%) or</p> <p>b. Who exercises control through right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements</p>
Partnership Firm	Has ownership of/ entitlement to more than fifteen per cent (15 %) of capital or profits

	of the partnership
Unincorporated Association or Body of Individuals	Has ownership of or entitlement to more than fifteen per cent (15 %) of the property or capital or profits of such association or body of individuals
Trust	<ul style="list-style-type: none"> The concept of 'Beneficial Owner' may not be relevant in the case of a trust as the settlor, trustees, protector (if any), beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust would be treated as the controlling person. If the settlor, trustee, protector, or beneficiary is an entity, the reporting financial institution must identify the controlling persons of such entity as discussed above.

Except in the case of a trust, where the reporting entity is unable to identify a natural person as the controlling person, the beneficial owner for such entity would be determined by identifying the relevant natural person who holds the position of senior managing official for such entity. Exemption from assessment of beneficial ownership is provided where the controlling interest is held by a company listed on a stock exchange or subsidiary of such company.

Please note that the OECD commentary on Automatic Exchange of Information, clarifies that trustees, protectors, beneficiaries, etc. need not actually be exercising ultimate effective control over the trust to be a controlling person.

• **Curing of Indicia**

The Guidance Note provides that where the electronic search gives an indication of residence which the financial institution considers to be incorrect, it could cure such indicia by obtaining a self-certification from the account holder. The Financial Institution could rely on a self-certification obtained previously. In this context, it may be relevant to note that the above relaxation in the guidance note is only an exceptional remedy and may not be construable as the general rule.

• **Relationship Manager (RM) Test**

The Guidance Note defines a Relationship Manager for application of the RM Test on high value accounts, as an employee or officer of the financial institution who has been assigned responsibility for specific account holders on an ongoing basis and who provides advice to Account Holders regarding their accounts as well as recommending and arranging for the provision of financial products, services and other related assistance.

• **Clarifications for aggregation in case of financial accounts**

For the purpose of determining the aggregate balance of financial accounts held by a person, the Guidance Note prescribes that the Reporting Financial Institution would need to take into consideration all financial accounts held by such person or any related entity. Based on this aggregation, the Reporting Financial Institution would then need to proceed to determine the value status (high value (or) low value) of such account.

Where a financial accounts' reporting manager knows, or has reason to know, that certain financials accounts are directly or indirectly owned, controlled, or established (other than in a

fiduciary capacity) by the same person, then the Reporting Financial Institution would need to aggregate all such accounts as directed in the Guidance Note. However, accounts which are exempt from being treated as financial accounts should not be included while determining such aggregate balance.

• **Reporting of interest in the case of custodial and depository accounts**

It has now been clarified that the actual interest paid or credited to the account has to be reported for FATCA & CRS purposes while interest accrued would be excluded for reporting purposes. In this context, please note that the Guidance Note does not specifically define the term "interest paid or credited".

• **Clarification on treatment of Trusts:**

- If the trust is an investment entity, its financial accounts will be debt and equity interests in the entity also, wherein equity interests are held by settlor or beneficiary or any natural person exercising ultimate effective control
- Further, if the settlor or beneficiary are non-residents, their equity interests would be treated as reportable accounts

- Details of financial activity required to be reported for different categories of account holders in case it qualifies as Reporting Financial Institution or Passive Non-Financial Entity
- Residency of Trust to be determined on the basis of the residential status of the trustee. In case of more than one trustee, the Trust to be considered resident of all such countries where the trustee is a resident

- **Draft Self-Certification Forms**

A template for self-certification forms for individuals and entities has been prescribed as part of the Guidance Note. While adopting the template provided, Financial Institutions may also consider inclusion of additional criterion/requirements for making the

documentation more robust.

Please refer Appendix D and E of the updated guidance note:

<http://incometaxindia.gov.in/news/guidance-note-for-fatca-crts-31-12-2015.pdf>

The takeaways

The latest guidance note issued by the Indian Revenue authorities discusses and explains various provisions of the Rules in detail and provides considerable insights to Indian financial institution.

The Indian Revenue authorities have requested stakeholders to provide suggestions so that the note can be further amended to consider evolving issues in FATCA and CRS implementation.

It is imperative for Indian Financial Institutions to review whether their present FATCA and CRS compliance programs, procedures, IT systems etc. are fully equipped to handle the reporting requirements.

Specifically, institutions such as banks, mutual funds, etc. should test capabilities of IT systems to determine whether they support the necessary compliance requirements.

As the timeline for reporting under FATCA & CRS falls due on 31 May 2016 and 31 May 2017 respectively, it is pertinent for the Financial Institutions to ensure that their systems are fully upgraded to meet the implementation requirements.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

Tax & Regulatory Services – Financial Services

Gautam Mehra, *Mumbai*
+91-22 6689 1154
gautam.mehra@in.pwc.com

Aravind Srivatsan, *Chennai*
+91-44 4228 5017
aravind.srivatsan@in.pwc.com

Our Offices

Ahmedabad

President Plaza
1st Floor Plot No 36
Opp Muktidham Derasar
Thaltej Cross Road, SG Highway
Ahmedabad, Gujarat 380054
+91-79 3091 7000

Bangalore

6th Floor
Millenia Tower 'D'
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 7000

Chennai

8th Floor
Prestige Palladium Bayan
129-140 Greams Road
Chennai 600 006
+91 44 4228 5000

Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th
Floor, Road No. 10, Banjara Hills,
Hyderabad – 500034,
Andhra Pradesh
Phone +91-40 44246000

Kolkata

56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake
Kolkata - 700 091, West Bengal
+91-033 2357 9101/
4400 1111

Mumbai

PwC House
Plot No. 18A,
Guru Nanak Road (Station Road),
Bandra (West), Mumbai - 400 050
+91-22 6689 1000

Gurgaon

Building No. 10, Tower - C
17th & 18th Floor,
DLF Cyber City, Gurgaon
Haryana -122002
+91-124 330 6000

Pune

7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
+91-20 4100 4444

For more information

Contact us at
pwctr.knowledgemanagement@in.pwc.com

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