



Tax Alert

The Cabinet Secretary for the National Treasury publishes the Common Reporting Standards (“CRS”) Regulations, 2023

The Finance Act, 2021 (“FA 2021”) amended the Tax Procedures Act, 2015 (“TPA”/ “the Act”) to introduce the Common Reporting Standards (“CRS”) regime in Kenya. The FA 2021 further provided that the CRS regime may be implemented in line with regulations prescribed by the Cabinet Secretary for the National Treasury and Economic Planning (“CS Treasury”).

Pursuant to the above, the CS Treasury gazetted the Tax Procedures (Common Reporting Standards) Regulations, 2023 (“the Regulations”) on 7 February 2023, with the aim of operationalizing the implementation of the CRS regime in Kenya.

In this alert, we summarise the key highlights of the Regulations and provide our view on the same. You are advised to read this alert together with [the Regulations](#) for more details.

Background

The FA 2021 amended the TPA by inserting a new section (Section 6B), which introduced the CRS regime in Kenya to effect the automatic exchange of financial account information between countries. The TPA was also amended to provide for penalties for any non-compliance with the CRS obligations.

The amendments were done following Kenya's ratification of the Convention on Mutual Administrative Assistance in tax matters in 2019, and in accordance with the CRS approved by the Organisation for Economic Co-Operation and Development ("OECD") on 15 July 2014.

The CRS regime in Kenya requires reporting financial institutions to comply with enhanced due diligence procedures and record keeping requirements; to identify reportable accounts as specified by the Regulations; and to file with the Commissioner an information return or 'nil' return. These obligations apply to both resident financial institutions and Kenyan branches of non-resident financial institutions.

Under the TPA, the CS Treasury is empowered to prescribe the common reporting standards by Regulations, which would specify the due diligence and reporting requirements, the manner of identifying reportable accounts, and the time and form of filing an information return.

In compliance with the Statutory Instruments Act, 2013, the CS Treasury and the Kenya Revenue Authority ("KRA") issued draft Regulations on 14 December 2021 and invited interested members of the public and stakeholders to submit their views.

Following the conclusion of the stakeholder engagement exercise, the CS Treasury gazetted the Regulations on 7 February 2023.

The Regulations at a glance

We provide below a summary of the salient provisions of the Regulations:

Requirements for financial institutions

- Financial institutions will be required to enhance their due diligence measures and identify all reportable accounts.
- Under the Regulations, "**Financial Institutions**" include "*custodial institutions, depository institutions, investment entities, or specified insurance companies*".



- A “**Reportable account**” is defined to mean a financial account that is held by one or more persons resident in a Reportable Jurisdiction. Reportable accounts exclude accounts held by government entities, Central Bank, international organisations, other financial institutions, and companies whose stock is traded regularly on a securities exchange.
- “**Reportable Jurisdictions**” as used above means, for purposes of the enhanced due diligence measures under the Regulations, a country other than the United States and Kenya.

What are the reporting obligations?

- **Filing** - Financial institutions must file, for each calendar year; a) a **declaration** in respect of identified reportable accounts; and b) an **information return** containing specified information on the reportable accounts not later than 31st May of the year following the declaration.

The information return shall be submitted electronically and shall be marked as “nil” if it does not identify any reportable accounts.

- **Record keeping** - Reporting financial institutions must maintain the records obtained for purposes of complying with the due diligence procedures in the Regulations for at least five (5) years.
- **General reporting requirements**- When filing their information return (before 31st May), financial institutions must include certain key information concerning reportable accounts, including the name, address, residence, and tax identification number (“tax PIN”) of the account holder; the account number and the account balance, among others as specified.

Due diligence requirements

- **General due diligence requirements** - Financial institutions must establish, maintain, and document the due diligence procedures set out in the Regulations.

Further, the Regulations prescribe the means of treating accounts as reportable, how to determine an account’s balance/ value, and allow for the use of service providers by financial institutions to meet their reporting/ due diligence obligations.

- **Due diligence procedures for pre-existing accounts** - The Regulations also provide for procedures that each financial institution must undertake for pre-existing accounts held by both individuals and entities.



Such procedures include, *inter alia*, ascertaining the residence, and residence status of account holders and reviewing existing regulatory (e.g. Know Your Customer (KYC)/ Anti Money Laundering (AML) information) or customer relationship information.

For pre-existing individual accounts, high-value accounts must be reviewed by **31 December 2022**, while low-value accounts must be reviewed by **31 December 2023**.

For pre-existing entity accounts whose balance exceeds USD 250,000 as of 30 June 2022, their review must be done by 31 December 2023.

- **Due diligence procedures for new accounts** - The Regulations similarly prescribe due diligence procedures for new entity and individual accounts. This includes obtaining and verifying self-certification from account holders regarding their residence, including by referring to documents collected pursuant to KYC/AML procedures.
- **Due diligence rules** - The Regulations provide rules to guide financial institutions in following the set out due diligence procedures, including on the degree of reliance on self-certification and other documentary evidence provided by account holders, methods of determining the aggregate value/ balance of accounts, and the treatment of cash value insurance contracts or annuity contracts.

The Regulations also prescribe rules to govern, *inter alia*, the ascertainment of an account holder's current residence, the residence of a financial institution, the address of an entity's principal office, and whether or not an account is maintained by a financial institution.

Effective date

The Regulations were gazetted on 7 February 2023. The Statutory Instruments Act, 2013, provides that Regulations come into operation on the date of their publication in the Gazette, or on a date specified in the instrument itself. Considering that the present Regulations do not specify their date of commencement, it is our considered view that the Regulations' commencement date is 7 February 2023.

Our View

The Regulations aim to operationalize Section 6B of the TPA, thereby providing a framework for the implementation of the CRS regime in Kenya. They are a demonstration of Kenya's effort in joining global tax transparent jurisdictions in relation to exchange of information on foreign accounts for tax purposes. If fully implemented, the CRS regime will compel financial institutions to collect and report financial account information on foreign tax residents to the KRA.





The KRA may exchange this information with the revenue authorities of the participating jurisdictions listed in the Regulations, and in return, obtain financial account information on Kenyan residents from other countries. This automatic exchange of financial account information is among the key aims of CRS and is intended to act as a deterrent to tax evasion.

The Regulations are indicative of the mounting international pressure for the verification of tax residency of account holders, in line with the current global drive to increase transparency for purposes of combatting tax evasion among other crimes.

That said, the Regulations exhibit some drafting deficiencies, for instance, there are no countries listed as Reportable Jurisdictions in the Second Schedule. Seeing as only accounts held by persons from “Reportable Jurisdictions” are reportable accounts for purposes of the reporting requirements, this omission creates ambiguity.

In addition, some of the obligations within the Regulations have compliance deadlines falling before the commencement date. For instance, financial institutions are required to review pre-existing high-value individual accounts by **31 December 2022**. While this may be a drafting error, the same may create needless uncertainty, particularly since there is varying jurisprudence on whether tax regulations can be retrospectively applied.

The Regulations also present additional due diligence and annual reporting requirements for financial institutions, which are already laden with almost-similar obligations under banking and AML laws. The increased compliance burden may be particularly pronounced for smaller players in the industry.

On a positive note, the CRS regime presents a viable course to increase tax compliance and is expected to seal tax revenue loopholes, by granting the KRA access to information on foreign accounts held by Kenyan tax residents in the participating jurisdictions. It also ensures that Kenya is not “blacklisted” or treated as a non-cooperative jurisdiction in the global arena, which comes with negative consequences in a number of jurisdictions like the European Union.

Conclusion

The Regulations are quite comprehensive and financial institutions should review their systems and procedures to ensure compliance.

We will keep a close eye on any developments and provide further updates relating to their full implementation.

Should you wish to discuss this further, kindly feel free to contact any of the contacts below or your usual Deloitte contact who will be more than glad to offer you guidance and assistance.

Contacts for this alert

Fred Omondi
Partner, Tax & Legal Leader
+254 719 039 318
fomondi@deloitte.co.ke

Lillian Kubebea
Tax & Legal Partner
+254 719 039 113
lkubebea@deloitte.co.ke

Walter Mutwiri
Tax & Legal Partner
+254 719 039 253
wmutwiri@deloitte.co.ke

Doris Gichuru
Tax & Legal Partner
+254 719 039 454
dgichuru@deloitte.co.ke

Patrick Chege
Tax & Legal Associate Director
+254 719 039 322
pchege@deloitte.co.ke

Fredrick Kimotho
Tax & Legal Senior Manager
+254 729 031 008
fkimotho@deloitte.co.ke

Edwin Wanjau
Tax & Legal Consultant
+254 719 039 431
ewanjau@deloitte.co.ke

Nicholas Gathecha
Tax & Legal Associate
+254 719 039 339
ngathecha@deloitte.co.ke

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