Guidance Notes: Automatic Exchange of Financial Account Information Act, 2016

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I. Purpose

The Securities Commission of The Bahamas (the "Commission") issues these Guidance Notes to assist its registrants and licensees (together, "registrants") in maintaining records in compliance with the provisions of the Automatic Exchange of Financial Account Information Act, 2016 (the "Act").

II. Background and Summary of the Act

In 2010, the United States of America (the "U.S.") enacted the Foreign Account Tax Compliant Act ("FATCA") provisions, which are aimed at reducing tax evasion by U.S. citizens and entities. In particular, FATCA is aimed at detecting U.S. taxpayers who use accounts with offshore financial institutions to conceal income and assets from the Internal Revenue Service (IRS). The substantive FATCA requirements for financial institutions were, in the main, adopted on 1 July 2014.

Anticipating that many countries' domestic laws would otherwise prevent foreign financial institutions from fully complying with FATCA, the G20[1] countries adopted the automatic exchange of information as the new global common reporting standard for the automatic exchange of tax information between multiple countries (the "Common Reporting Standard" or "CRS")[2]. The Common Reporting Standard both maximizes efficiency and reduces cost for financial institutions to share the requisite tax information.

In October 2014, The Bahamas government confirmed its commitment to implementing the new universally agreed global standard, using a bi-lateral approach, by 31 December 2018. On 14

[1] Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, United States, and the European Union.

[2] The Common Reporting Standard is a global standard under which participating jurisdictions agree to exchange information about financial accounts held by individuals and entities in reporting Financial Institutions (FI) in the reporting jurisdiction that relate to account holders resident in the receiving jurisdiction. The CRS consists of the Common Reporting Standards and the Commentary on CRS, as published by the OECD on 15 July 2014.

December 2017, the Government of The Bahamas acceded to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention).

The Act was gazetted in The Bahamas on 29 December 2016, and came into force on 1 January 2017. The Act is supported by the Automatic Exchange of Financial Account Information Regulations, 2017 (the "Regulations") and the guidance notes issued by the Bahamas Competent Authority dated 3 August 2018 (the "Guidance Notes") in respect of CRS.

The purpose of the Act and the Regulations is four-fold:

1) To give effect to the CRS;
2) To confer the necessary powers on the Competent Authority ("CA") - The Minister of Finance - to enter into an agreement with the government of another country for the automatic exchange of financial account information in tax matters;
3) To ensure the proper administration and enforcement of the Act; and
4) To ensure the performance of The Bahamas' obligations in an Agreement made under this Act.

Pursuant to the functions of the Commission, as prescribed in section 12, Securities Industry Act, 2011, the Commission is of the view that to promote an understanding by its registrants in complying with the Act, the Commission should publicly issue guidance notes and explanations.

In particular, the Commission should address its expectations with respect to the following:

1) Applicability of the Act;
2) Duty to register with the Competent Authority;
3) Applicability of Due Diligence Rules; and
4) Engagement of Third Party service providers.

III. Guidance Notes

Applicability

A core requirement of the Act is that Financial Institutions must collect and report specified information to the CA. The CA then exchanges the information with its relevant automatic exchange partners to fulfil The Bahamas' international obligations.

A Bahamian entity must be a financial institution to have reporting obligations. For the purposes of the Commission, the following registrants are considered Financial Institutions and, accordingly, should comply with the Act: a) Depository Institutions; b) Custodian Institutions; c) Investment Entities; and d) Investment Funds.

Depository Institution

A Depository Institution ("DI") is any entity that accepts deposits in the ordinary course of a banking or similar business. These include all registrants that are jointly licensed with the Central Bank of The Bahamas ("CBoB").

For CRS purposes, the meaning of a 'banking or similar business' is required to be applied consistent with the CRS Commentary, which provides a more expansive definition. Accordingly, an entity may be a Depository Institution for CRS purposes even if it is not, or is not required to be, authorised by

the Central Bank of The Bahamas as an authorised deposit-taking institution. In particular, an entity is a Depository Institution if, in the ordinary course of its business with customers, it accepts deposits or other similar investments of funds, and in addition to that activity also regularly engages in one or more of the following activities:

- makes personal, mortgage, industrial or other loans or provides other extensions of credit purchases, sells, discounts or negotiates accounts receivable, instalment obligations, notes, drafts, cheques, bills of exchange, acceptances or other evidences of indebtedness;
- issues letters of credit and negotiates drafts drawn under them;
- provides trust or fiduciary services;
- finances foreign exchange transactions, or
- enters into, purchases or disposes of finance leases or leased assets.

Custody Institution

A Custody Institution ("CI") is any entity that as a substantial portion of its business holds financial assets[3] for the account of others. The "substantive" test is met if the entity's gross income attributable to holding financial assets and related financial services equals to or exceeds 20% of the entity's gross income during the shorter of either: a) the three-year period ending on 31 December or the final day of a non-calendar year accounting period, prior to the year in which the determination is made; or b) the period during which the entity has been in existence.

Gross income attributable to holding financial assets and providing related financial services includes, but is not limited to, the following:

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

Registrants under the Securities Industry Act, 2011 who are licensed to deal as principal and/or agent and who hold client assets in an account in the name of the licensee (as opposed to having assets held

[3] The term "Financial Asset" includes a security (for example, a share of stock in a corporation; partnership or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture, or other evidence of indebtedness), partnership interest, commodity, swap (for example, interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity index swaps, and similar agreements), Insurance Contract or Annuity Contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, swap, Insurance Contract, or Annuity Contract. The term "Financial Asset" does not include a non-debt, direct interest in real property.

with a depository institution directly in the clients' names), are considered as custodial entities. Additionally, certain licensees under the Financial and Corporate Service Provides Act, 2020 may be considered custodial entities.

Investment Entities

CRS broadly defines an Investment Entity as any institution that either primarily conducts as a business specified activities for or on behalf of customers (type A), or primarily derives its gross income from investing or trading in financial assets and is managed by a financial institution (type B).

Specifically, an entity is a type A Investment Entity if it primarily conducts as a business for or on behalf of a customer, one or more of the following activities:

- trading in: money market instruments (cheques, bills, certificates of deposits, derivatives), foreign exchange, exchange interest rate and index instruments, transferable securities and commodity futures;
- individual and collective portfolio management; or
- investing, administering or managing funds or money on behalf of other persons.

An entity is regarded as primarily conducting these activities as a business if its gross income attributable to these activities is at least 50% of its total gross income during the shorter period of either a) the three-years ending on 31 December in the year before its status as an Investment Entity is to be determined, or b) the time the entity has existed.

Gross income remains attributable to activities conducted by an entity even if it is paid to a related entity, such as another company in the same group of companies.

An entity is a type B Investment Entity if:

- its gross income is primarily attributable to investing, reinvesting or trading financial assets, and
- it is managed by a Depository Institution, a Custodial Institution, a Specified Insurance Company or a type A Investment Entity mentioned above, and it meets the requisite financial assets test.

An entity is managed by a financial institution if that financial institution performs, either directly or through another service provider, any of the investing or trading activities described above on behalf of the entity. The activities may be performed as part of managing the entity as a whole, or by appointment to manage all or a portion of the financial assets of the entity.

Registrants who are licensed to manage and/or advise on securities are considered Investment Entities.

An entity is not regarded as being managed by a financial institution if that financial institution does not have discretionary authority to manage the entity's assets, investments or trading activities.

Financial Institutions – Trustee Documented Trusts

The Commission treats a trust as an entity for the Act's purposes, even though it is not considered an entity under common law. For a trust to be a Financial Institution it must fall under at least one of the following categories:

- A Custodial Institution;
- A Depository Institution; or
- An Investment Entity.

The category most likely to apply to trusts is 'Investment Entity'.

Trustee Documented Trusts ("TDTs") are not required to register with the CA in order for their trustees to fulfil reporting obligations with respect to TDTs. The CRS provides for trusts that would ordinarily be considered Reporting Financial Institutions to be considered Non-Reporting Financial Institutions where the trustee of the trust is itself a Reporting Financial Institution and the trustee will complete all of the CRS reporting requirements for the trust. However, the CRS Commentary indicates that the trustee must report the information as the trust would have reported it and identify the TDT with respect to which it is reporting.

Financial Institutions – Multiple Classifications

An entity can be more than one type of financial institution. Where this is the case, the Commission expects the entity to comply with the obligations that specifically apply to each type of financial institution it is (for example, if it is both a Custodial Institution and an Investment Entity, it must review and report both the Custodial Accounts it maintains and the equity or debt interests it issues to investors as an Investment Entity).

IV. Duty to register with the Competent Authority;

A Financial Institution is required to register with the Competent Authority for the purpose of CRS where it has Reportable Accounts. [Regulations 5 of the Regulations]

A Reportable Account is an account held with a Financial Institution by a person tax resident in a Reportable Jurisdiction[4], other than: (i) a corporation the stock of which is regularly traded on one or more established securities markets; (ii) any corporation that is a Related Entity of a corporation described in clause (i); (iii) a Governmental Entity; (iv) an International Organisation; (v) a Central Bank; or (vi) a Financial Institution..

Section 4 of the CRS Act provides that a "Reporting Financial Institution shall apply to the Competent Authority to be registered." On the face of section 4 of the CRS Act, all Reporting Financial Institutions are obligated to apply to the Competent Authority to be registered. However, regulation 5.1 of the CRS Regs provides that "[p]ursuant to section 4 of the Act, a Reporting Financial Institution shall apply to be registered with the Competent Authority, if the Reporting Financial Institution maintains one or more Reportable Accounts". Regulation 5.2 of the CRS Regs provides further that "[w]here a Reporting Financial Institution has registered with the Competent Authority but no longer maintains any

[4] "Reportable Jurisdiction" means a jurisdiction specified in the Second Schedule of the Regulations.

Reportable Accounts, the Reporting Financial Institution shall apply to de-register as a Reporting Financial Institution within 90 days of the end of the calendar year".

V. Applicability of Due Diligence Rules

The due diligence rules application to Financial Institutions differ depending on the nature of the Account. However, the Commission expects the following from all registrants that qualify as Financial Institutions:

a. The registrant has self-certifications on file in respect of its clients. **[Section 6 and 7 (1) (2) of the Act]**.
b. The information provided in the information returns reflect the information maintained in the account opening documents.
c. Information returns are filed with the CA on or before 30 September in respect of the previous fiscal year. **[Section 6 (1)(a) of the Act].**
d. If there is no self-certification on file:
    i. If the account is a New Accounts[5], management should have written documentation explaining the same and advising what further steps will be taken. Note: A Financial Institution should not maintain a New Account where it does not have a self-certificate on file [for a period of longer than 90 days].
    ii. If the account is a Preexisting Account, management should ensure that the records in respect of the account include:
        1. current mailing or residence address;
        2. a certificate of residence issued by an authorised government body (for example, a government or agency thereof, or a municipality) of the jurisdiction in which the payee claims to be a resident;
        3. with respect to an individual, any valid identification issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes;
        4. with respect to an Entity, any official documentation issued by an authorised government body (for example, a government or agency thereof, or a municipality) that includes the name of the Entity and either the address of its principal office in the jurisdiction in which it claims to be a resident or the jurisdiction in which the Entity was incorporated or organised;
        5. any audited financial statement, third-party credit report, bankruptcy filing, or securities regulator's report;
        6. any power of attorney or signature authority forms currently in effect; and
        7. any standing instructions (other than with respect to a Depository Account) to transfer funds currently in effect.

Pursuant to **[Section 6 of the Act]**, an information return must contain the following required information. The Commission therefore expects that all registrants that qualify as Financial Institutions maintain the following information on file in respect of each individual account holder and the Controlling Persons of each account holder that is an entity other than a Financial Institution:

[5] New accounts are accounts that were opened on or subsequent to 1 July 2017.

a. Name
b. Address
c. Jurisdiction of residence
d. Tax Identification Number (TIN)
e. Date of Birth
f. Place of Birth
g. Account number or functional equivalent
h. Name and identifying number (if any) of Reporting Financial Institution
i. Account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account.
j. For each custodial account:
    i. Total gross amount of interest
    ii. Total gross amount of dividends
    iii. Total gross amount of other income paid or credited to the account
    iv. The total gross proceeds from the sale or redemption of financial assets paid or credited to the account.
k. For each Depository Account - the total amount of gross interest paid or credited to the account in the calendar year.
l. For all other accounts - the total amount of gross interest paid or credited to the account including the aggregate amount of redemption payments made to the Account Holder during the calendar year.

Note: Accounts are considered "pre-existing" if opened on or before 30 June 2017.

Pre-existing Entity Accounts with a balance or value not exceeding $250,000 at 30 June 2017 do not need to be reviewed, identified or reported until the account balance exceeds $250,000 at 31 December of a subsequent calendar year.

For the avoidance of doubt, there is no threshold exemption for the review, identification or reporting of New Entity Accounts, or Individuals Accounts. **[Regulation 5(5)(6) of the Regulations].**

Finally it is expected that documents/records are maintained in the English Language. **[Section 7 (3) (b) of the Act and Regulation 8 of the Regulations].**

VI. Engagement of Third Party service providers.

A Reporting Financial Institution may engage a third party service provider to carry out any of its obligations under the Act. However, where it does so it will continue to be liable for the third party service provider's failure to carry out any of the Reporting Financial Institution's obligations under the Act. Where a third party service provider is engaged by a Reporting Financial Institution, the Reporting Financial Institutions should enter into a written agreement with the third party service provider and shall, pursuant to that agreement, at all times have access to the records and documentary evidence used to identify and report on Reportable Accounts and when requested, provide such records and documentary evidence to the CA; and

VII. Risk Analytics and Examinations Expectations

In the field, staff of the Commission's Risk Analytics and Examinations Department ("RED") will review the books and records of registrants to ensure the books and records are maintained in compliance with the provisions of the **Act, Regulations, Guidance Notes, and CRS.**

This will include inquiries with senior management to confirm whether the registrant has reportable accounts under, Section VIII of the CRS. Staff will then further confirm whether the firm has registered with the CA **[Section 4 (1) of the Act] [Regulation 5 of the Regulations].**

> *Note: The reporting financial institution must register no later than 90 days after the commencement of the Act (1 January 2017) or no later than 90 days after the date the firm becomes a reporting financial institution.*

RED staff will also review the registrant's policies and procedures manual to confirm whether the registrant maintains documented policies and procedures regarding the automatic exchange of financial account information. **[Regulation 3(1) of the Regulations].**

VIII. Conclusion

If you have any questions or comments concerning the above guidance notes, then please email us at info@scb.gov.bs, or contact the Supervision Department at 397-4100.

Please note that nothing in these Guidance Notes supersedes amendments to various Acts and Regulations and that the Minister of Finance is The Competent Authority for CRS/FATCA reporting.

If there are any queries, kindly submit an email to helpdesk@taxreporting.finance.gov.bs or information@taxreporting.finance.gov.bs.

The Competent Authority encourages all Financial Institutions to continue to check the information website at www.taxreporting.finance.gov.bs for updates.

Queries may also be sent in writing to the following:

The Competent Authority for FATCA/CRS
P.O Box N 3017
Nassau, The Bahamas