Regulatory and Reporting Issues
for
Private Client Practitioners

An Update

Society of Trust and Estate Practitioners (STEP) Ireland

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1. Glossary of Abbreviations and acronyms

AEOI – Automatic Exchange of Information

AML – Anti Money Laundering – for which Irish practitioners are regulated under the EU 3rd AML Directive and the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the "2010 Act"), Criminal Justice Act 2013 and Guidelines on the Prevention of the Use of the Financial System for the purpose of Money Laundering and Terrorist Financing[1]. The latest Directive "4th AML Directive" is currently in the process of passing through the EU legislative system and is discussed below.

CFT – Counter Terrorist Financing – commonly referred to in the context of AML.

Competent Authorities – in the context of AML legislation, the governmental departments of the relevant State.

CRS – Common Reporting Standard – the OECD global 'standard' released in July 2014 for the automatic exchange of information between offshore and onshore jurisdictions. 100 countries, including Ireland, have publically committed to adopting this new standard.

KYC /CDD – Know Your Client / Customer Due Diligence in the financial industry – the procedures that practitioners should adopt to verify and identify the client/customer.

FATF – Financial Action Task Force - a specialist body concentrating on the international fight against money laundering, established in 1989 by the G7 and now comprising 34 member jurisdictions including Ireland. This body has issued 'Recommendations' to take account of changing threats to the international financial system which Recommendations are intended to serve as internationally endorsed global standards against money laundering and terrorist financing and the aims of which are to increase transparency and enable countries successfully to take action against illicit use of their financial systems. FATF has established typologies essentially to study methods and trends in money laundering to aid in better understanding the threats. It also evaluates its member countries and imposes sanctions on members; Ireland was last reported on in June 2013[2]. The EU 4th AML Directive was drafted in response to FATF's updated Recommendations. FATF issued a guidance note on 'Transparency and Beneficial Ownership' in October 2014 to assist countries with the implementation of Recommendations 24 and 25 on this subject[3].

FATCA – Foreign Account Tax Compliance Act

FFI – Foreign Financial Institution (under FATCA)

FI – Financial Institution

FIU – Financial Intelligence Unit (the Garda Síochána – Garda Bureau of Fraud Investigation in Ireland) in the context of AML legislation.

Obliged Entities – in the context of AEOI the banks and other financial institutions and professionals who are required to carry out checks/report.

PEPs – politically exposed persons – AML concept relating to those persons and their relatives who are

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[1] Department of Finance publication.

[2] As Ireland has been moved to the level of 'largely compliant' it is no longer on the regular follow up process list. http://www.fatf-gafi.org/countries/d-i/ireland/

[3] See http://www.fatf-gafi.org/topics/fatfrecommendations/documents/transparency-and-beneficial-ownership.html

TIEA – Tax Information Exchange Agreement

2. Anti-Money Laundering Reporting

2.1. Current legislation – 3rd AML Directive and 2010 Act

Professionals recognise the importance of measures to prevent the movement of illicit funds and commit to ensuring such measures are effective. However there is a tension between the right of governments to tackle serious crime and the right of individuals to privacy. There is therefore a need for a balance between gathering financial information to fight illicit money flows and the importance of preserving the legitimate confidentiality of our clients' financial affairs. The AML legislation originating from the EU is one where these balances are sought where minimum standards were imposed on member states but with the scope for states to adopt stricter national measures if they wished. The current AML legislation is the Third Anti-Money Laundering Directive as implemented into Irish law by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

The principles of customer identification, verification and monitoring are at the heart of the principles of 'knowing your client' (KYC). General guidelines issued under the 2010 Act and specific guidelines for professionals including solicitors are available[4]. These guidelines seek to establish an industry standard and may be taken into account by a court in assessing whether a designated person has fulfilled his statutory obligations[5]. Indeed practitioners are aware that these procedures are also checked by professional indemnity insurers in assessing risk management for a solicitor's practice.

The legislation and guidelines adopt a risk based approach whereby the process of customer checking is meant to be more than a document collection exercise at the outset of a business relationship but rather a process spanning the duration of business dealings. This requires practitioners to discriminate between different customers and activities and to use their own 'good judgement'. In effect this expects practitioners to apply formal procedures but also step back and assess a situation giving them room to 'smell a rat'! 'Warning bells' in the mind of the practitioner are not expected to be ignored – further inquiries should be made and reasonable suspicions reported. Typically this will result in a high, medium or low profile categorisation of the client based on the assessment made, however the importance is to ensure the assessment is reviewed regularly throughout the business relationship[6].

Identification of beneficial owner should be the issue most prevalent in the mind of the practitioner dealing with private clients and especially with trusts. Beneficial owner means any individual who ultimately controls or owns a customer or on whose behalf a transaction is conducted[7]. Broadly this is anyone who has an interest in any relevant property of 25 per cent or more. The control may be exercised by means of a chain of natural or legal persons.

More specifically at present practitioners should, prior to starting a business relationship such as advising on private client matters, seek to comply with the obligations set out in the legislation[8] in respect of customers (clients) and the beneficial owners of its customers. Practitioners should

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[4] S.107 Act 2010 power of Minister for justice and Equality to issue guidelines.
[5] S107(2) Act 2010 provides a defence to an offence under the Act for the defendant to prove that s/he took all reasonable steps and exercised all due diligence to avoid committing the offence. S 107(3) provides that the court may have regard to any guidelines applying in determining such steps and diligence.
[6] At least annually. See para 4.23 Guidance notes for Solicitors in AML Obligations 2010, where it is noted that for some clients the risk profile can become more evident once the business relationship has begun.
[7] Ss. 26-30 Act 2010
[8] S. 33 Act 2010

- assess the source of the funds;
- assess the type of customer and business relationship involved; and
- assess the purpose and intended nature of the business relationship.

Each relevant individual should then be identified and verified[9]. In the case of a practitioner acting for an estate, where the practitioner assesses the risk to be standard, s/he should identify and verify the executor(s) or administrator(s) of the estate as the defined beneficial owner for these purposes[10]. If the practitioner is acting for a settlor of a trust and assesses the risk to be standard, s/he should identify and verify the client and identify all persons funding the trust. In the case of a practitioner acting for a trust, it is recommended that, where the practitioner is acting for the trust itself and assesses the risk to be standard, s/he should identify and verify all trustees, protectors, and other persons who hold powers of appointment over the trust fund or have power to give instructions to operate accounts of the trust funds[11].

If the matter relates to 'politically exposed persons' (as defined[12]), further special procedures will need to be adopted.

There is a further obligation for practitioners acting for the above (either the settlor or the trust itself or the estate) to identify (though not necessarily verify) the beneficial owner(s) connected with the customer or service concerned and to understand the ownership and control structure of the entity or arrangement concerned[13]. A beneficial owner of a trust is any of the following

i. Any individual who is entitled to a vested interest in possession, remainder or reversion, whether or not the interest is defeasible, in at least 25% of the capital of the trust property;
ii. In the case of a trust other than one that is set up or operates entirely for the benefit of individuals referred to in paragraph (a), the class of individuals in whose main interest the trust is set up or operates;
iii. Any individual who has control over the trust[14].

Practitioners should identify beneficial owners of a trust but need only verify their identity where reasonably warranted under the risk assessment procedure[15]. Where a beneficiary is entitled to less than 25% of the trust, provided they do not have control over the trust, then they only need to be identified by reference to the class of individuals entitled under the trust and therefore no verification of such identity should be required at least until payment from the trust to a particular beneficiary. Thus beneficiaries in the class of a 'pure' discretionary trusts should be identified but that identity should not need to be verified.

2.2. 4th AML Directive - upcoming

The 4th AML Directive continues the risk focused approach and was initiated to take on board the revised standards set by FATF in February 2012. The directive as initially drafted by the European Commission closely followed the FATF revised Recommendations[16]. The

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[9] By means of documentary evidence giving photographic proof and proof of current addresses by seeing original (or certified copies of) documents from a prescribed class of documents and keeping copies of these (the typical passport and utility bill requirement).
[10] S.29 Act 2010
[11] Irish Department of Justice guidelines Feb 2012 in relation to who is the customer in the case of a trust.
[12] S. 37 Act 2010
[13] S.33(2)(b) Act 2010
[14] Control is defined in s. 28(4) and (5) Act 2010
[15] Ss. 28(2) Act 2010 and 33
[16] February 2013 http://bit/ly/1e7wOGI

Directive[17] is expected to be endorsed by the full Parliament shortly and it needs to be endorsed by the EU Council of Ministers. Members States will then have two years to transpose the Directive into their national law.

The purpose of the Directive is to improve clarity and consistency of rules across all Member States. The proposed changes that pertain to trusts focus on the matter of Beneficial Owners. There is different but detailed changes to beneficial ownership of companies also where there will be a central register for corporate UBOs (ultimate beneficial owners).

The FATF Recommendations 24 and 25 deal with companies and trusts. Recommendation 25 states as follows –

> Recommendation 25
>
> Transparency and beneficial ownership of legal arrangements.
> Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

It must be recognised that FATF represents a minimum standard. Ultimately after protracted negotiations between the Council and the European Parliament the EU has opted to go further than the FATF Recommendations require, such as a central register in each EU country of beneficial ownership of companies and foundations made available to anyone with a 'legitimate interest'[18] and a central register in each EU country of trusts but one that is not public.

Register for Trusts

The European Parliament substantially amended the Commission's original draft Directive putting greater onus on practitioners dealing with trusts by the introduction of a public register for trusts separate to the register for companies. Towards the end of last year, after much lobbying by STEP and the Law Society in Ireland[19] and STEP UK, in an attempt to try to change the direction the 4th AML Directive was heading for trusts (which lobbying focused on the concern that public registers would expose vulnerable individuals to risk and general privacy concerns quite apart from results from other countries proving that ongoing regulation of service providers is more effective if done rigorously than a public register would serve), a compromise text was agreed. The latest version of the text is one which we hope trust

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[17] See Compromise text on Commission proposal 2013 - Council of the EU 12 January 2015 5116/15 http://data.consilium.europa.eu/doc/document/ST-5116-2015-ADD-2/en/pdf

[18] Not as yet defined, indication is that this may include investigative journalists and other concerned citizens, see EU press release http://www.europarl.europa.eu/news/en/news-room/content/20141216IPR02043/html/Money-laundering-Parliament-and-Council-negotiators-agree-on-central-registers .

[19] See joint submission dated January 2014 http://www.step.ie/law-society-and-step-joint-submission-on-the-4th-anti-money-laundering-directive also see summary from STEP.org http://www.step.org/eu-aml-compromise-pragmatic-solution?j=1228528&e=ak@aileenkeogan.ie&l=346_HTML&u=21650987&mid=1062735&jb=0

practitioners can live with and one with which we hope the European Parliament will be content over the long term[20]. Its purpose if to enhance the accessibility of beneficial ownership.

The compromise provides that there will be a central register in each member state for the identification of trusts in each member state ‘when the trust creates tax consequences’ which allows competent authorities and FIUs to access the information. The information on this need not now be made public.

At this stage, it is not anticipated that any of the major trust jurisdictions intend to allow obliged entities (banks and other financial institutions and professional advisers) access to the register. It is not however clear if certain member states will extend this provision beyond the Directive requirements in their enabling legislation. It will be interesting (and concerning) to see if any information gathered in Ireland and circulated under the exchange of information provisions to other member states will then find its way onto local registers in other countries that may be potentially more public.

The information must be able to be accessed in a timely manner by competent authorities and FIUs without alerting the parties to the trust. The register is likely to be managed under the auspices of the Department of Justice. It is therefore expected there will be a further filing requirement for trusts in Ireland to the extent there is a tax event or change in beneficial ownership of a trust, albeit this will not be made public.

It should be noted that information on Irish trusts will already be available to the Irish governmental authorities via other reporting obligations such as

- the 2010 Act in relation to any identified suspicious transactions carried out using the AML risk assessment procedures,
- the registration of the trust if it holds assets under form TR1,
- the registration of discretionary trusts under section 46(15) Capital Acquisitions Tax Consolidation Act 2003,
- the obligations of practitioners to report under section 896A Taxes Consolidation Act 1997,
- the information provided under from CA24 (Inland Revenue Affidavit) at Part 6 Question 10 in the case of Will trusts,
- the expected regulation of charitable trusts under the Charities Act 2009 and the registration of these anyhow with Revenue to obtain charitable tax status,
- the extensive regulation of pension trusts and reporting obligations to the Irish Pensions Board, Central Bank for UCITS and Unit Trusts.

We will therefore await details of how changes to reporting will be affected by the new Directive once brought into Irish law.

The trust provisions are contained in Article 30 set out in the Appendix 1.

Additional Trust AML Checks

Apart from the register the 4th AML Directive introduces the requirement to oblige trustees to obtain and retain adequate, accurate and current information on beneficial ownership of the trust. This information would include the identity of the settlor, trustees, protector, beneficiaries or class of beneficiaries and of any other natural person exercising effective control over the trust and it should be updated within a reasonable period following any change.

[20] See http://data.consilium.europa.eu/doc/document/ST-5116-2015-ADD-2/en/pdf

Now the number of persons to be identified appears to have increased from the 3rd AML Directive. Again each relevant individual should then be identified and verified[21]. In the case of trusts it is recommended that, where the practitioner assesses the risk to be standard, he should identify

- settlor(s),
- trustee(s),
- protector(s),
- identifiable beneficiaries or, where the individual beneficiaries cannot yet be determined, the class of beneficiaries in whose main interest the legal arrangement or entity is set up or operates; and
- other natural persons who exercise effective/ultimate control over a trust through direct or indirect ownership or through other means.[22]

In the case of legal entities such as foundations and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those above are included as beneficial owners. It is interesting to see that foundations may also be included in the company register separately[23].

Furthermore trustees will now be obliged to disclose their status as trustee to obliged entities[24] with which they form a business relationship or carries out an occasional transaction above certain thresholds.

These records will need to be kept and must be maintained on a current basis.

The definition of PEPs is also likely to be extended under the new Directive and now domestic PEPs are no longer exempt. The 4th AML will remove the element of a white list and move more towards a black list methodology, being a list of countries without comparable AML standards or where there is a particular risk.

A checklist for AML checks for practitioners dealing with trusts is set out in the Appendix 2.

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[21] By means of documentary evidence giving photographic proof and proof of current addresses by seeing original (or certified copies of) documents from a prescribed class of documents and keeping copies of these (the typical passport and utility bill requirement).
[22] Article 3 definition “beneficial owner”
[23] Article 29 4th Directive
[24] For example banks, professional advisers, financial institutions carrying out due diligence duties.

3. Exchange of Information for Tax Purposes

We already have the EU Savings Directive assisting the exchange of information for tax purposes between EU members. In this last year (2014/15) two significant reporting obligations came into being that will affect private clients from a practical perspective and which has truly global reach.

The USA started this with FATCA and this has been followed closely by the OECD promoted CRS, the Common Reporting Standard.

Ireland has embraced these reporting standards so much so that FATCA reports will be filed by the Irish Revenue by September next in respect of information gathered and to be reported to them by end July 2015.

Ireland has announced it will implement legislation in Summer 2015 to allow for CRS agreements to be agreed.

3.1. FATCA Ireland and Private Clients including Trusts

The Foreign Account Tax Compliance Act (FATCA) was signed into US law in March 2010, effective from January 2013 as part of the US Hiring Incentives to Restore Employment (HIRE) Act 2010. Its purpose is to increase revenue to the US Internal Revenue Service (IRS) by identifying offshore US accounts that could be used for tax evasion by US residents. It requires institutions outside the US to pass information to the US tax authorities.

While the legislation is controversial, it has now been accepted by many countries[25]. The threat of withholding of 30% tax on institutions with investments in the US[26] and penalties for the institutions appears to have spurred its implementation outside the US. Combined with 'de-risking' for AML purposes however many banks tightened up their entry requirements for accounts and indeed withdrawn financial services for some, including those for law abiding individuals.

Ireland concluded an inter-governmental agreement (IGA) with the US to better facilitate the implementation of FATCA and to provide a reciprocal exchange of information regarding US Financial Accounts held by Irish residents. This IGA was imported into Irish law under Finance Act 2013[27]. The Irish US IGA is based on a model[28] whereby institutions are required to report information directly to the Irish Revenue Commissioners rather than to the IRS and where Ireland then annually automatically exchanges information with the US in respect of reportable accounts. However Financial Institutions (FFIs) as defined still had to register with the IRS being directly to obtain a Global Intermediaries Identification Number (GIIN)[29] before the IRS list was published on 31 December 2014. To ensure the FFI is on this list, registration should have been completed before 24 October 2014.

In October 2014 Irish Revenue Commissioners finalised guidance notes on the implementation of FATCA in Ireland and Financial Accounts Reporting Regulations 2013[30]. Reporting Regulations were published in June 2014 to implement FATCA in Ireland with effect from 1 July 2014.[31]

3.1.1. Summary for trusts

FATCA has implications for trusts and estates whether operating in the US or outside. In the case of trusts, they will likely be either a Financial Institution (FFI, also known as an FI) for the purposes of the legislation or an NFFE.

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[25] All G7 countries, 42 countries hold IGAs and 59 jurisdictions have reached agreements in substance. Model 1, which Ireland has adopted, is reciprocal whereby the US will also share information to the partner country. However Latin America, the Middle East and China have not yet complied and may resist. A fall out is that many institutions are refusing to do business with known Americans because of the compliance costs and enhanced risks. There is also the huge administrative costs associated with compliance. More recently there has been a constitutional challenge taken against the IGA between Canada and the US based on the Charter of Rights and Freedom (privacy, search and seizure) and sovereignty issues including the division of federal and provincial powers in Canada.

[26] FATCA obliges all US paying agents to withhold tax of 30% from payments of US source income that are made to any non-US Financial Institution unless that institution has entered into an agreement with the US IRS to directly report certain information on Account Holders who are US persons. Under the IGA Irish Financial Institutions will not be subject to the 30% withholding tax on US source income provided they comply with the requirements of the Irish legislation.

[27] S. 104 FA 2013

[28] Model IGA published 26 July 2012, Model I similar to the model adopted by the UK, Denmark and Mexico.

[29] Using Form 8957 see Appendix

[30] See www.revenue.ie/en/business/international-tax

[31] S.I. 292/2014

NFFEs do not have FATCA reporting or withholding obligations towards the IRS, but an NFFE, which is a client of, or investor in, a participating FFI may be asked to provide FATCA certification on the US or non-US tax status of their direct or indirect owners.

An investment entity would be any entity that trades in financial instruments, managing a portfolio or managing, administering or investing funds on behalf of another person. It is a broad category so, while typically it would not seem obvious that a trust company or a corporate trustee would fall as a FFI under FATCA, it may. Any entity that is managed by a company that is considered an investment entity is also an FFI. If you have a company that has a professional asset manager, that company is an FFI. The category a trust falls into depends on both the nature of the trust assets and the nature of the trustees. Which category a trust falls into defines the level of reporting, who needs to report for the trust and whether registration is required for either the trust or the trustee.

The status of a trust depends on various factors but ***NOT*** on whether the trust has ***US connections to the settlor, beneficiaries or the ownership of US assets.***

As a trust will need to declare its status to any Financial Institution with which it has dealings (banks, stockbrokers etc.), the trust will need to determine its own status and either claim exemption, register as a Financial Institution (and then report itself) or self-certify that it is an NFFE.

If it is a Financial Institution the trust must be registered and obtain a GIIN and use this number as evidence for other Financial Institutions that it is FATCA compliant. It must then complete a due diligence on the composition of its trust and file a return detailing information about US residents/citizens who are beneficiaries or control the trust or file a nil return annually if there are no US connections as beneficiaries or controllers.

If it is not a Financial Institution it must determine if it is a passive NFFE as defined and self-certify this on a form W-8[32] for giving to Financial Institutions with which they hold accounts to avoid those institutions withholding 30% tax.

If the trust does not hold a Financial Account however this should be noted on the trust file to explain why the trust has not either registered as a Financial Institution or self-certified as a passive NFFE.

Once the trust has determined its status, a note of this should be kept with the trust deed. The status can change if circumstances change.

3.1.2. The Formal Details

Various questions must be asked of the trust/estate entity to know if it requires registration, reporting, self-certification or need do nothing at all other than note its position on the file.

3.1.2.1. Is the entity Irish resident?

The IGA applies to trusts resident in Ireland.

Revenue have confirmed that 'normal residence rules for trusts apply for the purposes of FATCA'. However different criteria apply in determining the residence of a trust under various tax heads. It had been assumed that the CGT test of residence under Section 54 Taxes Consolidation Act 1997 would be the relevant criteria to use in the context of the IGA and Revenue have indicated in correspondence that in the case of some trustees being resident

[32] Form W-8 See Appendix

outside Ireland in effect some of the CGT tests apply. However unusually the residence of the settlor appears to apply in the case of professional trustees[33].

If the trust is not Irish resident, it is not subject to Irish IGA reporting but may still need to report under the US FATCA regulations or under another IGA.

3.1.2.2. Is it a Financial Institution (also known as an FFI – Foreign Financial Institution)?

A ***Financial Institution*** is defined as a Custodial Institution, Depository Institution, Investment Entity, Relevant Holding Company, Relevant Treasury Company and a Specified Insurance Company. In the case of trusts and estates it is likely that the category ***Investment Entity*** will apply to these entities. This category includes an entity that is managed by an entity that conducts as a business one or more of various activities on behalf of a customer (Account Holder) including individual and collective portfolio management and investing, administering or managing funds or money on behalf of other persons. If the entity's gross income from such activities equals or exceeds 50% of the entity's gross income during the shorter of two periods[34] then it is deemed to be an Investment Entity.

Therefore the trust will be an Investment Entity if it engages another Financial Institution such as a stockbroker to manage the trust or financial assets on its behalf on a discretionary basis. This is not however entirely clear and the Irish Revenue guidance notes do not clarify what is meant by these professionally 'managed' trusts. Perhaps the latest update to UK guidance notes on their similar position is therefore helpful which indicates that 'a trust is professionally managed

- Where trustees have appointed a Financial Institution to carry out the day to day functions of the trust beyond just the managing of investments; or
- Where the Financial Institution manages the financial assets and manages the investment strategy.'

Therefore if the trust merely holds a Financial Account and there is no participation by the Financial Institution holding that account, does this make the trust itself a Financial Institution? Strictly speaking it does without further clarification in Ireland. Thus trusts placing trust funds on advisory accounts with investment managers would not seem to make the trust itself a Financial Institution.

3.1.2.3. Is it a Reporting Financial Institution or Exempt/Deemed Compliant?

The Financial Institution then must decide if it is a Reporting Irish Financial Institution or a Non Reporting Irish Financial Institution. A ***Reporting Irish Financial Institution*** is any Irish resident Financial Institutions unless it is exempt from FATCA reporting or deemed compliant for FATCA purposes under Annex II of the IGA or under US Regulations.

Exemption from reporting is categorised under Annex II Part I and includes NTMA, NAMA, Central Bank, and Irish offices of EU institutions or the European Investment Bank and certain retirement funds.

Deemed Compliant Entities are those entities such as sporting and charitable bodies, pension trusts, financial institutions with a local client base, certain collective investment vehicles all listed in Part II of Annex II of the IGA where they are categorised as ***Self Certified Deemed***

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[33] Per Revenue correspondence with STEP Ireland: If all trustees are Irish resident – trust is Irish resident. If some trustees are non-Irish resident – trust is Irish resident if effective administration of trust in Ireland. Professional trustees – residence of the settlor at the time the trust is established is attributed to the trust.

[34] The three year period ending on 31 Dec of the year preceding the year in which the determination is made or the period during which the entity has been in existence.

Compliant Financial Institutions which, in general need not register with the IRS, nor will such an entity have any reporting obligations in relation to any Financial Accounts it may have claim the exemption in the first place[35]. Investment managers and Investment Advisers managing or administering customer funds will also be Deemed Compliant Financial Institutions on condition the customer's assets are deposited in the customer's name with another Financial Institution. Investment Advisers solely giving investment advice and who do not manage or administer customer funds are likely to be treated as NFFEs.

Charitable trusts would therefore fall into this category and not require registration or reporting.

Other trusts that are already established under the above criteria as Investment Entities and therefore as Financial Institutions are then treated as Reporting Financial Institutions.

If the trust is a Reporting Financial Institution because it is managed by a Financial Institution, but that Financial Institution is not the trustee, the trust will be required to register as an Investment Entity unless the trust is able to take advantage of the ***Sponsored Investment Entity*** or the ***Owner Documented Financial Institution*** category.

3.1.2.4. Does the Financial Institution hold a Financial Account?

A ***Financial Account*** is an account maintained by a Financial Institution including equity/debt interests in an Investment Entity. A Financial Institution does not however automatically have Financial Accounts.

Therefore if the trust is a Financial Institution, it needs to assess if it holds any Financial Accounts. Likewise if the trust is not a Financial Institution but holds an account with a Financial Institution, that Financial Institution must assess if the trust account is a Financial Account. For example if the Financial Institution is acting as an executing broker (e.g. not acting on a discretionary basis but only on an advisory basis) then this facility will not be treated as a Financial Account.

The accounts of deceased persons are not treated as Financial Accounts on the condition that the death is noted by the Financial Institution (e.g. the death certificate is noted on the account) the account will not be treated as a Financial Account and so it is not reportable by the estate in the year of death or subsequently.

There may still be a need to identify the controlling person of the trust or estate (if the entity is a Passive NFFE) by virtue of the self-certification route, see below.

An account held by a Financial Institution for a non-financial intermediary (e.g. a solicitor or estate agent) established for the purposes of

- a court order, judgement or other legal matter where the solicitor/estate agent is acting on behalf of their client or
- a sale, lease, exchange of real or personal property with various conditions applying for compliance purposes

is not a Financial Account. It is an ***Intermediary Account (Escrow Account).*** A person holding a Financial Account for another person who himself is not a Financial Institution is not

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[35]See Revenue Guidance Notes issue dated January 2014 at Chap 2 para 3B. Self-Certified Deemed Compliant Financial Institutions. Clarification has been sought by STEP Ireland with the Irish Revenue on whether these bodies need concern themselves at all with FATCA. The Guide currently provides that 'unless specifically stated' the body will not have to register or submit returns or carry out due diligence under FATCA and are deemed self-certified Deemed Compliant Financial Institutions. If the body has US source income it should supply the US payor with self-certification in a particular form to avoid US FATCA withholding tax on that income.

treated as an Account Holder. This applies for nominees, agents, signatories, intermediaries, custodians. Where a parent opens an account for a child, the child (not the parent) is the Account Holder unless it is an Intermediary Account (Escrow Account).

Exempt accounts are listed in Annex II of the IGA and generally relate to pension type accounts, profit sharing schemes and ESOTs. If the account is an exempt account, it is not a Financial Account.

Where the account is not a Financial Account it would appear that it is not reportable nor is there a requirement for registration or a 'nil return' in respect of this.

3.1.2.5. Does the Financial Institution hold a Reportable Financial Account?

A Reportable Financial Account is a Financial Account that is not exempt, is held by one or more ***Specified US persons*** or by a passive NFFR with one or more controlling persons that are Specified US persons and is maintained by a Reporting Financial Institution.

Where the Financial Account is not a Reportable Financial Account, as the Account Holder is not a Specified US person, the Reporting Financial Institution must make a *nil return*.

3.1.3. What should be reported and how?

The reportable information for Financial Institutions that maintain Financial Accounts covers:

- Name, address and US tax identification number (TIN) of each Account Holder who is a Specified US Person;
- Account number;
- Name and identifying number of the reporting Irish institution;
- Account balance or value; and
- Amounts paid gross to the Account Holder and received gross by the account holder.

If it has been established that an Account Holder is a US person, the Financial Institution must obtain a US TIN number for that person. There are various provisions in relation to pre-existing and new accounts in this respect. The accounts are reportable if not exempt for all subsequent years unless the Account Holder ceases to be a US person. There are certain de minimis amounts exempting reporting (e.g.USD50,000 or less for deposits)

Where a trust or an estate is listed as the holder of a Financial Account, the trust is to be treated as the Account Holder rather than any owner or beneficiary.

In the case of a trust which is a Financial Institution, unless it avails of the Sponsored Investment Entity or the Owner Documented Financial Institution category, the trust will need to report in respect of persons who are the beneficial owner of all or a portion of the trust, persons who are beneficiaries entitled to mandatory distributions from the trust (directly or indirectly) and the persons who are beneficiaries who receive discretionary distributions from the trust in the reporting period.

This information must be reported online to Revenue through the ROS system. In turn Revenue will pass on this information to the US within 9 months after the year end to which the information relates, the first exchange to be made by 30 September 2015. Otherwise the Financial Institution is not FATCA compliant and categorised as a Non-Participating Financial Institution. In the case of Irish Financial Institutions, this will apply to those who do not comply with the guidelines and legislation.

It is possible for a trust which is a Financial Institution to provide a Designated Withholding Agent[36] with all relevant information and arrange that this agent reports to the IRS/Irish Revenue on behalf of the trustee.

The identification of the Account Holder may become an issue as the Financial Institution is expected to apply due diligence procedures to identify the Account Holder to ascertain if s/he/it is a Specified US Person[37].

A person is a US person if s/he/it is resident in the US or a US tax citizen. A trust is a US person if

- a court within the US would have authority under applicable law to render orders or judgments concerning substantially all issues regarding the administration of the trust; and
- one or more US persons have the authority to control all substantial decisions of the trust or an estate of a decedent that is a citizen or resident of the US.

The due diligence process requires that

- the Financial Institution identifies certain defined US indicia linked to an Account Holder[38] or
- the Account Holder self-certifies their status to the Financial Institution.

Financial Institutions can rely on self-certification in the following circumstances. Typically this is done on a US form known as an IRS Form W-8 or W-9[39].

For Individual Account Holders

This allows a person to confirm that s/he is not resident in the US and not a US tax citizen for new accounts and if, by using the Financial Institution's existing KYC procedures for anti-money laundering purposes, the confirmation is seen to be reasonable, provided the confirmation is checked against other records of that person, then this is acceptable. For existing accounts, if indicia suggest the Account Holder is a US person further inquiries are required to establish the veracity of the self-certification and this also depends on the level of funds in the Account (ref. low value and high value accounts).

For Entity Account Holders

If the entity is identified as a Specified US Person then the account is reportable unless self-certification determines it is not such a person. Generally there is no de minimis amount for this.

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[36] Such as a participating Financial Institution who agrees to undertake the additional due diligence and reposting required under the US Regulations to treat the Financial Institution as an Owner Documented Financial Institution and so the entity itself need not register with the IRS. If a Financial Institution relies on a third party service provider to fulfil its obligations under FATCA the obligations remain that of the Financial Institution which remains accountable.

[37] As set out in Chapters 7 – 10 of the Guidelines

[38] Indicia include –

- Identification of the account holder as a US resident or citizen,
- unambiguous indication of a US place of birth,
- current US mailing or residence address,
- current US telephone number,
- standing instruction to transfer funds to an account maintained in the US,
- current effective power of attorney or signatory authority to a person with a US address,
- a 'care of' or' hold mail' address (where the review of paper records will then need to be carried out).

[39] See Appendix

If the Financial Institution is not an Irish Financial Institution (or one of another recognised state) then the Financial Institution needs to establish if the entity is a Certified Deemed Compliant Financial Institution (as mentioned above), an Exempt Beneficial Owner or an excepted FFI. If the entity is a Passive NFFE the Financial Institution must obtain a self-certification from the Account Holder to establish its status unless information is publically available or already in its possession whereby it can be reasonably determined to be an active NFFE. If the trust is identified as a passive NFFE the Financial Institution must consider if any of the controlling persons of that entity are a US citizen or tax resident in the US and in this regard can rely on KYC information already gathered for those accounts holding less than USD1 million or in the case of accounts balances exceeding that, the Account Holder or the controlling person can self-certify.

3.1.4. Non-Financial Foreign Entity (NFFE)

Where a trust is not a Financial Institution and holds a Financial Account with a Financial Institution, it will be a Non-Financial Foreign Entity (NFFE).

In such cases the trust is required to prove a self-certification to the Financial Institution in relation to its status as a Passive or Active NFFE as applicable so that the Financial Institution with which the trust holds a Financial Account can carry out due diligence for that NFFE.

A passive NFFE is an NFFE that is not active. An active NFFE is any NFFE that meets one of the various criteria, including that less than 50 per cent of the NFFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50 per cent of the assets held by the NFFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income. For FATCA purposes, income received on assets used as capital in general insurance business should be treated as active rather than passive income. The guidelines as updated now lists what is and is not passive income and passive income includes dividends, interest, rents generally, annuities, excess foreign currency gains over losses.

Where a passive NFFE has controlling persons or beneficiaries that are US persons then its accounts will be reportable accounts but it is the Financial Institution that holds these accounts that will be required to report on the accounts. The trust will need to provide the details to the Financial Institution. However it is now permitted that a controlling person of Passive NFFEs can report their details direct to the IRS rather than to the relevant Financial Institution.

3.1.5. Practical Approach

It is expected that most Irish family trusts would either be

- Financial Institutions (where the trust fund is managed by a Financial Institution on a discretionary basis); or
- Passive NFFEs (as the greater part of the income will be passive).

On this basis the following checklist would be useful for practitioners dealing with trusts.[40]

- Is the trust resident in Ireland? If not, this is not of concern under the Irish IGA but may be under the FATCA regulations that pertain to the place of its residence. If it is Irish resident, then continue to the next question.

- Is the trust a charity? If so, it is exempt under Annex II and does not need to register or report under the Irish IGA.

[40] STEP UK have provided a very useful flowchart for the UK/US IGA which is very similar to the Irish/US IGA. They have also provided useful practical examples and a Guide.

- If the trust is a Financial Institution then it should register and report directly or appoint a third party to report for it.

- How is it determined if it is a Financial Institution?

  - Is it managed by professional trustees[41]? If so, it is a Financial Institution.

  - Does the trust have financial assets where more than 50% of its income comes from investing, reinvesting or trading in such investments? If not, then it may not be a Financial Institution. If the income has reached this threshold, then the trust is a Financial Institution.

  - Does the trust engage an adviser to manage its funds on a discretionary basis? Even if the trust does not have more than 50% of its income derived from its investments, it is a Financial Institution.

  - Does the trust have a corporate trustee which is in itself therefore a Reportable Financial Institution? If so, the corporate trustee should report on behalf of the trust (where the trust itself does not register or report). The corporate trustee must also register and report as a Financial Institution itself. This trust itself is then an 'Owner Documented Trust'.

- If the trust is not a Financial Institution then it will be a NFFE and it does not need to register or report. However it will need to self-certify on a form W8 that it is a passive NFFE or consider if it is an active NFFE.

3.1.6. FATCA Conclusion

All Irish trusts and trustees, whether or not they have any known US connections, need to consider their status under the Irish/US IGA. If they are required to register, they should have done so by 25 October 2014. Otherwise there will be withholding from 1 January 2015 last and potential penalties.

Financial Institutions with whom the trusts hold funds will be expecting each trust to produce a GIIN registration number that the trust was registered before 1 January 2015 or produce a certificate that confirms its status. It is likely that these procedures will arise as part of the Financial Institutions KYC procedures (either on their review of their procedures for existing accounts or on the initial set up of the accounts).

Failure to confirm the trust's status will leave Financial Institutions (including potentially the trusts themselves) open to penalties and will leave trusts vulnerable to withholding as payees.

Practitioners should identify and classify the entities comprising their practice and the client entities such as trusts with which they are connected. The terms of engagement for a practice should be amended to reflect that practitioners will need to consider FATCA and any necessary reporting on behalf of the trust as a client in respect of any dealings with that trust. If you are acting for trusts you will need to advise your clients, the trustees, of their reporting requirements including future reporting in a change of circumstances. If practitioners themselves or their partners are trustees, they need to be aware of what reporting requirements a trustee has immediately and on an ongoing basis.

[41] An entity carrying on business in Ireland where more than 50% of its gross income is attributable to trading in money market instruments, portfolio management or the investment and administration of funds.

- Any entities that are identified as Financial Institutions should be registered for a GIIN from the IRS.

- You should put in place adequate systems to identify and record US persons and report online with ROS to the Irish Revenue Commissioners. There will either be a nil return filed or a return detailing the US persons who are beneficiaries or control the trust.

- Any entities that are identified as passive NFFEs will be asked by Financial Institutions to confirm it is an NFFE using a form W8 so that the Financial Institution can operate the account for that entity.

- In such a case the Form W8 will allow the entity to list out the US persons relevant to the trust.

- Any changes to the status of the trust, the trustees or the beneficiaries of the trust will need to be notified to the Financial Institution or direct online with Revenue.

The US Internal Revenue Service has posted new clarifications of its guidance regarding the *Foreign Account Tax Compliance Act*, relating to Form 8966 reporting deadlines and nil reporting.

3.2. Common Reporting Standard – OECD

In July 2014, the Organization for Economic Cooperation and Development (OECD) released the new global 'standard' for the automatic exchange of information (AEOI) between offshore and onshore jurisdictions in tax matters – known as the Common Reporting Standard (CRS)[42] where a Model Competent Authority Agreement is offered similar to the OECD format of providing Tax Treaty models to jurisdictions to agree between them.

The CRS reach is truly global - over 100 countries have publically committed to adopting the new reporting standard. Offshore jurisdictions such as BVI, Cayman Islands, Isle of Man and Jersey have committed to the CRS which is most welcome to ensure its effectiveness.

Information sharing is expected to commence from September 2017 in respect of the year to 31 December 2016. Ireland has committed through the programme for Government to introduce legislation on this in July 2015. It is anticipated that Ireland will sign up to the first OECD CRS agreements with a number of early adopter countries in a matter of weeks so that the obligations will commence on 1 January 2016.

The CRS broadly aims to obtain financial information directly from the reporting financial institutions (FIs) which includes information related to all reportable accounts and also the personal data of the account holders. The information that is to be exchanged covers interests, dividends earned, account balances, income from insurance and sales proceeds from financial assets. It is also mandatory for personal data of account holders to be released, which includes, name, address, residence, tax identification number and place of birth.

The emphasis is on a single global standard platform for the automatic exchange of information and the OECD is focused on the creation of consistency and standardisation in the guidelines so there will be a process of simplification of data gathering and allow a higher effectiveness between jurisdictions. This should keep costs for Financial Institutions lower and allow effectiveness in cross border interpretation of reporting (as there will be less fragmentation and conflicts in data gathering processes) It is expected to include a Competent Authority (CA) Agreement that is likely to be used by the respective governments to reach an agreement on the provisions of the CRS. The CA will help enforce domestic tax laws and treaties. However it will not replace existing AEOI between countries such as within the EU. It will focus on a jurisdiction's existing tax compliance but will seek to ensure a model of reporting consistent throughout all jurisdictions to minimise costs of compliance.

The privacy of taxpayers will be impacted and they may need to keep check on how this change may affect them in terms of confidentiality. Focus will also be on taxpayers with offshore assets as the CRS aims at submission of voluntary disclosure as the only option.

The CRS draws extensively on the intergovernmental approach to implementing the US reporting standard known as FATCA, mentioned below. Terms such as a Passive NFE, Controlling Person and Reporting or Non-Reporting Financial Institution are common to the CRS and FATCA. However the CRS differs from FATCA to the extent FATCA is based on citizenship and withholding of taxes.

Core concepts of

- Terms such as Financial Institutions and passive and active NFFEs, Controlling Person and Reporting or Non-Reporting Financial Institution are common to the CRS and FATCA
- Both FATCA and CRS operate on a calendar year basis and the reporting between countries will take place within a 9 month period
- Both will issue a series of common guidances in interpreting rules.

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[42] http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-information-in-tax-matters.htm

However CRS differs from FATCA in relation to

- the basis of residence of an individual under CRS capturing the reporting (where FATCA focuses on the citizenship of the individual). Residence of trusts over multiple jurisdictions was considered in the Guidance issued in July 2014.
- there will not be withholding of tax (where FATCA withholds 30% for failure to report)
- there will not be a GIIN procedure for reporting FIs etc. on the basis the national tax authority will collect the data and report to the jurisdiction where a person with (or person with a beneficial interest in) a reporting account is resident.
- FATCA is based out of the US with various IGAs agreed between countries but still effective in the US without the IGAs against FIs with a presence in the US. CRS will be a series of treaties on a multinational or binational basis.

4. Tax Reporting and Compliance

4.1. Mandatory Disclosure

Chapter 3 of Part 33 TCA97 deals with the Mandatory Disclosure Regime for certain types of tax avoidance arrangements. This regime was updated significantly under s.88 Finance Act 2014 in respect of transactions commenced after 23 October 2014 although it has been in place since 2011. Guidance in this area was introduced by way of Regulations and Guidelines issued by the Revenue in January 2011[43]. The Regulations[44] and Guidance Notes[45] were updated in light of the changes to the Mandatory Disclosure Regime by Finance Act 2014.

The purpose of this regime is to serve as an ‘early warning’ mechanism for Revenue in respect of what they perceive to be aggressive tax planning.

Who discloses

Under the current regime, the promoters of schemes as defined are required to provide Revenue with information about schemes and proposals for schemes where an tax advantage[46] for a taxpayer is one of the main benefits of the scheme and where it falls within certain specified descriptions.

“Promoter” is defined in very broad terms under s.817D(1) and Regulations 28-30). A person may be a promoter, whether or not s/he is located in Ireland, if during the course of a relevant business (i.e. a business which includes the provision to other persons of services relating to taxation or a banking business), the person:

- is to any extent responsible for the design of a scheme,
- has specified information about the scheme and makes a marketing contact,
- makes a scheme available for implementation by other persons, or
- is to any extent responsible for organising or managing the implementation of the scheme.

In practice, Revenue indicate that promoters are likely to be ‘accountants, solicitors, banks and financial institutions, along with small firms of specialist promoters’.

Regulation 30 narrows the application of the term “promoter” in certain circumstances. In the case of scheme designers, where a person is only involved in the design of a scheme and is not involved in marketing the scheme, making it available to others for implementation or in the organisation or management of the scheme, the person will not be considered a promoter where either of the following conditions apply:

- the person does not give tax advice in relation to the scheme.[47] For example, a promoter might consult a law firm (that operates a business that includes giving tax

[43] Mandatory Disclosure of Certain Transactions Regulations 2011 (SI No. 7 of 2011) and the Guidance Notes on Mandatory Disclosure Regime January 2011
[44] Mandatory Disclosure of Certain Transactions (Amendment) Regulations 2015
[45] http://www.revenue.ie/en/practitioner/ebrief/2015/no-072015.html
[46] In effect an Irish tax advantage – guidelines indicate that, although the disclosure requirements apply to promoters outside Ireland also, this is only to the extent that the scheme enables or is expected to enable an Irish tax advantage to be obtained.
[47] Regulation 30(b)

advice) in relation to the company law aspects of a scheme, or an accounting firm about the accounting aspects of a scheme. So long as the law or accounting firm does not provide tax advice, it will not be treated as a promoter; or

- the person is not responsible for the design of all elements of the scheme and could not reasonably be expected to have sufficient information as would enable him/her to know whether or not the transaction is a disclosable transaction, or to comply with the disclosure requirements.[48]

The primary duty to disclose falls on the promoter of a scheme[49], but the client, or user, of a scheme may have to disclose in circumstances where

- the promoter of the scheme is outside the State and there is no promoter in the State.[50]
- there is no promoter (e.g. the scheme is devised "in-house" for use within that entity or a corporate group to which it belongs or is devised by an individual for his or her own use)[51]; or
- the promoter is a legal professional and asserts that legal professional privilege (LPP) prevents a disclosure being made (Note where LPP is asserted the promoter must assert the privilege in a particular form within a particular timeframe.[52] There are considerable dangers to an incorrect assertion of LPP and the fact that LPP can be waived.[53]

Timing and Penalties

Whether a disclosure is required or not needs to be determined when the transaction takes place as the disclosure must be made by the promoter within 5 working days of the date of the relevant date as defined.[54]

As the penalties for non-compliance with the mandatory disclosure regime set out in Chapter 3, Part 33, TCA97, are quite onerous, it is important to ensure that a disclosable transaction is in fact disclosed. The penalties apply to the advisers, not the taxpayers, and range from a fine of €4,000 plus €100 per day for failures arising after the penalty is imposed to higher penalties for more serious compliance failures of up to €500 per day for an initial period and then a further €500 a day thereafter.

[48] Regulation 30(c)
[49] Section 817E
[50] Section 817F
[51] Section 817G
[52] Sections 817H & 817J
[53] Merely asserting that LPP applies is insufficient in itself and, if it transpires that such a claim cannot be maintained, the legal professional may leave himself or herself liable to civil penalties for failure to disclose. It is important for practitioners to consider the form of disclosure to make as either the LPP could be waived and full disclosure made or the LPP be invoked but in that case disclosure of LPP being invoked must be made under s817H(3) within 5 working days of first becoming aware that a transaction forming part of a scheme has been implemented by the client and there is an obligation then to ensure the client is aware that the obligation to disclose rests with the client. The promoter as legal adviser needs to agree in its terms of engagement with the client who may also be a promoter that the legal adviser is able to disclose as appropriate in the manner the legal adviser is best comfortable with giving that the legal adviser is personally accountable for penalties if there is incomplete disclosure.
[54] Section 817D(1) the earliest of the date

- the promoter has specified information about the scheme and first makes a marketing contact;
- the date on which the promoter makes the transaction available for implementation by another person; and
- the date the promoter first becomes aware of any transaction forming part of the disclosable transaction having been implemented.

Specified Description

The Mandatory Disclosure regime applies where there is a scheme with a tax advantage that falls within one or more of the defined categories known as "specified descriptions". Some of these categories/hallmarks, whilst intended to be quite objective are nevertheless open to interpretation, some are generic in nature[55] and others more specific[56].

Included in these categories under the latest Revenue Guidelines is a category very relevant to the Irish private client practitioner. Inter vivos discretionary trusts and Will trusts (albeit there is an 'out' for will trusts "*established under the laws of' an EU member state and the trustees are resident in an EU member state*").[57] This specified description, effectively now of inter vivos trusts and non EU will trusts, targets schemes that seek to gain a tax advantage through the use of a discretionary trust, wherever located. Revenue in the Guidelines formally recognises that some discretionary trusts are trusts created under a will many of which will not have obtaining, or seeking to obtain, a tax advantage as one of the main benefits of the will trust. However, Revenue are of the view that where a promoter has given advice to an individual in relation to creating a will trust where obtaining, or seeking to obtain a tax advantage is one of the main benefits of the transactions to which the trustees of that trust are to be party, the advisor must disclose the scheme unless it falls into the Revenue list of routine day to day tax advice (which includes advising on the creation of a will) set out in the Appendix to their guidelines[58]. It is not clear if a 'regular' will, being part of a disclosable transaction with more complicated structuring, must thereby be tainted by the transaction and be disclosable even if it is an Irish/EU will. Therefore all practitioners assisting in the creation of trusts under Irish Wills should be cognisant of the mandatory disclosure regime.

Advice in relation to the creation of a will trust is implemented in the view of Revenue when the taxpayer enters into a will which follows that advice, notwithstanding that the taxpayer may amend the will at some point in the future or that the will trust may never actually come into being. The date on which a disclosure relating to bespoke advice must be made is linked to when that advice is implemented. This therefore requires promoters to disclose the contents of a Will that has not yet come into being and may never come into being and is fundamentally a matter that private client practitioners may have grave concerns in doing in principle. Letters of engagement will need to be adjusted to facilitate this disclosure.

Tax advantage and Main Benefit

The fundamental question to be answered for advisers in deciding if a transaction is disclosable is whether there is an actual "tax advantage" in addition to the transaction falling into the specified description.

Any advantage arising out of or by reason of a transaction relating to a reduction, deferral or avoidance of any assessment, charge or liability to tax, or any relief from, or refund of tax, or the avoidance of any obligation to deduct or account for tax is considered a tax advantage. This still leaves some degree of subjectivity in assessing whether transactions are reportable and

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[55] The promoter wishes to keep the transaction confidential from Revenue; or confidential from other promoters; fees likely to be charged on a premium or contingent basis; standardised documentation is involved; the transaction falls into specified transaction types, see footnote 55 below.
[56] Loss schemes (individual and corporate); employment schemes; income into capital schemes; income into gift schemes; discretionary trusts.
[57] Section 817DA(10) TCA97, Guidelines para 4.3.10 and the CAT section bullet point 4 of Appendix 1 of the Guidelines.
[58] Guidelines Appendix 1 examples include "Advising on the creation of a will trust where that trust is established under the laws of a member state of the European Communities and the trustees are resident in such a jurisdiction."

different advisers may reach different conclusions. This will pose difficulties, given the penalties for failure to disclose which penalties are imposed on the advisers, not the taxpayers.

The next question is whether the tax advantage is a main benefit or one of the main benefits of the transaction. It is indicated in the Guidelines that promoters fully understand the tax advantages such schemes are intended to achieve and so can objectively assess whether or not the main benefit or one of the main benefits of the transaction is a tax advantage. The Guidelines outline that in simple terms that the tax advantage is a main benefit of the transaction where

- There are a number of potential benefits from a transaction, and
- One of those potential benefits is to obtain or seek to obtain a tax advantage, and
- The person would not have entered into the transaction in its current form if the possibility of the tax advantage had not been there.

Revenue state that the Mandatory Disclosure rules '*do not impact on ordinary day-to-day tax advice between a tax adviser and a client that involves, for example, the use of schemes that rely on ordinary tax planning using standard statutory exemptions and reliefs in a routine fashion for bona fide purposes, as intended by the legislature. It is reasonable to assume that the tax advice given by most tax advisers to clients would be of an ordinary routine nature*'. The Guidelines then list in an appendix examples of '*routine day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes*'[59].

The Guidance notes confirm that disclosure will be on a non-judgmental basis and that there will be no presumption or inference that a transaction/scheme disclosed under the mandatory disclosure regime is a tax avoidance transaction. The term "tax advantage" under the mandatory disclosure regime largely reflects the definition of that term under s811C TCA97, the general anti avoidance section, so these notes confirm that, where the promoter decides there is a requirement to disclose because of the perception of a tax advantage, that perception will not be held against the taxpayer in any later claim by Revenue under the anti-avoidance legislation. Equally, the Guidelines confirm that the fact that a transaction may not come within the disclosure requirements in the view of promoters and Revenue cannot be regarded as an indicator that the scheme is not a tax avoidance transaction.

<u>Effect of Mandatory Disclosure on Protective Notices</u>

Section 811D TCA 1997 ensures that, where a person enters into a tax avoidance transaction and claims the benefit of a tax advantage contrary to section 811C TCA97, interest and a 30% surcharge will be payable on the tax that the taxpayer unsuccessfully attempted to avoid paying.

The section also provides that, by making a protective notification to Revenue in respect of a transaction, the taxpayer can, on a wholly non-prejudicial basis, obtain protection from the possibility of such surcharge arising in the event of Revenue successfully challenging the transaction. In such a case the tax arising from any assessment will then only become due for payment one month from the date of the assessment or amended assessment. In this instance the protective notification must contain full details of the transaction, full reference to relevant tax law and details of how that tax law is considered to apply to the transaction.

The protective notice protections do not apply where the transaction was one which was disclosable to Revenue under the Mandatory Disclosure Regime as mentioned above.

[59] See Appendix 3 below.

4.2. Other Reporting

Section 896A TCA97 imposes a reporting requirement for professional persons including, among others, solicitors, accountants, financial institutions, financial intermediaries, financial advisers, tax practitioners, trust service providers and companies. The reporting requirement arises where a professional person is "concerned with" the establishment of a settlement, where the settlor is Irish resident and the trustees are non-Irish resident.

A person "concerned with the making of a settlement" would include any third party who:

- is engaged or involved in the making of the settlement;
- facilitates or arranges the making of the settlement;
- provides services to or for a settlor or trustee in the making of the settlement;
- is involved in or arranges the transmission of funds in relation to the settlement.

The information to be returned to Revenue is the names and addresses of the Irish resident or ordinarily resident settlors, the non-resident trustees and the dates of the settlements. Reports must be submitted within 4 months of the date on which the relevant settlement was created.

In addition to the reporting by the private client practitioner, the client may have to carry out further reporting which the practitioner will need to advise on such as

- The trust should be registered with Revenue once it earns income tax and to obtain a PPSN for the purposes of opening a bank account. A form TR1 is required for this purpose. Subsequently the trust should file annual tax returns for income earned.
- Section 917A TCA 1997 provides a reporting requirement where a person transfers property to the trustees of a settlement otherwise than under a transaction entered into at arms' length where the trustees are neither resident or ordinarily resident in Ireland. The transferor has an obligation to report the payment under the provisions of this section within 3 months of the creation of the trust.
- Section 917B TCA 1997 provides a reporting requirement on the establishment of an offshore trust where the settlor is domiciled in Ireland and is either resident or ordinarily resident in Ireland. The settlor will have an obligation to report the establishment of the trust under the provisions of this section within 3 months of the creation of the trust.
- Where a person who is resident or ordinarily resident in Ireland causes funds to be transferred to a discretionary trust, wherever the trustees are resident, within 4 months of the creation of the trust, the person must file under Section 46(15) CATCA03 a return giving details of the terms of the trust, the names and addresses of the trustees and the objects of the trust and an estimate of the market value transferred.
- Section 806 TCA 1997 applies for the purposes of preventing the avoidance by individuals resident or ordinarily resident in Ireland of a liability to income tax "by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income become payable to persons resident or domiciled out of the State." Section 806(8)(a) TCA 1997 provides that Section 806 does not apply where the individual shows in writing or otherwise to the satisfaction of Revenue that the purpose of avoiding a liability to income tax was not the purpose or one of the purposes for which the transfer or associated operations or any of them was effected or that the transfer was a bona fide commercial transaction. If Section 806 is not to apply by virtue of the transfer of assets so that income is assessable on the transferor,

that transferor will be required to write to Revenue to seek satisfaction from Revenue in relation to this matter. This should be done before the filing date for the year of assessment in which the Trustee earns income.

Appendix 1

Article 30 4th AML Directive

1. Member States shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and current information on beneficial ownership regarding the trust.

This information shall include the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and of any other natural person exercising effective control over the trust.

2. Member States shall ensure that trustees disclose their status and provide in a timely manner the information referred to in paragraph 1 to obliged entities, when, as a trustee, the trustee forms a business relationship or carries out an occasional transaction above the threshold set out in points (b), (c) and (d) of Article 10.

3. Member States shall require that the information referred to in paragraph 1 can be accessed in a timely manner by competent authorities and FIUs.

4. Member States shall require that the information in paragraph 1 is held in a central register when the trust generates tax consequences. The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities when they are taking customer due diligence measures in accordance with Chapter II. Member States shall notify to the Commission the characteristics of these national systems.

5. Member States shall require that the information held in the central register referred to in paragraph 4 is adequate, accurate and current.

6. Member States shall ensure that obliged entities do not rely exclusively on the central register referred to in paragraph 4 to fulfil their customer due diligence obligations laid down in this Directive. Those obligations shall be fulfilled by using a risk-based approach.

7. Member States shall ensure that competent authorities and FIUs are able to provide information referred to in paragraph 1 and 4 to the competent authorities and FIUs of other Member States in a timely manner.

8. Member States shall ensure that the measures provided for in this Article apply to other types of legal arrangements with a structure or functions similar to trusts.

9. Within four years after the date of entry into force of this directive, the Commission shall submit a report to the European parliament and the Council assessing the conditions and the technical specifications and procedures for ensuring safe and efficient interconnection of the central registers. Where appropriate, the report shall be accompanied by a legislative proposal.

Appendix 2
Checklist AML checks for trusts
Comparisons 3rd and 4th AML Directives

3rd AML Directive Re Trust client	**4th AML Directive Re Trust client**
After risk assessment …	After risk assessment …
Identify and verify the identity of* • trustees, • protectors, and • other persons who hold powers of appointment over the trust fund or have power to give instructions to operate accounts of the trust funds	Identify and verify the identity of* • settlors, • trustees, • protectors, • identifiable beneficiaries • where the individual beneficiaries cannot yet be determined, the class of beneficiaries in whose main interest the legal arrangement or entity is set up or operates; and • other natural persons who exercise effective or ultimate control over a trust through direct or indirect ownership or through other means.
Identify only* the beneficial owner(s) connected with the customer or service concerned • Beneficial owner >25% interest (interest being a vested interest in possession, remainder or reversion (whether or not interest is defeasible)) • Individual who has control** over the trust • Look through for beneficial owner of corporate with interest in trust • Class of beneficiaries (discretionary or beneficial owner(s) < 25% interest) unless actual payment made from trust	TBA – depending on local legislation
Understand the ownership and control structure of the entity or arrangement concerned	Likely to continue to apply
	Trustees must disclose status as trustee to obliged entities with which the trust forms a business relationship
	Trustees must obtain and retain adequate, accurate and current information on beneficial ownership of the trust – ongoing requirement
	Filing of this information to central register of each member state
*where risk is assessed as standard and there are no PEPs involved	*where risk is assessed as standard and there are no PEPs involved
** Control = power alone or jointly with another or with consent of another to • Dispose of, advance, lend, invest, pay or apply trust property • Vary the trust • Add or remove beneficiary or someone from class of beneficiaries • Appoint or remove trustees • Direct, withhold consent to or veto the exercise of any above powers	

Appendix 3

Mandatory Disclosure

Extract Revenue Guidelines
Appendix 1 of Guidelines
‘*Examples of what Revenue would consider as* r*outine day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes’*