



BERMUDA

Country-by-Country Reporting GUIDANCE

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Overview

General

Country-by-Country Reporting (**CbCR**) is part of Action 13 of the OECD/G20 Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013)(**BEPS**) requires the development of “*rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNEs provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template*”.

In October 2015, the Organisation for Economic Co-operation and Development (**OECD**) published the Transfer Pricing Documentation and Country-by-Country Reporting Action 13: 2015 Final Report (**OECD Final Report**) (see below). The OECD Final Report recognised that enhancing transparency for tax administrations, by providing them with adequate information to conduct transfer pricing risk assessments, is an essential part of tackling the BEPS problem.

CbCR requires multinational enterprises (**MNE**) which meet certain criteria to file a country-by-country report (**CbC Report**) to tax administrations that provides a breakdown of the amount of revenue, profits, taxes and other indicators of economic activities for each tax jurisdiction in which the MNE group does business. CbCR only applies to MNE groups with annual consolidated group revenue of €750 million or more in the preceding fiscal year (**MNE Groups**).

For the first time, CbCR will give tax administrations a global picture of the operations of MNE Groups. Tax authorities can then use this information to perform high-level transfer pricing risk assessments and to evaluate other BEPS-related risks.

Core Documents

The following are the core OECD elements of CbCR:

- [OECD Transfer Pricing Documentation and Country-by-Country Reporting, Action 13: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project](#)
- [OECD Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13, OECD/G20 Base Erosion and Profit Shifting Project \(Implementation Guidance\)](#)

The OECD has also published the [OECD BEPS 2015 Final Reports Frequently Asked Questions](#).

The legal basis for Bermuda to exchange information under CbCR with other jurisdictions is contained in the [Multilateral Competent Authority Agreement \(MCAA\)](#), to which Bermuda is a party. The MCAA contains

the rules on the modalities of the exchange between the Bermuda Competent Authority (Minister of Finance) and partner jurisdictions' Competent Authorities. It also contains representations on confidentiality, safeguards and the existence of the necessary infrastructure for an effective exchange relationship.

Domestic Law

The relevant legislation that requires Constituent Entities resident in Bermuda for tax purposes (**Bermuda Constituent Entities**) to collect, maintain and report information for exchange with partner jurisdictions is as follows (**Bermuda CbCR Legislation**):

- International Cooperation (Tax Information Exchange Agreements) Act 2005; and
- International Cooperation (Tax Information Exchange Agreements) Country-by-Country Reporting Regulations 2017 (**CbCR Regulations**).

The Bermuda CbCR Legislation brings into effect obligations that certain Constituent Entities have to provide CbC Reports to the Authority (as defined below) for exchange with other jurisdictions.

All countries participating in the BEPS project agreed a CbCR implementation package. This package can be found at Annex IV to Chapter V (page 37) of the OECD Final Report and includes model legislation for the introduction of CbCR requirements (**OECD Model Legislation**). The purpose of the implementation package, and in particular, the OECD Model Legislation, is to ensure a consistent and standard approach to CbCR across all implementing countries. For this reason, the Bermuda CbCR Legislation closely mirrors the OECD Model Legislation to the extent its provisions apply to Bermuda. A good understanding of the OECD Final Report is critical to understanding and interpreting the Bermuda CbCR Legislation and should be read in conjunction with this Guidance.

Notwithstanding the above, it should be noted that there are some differences between the OECD Model Legislation and the Bermuda CbCR Legislation, particularly because Bermuda is a non-reciprocal jurisdiction. Where there is a conflict, the Bermuda CbCR Legislation takes precedence.

A number of terms used in this Guidance are defined in the Bermuda CbCR Legislation, and whilst this Guidance provides further information to assist with the interpretation of some of these terms, the reader is referred to the Bermuda CbCR Legislation for full definitions of all relevant terms.

Purpose of this Guidance

This Guidance on CbCR can neither extend nor restrict the scope of CbCR as implemented by the relevant Bermuda CbCR Legislation.

This Guidance is intended to aid businesses that may have responsibilities to report information under the Bermuda CbCR Legislation. It is also intended as a reference source for Bermuda Constituent Entities, legal and tax professionals for use alongside the Bermuda CbCR Legislation and OECD core documents.

A relevant Bermuda Constituent Entity must apply the Bermuda CbCR Legislation in force at the time, with reference to any OECD explanatory materials for CbCR and this Guidance as applicable.

Bermuda Constituent Entities are encouraged to seek professional advice if they are uncertain in any way of their obligations under the CbCR framework.

The Bermuda Authority

For the purposes of the MCAA, the Bermuda Competent Authority is the Minister of Finance (**Minister**). The delegated functions of the Minister are carried out by the Ministry of Finance which is the government department responsible for the operation of all mechanisms for the exchange of information for tax purposes. The Minister and the Ministry of Finance are together referred to in this Guidance as the '**Authority**'.

The Authority is responsible for ensuring that relevant Bermuda Constituent Entities comply with their obligations under the Bermuda CbCR Legislation.

Relevant Bermuda Constituent Entities will report the information required under CbCR to the Authority which will in turn exchange information with partner jurisdictions that have satisfied the requisite confidentiality and data safeguards standards, and have the appropriate legal instruments and legislative frameworks in place.

Notification and Reporting to the Authority

Notifications and reporting for CbCR will be conducted through the Bermuda Automatic Exchange of Information Electronic Portal (**Electronic Portal**), details of which will be notified by the Authority in accordance with the CbCR Regulations.

Notification

Under regulation 5 of the CbCR Regulations, any Constituent Entity of an MNE Group that is resident for tax purposes in Bermuda needs to notify the Authority if it is the Ultimate Parent Entity or the Surrogate Parent Entity of an MNE Group, no later than 1 September, 2017 for Reporting Fiscal Years ending up to 31 August, 2017, and thereafter notification must be made no later than the last day of the Reporting Fiscal Year of the relevant MNE Group. Pursuant to the International Cooperation (Tax Information Exchange Agreements)

Country-by-Country Reporting Amendment Regulations 2017, under regulation 5(1) if the Constituent Entity is neither the Ultimate Parent Entity nor the designated Surrogate Parent Entity of an MNE Group it does not notify the Authority of such.

Notification is a one-off process and does not need to be repeated annually. Changes to notification details must, however, be advised to the Authority via the Electronic Portal.

Reporting

CbC Reports will need to be filed in respect of accounting periods starting on or after 1 January 2016 for MNE Groups that are in scope.

Pursuant to the International Cooperation (Tax Information Exchange Agreements) Country-by-Country Reporting Amendment Regulations 2017, under regulation 6(2) the definition of a Bermuda reporting entity means that a Constituent Entity as a Bermuda reporting entity (other than Ultimate Parent Entity) is only required to file under regulation 6(2) when it has been appointed by the MNE Group to do so (as a Surrogate Parent Entity).

Under regulation 7 of the CbCR Regulations, CbC Reports must be filed no later than twelve (12) months after the last day of the Reporting Fiscal Year of the MNE Group.

The Electronic Portal is currently available for CbCR notifications and reporting and a user guide is available on the Authority's website, to assist Bermuda Constituent Entities with the process of CbCR notification and reporting via the Electronic Portal.

The Bermuda reporting schema for the CbCR will be the published [CbCR XML Schema Version 2.0](#) that is available on the OECD website. For the avoidance of doubt, the language for reporting is English.

As noted in Article 4(2) of the CbCR Regulations, the CbC Report must be completed and filed in a form identical to and applying the definitions and instructions contained in the standard template set out at Annex III of Chapter V of the OECD Final Report. The CbC Report must also reflect and incorporate the interpretations and guidance outlined within the OECD Implementation Guidance.

Confidentiality

As Bermuda is a non-reciprocal jurisdiction, the Authority will not use the CbC Reports for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Bermuda, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer pricing rules, nor will it use the CbC Reports for economic and statistical analysis. Further, the Authority will not conduct transfer pricing adjustments based on the CbC Reports.

Bermuda will exchange information under CbCR with partner jurisdictions which have in place adequate measures to ensure the required confidentiality and data safeguards are met. These confidentiality obligations are evaluated by the Global Forum on Transparency and Exchange of Information for Tax Purposes through its implementation monitoring programme. Confidentiality and data safeguard questionnaires for all CbCR jurisdictions are filed with the OECD Co-ordinating Body Secretariat.

Guidance on Technical Issues

Constituent Entities Required to Report

The following types of Constituent Entities will be required to file CbC Reports in Bermuda:

- An Ultimate Parent Entity of an MNE Group resident in Bermuda for tax purposes
- A Surrogate Parent Entity of an MNE Group resident in Bermuda for tax purposes (in certain circumstances)

It should be noted that the secondary reporting mechanism which requires a Constituent Entity of an MNE Group, that is neither an Ultimate Parent Entity nor a Surrogate Parent Entity, to file a CbC Report in certain circumstances does not apply in Bermuda.

Surrogate Parent Entities

Where a Bermuda Constituent Entity is appointed as a Surrogate Parent Entity, the Bermuda CbCR Legislation applies to require that Surrogate Parent Entity to provide a CbC Report in the same manner as an Ultimate Parent Entity. In particular, regulation 6(2) of the CbCR Regulations provides that a Bermuda Constituent Entity which has been appointed as a Surrogate Parent Entity must provide a CbC Report to the Authority in compliance with the CbCR Regulations.

Residency for Tax Purposes

The Reporting Entity should report all of the tax jurisdictions in which Constituent Entities of the MNE Group are resident for tax purposes. The OECD Final Report states that a tax jurisdiction is defined as any (State or non-State) jurisdiction which has fiscal autonomy. A separate line should be included in the report for all Constituent Entities in the MNE Group deemed by the Reporting MNE not to be resident in any tax jurisdiction for tax purposes.

Where a Constituent Entity is resident in more than one tax jurisdiction, the applicable tax treaty tie breaker

should be applied to determine the tax jurisdiction of residence. Where no applicable tax treaty exists, the Constituent Entity should be reported in the tax jurisdiction of the Constituent Entity's place of effective management. The place of effective management should be determined in accordance with the provisions of Article 4 of the [OECD Model Tax Convention](#) and its accompanying [Commentary](#).

Reporting Entities should note that a 'non-resident' designation under the Exchange Control Regulations 1973 is not a determining factor in whether a Constituent Entity is resident for tax purposes in Bermuda.

Threshold for Excluded MNE Groups

According to the CbCR Regulations, an Excluded MNE Group means, with respect to any Fiscal Year of the Group, a Group having total consolidated group revenue of less than EUR750 million during the Fiscal Year immediately preceding the Reporting Fiscal Year as reflected in its Consolidated Financial Statements for such preceding Fiscal Year.

"Reporting Fiscal Year" means the Fiscal Year the financial and operational results of which are reflected in the Country-by-Country report.

As such, the threshold year is the year prior to the year that is assessed in the CbC report, such that:

- If a MNE Group does not meet the threshold on the 2015 or 2016 consolidated statements, but does meet the threshold on the 2017 consolidated statements, then the year ending in 2017 is the "Preceding Fiscal Year" and the first "Reporting Fiscal Year" for such an entity would be the year ending in 2018 (with a report due in 2019).
- In the above example, the MNE Group would be required to file a 2018 report (due in 2019) even if the Group's revenue drops below the threshold on the 2018 statements, given the Excluded MNE Group definition is based on the revenues in the preceding calendar year.
- The notification deadline in such a case would be the last day of the 2018 fiscal year, as this is the first reporting year.

Investment Funds

The Implementation Guidance confirms that the application of CbCR to investment funds depends on the relevant accounting treatment and that the governing principle is to follow the accounting consolidation rules.

If, applying accounting rules, an investment entity does not consolidate investee companies (for example the investment entity reports fair value of the investee companies through profit and loss rather than consolidation), then those investee companies should not form part of an MNE Group and should not be considered Constituent

Entities. However, if the accounting rules require that the investment entity consolidates with an investee company, the investee company should be part of an MNE Group (where one exists) and should therefore be considered a Constituent Entity.

It is also possible for a company, which is owned by an investment fund, to control other entities such that, in combination with these other entities, it forms an MNE Group. In this case, and if the MNE Group exceeds the revenue threshold, it would need to comply with the requirement to file a CbC Report.

Partnerships

As with Investment Funds, the Implementation Guidance confirms that for partnerships the governing principle to determine an MNE Group is to follow the accounting consolidation rules. If the accounting consolidation rules apply to a partnership, then that partnership may be a Constituent Entity of an MNE Group subject to CbCR.

Completion of CbC Reports

It should be borne in mind that the CbC Report is intended to apply for a multitude of entity types across a broad range of industries and that, therefore, it is not practical to draft guidance on the completion of CbC Reports that provides a definitive answer for every type of entity or industry.

The OECD Final Report (page 31) includes detailed instructions and guidance on how to complete CbC Reports and should be reviewed in full in advance of completing CbC Reports.

The Reporting Entity should adopt a reasonable, practical and consistent approach to completion of CbC Reports.

Exchange of CbC Reports by the Competent Authority

Bermuda's Competent Authority will annually exchange on an automatic basis the CbC Report received from each Reporting Entity that is resident for tax purposes in Bermuda with all such other Competent Authorities of Jurisdictions with respect to which Bermuda has an agreement in effect, and in which, on the basis of the information in the CbC Report, one or more Constituent Entities of the MNE Group of the Reporting Entity are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment.

Revenues – Unrelated Party and Revenues – Related Party

The OECD Transfer Pricing Documentation and Country-by-Country Reporting, Action 13: 2015 Final Report

explains that “Revenues – Unrelated Party” should be read as referring to revenues arising from transactions between independent parties and “Revenues – Related Party” should be read as referring to revenues arising from associated enterprises.

In addition, interpretative guidance issued by the OECD in April 2017 (within the Implementation Guidance document) explains that “for the third column of Table 1 of the CbC report, the related parties, which are defined as “associated enterprises” in the Action 13 report, should be interpreted as the Constituent Entities listed in Table 2 of the CbC report”.