GLOBAL FUND SERVICES

Regulatory Working Group

Introduction

Luxembourg Law No. 8029, of 16 May 2023, relates to the implementation of the Directive on Administrative Cooperation (DAC7) in Luxembourg. DAC7 aims to enhance exchange of information and cooperation between EU member states in the field of taxation.

In the context of the Common Reporting Standard (CRS), the global standard for the automatic exchange of financial account information, Luxembourg Law No. 8029 requires Reporting Financial Institutions to issue notifications to Reportable Individuals.

Under DAC7 and Luxembourg Law No. 8029, Reporting Financial Institutions in Luxembourg must notify Reportable Individuals that their financial account information will be reported to the Luxembourg tax authorities and potentially exchanged with other jurisdictions. This notification requirement applies to individuals who are tax residents in countries that have activated exchange of information with Luxembourg under the CRS.

The purpose of the notification is to ensure transparency and inform Reportable Individuals about the exchange of their financial account information, allowing them to take necessary actions to comply with their tax obligations.

Notification Requirements

The scope of the notification requirement includes:

1. **Identification of Reportable Individuals**: Financial Institutions must identify individuals who are tax residents in reportable jurisdictions. This can include both individual investors and Controlling Persons of Passive NFEs.

2. **Notification content:** The notification must inform the Reportable Individual about the reporting obligation, the information that will be reported, and the potential exchange of information with other jurisdictions. The 'information that will be reported' has been subject to interpretation with some financial institutions including all of the specific information that will be reported for the individual, some limiting it to certain elements, for example tax residency(ies) and some indicating only the categories of information that will be reported, for example, 'your tax residency', without naming the specific confidential information.

3. **Data Protection**: Notifications must include reminders of the individual's right of access and right to rectification of any information.

4. **Timing:** Notifications must be issued on an annual basis to Reportable Individuals for the relevant reporting year, at least one month before the reporting deadline, to provide individuals with enough time to invoke their right to rectification prior to reporting.

Considerations

There can be data security concerns with issuing the full-detailed notification due to the level of detail required particularly in relation to:

- Even with complete and accurate records, an individual may not yet have informed of a change of address, or updated e-mail address, resulting in two issues of confidential data being sent to outdated details and no notification being received by the individual.
- Mail can be misdelivered, giving rise to the risk of data breach
- In certain jurisdictions mail can be more prone to interception / theft
- The nature of the detail, if full detail is included, gives rise to the risk of phishing or identity theft.

There are further considerations particular to Controlling Persons including:

- Although Controlling Persons - like individual investors - are required to update the financial institution of any change in their status or contact details, they may in practice be less inclined to do so because they are not in regular contact with the fund, receiving statements and contract notes directly etc.
- There is therefore a greater concern with controlling persons than with individual investors that contact information is out of date and not correct.
- The question then arises whether it is appropriate for the financial institution to send the controlling person's notification to the entity investor, taking into consideration that it is the controlling person's sensitive personal data
- As the fund is contracted with the entity investor and not directly with the controlling person, this may have a bearing on the approach taken.

Delegation

The responsibility for issuing notifications to Reportable Individuals lies with the Reporting Financial Institution, the fund, although the fund may wish to delegate the task to a third party such as a mailing vendor. Transfer Agents may or may not offer this as part of an AEoI reporting service depending on the particular services engaged and contractual arrangements in place.

Timing

As mentioned above, notifications must be issued on an annual basis to Reportable Individuals for the relevant reporting year, at least one month before the reporting deadline, to provide individuals with enough time to invoke their right to rectification prior to reporting. Financial institutions may wish to issue these earlier, perhaps 2 months, to allow sufficient time for information updates and related AML/KYC reverifications to occur.

Under the Common Reporting Standard (CRS), individuals are responsible for notifying their financial institution of any changes in their circumstances and providing an updated self-certification at any point during their investment lifecycle. Notifications issued by the financial institution may prompt individuals to update previously omitted information.

If an individual provides updated information after the reporting deadline, the reporting submitted in good faith based on the previous information will stand, as it represents the latest correct information provided by the individual at the time of reporting. This is despite the individual's failure to fulfil their responsibility to provide updated information upon a change of circumstance.

Obligation of means

The data controller - the fund or its delegate - does not have to prove that all the relevant persons have effectively received *in concreto* the information but only that all reasonable and necessary steps to achieve that outcome have been performed and undertaken.

Other jurisdictions

There is no indication as yet that other jurisdictions will implement a similar requirement. In Ireland, Revenue have recently acknowledged that a different interpretation was taken in Luxembourg and confirmed that the European Commission has confirmed that Customer Information Notices, generally included within the self-cert, are sufficient for notification purposes.