Guidance Notes on the Implementation of Foreign Account Tax Compliance Act (FATCA) in Ireland

Part 38-03-22

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Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

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Introduction

These Guidance Notes are intended to provide guidance to *Financial Institution*s on how to comply with their obligations under the Agreement and under the Financial Accounts Reporting (United States of America) Regulations 2014 (S.I. No 292 of 2014), as amended by Financial Accounts Reporting (United States of America) (Amendment) Regulations 2015 (S.I. No 501 of 2015) and Financial Accounts Reporting (United States of America) (Amendment) Regulations 2018 (S.I. No 19 of 2018). They do not have the force of law and do not affect any person's right of appeal.

Terms defined in the Agreement, the Regulations, or in Appendix II of these Guidance Notes are denoted in *italics*.

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1 FATCA Overview

1.1 Background

The Foreign Account Tax Compliance Act ('FATCA') forms part of the US Hiring Incentives to Restore Employment Act of 2010. The overall aim of this legislation is to combat tax evasion by improving exchange of information between tax authorities in relation to US citizens and residents who hold assets off-shore. FATCA imposes a 30% US withholding tax on US source income/proceeds on payments that are made to any non-US *Financial Institution* **unless** that institution has entered into an agreement with the US Internal Revenue Service ('the IRS') to directly report certain information on *Account Holders* who are *US persons*, or is otherwise outside the scope of FATCA

On 21 December 2012, the Minister for Finance, on behalf of the Government, signed an intergovernmental agreement with the US in relation to the implementation of FATCA in Ireland ('the Agreement'). The Statutory Instrument implementing the Agreement (S.I. No 33 of 2013) is included in Part 3 of Schedule 24A to the Taxes Consolidation Act, 1997.. This Statutory Instrument together with the Financial Accounts Reporting (United States of America) Regulations 2014 (S.I. No 292 of 2014) as amended by Financial Accounts Reporting (United States of America) (Amendment) Regulations 2015 (S.I. No 501 of 2015) and Financial Accounts Reporting (United States of America) (Amendment) Regulations 2018 (S.I. No 19 of 2018) ('the Regulations'), and section 891E of the Taxes Consolidation Act give legislative effect to the Agreement.

The Agreement provides for the automatic reporting and exchange of information on an annual basis in relation to accounts held in Irish *Financial Institutions* by US persons, and the reciprocal exchange of information regarding US *Financial Accounts* held by Irish residents.

1.2 Scope of FATCA

The Agreement, the Regulations, and these Guidance Notes apply to all Irish *Financial Institutions* that maintain *Financial Accounts.* Where a *Financial Account* is held by:

- a *Specified US Person* or

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- a passive entity with controlling persons that are *Specified US Persons*

the account will be regarded as a *Reportable Account* (see Chapter 3) and a *Reporting Financial Institution* must identify all such accounts using the due diligence procedures set out in the Agreement and then submit a return containing details of these accounts to Revenue on or before 30 June each year.

*Reporting Financial Institution*s with no *Reportable Accounts* will be required to submit a nil return to Revenue.

In addition to reporting information on *Reportable Accounts* and for the tax years 2015 and 2016 only, a *Reporting Financial Institution* must report payments made by it to *Non-Participating Financial Institution*s ('*NPFI*').

A *NPFI* is a *Financial Institution* that is not FATCA compliant. This situation will arise where: -

- the *Financial Institution* is located in a jurisdiction that does not have an Intergovernmental Agreement ('IGA') with the US and the *Financial Institution* has not itself entered into a FATCA agreement with the IRS, or
- the *Financial Institution* is classified as being a *NPFI* due to significant non-compliance with its obligations.

A *Financial Institution* will only be classified as an *NPFI* where there is significant non-compliance with the Agreement and the Regulations and, following a period of enquiry, it has not rectified that non-compliance. Where a *Financial Institution* becomes a *NPFI*, details may be published by the IRS.

The presence of an *NPFI* in its group will not preclude a *Financial Institution* from being treated as a *Participating Financial Institution* for FATCA purposes. Where an Irish *Financial Institution* has a related entity that, is an *NPFI* because of the jurisdiction it operates in or due to the expiration of the transitional rule for limited FFIs and limited branches under relevant U.S. Treasury Regulations, the Financial *Institution* must treat the related entity as an *NPFI* and report payments made to the *NPFI* (see Chapter 11).

For the purposes of FATCA, an entity is related to another entity if one entity controls the other or the two entities are under common control. For this purpose

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control includes direct or indirect ownership of more than 50 per cent of the vote and value in an entity.

Certain *Financial Institutions* will be considered to be *Deemed Compliant Financial Institutions* (see Annex II of the Agreement, section 3 of Chapter 2 of these Guidance Notes, and Appendix 1 of these Guidance Notes). Some further exceptions may also apply in respect of certain products and entities (see Annex II of the Agreement).

A *Financial Institution* will need to establish what type of *Financial Institution* it is for the purposes of the Agreement and its obligations under the Agreement.

Registration and reporting are distinct functions under FATCA. All FATCA registration is made directly with the IRS via the [IRS Registration Portal](). For further details, see Appendix 3.

Reporting under FATCA commenced in 2015.

1.3 Interaction with US Regulations

Irish *Financial Institutions* must apply the Irish Regulations in force at the time and adhere to the published Revenue Guidance. However, an Irish *Financial Institution* should not be at a disadvantage as a result of applying the Irish legislation implementing the Agreement as compared to the position that they would be in if applying the US Regulations or the terms of another FATCA Model 1 IGA entered into between the US and another jurisdiction. Thus, where a *Financial Institution* identifies an element of the US Regulations or an element of another FATCA Model 1 IGA that it considers to be more favourable, it should contact Revenue to discuss the issue.

If the US authorities subsequently amend the underlying US regulations to introduce additional or broader exemptions Revenue will consider whether to incorporate these changes into its Regulations or Guidance Notes. Revenue will publish any updates on its dedicated Automatic Exchange of Information webpage (see:

http://www.revenue.ie/en/companies-and-charities/international-tax/aeoi/what-is-aeoi.aspx) and make any subsequent changes to the Regulations if needed.

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1.4 Purpose of these Guidance Notes

These Guidance Notes are intended to provide guidance to *Financial Institution*s on how to comply with their obligations under the Agreement and under the Financial Accounts Reporting (United States of America) Regulations 2014 (S.I. No 292 of 2014), as amended by Financial Accounts Reporting (United States of America) (Amendment) Regulations 2015 (S.I. No 501 of 2015) and Financial Accounts Reporting (United States of America) (Amendment) Regulations 2018 (S.I. No 19 of 2018). They do not have the force of law and do not affect any person's right of appeal.

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1.5 Revenue contacts

Where further information is required on the issues raised in these guidelines, please contact the Revenue Commissioners via MyEnquiries on ROS.

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2 Reporting Financial Institutions

2.1 Introduction

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As stated earlier, FATCA applies to Irish *Financial Institution*s. This includes subsidiaries and branches of non-resident *Financial Institution*s that are located in Ireland and which fall within any of the categories referred to in Section 2 below. However, subsidiaries and branches of Irish entities that are not located in Ireland are excluded from the scope of the Agreement and will be covered by any relevant rules in the country in which they are located.

Generally, if an entity is resident for tax purposes in Ireland, then it will be within the scope of the Agreement. For this purpose, "check the box" elections made to the IRS are not relevant for determining whether an entity is resident in Ireland.

Example 1

ABC Bank PLC, which is located in Dublin has the following financial institutions in its group:

- a subsidiary (S) located in Cork,
- a subsidiary (D) located in Partner Jurisdiction 1,
- a branch (F) located in Partner Jurisdiction 2,
- a branch (X) located in a country that does not have an agreement with the US.

Under the terms of the Agreement:

- ABC Bank PLC and its subsidiary S will be Irish *Financial Institution*s and will report to the Revenue Commissioners;
- Subsidiary D and branch F will be classified under the Agreement as *Partner Jurisdiction Financial Institution*s and will report to their respective jurisdictions;
- Branch X will be a *Non- Participating Financial Institution* if its country of residence does not have an agreement with the US and if it cannot or does not comply with the obligation to report directly to the US;

Example 2

WXY Bank is resident in the U.K and has the following entities in its group:

- Subsidiary 1 located in Scotland;
- Subsidiary 2 located in Denmark;
- Branch 1 located in Ireland.

Under the FATCA rules, WXY Bank and Subsidiary 1 will report to HMRC in the UK while Subsidiary 2 will report to SKAT in Denmark . Branch 1 will report to Revenue.

2.2 Definition of Financial Institution

For the purposes of FATCA, a *Financial Institution* is a non-US entity that falls into any of the following categories:

- a *Custodial Institution*,
- a *Depository Institution*,
- an *Investment Entity*, or
- a *Specified Insurance Company.*

An entity may fall within more than one category of *Financial Institution*.

2.2.1 Custodial Institution

A *Custodial Institution* is any entity that earns a substantial portion (at least 20 per cent) of its gross income from the business of holding financial assets for the account of others and the provision of related financial services during the shorter of:

- its last 3 accounting periods, or
- in the period since commencement of business, where the entity has not been in business for 3 years.

The term “related financial services” means any ancillary service directly related to the holding of assets by the institution on behalf of others. Income arising from these services includes:

- custody, account maintenance and transfer fees;

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- execution and pricing commission and fees for securities transactions;
- income earned from extending credit to customers;
- income earned from contracts for difference and on the bid-ask spread of financial assets; and
- fees for providing financial advice, clearance and settlement services.

Brokers, custodial banks, trust companies, clearing organisations (such as central securities depositories) and nominees are all likely to fall within the definition of *Custodial Institution*. Insurance brokers do not hold assets on behalf of clients and thus should not generally fall within this category of *Financial Institution*.

2.2.2 Depository Institution

A *Depository Institution* is defined as an entity that accept deposits in the ordinary course of a banking or similar business.

This category would include banks, credit unions, industrial and provident societies and building societies. This is not an exhaustive list and whether or not an entity is a *Depository Institution* will depend on what activities are actually undertaken by the entity. Generally, however, insurance brokers and solicitors would not be expected to fall within this definition.

A *Financial Institution* accepts a deposit if a sum of money is paid to it on terms−

- under which it will be repaid, with or without interest or premium, either on demand or at a time or in circumstances agreed by or on behalf of the person making the deposit and the *Financial Institution* receiving it, and
- which are not referable to the provision of property (other than currency) or services or the giving of security;

The requirement that a *Financial Institution* accept deposits in the ordinary course of a banking business will generally be met if the money received by way of deposit is lent to others or any other activity of the *Financial Institution* is financed wholly, or to a material extent, out of the capital of, or interest on, money received by way of deposit.

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Entities that issue payment cards that can be pre-loaded with funds in excess of $50,000 to be spent at a later date, such as pre-paid credit card or “e-money”, will also be considered to be a *Depository Institution* for the purposes of the Agreement.

Entities that provide asset backed finance services or that accept deposits solely from persons as collateral or security pursuant to a sale or lease of property, a loan secured by property or a similar financing arrangement between such entity and the person making the deposit with the entity, will not be *Depository Institution*s. This might, for instance, apply to a leasing, factoring or invoice discounting business.

Entities that facilitate money transfers by instructing agents to transmit funds (but do not finance the transactions) will not be considered to be engaged in banking or similar business as this is not seen as accepting deposits.

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2.2.3 Investment Entity

An *Investment Entity* is an entity that primarily conducts as a business, or is managed by an entity that conducts as a business, one or more of the following activities, for or on behalf of a customer (e.g. an *Account Holder*):

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

An entity will be regarded as an *Investment Entity* where the entity's gross income attributable to such activities is equal to or exceeds 50 per cent of the entity's gross income during the shorter of:

- the three-year period ending on 31 December of the year preceding the year in which the determination is made; **or**
- the period during which the entity has been in existence.

In practice, an entity that is professionally managed by a regulated *Financial Institution* and that performs any of the activities listed above, either directly or through another third party service provider, will generally be an *Investment Entity*.

Where an entity is managed by an individual the managed entity will not be an *Investment Entity* because an individual cannot be an *Investment Entity*.

The term "Investment Entity" does not include an entity who undertakes substantially one or more of the following functions:

(a) An entity that primarily engages in financing and hedging transactions with, or for, *Related Entities* that are not *Financial Institutions*, and does not provide financing or hedging services to any Entity that is not a *Related Entity*, provided that the group of any such Related Entities is primarily engaged in a business other than that of a *Financial Institution*, or

(b) Primarily all of the activities of the entity consist of holding (directly or indirectly) all or part of the outstanding stock of one or more *Related Entities* that engage in trades or businesses other than the business of a *Financial Institution*, or

Notwithstanding the above, an entity listed at (a) or (b) above will not be an Active NFFE if it functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes.

An *Investment Entity* whose assets consist of non-debt direct interests in real property, even if managed by another *Investment Entity* will not be an *Investment Entity*, e.g. a REIT. In circumstances where the principal company in a REIT group structure does not hold a direct interest in real property and the entity is managed by another *Investment Entity*, the principal company will be an *Investment Entity*.

Collective Investment Schemes are the main type of entity covered by this heading. However the definition of *Investment Entity* is very wide and would include in addition to Collective Investment Schemes, persons such as fund administrators, fund managers, fund distributors, custodians, nominees etc. Although such entities are *Investment Entities* in accordance with the definition, they will not be regarded as a *Reporting Financial Institution* unless they hold *Financial Accounts* (see Chapter 5.1).

Many Collective Investment Schemes are constituted as umbrella funds, whereby investment portfolios are held for different investors, through sub-funds with segregated liability. In such situations, registration and reporting may be carried out by the umbrella or on a sub-fund basis.

Investment Limited Partnerships and Common Contractual Funds will also be covered by this heading and regarded as *Financial Institutions*

A unit trust scheme (as defined under section 1 of the Unit Trusts Act 1990) will be an *Investment Entity* where the trust or trustee engages another *Financial Institution* to manage the trust or financial assets on its behalf. The fact that a trust holds a *Financial Account* (eg a *Depository Account*) with a *Financial Institution* does not of itself mean that the trust is a *Financial Institution*.

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A trust will be an *Investment Entity* where (a) the trustee is a *Financial Institution*, (b) the trustee engages a *Financial Institution* to manage the trust, or (c) the trustee engages a *Financial Institution* to manage the financial assets of the trust. If the trust is not professionally managed, then it will be treated as a *NFFE*.

When a Collective Investment Scheme is closed (i.e. there are no remaining investors in the fund and the fund is not open to new investors) but there remain residual debtors and recovery actions are being pursued, the fund will be not an *Investment Entity* for the purposes of FATCA.

Whilst the Collective Investment Scheme is considered to be the *Financial Institution* in all cases, either at umbrella or sub-fund level, the party responsible for ensuring compliance with the Regulations may differ, as outlined in the examples below:

(a) for a Collective Investment Scheme constituted as a corporate entity, that corporate entity is responsible for ensuring its own compliance with the Regulations;
(b) for a Collective Investment Scheme constituted as trust and the trustee of the trust is a person who carries on business in the State, the trustee is the responsible for ensuring that the trust is compliant with the Regulations;
(c) for a Collective Investment Scheme constituted as a Unit Trust Scheme or Common Contractual Fund, the manager of the Scheme or Fund will be responsible for ensuring compliance with the Regulations;
(d) for a Collective Investment Scheme constituted as an Investment Limited Partnership, the general partner is responsible for ensuring the ILP's compliance with the Regulations, and
(e) for a Collective Investment Scheme constituted otherwise than as described in (a) to (d) above and the manager of the Collective Investment Scheme is a person who carries on business in the State, that person is responsible for ensuring the ILP's compliance with the Regulations.

In practice, the corporate entity, trustee, or manager may appoint another to carry out its duties and obligations under the Regulations, however, ultimate responsibility for any failure by the appointee to carry out those duties and obligations will remain with the corporate entity, trustee, or manager.

Investment Managers and Investment Advisers

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Under the provisions of the Agreement, an Investment Adviser or Investment Manager may fall within the meaning of *Financial Institution* (usually *Investment Entity*) solely because they render investment advice to, or on behalf of, a customer for the purposes of investing, managing or administering funds deposited in the customer's name.

An *Investment Entity* established in Ireland that is a *Financial Institution* solely because it:

(a) renders investment advice to, and acts on behalf of, or
(b) manages portfolios for, and acts on behalf of,

a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a *Financial Institution* other than a *NPFI*, will be regarded as a *Deemed Compliant Financial Institution*.

In the case of Investment Advisers who solely render investment advice to customers and do not otherwise undertake investment services or maintain financial accounts, they are likely to fall within the meaning of *NFFE*.

Insurance brokers are unlikely to fall within the definition of *Investment Entity* where they act as an agent.

2.2.4 Specified Insurance Company

An insurance company is a *Specified Insurance Company* when the products written by the company are classified as *Cash Value Insurance Contracts* or *Annuity Contracts* (see Article 1 to the Agreement) or if payments are made with respect to such contracts.

Insurance companies that only provide general insurance or term life insurance will not be *Financial Institution*s under this definition and neither will reinsurance companies that only provide indemnity reinsurance contracts.

A *Specified Insurance Company* can include both an insurance company and its holding company. However, the holding company itself will only be a *Specified Insurance Company* if it issues or is obligated to make payments with respect to *Cash Value Insurance Contracts* or *Annuity Contracts*. As only certain persons are permitted to provide *Insurance Contracts* or *Annuity Contracts*, it is unlikely that an

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insurance holding company will in itself issue or will be obligated to make payments with respect to *Cash Value Insurance Contracts* or *Annuity Contracts*.

Insurance brokers are part of the payment chain and should not be classified as a *Specified Insurance Company* because they are not obliged to make payments under the terms of the *Insurance* or *Annuity Contract*.

2.2.5 Treatment of holding companies and treasury companies

A holding company or treasury company will only be considered a *Financial Institution* if it meets the definition of the four *Financial Institution* categories specified in the definition above Where a holding company or treasury company does not fall into one of the above-mentioned categories of *Financial Institution* it will be classed as a *Non-Financial Foreign Entity (NFFE)*, and will fall into the category of "active" or "passive" in accordance with the criteria set out in Appendix 2 of the Guidance Notes.

Amending Regulation S.I. 501 of 2015 amends the implementing Regulation (S.I. No 33 of 2013) to prescribe this treatment. In circumstances where a holding company or treasury company of a financial group had previously identified itself as a Relevant Holding Company or Relevant Treasury Company based on the implementing Regulation, and completed its FATCA registration as the lead *Financial Institution* of an *Expanded Affiliated Group (EAG)*, Revenue will allow the entity to continue to treat itself as the lead *Financial Institution* for reporting purposes. An entity acting in this capacity will remain outside the definition of *Financial Institution* and will have no Irish reporting obligations in its own right.

2.3 Related Entities

For the purposes of FATCA, when a *Financial Institution* is considering its own group, an entity is regarded as being related to another entity if one entity controls the other or the two entities are under common control. For this purpose, “control” means the direct or indirect ownership of more than 50% of the vote and value in an entity.

The concept of related entities is relevant in the context of the reporting obligations of *Reporting Financial Institutions* in respect of payments to any related entities that are *NPFIs*.

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2.4 Reporting Financial Institution - Exemptions

An Irish *Financial Institution* or an Irish branch of a non-Irish *Financial Institution* will be a *Reporting Financial Institution* under FATCA unless it is exempt from FATCA reporting or is deemed to be compliant for FATCA purposes under Annex II of the Agreement or under the US Regulations.

2.4.1 Exempt Beneficial Owner

An entity falling within the *Exempt Beneficial Owner* category will not have to register with the IRS nor will it have any reporting obligations in relation to any *Financial Accounts* that it may maintain. *Reporting Financial Institutions* will not be required to review or report on accounts held by such *Exempt Beneficial Owners*. The categories of *Exempt Beneficial Owner* are set out in Part I of Annex II to the Agreement and are as follows:

- Irish Governmental Organisations,
- the Central Bank,
- International Organisations, and
- Certain Retirement/Pension Funds.

2.4.2 Deemed Compliant Entities

An entity will be *Deemed Compliant* if it is listed in Part II of Annex II to the Agreement or in the US Regulations.

There are 2 categories of Deemed Compliant Institutions – (i) self certified or (ii) registered.

(i) *Self-Certified Deemed Compliant Financial Institutions* listed in the Agreement

- Non Profit Organisations,
- Financial Institutions with a local client base, and
- Certain Collective Investment Vehicles.

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***Self-Certified Deemed Compliant Financial Institutions* listed in the US Regulations**

- Non registering local banks,
- Financial Institutions with only low value accounts,
- Sponsored closely held investment vehicles,
- Limited Life debt investment entities,
- Investment Managers/Investment Advisers (see Chapter 2 paragraph C for further details, and
- Owner documented Financial Institutions.

In general and unless specifically indicated in the qualifying conditions, *Self-Certified Deemed Compliant Financial Institutions* do not have to register or report under FATCA.

(ii) Registered Deemed Compliant Financial Institutions

The *Financial Institutions* falling within this category are not included as *Deemed Compliant Financial* Institutions under the Agreement. However the institutions are regarded as *Registered Deemed Compliant Financial Institutions* under the US Regulations. As such paragraph 1(q) of Article 1 of the Agreement enables Irish *Financial Institutions* that comply with the various conditions to qualify for the exemption. An institution falling within this category must register with the IRS and obtain a GIIN in accordance with the arrangements set out in Appendix 3 but is only required to report information in specific circumstances. Institutions falling within this category are:

- Non-reporting members of a group of related *Participating Financial Institutions*,
- restricted funds,
- qualified credit card issuers,
- sponsored investment entities, or
- controlled foreign corporations.

Detailed descriptions of the various *Deemed Compliant* and exempt *Financial Institutions* are contained in Appendix 1.

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3 Reportable Accounts

3.1 Introduction

Reporting Financial Institutions must provide information to Revenue on an annual basis in relation to *Reportable Accounts.*

A *Reportable Account* is a *Financial Account* that:

1. is not an exempt account,
2. is held by one or more *Specified US Persons* or by a *Passive NFFE* with one or more controlling persons that are *Specified US Persons*, and
3. is maintained by a *Reporting Financial Institution*.

Chapters 7 – 11 set out the due diligence procedures that must be followed by *Reporting Financial Institutions* in order to identify *Reportable Accounts*

3.2 Financial Account

The term *Financial Account* is defined as an account maintained by a *Financial Institution* and includes certain *Equity or Debt Interests in an Investment Entity*. This is a very wide definition and would include for instance, a capital or profits interest in a partnership if that partnership is an *Investment Entity*. It does not include equity and debt interests that are regularly traded on an established securities market. There are 5 categories of *Financial Accounts*:

1. *Depository Accounts*
2. *Custodial Accounts*
3. *Cash Value Insurance Contracts*
4. *Annuity Contracts*
5. Certain *Equity and Debt Interests in an Investment Entity*

A definition of each category is included in Appendix 2.

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A *Financial Institution* may offer more than one type of *Financial Account*. Additionally while an entity may be categorised as a *Financial Institution* it may not have any *Financial Accounts*.

Except in the case of certain *Equity and Debt Interests in an Investment Entity*, the definition of *Financial Account* does not extend to shareholdings on an issuer's share register nor debenture/loan stock holdings (including shareholdings which have been the subject of an acquisition, as a result of which the original share register no longer exists). However shareholdings and loan/debenture stock holdings can be 'financial instruments/contracts' and are reportable if held in a *Custodial Account*.

Where a *Financial Institution* is acting as an executing broker, and simply executing trading transactions, or receiving and transmitting such instructions to another executing broker, (either through a recognised exchange, multilateral trading facility or a non EU equivalent of such, a clearing organisation or on a bilateral basis) the *Financial Institution* will not be required to treat the facilities established for the purposes of executing a trading transaction, or receiving and transmitting such instructions, as a *Financial Account*. The *Financial Institution* acting as custodian will be responsible for performing due diligence procedures and reporting where necessary.

In certain circumstances "placing agents" will typically acquire shares for a 2-3 day period (maximum 7 days) and hold these as nominee for an underlying investor. The placing agent will also have cash funds deposited by the investor for a similar period. The two would ultimately be matched and the shares delivered to the designated custodian of the investor. To eliminate the creation of a series of custodial accounts which would open and close in a 2-3 day window and therefore be potentially reportable such funds will not be regarded as *Financial Accounts* provided that:

1. The account is established and used solely to secure the obligation of the parties to the transaction.
2. The account only holds the monies appropriate to secure an obligation of one of the parties directly related to the transaction, or a similar payment, or with a financial asset that is deposited in the account in connection with the transaction.
3. The assets of the account, including the income earned thereon, are paid or otherwise distributed for the benefit of the parties when the transaction is completed.

The term *Financial Account* includes *Equity and Debt Interests in an Investment Entity* other than interests that are regularly traded on an established securities market. In the context of *Investment Entities* which are *Collective Investment Schemes* (including sub-funds of umbrella *Collective Investment Schemes*) which are

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regularly traded on a recognised stock exchange, these shall not be considered to be *Financial Accounts*.

In this regard, such *Investment Entities* whose interests comprise entirely of interests which are regularly traded on recognised stock exchanges should have no responsibilities in respect of due diligence and reporting under the Regulations. In addition, payments in respect of such classes of interests should not fall in scope of Chapter 11 (Reporting of Payments made to Non-Participating Financial Institutions).

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3.3 Accounts that will not be regarded as Financial Accounts

3.3.1 Intermediary Accounts (Escrow Accounts)

An account will not be a *Financial Account* where it is held by an Irish *Financial Institution* for a non-financial intermediary (such as a firm of solicitors or estate agents) and is established for the purposes of either:

- a court order, judgement or other legal matter on which the non - financial intermediary is acting on behalf of their underlying client, or
- a sale, exchange, or lease of real or personal property. Where this applies the account must also comply with all of the following conditions:
  - the account holds only–
    - the monies appropriate to secure an obligation of one of the parties directly related to the transaction,
    - a similar payment, or
    - a financial asset that is deposited in the account in connection with the transaction,
  - the account is established and used solely to secure the obligation of the parties to the transaction,
  - the assets of the account, including the income earned thereon, will be paid or otherwise distributed for the benefit of the parties when the transaction is completed,
  - the account is not a margin or similar account established in connection with a sale or exchange of a financial asset, and
  - the account is not associated with a credit card account.

3.3.2 Accounts of Deceased Persons

Accounts of deceased persons will not be treated as *Financial Accounts* on the condition that the *Financial Institution* has received and is in possession of formal notification of the *Account Holder's* death (for example a copy of the deceased's death certificate, grant of probate, a copy of the Coroner's Interim Certificate of the Fact of Death, etc.).

3.3.3 Exempt Accounts

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Annex II of the Agreement sets out details of products that are exempt from FATCA and therefore need not be reported. These are:

(i) Certain Retirement Accounts or Products

This exemption covers the following products (see Annex II of the Agreement)

- A Retirement Benefit Scheme, within the meaning of section 771 of the Taxes Consolidation Act 1997, approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act.
- An *Annuity Contract* or a trust scheme or part of a trust scheme approved by the Revenue Commissioners under Chapter 2 of Part 30 of the Taxes Consolidation Act 1997.
- A PRSA contract in respect of a PRSA product, approved by the Revenue Commissioners under Chapter 2A of Part 30 of the Taxes Consolidation Act 1997.
- An Approved Retirement Fund or an Approved Minimum Retirement Fund provided for under a Retirement Benefit Scheme, an Annuity Contract or a PRSA as approved under Chapters 1, 2 or 2A of Part 30 of the Taxes Consolidation Act 1997.
- Those Irish approved pension schemes or contracts under Part 30 of the Taxes Consolidation Act 1997 or Approved Retirement Funds or Approved Minimum retirement Funds that are excluded from the definition of *Financial Account* pursuant to Article 1(s)(3) of the Agreement.
- An account or product excluded from the definition of *Financial Account* under an agreement between the United States and another partner jurisdiction to facilitate the implementation of FATCA, provided that such account or product is subject to the same requirements and oversight under the laws of such other partner jurisdiction as if such account or product were established in that partner jurisdiction and maintained by a *Partner Jurisdiction Financial Institution* in that partner jurisdiction.

This paragraph is designed to cover the provision of cross border pensions.

Example

An Irish insurance company directly writes pension business into the Netherlands but it has no permanent establishment in the Netherlands. The pension account that is offered fully complies with Dutch pension and tax law, and consequently would be exempted under the Dutch-US IGA if the *Financial Account* was held by a Dutch based insurance company.

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(ii) Certain Other Tax-Favoured Accounts or Products

The following products are covered by this exemption:

- **Save As You Earn Share Option Schemes**

  Schemes approved by the Revenue Commissioners under Chapter 3, Part 17 and Schedule 12A Taxes Consolidation Act 1997.

- **Profit Sharing Schemes**

  Schemes approved by the Revenue Commissioners under Chapter 1, Part 17 and Schedule 11 Taxes Consolidation Act 1997.

- **Employee Share Ownership Trusts**

  Schemes approved by the Revenue Commissioners under Chapter 2, Part 17 and Schedule 12 Taxes Consolidation Act 1997.

3.4 Accounts maintained by Financial Institutions

An account will be "maintained" by a *Financial Institution* in the following circumstances:

- A *Depository Account* is maintained by the *Financial Institution*, which is obliged to make payments with respect to the account.
- A *Custodial Account* is maintained by the *Financial Institution* that holds custody over the assets in the account (including a *Financial Institution* that holds assets in the name of the broker "in street name") for an *Account Holder*.
- An *Cash Value Insurance Contract* or an *Annuity Contract* is maintained by the *Financial Institution* that is obliged to make payments with respect to the contract.
- An *Equity or Debt Interest* in a *Financial Institution*, where that *Equity or Debt Interest* constitutes a *Financial Account*, is treated as being maintained by that *Financial Institution* where that *Financial Institution* is an *Investment Entity*.

A *Financial Institution* may maintain more than one type of *Financial Account*. For example a *Depository Institution* may also maintain *Custodial Accounts* as well as *Depository Accounts*.

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The date on which a *Financial Account* is created will depend on the type of account. An account will be created when the *Financial Institution* is required to recognise the account based on existing operating procedures or regulatory or legal requirements of the jurisdiction in which it operates.

3.5 Account Holder

In most cases the identification of the holder of a *Financial Account* by a *Reporting Financial Institution* will be straightforward. However this may not always be the case as a result of existing commercial or legal practices, for example as the result of the use of nominees and third party beneficiaries.

Notwithstanding existing practices, for the purposes of FATCA, a *Reporting Financial Institution* will be expected to apply the due diligence procedures set out in Chapters 7 to 10 to identify the *Account Holder*.

- **Trusts, Estates and Partnerships**

  Where a trust (other than a unit trust that is a Collective Investment Scheme, see Chapter 2, Section 2C) or 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. This does not remove the requirement to identify the controlling person of a trust or estate where, say, the trust is a *Passive NFFE*.

  In relation to a share register, where an issuer's share register has been subject of an acquisition, (for example a takeover of Company X by Company Y) and shareholders of Company X have not responded and accepted the offer, they become known as dissenters or dissenting shareholders. On completion of the takeover, the consideration is transferred to a trustee to be held on the dissenters' behalf until they claim the proceeds and it is paid to them, however the trustee does not become the *Account Holder*. This is because the original shareholdings (equity interests) are not *Financial Accounts* unless the provisions regarding *Equity or Debt Interest* in an *Investment Entity* apply.

  Where a *Financial Account* is held in the name of a partnership (other than an Investment Limited Partnership that is a Collective Investment Scheme, see Chapter 2, Section 2C) it will be the partnership that is the *Account Holder* rather than the partners in the partnership

- **Cash Value Insurance Contracts and Annuity Contracts**

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A *Cash Value Insurance* or *Annuity Contract* is held by each person that is entitled to access the contract's value (for example, through a loan, withdrawal, surrender, or otherwise) or change a beneficiary under the contract.

Where no person can access the contract's value or change a beneficiary, the *Account Holders* are any person named in the contract as an owner and any person who is entitled to receive a future payment under the terms of the contract. When an obligation to pay an amount under the contract becomes fixed, each person entitled to receive a payment is an *Account Holder*.

- **Joint life second death Cash Value Insurance Contracts**

  Joint life second death *Cash Value Insurance Contracts* are sometimes taken out by spouses. Such policies insure both parties, but do not pay out on the death of the first person. Instead the policy remains in force until the other person has died or the policy is surrendered.

  Where one of the policyholders whose life is assured is a US person this will be a *Reportable Account*. If the US person dies first, there will be a requirement to report this at the end of the year in which the US person dies. However, as there will no longer be any US indicia associated with such a policy and also no US *Account Holder* there will be no further requirement to report this account in subsequent years.

- **Accounts held by persons other than a *Financial Institution***

  A person, other than a *Financial Institution*, that holds a *Financial Account* for another person as an:

  - agent
  - custodian
  - nominee
  - signatory
  - investment adviser
  - intermediary

  is not treated as an *Account Holder* with respect to such an account.

  Where the *Financial Account* does not meet the conditions relating to intermediary accounts (Escrow Accounts) then the person on whose behalf the account is held is the *Account Holder*. For example where a parent opens an account for a child, the child would be the *Account Holder*.

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4 Reporting

4.1 Introduction

*Reporting Financial Institution*s are required to report details of *Reportable Accounts* maintained by the *Financial Institution*s.

4.2 Information to be reported

The information to be included in the return to Revenue is:

4.2.1 Information applicable to all *Reportable Accounts*

- *Account Holder* name.
- Address of the *Account Holder*.
- US TIN where applicable (See paragraph 1.2).
- The account number or the functional equivalent of an account number.
- The name and identifying number of the *Reporting Financial Institution*.
- The account balance or value as of the end of the reporting period.

4.2.2 Information for Custodial Accounts

Where the account is a *Custodial Account* the following information is also required:

- The total gross amount of interest paid or credited to the account.
- The total gross amount of dividends paid or credited to the account.
- The total gross amount of other income paid or credited to the account.
- The total gross proceeds from the sale or redemption of property paid or credited to the account.

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4.2.3 Information for Depository Accounts

Where the account is a *Depository Account* the following information is also required, the total amount of gross interest paid or credited to the account.

4.2.4 Information for Cash Value Insurance Contracts or Annuity Contracts

Where the account is a *Cash Value Insurance Contract*, the following information must be reported:

- The annual amount reported to the policy holder as the gross surrender value of the account,

  or

  The gross surrender value of the account as calculated by the company on 31 December;

  and

- Any part surrenders taken during the policy year.

4.2.5 Information for accounts other than Custodial or Depository Accounts or Cash Value Insurance Contracts

For accounts other than a *Custodial* or *Depository Account* the following information is also required, the total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account.

4.3 Taxpayer Identification Numbers (TINs)

Where it has been established that an *Account Holder* is a US person, a *Reporting Financial Institution* is required to obtain a US TIN. This obligation applies to both Pre-existing and New Accounts and a US TIN should be reported for all *Account Holders* in respect of reporting for the 2017 period (in filing year 2018) and subsequent periods. A US TIN means a US federal taxpayer identifying number.

For *Pre-existing Individual Accounts* that are *Reportable Accounts*, from 1 January 2017, a *Reporting Financial Institution* must obtain the US TIN for all *Account Holders.*

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The IRS has issued guidance which recognises that some *Reporting Financial Institutions* need additional time to implement practices and procedures to obtain a US TIN for some *account holders*. Accordingly, in the case of a *Pre-existing Account*, for the calendar years 2017, 2018 and 2019; if the *Reporting Financial Institution* is unable to obtain the US TIN from an *Account Holder*, the *Reporting Financial Institution* can report the account without the US TIN if they meet the following requirements:

- obtain and report the date of birth of the *Account Holder*,
- request the required US TIN annually from each *Account Holder* where the US TIN is not on file,
  <u>and</u>
- before reporting information that relates to the calendar year 2017, the *Reporting Financial Institution* must search any electronically searchable data maintained by that Reporting *Financial Institution* for the US TIN.

Please note that this treatment will not be available from the calendar year 2020 onwards.

For all *New Individual Accounts* that are identified as *Reportable Accounts* from 1 July 2014 onwards, the reporting institution must obtain a self-certification from *Account Holders* who have been identified as resident in the US. The self-certification must include a US TIN.

Where, in the case of a *New Individual Account* that has one or more US indicia, the proposed *Account Holder* fails to provide a US TIN and/or confirm its status and the account becomes active, the account is to be treated as a *Reportable Account*. Where a *Reporting Financial Institution* has been unable to obtain a US TIN and/or confirm the status of an *Account Holder,* the *Reporting Financial Institution* should document all efforts and contacts made with the *Account Holder* to obtain this information. The *Reporting Financial Institution* should have the documentation to demonstrate that they have made every attempt to contact the *Account Holder* and obtain the required information.

Where a *Reporting Financial Institution* is reporting an *Account Holder* for whom they have not obtained a TIN, a placeholder should be included in the xml file. Further information on the format of the placeholder is available in the document entitled “FATCA validation changes guide” on the Revenue website. Where a

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Reporting Financial Institution is reporting an *Account Holder* for which they have not obtained a *self-certification*, the "AcctHolderType[1]" codes for *Reportable Accounts* should be used.

There is no requirement for a *Reporting Financial Institution* to verify that any US TIN provided is correct. A *Reporting Financial Institution* will not be held accountable where information supplied by an individual proves to be inaccurate.

4.4 Account Number

If a *Reportable Account* has a unique identifying number or code, this is what should be reported. This will include identifiers such as Bank Account Numbers and Policy Numbers for insurance contracts as well as other non-traditional unique identifiers. The unique identifier should be sufficient to enable the *Reporting Financial Institution* to identify the *Reportable Account* in the future. If there is no account number, the functional equivalent of an account number should be supplied. This may include non-unique identifiers that relate to a class of interests. A non-unique identifier should be sufficient to enable the *Reporting Financial Institution* to identify the *Reportable Account* held by the named account holder in future. Exceptionally, if the *Reportable Account* does not have any form of identifying number or code then what should be reported is a description sufficient for the *Reporting Financial Institution* to identify the *Reportable Account* held by the named account holder in the future.

4.5 Registration Number

The registration number to be reported is the Global Intermediary Identification Number (GIIN) that will be assigned to the *Financial Institution* by the IRS on registration.

4.6 Determination of the account balance or value

Generally the balance or value of a *Financial Account* is the balance or value that is calculated by the *Financial Institution* for the purposes of reporting to the *Account*

[1] Please see the FATCA xml schema V2.0 User guide for a further description of this schema element.

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Holder. The balance to be reported is the balance or value of the account at the end of the reporting period except in the case of closed accounts.

In the case of a trust, the balance or value to be reported in the case of a person who is the beneficial owner of a portion or all of the trust will be the most recent value calculated by the *Reporting Financial Institution*. The balance or value for a beneficiary that is entitled to a mandatory distribution from the trust will be the net present value of amounts payable in the future.

The balance or value in the case of *Depository Accounts* will be the amount in the account on 31 December in the relevant year unless the account is closed on a date before that.

The balance or value in the case of other *Financial Accounts* will be the amount in the account on 31 December in the relevant year. Where it is not possible (or usual business practice) to value an account at 31 December, a *Reporting Financial Institution* should use the normal valuation point for the account that is nearest to the 31 December, whether this is before or after 31 December.

Example: Cash Value Insurance Policy

In the case of a policy taken out on 1 July 2013, it will be valued on the 30 June 2014. If the value exceeds the reporting threshold, then it is this 30 June 2014 value that will be reported for the year ending 31 December 2014. This will be reported to Revenue in 2015.

The date to be used where the 31 December falls on a weekend or non-working day is the last working day before that 31 December.

In arriving at the balance or value, the *Reporting Financial Institution* will use the valuation methods that it applies in the normal course of its business. Any valuation method adopted must be consistent and verifiable.

The balance or value of an equity interest is the value calculated by the *Reporting Financial Institution* for the purpose that requires the most frequent determination of value, and the balance or value of a debt interest is its principal amount.

The balance or value of the account should not be reduced by any liabilities or obligations incurred by an *Account Holder* with respect to the account or any of the assets held in the account and should not be reduced by any fees, penalties, or other charges for which the *Account Holder* may be liable upon terminating, transferring, surrendering, liquidating, or withdrawing cash from the account.

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4.7 Account Closures

The Regulations provide that the account balance or value to be reported where an account is closed during a year is the balance or value of the account on the day the account is closed. The intention is to capture the amount withdrawn from the account in connection with the closure process as opposed to the balance at the point of closure as there is an expectation that the balance will be reduced prior to the point of closure.

For these purposes, it is acceptable for the *Reporting Financial Institution* to:

- report the balance or value within 5 business days of when they receive instructions from the *Account Holder* to close the account, or
- report the most recently available balance or value that is obtainable following receipt of instructions to close the account. This may include the balance or value that pre-dates the instructions to close the account if this is the balance or value that is most readily available.

For accounts that close because the customer has switched to another bank, the balance to be reported should be that calculated as the transferable balance in accordance with standard bank account switching rules.

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4.8 Joint Accounts

For joint accounts, the entire balance or value of the account should be attributed to each holder of the account. This applies for both aggregation and reporting purposes.

For example where a jointly held account has a balance or value of $100,000 and one of the *Account Holders* is a *Specified US Person* then the amount to be attributed to that person would be $100,000. If both *Account Holders* were *Specified US Persons* then each would be attributed the $100,000 and reports would be made for both.

4.9 Currency Conversion

Where accounts are denominated in a currency other than US dollars, the threshold limits must be converted into the currency in which the accounts are denominated in order to determine whether the account is reportable. For reporting purposes, the account balance or value of an account may be reported in US dollars or in the currency in which the account is denominated.

The conversion rate to be used should be a published spot rate as of 31 December of the year for which the report is being prepared. Where an account has been closed during the year, a *Financial Institution* should use the spot rate on the date on which the closing balance is determined to convert the threshold amount.

Where the balance of a *Cash Value Insurance Contract* or an *Annuity Contracts* is required to be converted to USD at a date other than 31 December, the spot rate on the date of valuation should be used.

Examples of acceptable published exchange rates include, Reuters, Bloomberg, the Central Bank of Ireland, and the Financial Times.

Example 1

The threshold to be applied to Euro denominated Pre-existing Individual Depository Accounts when a published spot rate as of 31 December 2013 is 1.28 would be €39,062. ($50,000/ 1.28)

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Where the balance or value is determined on another date within the calendar year, the threshold limits should still be converted by reference to the spot rate as of 31 December of the relevant year.

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Example 2

A Pre-existing Cash Value Insurance Contract is valued at €200,000 as of 30 April 2013. It will be measured against the $250,000 threshold at 31 December 2013 when a published EURO/USD spot rate is 1.2800.This would result in a threshold of €195,313. ($250,000/1.28) and the contract would be reportable.

4.10 Timetable for Reporting

The reporting requirements are phased in over a 3 year period starting from 30 June 2015 in respect of 2014.

With respect to 2014 the information that needs to be reported is as set out in paragraph 3A points 1-6 above.

With respect to 2015 all of the information shown in paragraph 3 should be reported with the exception of the gross proceeds from the sale or redemption of property paid or credited to the account.

All information, including gross proceeds should be reported with respect to 2016 and subsequent years.

This is demonstrated in the following example:

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Reporting Year	In respect of	Information to be reported	Reporting date to Revenue
2014	• Each Specified US Person either holding a Reportable Account **Or** • who is a Controlling Person of a Passive NFFE	• Name • Address • US TIN (where applicable or DOB for Pre-existing Accounts) • Account number or functional equivalent • Name and identifying number of Reporting Financial Institution • Account balance or value	30 June 2015
2015	As 2014, plus payments to NPFIs	• As 2014 plus: • **Custodial Accounts** The total gross amount of interest, dividends and other income paid or credited to the account • **Depository Accounts** The total amount of gross interest paid or credited to the account in the calendar year or other reporting period • **Cash value insurance contracts** Surrender value; or amount calculated by the Specified Insurance Company; and any part surrenders. • **All other accounts** The total gross amount paid or credited to the account including the aggregate amount of any redemption payments.	30 June 2016
2016	As 2015	• As 2015 plus: • **Custodial Accounts** The total gross proceeds from the sale or redemption of property paid or credited to the account	30 June 2017
2017 onwards	As 2015	• All of the above	30 June following the end of reported calendar

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year

5 Identification and reporting of interests in Collective Investment Schemes ('CIS' or 'Funds') and other entities

5.1 Identification of accounts held by Collective Investment Schemes

The definition of *Investment Entity* is quite wide and includes Collective Investment Schemes, as well as fund managers, investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts as all of these entities could be investing, administering or managing Collective Investment Schemes. However, in any such case, the entity will only have reporting obligations if it holds *Financial Accounts*.

The only *Financial Accounts* that are relevant to Collective Investment Schemes are the equity and debt interests in the Collective Investment Scheme. An entity within the definition of *Investment Entity*, by virtue of investing, administering or managing Collective Investment Schemes but which does not itself hold *Financial Accounts* is not required to identify or report the accounts it administers or manages. For example, a Transfer Agent who provides services to a Collective Investment Scheme on a third party basis, would not typically have a direct obligation to identify or report the accounts it maintains for and on behalf of the Collective Investment Scheme. It may agree to provide additional services to the Collective Investment Scheme to assist with the Collective Investment Scheme's obligations under the Regulations, but the Collective Investment Scheme in this case would be the *Reporting Financial Institution* with responsibility for compliance with the Regulations.

It follows that where the *Investment Entity* is an investment undertaking (within the meaning of section 739B of the TCA), that investment undertaking is the only entity with an obligation to report on the accounts of the fund as it is the entity holding the *Financial Accounts*.

Where the interests in the Collective Investment Scheme are held directly by the investors, the Collective Investment Scheme is the only *Financial Institution* that will be regarded as a *Reporting Financial Institution* in relation to the Collective Investment Scheme. Where the Collective Investment Scheme's interests are held

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through intermediaries, those intermediaries are responsible for identifying their own direct *Account Holders*.

An entity which is regarded as an *Investment Entity* and therefore a *Financial Institution* solely because it administers or manages an investment undertaking will not be regarded as a *Reporting Financial Institution* merely because of its management or administration activities. However such an entity will be a *Reporting Financial Institution* if it maintains *Financial Accounts* other than those of the investment undertaking. In this respect, equity and debt interests in the fund manager/administrator itself would not be considered to be *Financial Accounts*.

5.2 Platforms and other fund distributors

Fund distributors, which may include independent financial advisers (IFAs), fund platforms, wealth managers, brokers (including execution-only brokers), banks, building societies and insurance companies, may fall within the definition of *Investment Entity* because of their role in distributing a collective investment vehicle.

There are two different types of fund distributors: those that act as an intermediary in holding the legal title to the collective investment vehicle (i.e. as nominee) and those that act on an advisory-only basis.

Where a customer appears on a Collective Investment Scheme's register, the responsibility to report on that customer lies with the fund. However, if a customer invests in a fund via a fund platform, the responsibility to report may lie with the platform. For example, fund platforms typically hold legal title to fund interests as nominees on behalf of their customers (the investors). The customers access the platform in order to buy and sell investments and to manage their investment portfolio. The platform will back the customers' orders with holdings in the Collective Investment Schemes, and possibly other assets, but only the platform will appear on the shareholders' register of the Collective Investment Schemes. Where this is the case the platform will be responsible for the reporting on its *Financial Accounts*.

On the other hand, most but not all IFAs act in an advisory-only capacity. They advise their customers on a range of investments, and may intermediate between the fund, or in some cases fund platform, and the customer. However, they will not hold legal title to the assets, instead the customer appears on the share register of the fund or as a direct customer to a fund platform. Financial advisers acting in this manner will not be regarded as the *Financial Institution* that maintains the *Financial Accounts*.

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A platform may have a 'mixed business' where it acts as an adviser or "pure intermediary" between the investor and the underlying *Financial Institution* on behalf of some customers. In addition, it also holds legal title to interests on behalf of other customers. In the case where legal title is held, the platform will be a *Financial Institution* with a reporting obligation in respect of those interests.

From the platform's perspective, it will not be treated as maintaining those accounts where it acts as an adviser or "pure intermediary". This is consistent with the treatment of a Central Securities Depository.

5.3 Fund nominees - Distributors in the chain of legal ownership

Distributors that hold legal title to assets on behalf of customers and are part of the legal chain of ownership of interests in Collective Investment Schemes are *Financial Institution*s. In most cases they will be *Custodial Institutions* because they will be holding assets on behalf of others.

Normally, the primary business of a fund nominee, fund intermediary or fund platform will be to hold financial assets for the account of others. As such, fund nominees, fund intermediaries and fund platforms will be treated as *Custodial Institution*s unless specific factors indicate that their businesses are better characterised as falling within the definition of *Investment Entity*.

In some cases there may be uncertainty over whether such a distributor meets the condition requiring 20% of the entity's gross income to derive from holding financial assets and from related financial services. This may be the case if, for example, the income derived from acting as nominee arises in another group company, or where income is derived from commission, discounts or other sources where it is not clear whether the gross income test is met.

Where this condition is not met, fund nominees, fund intermediaries and fund platforms will nevertheless still be *Financial Institution*s because they would otherwise be within the definition of *Investment Entity*. In this case, the *Financial Accounts* will be the accounts maintained by the distributor and the distributor will be responsible for ensuring it meets its obligations in respect of those accounts.

For the purpose of aggregating accounts to determine whether any pre-existing custodial accounts are below the exemption thresholds (See Chapter 7 and Chapter

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9), a *Custodial Institution* will need to consider all the *Financial Accounts* of its customers, without reference to whether the customers' underlying interests are in different Collective Investment Schemes.

5.4 Advisory-only distributors

Distributors that act in an advisory-only capacity and are not in the chain of legal ownership of a Collective Investment Scheme will **not** be regarded as a *Financial Institution* in respect of any accounts they advise on. Such distributors, which may include some IFAs, may nevertheless be asked by *Financial Institution*s to provide assistance in identifying *Account Holders* and obtaining self-certifications. For example, IFAs will often have the most in-depth knowledge of the investor and direct access to the customer and so will be best placed to obtain self-certifications. However, advisory-only distributors will not be regarded as *Financial Institution*s and they will only have obligations pursuant to contractual agreements with those *Financial Institution*s where they act as a third party service provider in relation to those accounts.

In practice, reliance on third parties for account identification and self-certification in FATCA should work in a similar manner to section 40 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

5.5 Identification and reporting on interest in a Collective Investment Scheme (including unit trusts)

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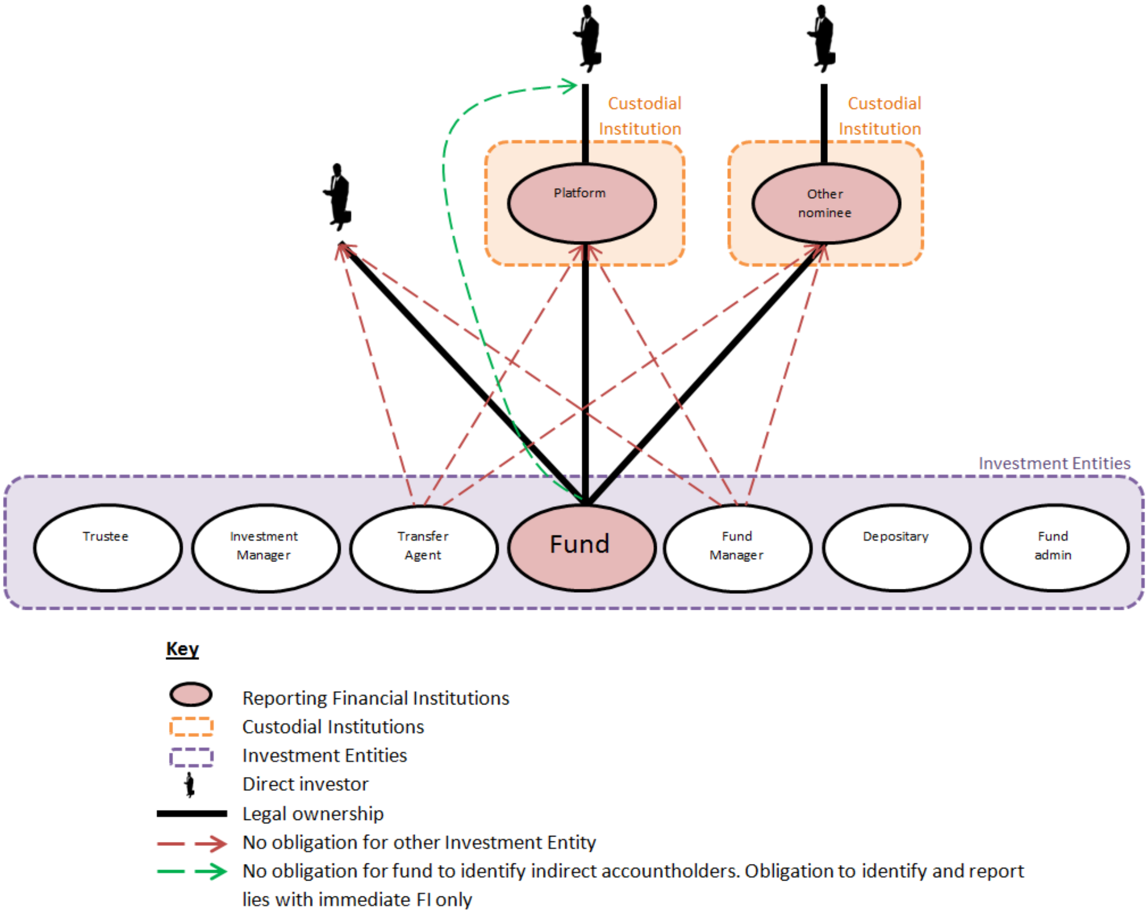

Where a fund manager acts as operator of the fund (e.g. in the case of a unit trust or common contractual fund) and is assigned responsibility for fulfilling the regulatory obligations of the fund, the fund manager will also normally be responsible for compliance with the FATCA obligations in relation to the *Financial Accounts* of the fund. A fund manager may use a third party service provider such as a transfer agent to provide fund administration services including maintaining records of investors, account balances and transactions. In these cases, the fund manager might appoint the third party service provider to fulfil account identification and reporting requirements as they will have the necessary records.

The fund's account identification and reporting obligations apply only to its registered *Account Holders*. It is required to identify all direct individual *Account Holders* pursuant to the due diligence obligations outlined in this guidance. To the extent that indirect individual accounts are held through a *Reporting Financial Institution* (e.g. platforms or other nominees), the fund's obligation is to identify the direct *Account Holder* (i.e. the *Financial Institution*) only. In turn, the intermediary *Financial Institution* will have its own obligation to identify and report on its own *Account Holders*.

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In the diagram above, the fund would need to identify any direct individual *Account Holders* (left hand side) and the *Financial Institution*s on the share register only. It would be required to report information on any of these that are *Specified US Persons*.

In turn the *Custodial Institution*s that act as distributors (and not the fund) would be required to identify and report on their direct *Account Holders*. The fund has no obligation to identify and report on accounts held indirectly through other *Financial Institution*s.

5.6 Transfer Agents

Where a Transfer Agent has been appointed FATCA services provider to a number of Collective Investment Schemes, the Transfer Agent is not required to obtain due diligence documentation for each account held by the same investor where that investor maintains multiple accounts with that Transfer Agent. The Transfer Agent may obtain one set of FATCA due-diligence documentation for an Investor to validate the same investor's status in all Collective Investment Schemes serviced by that Transfer Agent.

Example:

Investor X is a registered investor in three unrelated Collective Investment Schemes A, B, and C, which are serviced by the same Transfer Agent. For Fund A, the investor has completed a form of Self-Certification confirming their FATCA status. Therefore, the Self-Certification document can be used to validate the Investor's FATCA status in all three funds, without the Transfer Agent having to go out to the same investor again to request duplicate documentation.

5.7 Accounts held by Trusts (other than Unit Trusts)

A trust will be an *Investment Entity* and therefore a *Financial Institution* where the trust or trustee engages another *Financial Institution* to manage the trust or financial assets on its behalf.

Where a trust is not a *Financial Institution*, it will be a *NFFE*. In such cases, the trust will have to provide a self certification in relation to its status as either a *Passive* or

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Active NFFE where required. *Financial Institutions* that hold accounts for such trusts will need to follow the relevant due diligence for *NFFE*s.

Where the trust is an *Investment Entity* 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 *Owner-Documented Financial Institution* category.

The information to be reported in relation to trusts that are *Investment Entities* will be information relating to the equity interest in the trust i.e. interests held by:

- a person who is a beneficial owner of all or a portion of the trust,
- a beneficiary that is entitled to a mandatory distribution (either directly or indirectly) from the trust, or
- a beneficiary that receives a discretionary distribution from the trust in the reporting period.

5.8 Reporting of Dormant Accounts

An Irish *Reporting Financial Institution* may apply its existing normal operating procedures to classify an account as dormant. Where normal operating procedures are not applicable, then the *Reporting Financial Institution* is to classify an account as dormant for the purposes of the Agreement where:

- there has been no activity on the account in the past three years,
- the *Account Holder* has not contacted the *Reporting Financial Institution* regarding that account or any other account in the past six years, and
- the account is not linked to an active account belonging to the same *Account Holder*.

The Irish *Reporting Financial Institution* should classify the account based upon existing documentation it already has in its possession for the *Account Holder*. Where this review determines that the dormant account is reportable, then the *Reporting Financial Institution* should make the appropriate report notwithstanding that there has been no contact with the *Account Holder*.

An account will no longer be dormant where:

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- under normal operating procedures the account is not considered dormant,
- the *Account Holder* contacts the *Reporting Financial Institution* in relation to that account or any other account held by the *Account Holder* with that *Financial Institution*, or
- the *Account Holder* initiates a transaction with respect to the dormant account or other any other account held by the *Account Holder* with that *Reporting Financial Institution*.

The *Reporting Financial Institution* would then have to ensure it establishes the *Account Holder's* status as if the account were a new account.

The rules for determining whether nor not a life assurance policy is dormant are set out in the Unclaimed Life Assurance Policies Act, 2003. Section 6(2)(a) of that Act sets a period of 5 years for specified (i.e. fixed) term policies after which time the insurance company may treat the account as being dormant. Section 6(2)(b) sets a period of 15 years for open-ended policies after which time the insurance company may treat the account as being dormant. Where an individual subsequently comes forward, the policy is reactivated and treated as a *Pre-existing Individual Account*.

5.9 Treatment of Accounts with a Nil Balance

Where an *Investment Entity* maintains an account with a nil balance at June 30th 2014 and a subsequent investment would not require further AML/KYC or other regulatory procedures to be carried out, the account may be treated as a pre-existing account for FATCA purposes. In order for the institution to treat the account as pre-existing there must have been some activity in the account within the previous 12 months i.e. the account could not have been at a nil balance for more than 12 months.

5.10 Securitisation Vehicles

Securitisation structures are in many instances legally remote from the *Financial Institution* in relation to which the risks and rewards of the structure are associated. The common principles (as set out in Chapter 2) as to whether an entity meets the definition of a *Financial Institution* should be applied to all entities within a securitisation structure.

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A securitisation vehicle that is a *Reporting Financial Institution* will need to consider if it has any *Financial Accounts* that may be reportable. If there are no *Reportable Accounts* a nil return is still required.

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5.11 Reporting responsibility where securities are held in a Central Securities Depository

Members of Central Securities Depositories (CSD), such as CREST and Clearstream, or the *Financial Institutions* that access CSD on their behalf, are responsible for any reporting required by the Agreement in respect of any securities held by means of the CSD. The CSD will not be treated as maintaining *Financial Accounts* and is not required to undertake any reporting required by the Agreement in respect of such securities. Notwithstanding the foregoing, in accordance with Article 5, paragraph 3 of the Agreement, the CSD may report on behalf of such members in respect of interests recorded as a third party service provider.

5.12 Fully disclosed clearing and settlement (Model B) – Reporting

This refers to arrangements designed to facilitate the clearing and settlement of security transactions utilising a third party provider's existing information technology infrastructure 'IT' systems, specifically those that interface with the international securities settlement and clearing systems (clearing firms).

A tri-partite relationship between the underlying customer, the broker and the clearing firm is created, by virtue of the fact that the broker has entered into a fully disclosed clearing relationship with the clearing firm on his own behalf, and, acting as the agent of its underlying client.

For the avoidance of doubt where a broker has opened an account (or sub-accounts) with the clearing firm, in the name of the underlying client and fulfils all verification and due diligence requirements on its underlying clients the *Financial Accounts* remain those of the broker and not the clearing firm.

Therefore reporting and classification of the underlying client required under the Agreement and the legislation is the responsibility of the broker. The clearing firm will however treat the broker as its client and consequently as the person for which it maintains a *Financial Account* and will undertake reporting and classification with respect to such broker accordingly.

The term broker in respect of fully disclosed clearing and settlement would include any *Financial Institution* who acts on behalf of the underlying investor in respect of

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executing, placing or transmitting orders and would therefore include Financial Advisors if their business is more than simply advisory.

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5.13 Reporting of sponsored entities

A fund manager may act for funds located in a number of jurisdictions. When acting as a sponsor, the fund manager will need to act on behalf of the sponsored fund ranges independently, with respect to each tax authority in which the funds are domiciled.

Example A

An Irish fund manager manages fund ranges in Ireland and an IGA Country A. The Irish fund manager can register as a sponsor for some or all of the funds in each of these jurisdictions. The sponsor would be responsible for reporting to:

- Revenue in respect of the sponsored Irish fund ranges and
- the tax authorities in IGA Country A on behalf of the sponsored funds domiciled in IGA Country A.

Example B

A Luxembourg fund manager manages fund ranges in Ireland, IGA Country A and also funds in a non-IGA Country. The Lux fund manager can register as a sponsor for some or all of the funds in each of these jurisdictions. The sponsor would be responsible for reporting to:

- Revenue in respect of the sponsored Irish fund ranges,
- the tax authorities in IGA Country A on behalf of the sponsored funds domiciled in IGA Country A, and
- the IRS in respect of sponsored funds domiciled in the non-IGA Country.

Where a sponsor acts on behalf of a range of funds, the classification of an account as a *New Account* or a *Pre-existing Account* can be done by reference to whether the account is new to the sponsor (fund manager) and not the fund. This prevents a fund manager from having to seek FATCA information from the same *Account Holder* repeatedly, where that *Account Holder* has invested in more than one of the sponsored funds. Where a sponsor is able to link accounts in this manner, the accounts will need to be aggregated for the purposes of determining whether the accounts exceed the *de-minimis* for reporting.

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5.14 Accounts acquired by way of a merger

Where a *Financial Institution* acquires accounts by way of a merger or bulk acquisition of accounts, the *Financial Institution* can rely on the status of *Account Holders* as determined by the predecessor *Financial Institution* for a period of six months provided that the predecessor *Financial Institution* has met its due diligence obligations which may be evidenced by a Letter of Undertaking in a similar manner to that required under section 40 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

The *Financial Institution* may continue to rely on the due diligence work of the predecessor beyond the six month period where the documents that it holds, including any documentation (including copies of documentation) that was acquired as part of the merger or acquisition, continues to support the status claimed of *Account Holders*. The *Account Holder*'s status will need to be verified by the acquiring *Financial Institution* in accordance with the due diligence procedures should the acquirer have reason to know a status is incorrect or that there is a change in circumstance.

This rule only applies where the predecessor is not part of the acquirer's expanded affiliated group, either before or after the merger or bulk acquisitions.

Where a *Deemed Compliant Financial Institution* becomes part of a group as the result of a merger or acquisition, the status of any account maintained by the *Deemed Compliant Financial Institution* can be relied upon unless there is a change in circumstances.

5.15 Reporting obligations in the case of mergers of Investment Entities

Mergers of *Investment Entities* can be different to mergers of *Custodial Institution*s or *Depository Institution*s. Because the *Financial Accounts* of *Investment Entities* are its equity and debt interest holders, the merger of two *Investment Entities* creates in the surviving *Investment Entity* a series of new accounts.

Mergers of *Investment Entities* will normally involve a surviving *Investment Entity* (e.g. a fund) taking over the assets of the merging *Investment Entity* in exchange for issuing shares or units to the investors of the merging fund. The shares or units in the merging *Investment Entity* are then extinguished. The new shares in the surviving

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fund will be new accounts except where both funds are sponsored by the same sponsor – see below.

So that fund mergers are not impeded, or held up by the requirement to perform due diligence on a series of new accounts, special rules apply to the documentation of new accounts on a merger of *Investment Entities*. There are a number of potential scenarios depending upon whether the merging fund (the investors of which will create the new accounts in the surviving fund) is a *Financial Institution* and whether it is a *Reporting Financial Institution*, a *Deemed Compliant Financial Institution* or a *Non-Participating Financial Institution*.

Where both funds are sponsored Irish funds with the same sponsor, no new accounts are created. This is because for sponsored *Financial Institutions*, whether a *Financial Account* is a new account is determined by reference to whether it is new to the sponsor (for example the fund manager), and not whether it is new to the *Sponsored Financial Institution* (i.e. the fund).

Where the merging fund is a *Reporting Financial Institution* (including a *Sponsored Financial Institution*, but where the funds do not share the same sponsor), a FATCA Partner *Jurisdiction Financial Institution* or a Participating Foreign *Financial Institution*, the surviving fund can rely on the account identification and documentation performed by the merging fund and will not need to undertake any further account due diligence in order to comply with its FATCA obligations. The surviving fund can continue to use the same account classification as the merging fund until there is a change in circumstances for the *Financial Account*.

Where the merging fund is not a *Reporting Financial Institution*, a FATCA Jurisdiction *Financial Institution* or a Participating Foreign *Financial Institution* (because it is a *Deemed Compliant* fund, a Non-Participating Irish *Financial Institution* or a Non-Participating Foreign *Financial Institutions*), the surviving fund will need to undertake account identification procedures on the new accounts. However, in these circumstances the account identification procedures will be limited to those that are required for *Pre-existing Accounts* and should be carried out at the latest by the 31 December following the date of the merger or 31 December of the year following the year of the merger if the merger takes place after 30 September of any calendar year.

A *Financial Institution* will not be required to obtain new documentation (including new self-certifications) for new *Account Holders* where the new accounts are created by virtue of a merger.

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5.16 Reporting obligations in the case of partnerships

A partnership is regarded as an entity under the Agreement. Where a partnership is a *Financial Institution* it will need to identify any *Financial Accounts* it maintains, this will include any equity interest. This means that a partnership will be required to identify and where necessary report on the capital or profits interest of any of the partners who are *Specified US Persons*.

5.17 Reporting and identification obligations in the case of accounts held by non financial intermediaries

Where a *Financial Account* holds on a pooled basis, the funds of underlying clients of a non-financial intermediary and:

- the only person listed or identified on the *Financial Account* with the *Financial Institution* is the non-financial intermediary; and
- the non-financial intermediary is not required to disclose or pass their underlying client or clients' information to the *Financial Institution* for the purposes of AML/KYC or other regulatory requirements

the *Reporting Financial Institution* is required to report on and undertake the due diligence procedures in respect of the non-financial intermediary only.

5.18 Reporting of Non Financial Foreign Entities (NFFE)

An *NFFE* is any non-US entity that is not a *Financial Institution*. Only the accounts of *Passive NFFE*s need to be reviewed when applying the due diligence procedures to identify *Specified US Persons* and *Reportable Accounts*. If an *NFFE* is not an *Active NFFE*, it will be regarded as a *Passive NFFE*.

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6 Identification of Account Holders – Self Certification and Aggregation

6.1 Introduction

The main objective of the legislation is to require *Reporting Financial Institution*s to identify and report the *Financial Accounts* of *Specified US Persons*.

The due diligence process requires that:

1. the *Reporting Financial Institution* identifies certain defined US indicia that are linked to an *Account Holder* or
2. the *Account Holder* self-certifies their status to the institution.

There are several common concepts in the identification process and these are covered in more detail in the following sections.

6.2 Self Certification

As part of the process of identifying the status of *Account Holders* and entities and identifying the controlling persons of entities, *Reporting Financial Institution*s can rely on self certification in the following circumstances:

6.2.1 In the case of Individual Account Holders

- in order to show that an individual is not in fact a US citizen or US resident for tax purposes, even if US indicia are found in respect of a lower value or high value *Pre-existing Individual Account* that they hold;
- to establish the status of an individual *Account Holder* of a new account and whether or not they are a US citizen or US resident for tax purposes;
- to obtain a US TIN from a *New Individual Account Holder* that is a US resident for tax purposes.

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6.2.2 In the case of entity Account Holders

- to verify the status of an entity where information indicates the *Account Holder* is a *Specified US Person* unless a *Reporting Financial Institution* can reasonably determine that the *Account Holder* is not a *Specified US Person* based on information in its possession or that is publicly available;
- to verify the status of a *Financial Institution* that is neither an *Irish Financial Institution* nor a *partner jurisdiction Financial Institution* where the status of the *Financial Institution* cannot be verified from checking its GIIN against the IRS published list;
- to establish whether an entity is a *Passive NFFE*;
- to establish the status of a controlling person of a *Passive NFFE* and whether or not they are a resident in the United States for tax purposes.

A self-certification can be in any format and the term self-certification includes the use of withholding certificates. A self-certification cannot be relied upon if a *Reporting Financial Institution* has reason to know that it is incorrect or unreliable or there is a change in circumstances which change the *Account Holder*'s status.

6.3 Self-Certification for New Individual Accounts

6.3.1 Obtaining a self-certification

Unless the *Financial Account* is of a type that does not need to be reviewed, identified or reported, a *Reporting Financial Institution* is required to obtain a self-certification that would enable it to determine whether the *Account Holder* is resident in the US for tax purposes. For these purposes, a citizen of the US is considered to be resident for US tax purposes even if they are also tax resident in another jurisdiction.

6.3.2 Wording of self-certification

A *Reporting Financial Institution* can choose the form of wording to use in order to determine whether an *Account Holder* of a *New Individual Account* is resident in the US for tax purposes provided the self-certification form contains the following information:

a) the name and permanent resident address of the *Account Holder*;

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b) confirmation that they are not resident in the US for tax purposes, and that they are not a US citizen; and

c) where confirmation is not obtained at (b) above, the US Taxpayer Identification Number ("TIN").

The form must be signed and dated by the *Account Holder* and accompanied by the documentary evidence that supports the individual's status as set out above. The form can include other information required for other purposes such as AML/KYC due diligence and can be in paper or electronic format.

6.3.3 Format of the self-certification

*Financial Institution*s may permit individuals to open accounts in various ways. For example, individuals can make investments into funds by phone applications, online applications or on written application forms. They may even invest without using any of the *Financial Institution*'s designated application processes and instead send a cheque with a covering letter (which is then followed up with the required documentation). Self-certifications can be obtained in any of these account opening formats.

The following examples are intended to illustrate how the self-certification process may operate but are not exhaustive.

Example 1. Telephone Applications

An individual phones a *Financial Institution* requesting to open an account in line with the *Financial Institution*'s normal account opening procedures.

The telephone operator asks: "can you confirm that you are not resident in the US for tax purposes and that you are not a US citizen". The individual confirms this on the call and the operator records the confirmation on the *Financial Institution*'s system. The paperwork sent to the investor to confirm the account opening should include their response to this self-certification question and require them to contact the *Financial Institution* in the event that it is not correct.

Example 2. Online applications

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An individual accesses the website of a *Financial Institution* to open an account in line with the *Financial Institution*s normal account opening procedures. On the account opening web page, along with information about the individual, such as name and address, the individual is asked to tick a box against the following narrative: "Tick this box if you are resident in the US for tax purposes or if you are a US citizen" and "Tick this box if you are not resident in the US for tax purposes or a US citizen".

Example 3. Paper Applications

An individual fills out an application form to open an account with a *Financial Institution*. Beside the signature box the application form includes the following wording: "Tick this box if you are resident in the US for tax purposes or if you are a US citizen" and "Tick this box if you are not resident in the US for tax purposes or a US citizen".

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6.3.4 Confirming the reasonableness of the self-certification

A *Reporting Financial Institution* is required to confirm the reasonableness of the self-certification based on information obtained by the *Reporting Financial Institution*. For this purpose, a *Reporting Financial Institution* may use information obtained by it pursuant to its Anti-Money Laundering (AML) and Know Your Customers (KYC) procedures

A *Reporting Financial Institution* is required to check the self-certification against other records of the individual that are held or obtained by the *Reporting Financial Institution*. For example, where an *Account Holder* has provided a self-certification confirming they are not US resident for tax purposes, but then provides a US address to the *Reporting Financial Institution*, this would require the *Reporting Financial Institution* to make further enquiries.

*Reporting Financial Institution*s can meet their AML/KYC requirements by placing reliance on the AML procedures performed by other parties. A *Financial Institution* may request that the party performing the AML procedures and on which it has placed reliance should obtain a self-certification for the purposes of the FATCA legislation, and should confirm the reasonableness of the self-certification based on information obtained by the third party.

In these cases the *Reporting Financial Institution* can meet the obligations of FATCA by obtaining a certification from the third party that they have confirmed the reasonableness of the self-certification based on other documentation the third party has received. However, where the self-certification is received directly by the *Reporting Financial Institution*, there is no requirement to ensure that a third party performing AML procedures has confirmed its reasonableness. In such cases, the *Reporting Financial Institution* is required to confirm this based on any other information it alone has obtained or holds.

The following examples show how this will work in practice.

Example 1 Phone Applications

A *Reporting Financial Institution* has received a new account opening instruction from an individual (this may have been by phone). The *Reporting Financial Institution* has performed AML procedures by checking the identity

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of the individual (name, address and date of birth) against the records of a credit reference agency. The check confirmed the identity of the individual.

The *Reporting Financial Institution* can satisfy its obligations under the legislation by confirming the reasonableness of the self-certification against other information in the account opening instruction and any other information it has on the individual. Where no other information exists the reasonableness is confirmed based on the information in the account opening instruction alone.

If the account opening instruction is received by phone, it is the usual practice that the *Account Holder* receives paperwork that includes their response to the self-certification question and other information provided by them. The *Account Holder* is requested to contact the *Reporting Financial Institution* in the event that any of the information is not correct within a specified period (say, 30 days). Provided the *Reporting Financial Institution* does not receive any other information from the *Account Holder* within the specified time, and provided the self-certification is otherwise reasonable then the requirements are met.

Example 2 Third Party Advisors

A *Reporting Financial Institution* has received a new account opening instruction from an individual who has been advised by an independent financial adviser (IFA) The *Reporting Financial Institution* has relied on an introducing IFA to perform AML and has obtained a certificate that the IFA has performed AML checks on the individual. The *Reporting Financial Institution* has no prior knowledge of the individual.

The account opening instruction is received directly from the individual and contains certain information about the individual (name, address, date of birth, contact details including telephone number and email address), and a self-certification that the individual is not resident in the US for tax purposes, and is not a citizen of the US.

The *Reporting Financial Institution* can satisfy its requirements under the Agreement by confirming the reasonableness of the self-certification against other information contained in the account opening instruction and any other information it has on the individual. Where no other information exists the reasonableness is confirmed based on the information in the account opening instruction alone.

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Example 3 Third Party Advisor

As per example 1 but the self-certification is obtained by the introducing IFA. The *Reporting Financial Institution* can satisfy its requirements under the Agreement by obtaining a certification from the IFA that they have confirmed the reasonableness of the self-certification against other information it has obtained from the individual, including information obtained pursuant to its AML procedures.

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Example 4 Third Party Advisor

As per example 1, but the individual has been introduced by an IFA, although the *Reporting Financial Institution* has not placed reliance on the IFA's AML procedures, but instead has performed its own AML procedures as in example 1.

The *Reporting Financial Institution* can satisfy its requirements under the Agreement by confirming the reasonableness of the self-certification against other information contained in the account opening instruction and any other information it holds on the individual. Where no other information exists the reasonableness is confirmed based on the information in the account opening instruction alone.

6.4 Self-Certification for Pre-existing Individual Accounts

If following an electronic record search for *Low Value Accounts* or the enhanced review procedures for *High Value Accounts*, indicia have been found that suggest the *Account Holder* is potentially a US citizen or US resident for tax purposes then the *Reporting Financial Institution* must treat the account as reportable. However, if the *Reporting Financial Institution* is able to obtain a self-certification from the *Account Holder* which cures the indicia, then the account is not to be treated as reportable.

6.5 Self Certification for New Entity Accounts

For certain *New Entity Accounts*, a *Reporting Financial Institution* can identify the Entity *Account Holder* by relying on information it holds or that is publically available. Where it is unable to do so, it must obtain a self-certification from those Entity *Account Holders*. A self-certification must also be obtained from any Entity Account Holder who is identified as one of the following:

- a *Specified US Person*,
- a *Financial Institution* that is neither an Irish *Financial Institution* nor a *Partner Jurisdiction FI*, *Participating FFI*, a *Deemed Compliant FFI*, an *Exempt Beneficial Owner*, or an Excepted FI, as defined in the relevant US Treasury Regulations,
- a *Passive NFFE*.

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For entities that are *Passive NFFE*s, the *Reporting Financial Institution* must identify the controlling persons and obtain a self-certification from them to determine whether any such person is a citizen or resident of the US. This could be in achieved in the same way as described for *New Individual Accounts*.

In the case of a passive *NFFE* the self-certification can be provided by either the *Account Holder* or by the Controlling Person or Persons themselves.

6.6 Self-Certification for Pre-existing Entity Accounts

Self-certification is required where:

- an entity *Account Holder* is identified as a *Specified US Person*. In such cases, the *Financial Institution* will be required to treat the account as reportable unless it obtains a self-certification to determine that the *Account Holder* is not a *Specified US Person*.
- the *Account Holder* is a *Financial Institution* that is not an *Irish Financial Institution* or *Partner Jurisdiction Financial Institution*. In such cases a self-certification is required to establish whether the entity is a *Certified Deemed Compliant Financial Institution*, an *Exempt Beneficial Owner*, or an *excepted FFI,* as defined in relevant US Treasury Regulations.
- an entity *Account Holder* is a *Passive NFFE* (i.e. it is not an *Active NFFE* (see Appendix 2)). Where the *Account Holder* is a *Passive NFFE*, the *Financial Institution* must obtain a self-certification from the *Account Holder* to establish its status, unless it has information in its possession or that is publicly available, based on which it can reasonably determine that the entity is an *Active NFFE*.
- the account is held by one or more *NFFEs* with an account balance that exceeds $1,000,000. In such cases, a self-certification from the *Account Holder* or controlling person is required.

6.7 Aggregation of accounts

In order to determine whether *Financial Accounts* are reportable and the extent to which enhanced review procedures are required in respect of *High Value Accounts*, a *Financial Institution* will need to consider aggregation of accounts of both individuals and entities.

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Aggregation is only required to the extent that a *Financial Institution*'s computerised system can link the account by reference to a data element such as a customer or taxpayer identification number or by a name and address. Where accounts can be linked by a data element, but the system does not provide an aggregated balance of the accounts, aggregation will still be required - it is not necessary for the computer system to total the balances of the accounts for the aggregation rule to apply.

Where an *Account Holder* has the ability to manage a number of accounts in a single place, such as a secure online environment this does not automatically lead to the aggregation rules applying. Aggregation is dependant on the *Financial Institution'*s core systems being able to aggregate as explained above.

6.7.1 Relationship Manager

A *Financial Institution* may appoint a relationship manager for a customer's accounts. The due-diligence requirements will vary depending on the value of an account where there is a relationship manager assigned. For example, where the value of the account is greater than USD $1m an enhanced due-diligence process will be required.

For the purposes of determining the aggregate balance or value of accounts held by a person to determine whether an account is a *High Value Account*, a *Financial Institution* shall also be required, in the case of any accounts that a relationship manager knows or has reason to know are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person, to aggregate all such accounts. Aggregation in these circumstances also applies across accounts held by an individual and an entity where the relationship manger knows that the individual is the *Controlling Person* of an *Entity Account* held with the same *Financial Institution.*

For example, US person A has a *Depository Account* of $5,000, and a *Custodial Account* of $950,000, and a relationship manager knows that the individual controls an entity that has an *Entity Account* (a *Depository Account*) of $50,000.

As the relationship manager knows that the individual controls the three accounts, aggregation and reporting would apply as follows:

Upon aggregation, the custodial account is a *High Value Account* and the high value due diligence rules apply. As the *Depository Account* held by the individual is below the $50,000 threshold (and assuming the Financial Institution has elected to apply

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the reporting thresholds), the individual's *Depository Account* can be excluded from review The entity's *Depository Account* can be excluded from review as it is under the $250,000 exception threshold for entities.

6.7.2 Exempt Products

If a product is exempt from being treated as a *Financial Account* it does not need to be taken into account for the purposes of aggregation. Therefore, where an individual holds an exempt pension fund as well as several *Depository Accounts* with the same *Financial Institution* and the systems enable these to be linked, the *Depository Accounts* will be aggregated but not the pension.

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6.7.3 Collective Investment Schemes

In the case of funds Collective Investment Schemes, aggregation is required at at *Reporting Financial Institution* level. In the case of funds this can be at Umbrella or at sub-fund level, depending on how the fund chooses to register.

6.7.4 Aggregation of Sponsored funds

The sponsor of a range of funds acts on behalf of the funds and stands in their place in relation to meeting the FATCA obligations of the funds, however, ultimate responsibility for these obligations remains that of the sponsored financial institution.

Aggregation is required across the range of funds that have the same sponsor, where the sponsor or its service provider uses the same computerised systems to link the accounts.

In practice, a sponsor (typically the fund manager) will use a service provider (the transfer agent) to manage the client relationships of the account holders (the investors in the funds). Where different service providers are used by the same sponsor, the systems might not link account information across service providers. In such cases, aggregation is only required at the level of the service provider (transfer agent).

For example, where a sponsor manages all the client relationships through a single transfer agent, aggregation should happen at the level of the sponsor (to the extent that the system links accounts). Where a sponsor has two fund ranges each using a different transfer agent, in practice aggregation is possible only at the fund range/transfer agent level, as this is where the client relationship is held. The sponsor would aggregate at the level of the transfer agent (to the extent that the transfer agent's system links accounts).

Where a computer system links accounts across related entities, wherever they are located, then the *Reporting Financial Institution* will need to aggregate the accounts to consider whether any of the reporting thresholds apply. However, once it has considered the thresholds, the *Reporting Financial Institution* will only be responsible for reporting the accounts it holds.

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Example 1.

Bank A is an Irish *Reporting Financial Institution* and has a related entity Bank C which is also an Irish *Reporting Financial Institution*. Bank A can link the *Depository Account* of US person X to another *Depository Account* in the name of US person X with Bank C by virtue of their address. The aggregation exercise shows that the total amount held in these accounts is above the *Depository Account* threshold for reporting.

Bank A and Bank C must each report individually on the accounts they hold for US person X.

Example 2. Aggregation of individual accounts

Two US persons have three accounts between them, one deposit account each and a jointly held deposit account with the following balances:

US Person A $35,000

US Person B $25,000

Joint Account $30,000

The joint account can be associated with both A and B by reference to a data element in the *Reporting Financial Institution's* computer system. The system shows the account balances for the accounts. However, the system does not show a combined balance for the accounts. The fact that the system does not provide a combined balance does not prevent the aggregations rules applying. The balance on the joint account is attributable in full to each of the *Account Holders*. The aggregate balance for A would be $65,000 and for B $55,000.

As the amounts after attribution are in excess of the $50,000 threshold both *Account Holders* will be reportable. If A was not a US person then only B would be reportable following an aggregation exercise.

Example 3. Aggregation in the case of negative balances

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Two US Persons have 3 accounts with the same *Reporting Financial Institution*, one account each and a jointly held account with the following balances:

US Person A $53,000

US Person B $49,000

Joint Account ($8,000) to be treated as nil

The accounts can be linked and therefore must be aggregated but, for the purposes of aggregation, the negative balance in the joint account should be treated as nil. Therefore the only *Reportable Account* after applying the thresholds would be that for person A.

Example 4. Application of the $1million threshold to determine whether or not an account is a High Value account and subject to enhanced due diligence

Fund A is a *Reporting Financial Institution* and can link the accounts of individual Investor A by a Tax Identification Number found when conducting a review of pre-existing investors.

- Investor A has a holding in Fund A with a value of $800,000
- Investor A has a second holding in Fund A as part of a joint account with a value of $400,000

The entire value of the joint account is attributable to both holders of the joint account, therefore the aggregate value of Investor A's holding is $1,200,000. Therefore Investor A will be treated as a *High Value Account* for the purposes of performing due diligence."

6.7.5 Entity accounts

For the purposes of determining the aggregate balance or value of accounts held by an entity, all accounts held by the entity will need to be aggregated where the *Financial Institution*'s computerised system can link the account by reference to a common data element.

6.7.6 Reporting

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Once an aggregation exercise has taken place and it is determined that the accounts are reportable, the amount to be reported in the case of each individual or entity, is the account balance on each account. A *Financial Institution* should not consolidate the account balances into one *Reportable Account* for reporting purposes. Where a registration for a GIIN has been undertaken at the level of the sponsoring management company and the sponsoring management company has sponsored funds administered by another Transfer Agent, it is not necessary for the sponsoring management company to consolidate reports for its sponsored entities. Multiple returns relating to one GIIN can be filed and each Transfer Agent can file a return on behalf of the sponsoring entity.

6.8 Data protection notices

As FATCA requires Financial Institutions to collect personal information (and in certain circumstances report this information to Revenue), Financial Institutions should ensure that Account Holders are aware that the information collected could be reported to Revenue for exchange with the IRS. An example of how this could be achieved by a Financial Institution is by amending their privacy/data protection notices to customers to include this information or by incorporating the information into their account opening documentation. Financial Institutions should also ensure that they provide contact details for any customers who have concerns about the information being collected or wish to make a Subject Access Request.

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7 Due Diligence Process for Pre-existing Individual Accounts

7.1 General

Reporting Financial Institutions are responsible for the identification and reporting of *Financial Accounts* held by *Specified U.S Persons* or by *Passive NFFEs* with one or more Controlling Persons who are *Specified U.S Persons* or by *Non-Participating Financial Institutions*. This Chapter sets out the guidance which *Reporting Financial Institutions* must follow when carrying out due-diligence to identify those account holders.

A *Reporting Financial Institution* can rely on a third party service provider to fulfil its obligations under the regulations, but the obligations remain the responsibility of the *Reporting Financial Institution* and so any failure will be seen as a failure on the part of the *Reporting Financial Institution*.

> **Example 1**
>
> A fund may use a Transfer Agent, or other person such as a fund administrator to fulfil its due-diligence requirements or a company may use a business process outsourcing provider to fulfil its due diligence requirements. However, in the event of any irregularities or failure to meet the legislative requirements the *Reporting Financial Institution*, in this case the fund or the company, will be held accountable.

7.1.1 IRS withholding certificates

Withholding certificates issued by the IRS such as the W-8 and W-9 series are acceptable in establishing an account holder's status. A pre-FATCA W-8 form may be accepted in lieu of obtaining an updated W-8 until such time as the W-8 needs to be updated.

A *Reporting Financial Institution* can use its own forms to support a claim by the *Account Holder* that any indicia found do not properly represent the *Account Holder's* status.

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7.1.2 Validity of documentation

All documentary evidence, including self-certification, used to establish an *Account Holder's* status will remain valid indefinitely until a change in circumstances or knowledge results in a change in the *Account Holder's* status (see Chapter 12 paragraph 1 for further details regarding Change of Circumstances).

7.1.3 Retention of Documentary Evidence

A *Reporting Financial Institution*, sponsoring entity or third party service provider undertaking due diligence on behalf of a *Reporting Financial Institution*, must retain records of the documentary evidence used to support an *Account Holder's* status for six years following the end of the year in which the relevant account was closed. The documentary evidence can be retained as originals, photocopies or in an electronic format.

A *Pre-existing Account* is an account opened on or before 30 June 2014. *Pre-existing Accounts* will fall into one of three categories depending on the balance or value of the account. These are: -

- accounts exempted by threshold
- *Low Value Accounts*
- *High Value Accounts*.

7.2 Threshold Exemptions that apply to Pre-existing Individual Accounts

The legislation allows for *Financial Institutions* to elect to apply the following exemptions when reviewing and identifying *Pre-existing Individual Accounts*. The election can apply to all relevant Financial Accounts or to a clearly identifiable group of accounts, such as Financial Accounts grouped by a line of business or by reference to the location where the Financial Accounts are maintained.

If a *Financial Institution* does not make an election to apply the thresholds then it will need to review all relevant accounts.

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The following accounts do not need to be reviewed, identified or reported to Revenue where the appropriate election has been made: -

- any *Depository Accounts* with a balance or value of $50,000 or less.
- *Pre-existing Individual Accounts* with a balance not exceeding $50,000 at the 30 June 2014, unless the account becomes a *Low Value Account* as of 31 December 2015 or any subsequent year.
- *Pre-existing Individual Accounts* that qualify as *Cash Value Insurance Contracts* or *Annuity Contracts* with a balance or value of $250,000 or less at 30 June 2014 unless the account becomes a *Low Value Account* as of 31 December 2014 or any subsequent year.
- all *Pre-existing Cash Value Insurance Contracts* and *Annuity Contracts* regardless of the value or balance if the sale of such contracts to US residents is effectively prevented by either Irish or US law or regulatory procedure and Irish law requires reporting or withholding with respect to insurance products held by residents of Ireland. This also applies to policies held in trust or assigned to a trust on or before 30 June 2014. No Irish law prevents the sale of *Cash Value Insurance* products or *Annuity Contracts* to US residents. However, the sale of contracts to US residents will be considered to be effectively prevented if the issuing insurance company is not licensed to sell insurance in any state of the United States and is not registered with the Securities and Exchange Commission.

The assignment of a pre-existing *Cash Value Insurance Contract* or *Annuity Contract* to another person will be treated as a new account and the above will not apply. This is to ensure that *Pre-Existing Cash Value Insurance Contracts* assigned after 1 July 2014 to *US Persons* are correctly identified and reported where necessary.

Once the insurance company has been made aware that an assignment has been made, the insurance company will need to carry out checks on the new policy holder, before any payments are made to the *Account Holder*. If the policyholder does not self-certify their status or provide relevant documentation, the insurance company should assume the person to be a *US Person* and should provide the relevant reports to Revenue on an annual basis.

Where the insurance company has reason to know that the policy holder has had a change in circumstances and has subsequently become a *US Person* a self certification should be obtained, and the account should be reported.

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7.3 Reportable Accounts

Pre-existing Accounts will be reportable if they are not exempt, where the *Reporting Financial Institution* has identified US Indicia, and these indicia have not been cured or repaired. Once identified as a *Reportable Account* (unless it is a *Depository Account*) the account will remain reportable for all subsequent years unless the *Account Holder* ceases to be a *US Person*. In the case of a *Depository Account,* however, the requirement to report only applies where the balance or value of the account is above the reporting threshold of $50,000 and provided the relevant election under Regulation 6(2) of the Regulations has been made.

Example

A *Depository Account* belonging to a US person with a balance of $65,000 as of 31 December will need to be reported. The following year there is large withdrawal from the account bringing the balance down to $20,000 as of 31 December. As the balance is now below the $50,000 threshold the account does not need to be reported provided the relevant election has been made.

Where the *Reporting Financial Institution* has identified US indicia, and those indicia have not been cured or repaired. The relevant *Pre-existing Accounts* will be reportable unless they are exempt from being *Financial Accounts*.

Where a *Pre-existing Lower Value* or *High Value Account* closes prior to the *Reporting Financial Institution* carrying out its due diligence procedures, the account still needs to be reviewed. This will not however apply to accounts that are closed prior to 30 June 2014.

Where an account is closed on or after 1 July 2014 and the *Financial Institution* has no continuing contractual relationship with the *Account Holder* and therefore is unable to undertake action in relation to any indicia or is unlikely to receive a response to any query made to the *Account Holder*, the account should be treated as reportable in that reporting year.

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7.4 Low Value Accounts

A *Low Value Pre-existing Individual Account* is an account with a balance or value that exceeds the appropriate threshold of $50,000 for *Depository* and other *Pre-existing Individual Accounts* or $250,000 in the case of *Cash Value Insurance Contracts* and *Annuity Contracts*, but does not exceed $1,000,000.

7.4.1 Electronic Record Searches for Low Value Accounts

In order to identify the *Account Holder*, a *Reporting Financial Institution* is required to review its electronically searchable data for any of the following US indicia:

- Identification of the *Account Holder* as a US citizen or resident;
- Unambiguous indication of a US place of birth
- Current US mailing or residence address (including P.O. Box and 'care of' addresses)
- Current US telephone number
- Standing instruction to transfer funds to an account maintained in the US
- Current effective power of attorney or signatory authority granted to a person with a US address
- An 'in care of' or 'hold mail' address that is the sole address the institution holds for the *Account Holder*. An "in care of address" or "hold mail" address is not treated as US indicia for the purposes of electronic searches but would be regarded as US indicia where a review of paper records is required.

When carrying out an electronic search there is no requirement to search systems of related entities.

Where none of the indicia listed above are discovered through an electronic search, no further action is required in respect of *Low Value Accounts*, unless there is a change of circumstance that results in one or more US indicia being associated with the account. Where that happens the account will become reportable unless further action is taken by the *Financial Institution* to attempt to cure or repair the indicia.

Where US indicia are found and the *Financial Institution* attempts to verify or cure those by contacting the *Account Holder*, but there is no response then the account should be treated as reportable after 90 days of initiating contact.

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7.4.2 Qualified Intermediaries

An *Irish Financial Institution* that has previously obtained documentation from an *Account Holder* to establish the *Account Holder*'s status in order to meet its obligations under a *Qualified Intermediary, Withholding Partnership* or *Withholding Trust* agreement, or to fulfil its reporting obligations as a US payor under chapter 61 of the US Tax Code, is not required to perform the electronic search in relation to those accounts. It will however have to apply the appropriate due diligence procedures to all other *Pre-existing Individual Accounts*.

7.4.3 Where the electronic search identifies US indicia

Where the electronic search uncovers US indicia, the *Financial Institution* must report the account or obtain documentation showing that the US indicia is incorrect or no longer applies to the *account holder*. The action to be taken in such cases is set out below.

A. Identification of the account holder as a US citizen or resident

Where the indicia found indicates that the *Account Holder* is a US citizen or resident by birth, the account needs to be reported unless the *Reporting Financial Institution* obtains or currently maintains a record of **all** of the following:

- a self-certification showing that the *Account Holder* is neither a US citizen nor a US resident for tax purposes, **and**
- evidence of the *Account Holder's* citizenship or nationality in a country other than the US (e.g. passport or other government issued means of identification; and
- in the case of a US citizen, a copy of the *Account Holder's* Certificate of Loss of Nationality of the United States.

B. Unambiguous US Place of Birth

Where the indicia found is an unambiguous US place of birth then the account needs to be reported unless the *Financial Institution* obtains or currently maintains a record of all of the following:

- a self-certification showing that the *Account Holder* is neither a US Citizen nor a US resident for tax purposes;

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- evidence of the *Account Holder*'s citizenship or nationality in a country other than the US (e.g. passport or other government-issued means of identification); and
- a copy of the *Account Holder*'s Certificate of Loss of Nationality of the United States or a reasonable explanation of, the reason the *Account Holder* does not have such a certificate, or the reason the *Account Holder* did not obtain US citizenship at birth.

C. Current US mailing address/residence address

Where the indicia found is a current US mailing address or residence address, or there are one or more US telephone numbers that are the only numbers associated with the account then the account must be reported unless the *Reporting Financial Institution* obtains or currently maintains a record of the following:

- A self-certification that the *Account Holder* is neither a US citizen nor a US resident for tax purposes; and
- Evidence of the *Account Holder*'s citizenship or nationality in a country other than the US (e.g. passport or other government-issued means of identification);

D. Current US telephone numbers

Where the indicia found is one or more US telephone numbers and these are the only telephone numbers associated with the account, then the account must be reported unless the Irish *Financial Institution* obtains or currently maintains a record of the following:

1. a self certification that the *Account Holder* is neither a US Citizen nor a US resident for tax purposes; and
2. Evidence of the *Account Holder*'s citizenship or nationality in a country other than the US (e.g. passport or other government-issued means of identification);

E. Standing Instructions (other than with respect to a Depository Account) to transfer funds to an account maintained in the US

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There will be a standing instruction if the *Account Holder* has mandated the *Reporting Financial Institution* to make regular transfers to another account that can clearly be identified as being an account maintained in the United States.

Where the indicia found is standing instructions to transfer funds to an account maintained in the United States, the account must be reported unless the *Reporting Financial Institution* obtains or currently maintains a record of :

1. a self-certification that the *Account Holder* is neither a US Citizen nor a US resident for tax purposes, and
2. acceptable documentary evidence which establishes the *Account Holder*'s non US status. This evidence can be:
   - A certificate of residence issued by an appropriate tax official of the country in which the payee claims to be a resident.
   - Any valid identification issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes.
   - Any financial statement, third-party credit report, bankruptcy filing, or US Securities and Exchange Commission report.
   - With respect to an account maintained in a jurisdiction with anti-money laundering rules that have been approved by the IRS in connection with a QI agreement (as described in relevant US Treasury Regulations), any of the documents other than a Form W-8 or W-9 referenced in the jurisdiction's attachment to the QI agreement for identifying individuals.

F. Effective Power of Attorney or signatory authority

Where the indicia found is:

- a current effective power of attorney or signatory authority granted to a person with a US address;
- an 'in care of' or 'hold mail' address that is the sole address the *Reporting Financial Institution* holds for the *Account Holder* or,
- one or more US telephone numbers associated with the account,

the account must be reported unless the Irish *Reporting Financial Institution* obtains or currently maintains a record of the following:

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1. a self-certification that the *Account Holder* is neither a US Citizen nor a US resident for tax purposes; and
2. acceptable documentary evidence which establishes the *Account Holder*'s non US status. This evidence can be:
   - A certificate of residence issued by an appropriate tax official of the country in which the payee claims to be a resident;
   - Any valid identification issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes;
   - Any financial statement, third-party credit report, bankruptcy filing, or US Securities and Exchange Commission report; or

With respect to an account maintained in a jurisdiction with anti-money laundering rules that have been approved by the IRS in connection with a QI agreement (as described in relevant US Treasury Regulations), any of the documents other than a Form W-8 or W-9 referenced in the jurisdiction's attachment to the QI agreement for identifying individuals.

7.5 High Value Accounts

Pre-existing Individual Accounts with a balance or value that exceeds $1,000,000 at 30 June 2014 or at 31 December 2015 or 31 December of any subsequent year will be regarded as *High Value Accounts* for FATCA purposes. In order to identify the *Account Holder* of a *High Value Account*, a *Reporting Financial Institution* is required to review both its electronic and paper records as set out below.

Where a *Reporting Financial Institution* has previously obtained documentation from a *Pre-existing Individual Account Holder* to establish the *Account Holder*'s status in order to meet its obligations under a QI, Withholding Partnership or Withholding Trust agreement, or to fulfil its reporting obligations as a US payor under chapter 61 of the US Tax Code, it is not required to perform the electronic search or the paper record search for such accounts.

Any Irish *Financial Institution* that falls into this category is required, however, to perform the relationship manager enquiry where the accounts are high value *Pre-existing Individual Accounts.*

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7.5.1 Electronic Record Searches

A *Reporting Financial Institution* must review its electronically searchable data in the same manner as for Low Value Accounts.

For this purpose, electronically searchable means that the *Reporting Financial Institution* has a system that includes these specific searchable fields, regardless of whether the data is fully populated.

7.5.2 Paper Record Search

A paper record search will not be required where all of the following information is electronically searchable:

- the *Account Holder*'s nationality or residence status;
- the *Account Holder*'s resident address and mailing address currently on file;
- the *Account Holder*'s telephone number(s) currently on file;
- whether there are standing instructions to transfer funds to another account;
- whether there is a current "in-care-of" address or "hold mail" address for the *Account Holder*; and
- whether there is any power of attorney or signatory authority for the account.

The paper record search should include a review of the current customer master file and, to the extent they are not contained in the current master file the following documents associated with the account and obtained by the *Reporting Financial Institution* within the last 5 years should also be reviewed:-

- the most recent documentary evidence collected with respect to the account;
- the most recent account opening contract or documentation;
- the most recent documentation obtained by the *Financial Institution* for AML/KYC Procedures or for other regulatory purposes;
- any power of attorney or signature authority forms currently in effect; and
- any standing instructions to transfer funds currently in effect.

This information should be reviewed for any US indicia.

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Exceptions

A *Reporting Financial Institution* is not required to perform the paper record search for any Pre-existing Individual Account with respect to which it has obtained a Form W-8BEN and documentary evidence which establishes the account's status as an account other than a US Reportable Account.

7.5.3 Relationship Manager

In addition to the electronic and paper searches the *Reporting Financial Institution* must also consider whether any relationship manager associated with the account (including any accounts aggregated with such account) has actual knowledge that would identify the *Account Holder* as a *Specified US Pe*rson. If the relationship manager does know that the *Account Holder* is a *Specified US Person* then the account must be reported unless the indicia can be cured.

A *Reporting Financial Institution* must also ensure that they have procedures in place to capture any change of circumstance in relation to a *High Value Individual Account*, made known to the relationship manager in respect of the *Account Holder*'s status. For example, if a relationship manager is notified that the *Account Holder* has a new mailing address in the US, this would be a change in circumstance and the *Reporting Financial Institution* would either need to report the account or obtain the appropriate documentation to cure or repair that indicia.

For these purposes a relationship manager is assumed to be any person who:

- is an officer or other employee of the *Reporting Financial Institution,*
- is assigned responsibility for specific *Account Holders* on an on-going basis,
- advises the *Account Holders* regarding their accounts, and
- arranges for the overall provision of financial products, services and other related assistance.

Where one or more of the indicia are discovered through the enhanced review procedures and none of the cures or repairs can be applied, the *Reporting Financial Institution* must treat the account as a *US Reportable Account* for the current and all subsequent years. This applies for all accounts except for *Depository Accounts* unless the *Account Holder* ceases to be a *Specified US Person.*

Where none of the indicia are discovered in the electronic search, the paper record search or by making enquiries of the relationship manager, no further action is required unless there is a subsequent change in circumstances. If there is a change in

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circumstances that results in one or more of the indicia listed in this section being associated with the account and none of the cures or repairs can be applied, the account must be treated as a *US Reportable Account* for the year of change and all subsequent years. This applies for all such accounts except for *Depository Accounts* and unless the *Account Holder* ceases to be a US citizen or resident individual.

Where a *Reporting Financial Institution* has started its review, US indicia are found and attempts are made to verify or cure those indicia by contacting the account holder, but the *Account Holder* does not respond, the account should be treated as reportable 90 days after initiating contact. The 90 day limit is to allow the *Account Holder* sufficient time to respond to requests for information.

7.6 Timing of reviews

7.6.1 Low Value Accounts

The review of *Pre-existing Accounts* that are *Low Value Accounts* at 30 June 2014 must be completed by 30 June 2016. For *pre-existing Low Value Accounts* that are identified as reportable, they are only reportable from the year in which the account is identified as such.

Example

The due diligence procedures are carried out on a *Low Value Account* during March 2015 and the account is determined as reportable. The *Reporting Financial Institution* is only required to report information on the account for the year ending 2015 onwards.

7.6.2 High Value Accounts

The review of *Pre-existing Accounts* that are *High Value Accounts* at 30 June 2014 must be completed by 30 June 2015. If a *High Value Account* is identified as a reportable account in a review carried out before 31 December 2014, the account must be included in the 2014 FATCA return. Otherwise, the account becomes reportable from the year in which it is identified.

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Example

The due diligence procedures are carried out on a *High Value Individual account* during April 2015 and the account is determined as reportable. The *Reporting Financial Institution* is required to report on the account for 2015 and thereafter.

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7.7 Change in circumstances

If the account is reportable it will remain reportable for all subsequent years unless there is a change in circumstances that means that the *Account Holder* ceases to be a *Specified US Person.*

Where the balance or value of an account does not exceed $1,000,000 as of 30 June 2014, but does exceed that amount as of the last day of a subsequent calendar year, the *Reporting Financial Institution* must perform the procedures described for *High Value Accounts* by 30 June of the year following the year in which the balance or value exceeded $1,000,000. Where the review shows that the account is reportable, the *Reporting Financial Institution* must report the required information about the account with respect to the year in which it is identified as a *US Reportable Account* and subsequent years on an annual basis.

8 Due diligence process in the case of New Individual Accounts

8.1 Introduction

A *New Individual Account* is an account held by an individual and opened on or after 1 July 2014.

8.1.1 Reportable Accounts

Where it is established that the holder of a New Individual Account is a US citizen or resident in the US for tax purposes then the account must be treated as a *Reportable Account.*

In this instance the *Reporting Financial Institution* is required to obtain a record of a *US TIN*, this may be received as part of the account opening documentation such as a self-certification or a US W9 form. As per the IRS FAQ 10, it is the position of the IRS that a *Financial Institution* should not open a new account without self-certification. While Revenue does not require *Reporting Financial Institutions* to close new accounts for which self-certification has not been provided, the IRS may deem a

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Financial Institution recalcitrant where it has opened a new account without a self-certification from the *Account Holder*.

8.1.2 New Account Holders of Pre-Existing Accounts

Where a new account is opened by an individual *Account Holder* who already has a *Pre-existing Account* with the same entity, the *Reporting Financial Institution* does not need to apply the due diligence requirements to the new account provided that it can link the two accounts for the purposes of aggregation and reports the aggregated balance on the account.

Where a new account is opened prior to any *Pre-existing Accounts* being reviewed then the *Reporting Financial Institution* may use the information obtained from the due diligence procedures for the new account to review the status of the *Account Holder's Pre-existing Account.*

8.2 Threshold Exemptions that apply to New Individual Accounts

The legislation allows *Reporting Financial Institution*s to elect not to review or identify *New Individual Accounts* that are *Depository Accounts* where the account balance does not exceed $50,000.

Further, where a *Reporting Financial Institution* so elects, *New Individual Accounts* that are *Cash Value Insurance Contracts* are not *Reportable Accounts* where the account balance does not exceed $50,000

The election can apply to all relevant *Financial Accounts* or to a clearly identifiable group of accounts, such as *Financial Accounts* grouped by a line of business or by reference to the location where the *Financial Accounts* are maintained.

If a *Reporting Financial Institution* does not make an election under the Regulations to apply the threshold exemptions, then all accounts, regardless of the balance, will need to be reviewed and then reported if they are held by *Specified US Persons*.

8.3 Identification of New Individual Accounts

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For accounts that are not exempted the *Reporting Financial Institution* must carry out the following procedures upon opening an account.

- Obtain a self-certification that allows the *Reporting Financial Institution* to determine whether the *Account Holder* is US tax resident; and c
- confirm the reasonableness of this self-certification based on the information the *Reporting Financial Institution* obtains in connection with the opening of the account, including any documentation obtained for AML/KYC Procedures

For these purposes a US citizen is considered to be resident in the US for tax purposes even where they are also tax resident of another country.

If an account is jointly held by an individual and an entity, the *Reporting Financial Institution* will need to apply separately both the individual and entity due diligence requirements in relation to that account.

Where it is established that the holder of a *New Individual Account* is resident in the US for tax purposes then the account must be treated as a *Reportable Account*.

8.4 Accounts held by beneficiaries of a Cash Value Insurance Contract that is a Life Insurance Contract

A *Reporting Financial Institution* can treat an individual beneficiary (other than the owner) who receives a death benefit under a Cash Value Insurance Contract that is a Life Insurance Contract as a non-US Person and treat such account as a non-US account unless the participating Financial Institution has knowledge or reason to know that the beneficiary is a US Person. If a *Reporting Financial Institution* has knowledge or reason to know that the beneficiary is a US Person the account should be treated as a *Reportable Account*.

8.5 Reliance on Self-Certification and Documentary evidence

Where information already held by a *Reporting Financial Institution* conflicts with any statements or self-certification or the *Reporting Financial Institution* has reason

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to know that the self-certification or other documentary evidence is incorrect then it may not rely on that evidence or self-certification.

A *Reporting Financial Institution* will be considered to have reason to know that a self-certification or other documentation associated with an account is unreliable or incorrect if based on the relevant facts that a reasonably prudent person would question the claims made.

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9 Due Diligence Process in the case of Pre-existing Entity Accounts

9.1 Introduction

Pre-existing Entity Accounts are those accounts held by persons other than individuals that are in existence at 30 June 2014.

9.2 Threshold Exemptions that apply to Pre-existing Entity Accounts

The legislation allows *Reporting Financial Institution*s to elect not to review, identify or report a *Pre-existing Entity Account* where the account balance or value of the account does not exceed $250,000 at 30 June 2014. This election remains valid until the account balance exceeds $1,000,000 as of the last day of 2015 or any subsequent calendar year. Accounts with balances or values that exceed $250,000 at 30 June 2014 should be reviewed to determine the status of the account and identify whether the account is reportable.

The election can apply to all *Pre-existing Entity Accounts* or to a clearly identifiable group of accounts, such as *Financial Accounts* grouped by a line of business or by reference to the location where the *Financial Accounts* are maintained.

If a *Reporting Financial Institution* does not make an election under the Regulations to apply the threshold exemptions then it will need to review all relevant accounts.

9.3 Reportable Accounts

An account is only reportable where the account is held by one or more *Specified US Persons* or by *passive NFFE*s with one or more controlling persons who are US citizens or residents. Controlling persons are defined as natural persons who exercise control over an entity. In the case of a trust, such term means the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. In the case of a legal arrangement other than a trust, such term means persons in equivalent or

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similar positions. The term “controlling persons” is to be interpreted in a manner consistent with the Financial Action Task Force recommendations.

If the *Account Holder* is a *Non-Participating Financial Institution* (*NPFI*) then payments made to the *NPFI* in 2015 and 2016 will be reportable.

Where a *Pre-existing Entity Account* closes prior to the *Reporting Financial Institution* carrying out its due diligence procedures, then the account is still required to be reviewed. This will not apply to accounts that are closed on or before 30 June 2014.

An entity account will also be reportable where a self-certification is not provided or the entity’s status cannot be determined from information held or that is publicly available. In this situation the account should continue to be reported until such time as the entity’s status is correctly identified. Where a *Reporting Financial Institution* has been unable to obtain a self-certification to confirm the status of an *Account Holder,* the *Reporting Financial Institution* should document all efforts and contacts made with the *Account Holder* to obtain this information. The *Reporting Financial Institution* should have the documentation to demonstrate that they have made every attempt to contact the *Account Holder* and obtain the required information.. Where a *Reporting Financial Institution* is reporting an *Account Holder* for which they have not obtained a *self-certification*, the “AcctHolderType[2]” codes for *Reportable Accounts* should be used.

9.4 US Indicia for Entities with Pre-Existing Accounts

The term US indicia when used with respect to an entity includes any of the following:

- place of incorporation or organisation;
- classification of an *Account Holder* as a US resident in the current customer files;
- a current US residence address or US mailing address;
- with respect to an offshore obligation, standing instructions to pay amounts to a US address or an account maintained in the US;
- a current telephone number for the entity in the US;

[2] Please see the FATCA xml schema V2.0 User guide for a further description of this schema element - https://www.irs.gov/pub/irs-pdf/p5124.pdf.

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- a power of attorney or signatory authority granted to a person with a US address;
- an "in-care-of" address or "hold mail" address that is the sole address provided for the entity.

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9.5 Documentary evidence required to repair US indicia

If there are any of the US indicia described above, the *Reporting Financial Institution* may treat the entity as non-US only if the *Reporting Financial Institution* obtains a withholding certificate (e.g. an IRS W8 form) for the entity or reasonably determines based on information in its possession or that is publicly available, that the *Account Holder* is not a Specified U.S. Person.

9.6 Identification of an entity as a Specified US Person

Information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon in order to identify if an entity is a *Specified US Person*. A US place of incorporation or organisation, or a US address would be examples of information indicating that an entity is a *Specified US Person.* If the *Account Holder* is determined to be a *Specified US Person* then the account should be treated as reportable unless a self-certification is obtained from the *Account Holder* which shows that the *Account Holder* is not in fact a *Specified US Person*.

Article 1(1)(gg) of the Agreement includes a list of exceptions for *Specified US Persons*. To avoid unnecessary reporting, a self-certification should be obtained from any entity that is believed to be within this definition but where there is insufficient information held by the *Reporting Financial Institution* to allow it to make a correct determination.

9.7 Identification of an entity as a Financial Institution

In order to identify if an entity is a *Financial Institution*, information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure or a Global Intermediary Identification Number) can be relied upon.

If the entity is a *Financial Institution* then the account is not a *Reportable Account* unless the entity is a *Non-Participating Financial Institution* (See Chapter 11 for payments to *Non-Participating Financial Institutions*).

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9.8 Identification of an entity as a Non-Participating Financial Institution

If the entity is an *Irish Financial Institution* or a *Financial Institution* in another partner jurisdiction, no further review, identification or reporting will normally be required unless that *Financial Institution* has been identified as an *NPFI* following significant non-compliance.

If the *Account Holder* is a *Financial Institution* but not an *Irish Financial Institution* or a *Financial Institution* in another partner jurisdiction, then it should be treated as a *Non-Participating Financial Institution* unless the entity provides a self-certification stating that it is a *Certified Deemed-Compliant Financial Institution*, an *Exempt Beneficial Owner*, or an *excepted Financial Institution* within the meaning of US Regulations. Alternatively, the *Financial Institution* may be able to verify that the entity is a participating *Financial Institution* or *Registered Deemed-Compliant Financial Institution* from its FATCA identifying number etc or other information that is publicly available or in the possession of the *Reporting Financial Institution,* as applicable.

If the *Account Holder* is a *Non-Participating Financial Institution* then the *Financial Institution* will need to report on payments made to it (see Chapter 11).

9.9 Identification of an entity as a Non Financial Foreign Entity (NFFE)

When an entity *Account Holder* is not identified as either a *Specified US Person* or a *Financial Institution*, the *Financial Institution* must consider whether the entity is a *Passive NFFE* and if any of the controlling persons of that entity are a US citizen or tax resident of the United States.

An *NFFE* will be a *Passive NFFE* if it is not an *Active NFFE*. In order to determine whether the entity is a *Passive NFFE*, the *Reporting Financial Institution* must obtain a self-certification from the *Account Holder* establishing its status, unless it can reasonably determine that the Account Holder has such status on the basis of has information in its possession or the *Account Holder's Global Intermediary Identification Number* or other information that is publicly available.

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To determine whether the controlling persons of a *passive NFFE* are citizens or residents of the United States for tax purposes, a *Reporting Financial Institution* may rely on:

- information collected and maintained pursuant to AML/KYC Procedures in the case of an account, held by one or more *NFFEs*, with a balance that does not exceed $1,000,000.
- a self-certification from an *Account Holder* or controlling person in the case of an account, held by one or more *NFFEs*, with a balance that exceeds $1,000,000.

9.10 Timing of reviews

The review of pre-existing entity accounts with an account balance or value that exceeds $250,000 as of 30 June 2014 must be completed by 30 June 2016.

The review of pre-existing entity accounts with a balance or value that does not exceed $250,000 at 30 June 2014, but exceeds $1,000,000 as of December 31 of any subsequent year, must be completed by 30 June of the following year.

Example

An entity account had a balance of $240,000 at 13 May 2014 so there was no requirement to review or report on the account. On 31 December 2017 the balance in the account had increased to $1.1.m. so the account must be reviewed by 30 June 2018.

Pre-existing Entity Accounts that are identified as reportable are only reportable from the year in which they are identified as such.

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10 Due Diligence Process for New Entity Accounts

10.1 Introduction

A *New Entity Account* is an account that is held by a person other than an individual and that is opened on or after 1 July 2014.

10.2 Exemptions that apply to New Entity Accounts

Apart from *Cash Value Insurance* Contracts there is no *de minimis* threshold for new entity accounts so all *New Entity Accounts*, with the exception of *Cash Value Insurance Contracts*, are subject to the review and the due diligence procedures. *Cash Value Insurance Contracts* are excluded from FATCA if they have a cash value of less than $50,000.

10.3 Reportable Accounts

An *Account Holder* of a *New Entity Account* must be classified as either:

- a *Specified US Person;*
- an *Irish Financial Institution* or other *Partner Jurisdiction Financial Institution;*
- a *Participating FFI*, a *Deemed Compliant FFI*, an *Exempt Beneficial Owner*, or an excepted FFI, as defined in relevant US Treasury Regulations;
- an *active NFFE* or *passive NFFE, or*
- a *Non-Participating Financial Institution*.

New Entity Accounts will be reportable where there is an *Account Holder*:

- who is a *Specified US Person,* or
- that is a *passive NFFE* with one or more controlling persons who is a citizen or resident of the US.

If the *Account Holder* is one of those listed below then the account is not a US Reportable account:

- a *US Person* other than a *Specified US Person*;
- an Irish *Financial Institution* or other *Partner Jurisdiction Financial Institution*;

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- a *Participating FFI*, a *Deemed Compliant FFI*, an *Exempt Beneficial Owner*, or an *Excepted FFI*, as those terms are defined in relevant US Treasury Regulations; **or** an *Active NFFE*;
- a *Passive NFFE* where none of the controlling persons are US citizens or resident in the US.

10.3.1 New Account Holders of Pre-Existing Accounts

Where a *New Account* is opened by an entity account holder who already has *a Pre-existing Account* with *a Reporting Financial Institution*, and the *Reporting Financial Institution* is permitted to treat both accounts on the same basis for the purposes of applying AML/KYC due diligence the *Reporting Financial Institution* can choose to apply the due diligence requirements for either *Pre-existing* or *New Accounts* to the new account, provided that it can link the two accounts for the purposes of aggregation and reports the aggregated balance on the account.

10.4 Identification of an entity as an Irish Financial Institution

A *Financial Institution* may rely on publicly available information, a GIIN, or information already within the *Financial Institution*'s possession to identify whether an *Account Holder* is an *Active NFFE* or an Irish or partner jurisdiction *Financial Institution*. Where there is no such information available, the *Financial Institution* must obtain a self-certification from the *Account Holder* to establish the *Account Holder*'s status.

10.5 Identification of an entity as a Non Participating *Financial Institution*

If the entity is an *Irish Financial Institution* or a *Financial Institution* in another partner jurisdiction, no further review, identification or reporting will normally be required unless that *Financial Institution* is an *NPFI* that has been identified as such by the IRS following significant non-compliance.

If the *Account Holder* is a *Financial Institution* but not an *Irish Financial Institution* or a *Financial Institution* in another partner jurisdiction, then the entity is treated as a *Non-Participating Financial Institution* unless the *Financial Institution*:

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- obtains a self-certification from the entity stating that it is a *Certified Deemed Compliant Financial Institution*, an *Exempt Beneficial Owner*, or an *Excepted Financial Institution within the meaning of US Regulations*, or
- otherwise verifies that the institution is a *Participating Financial Institution* or *Registered Deemed Compliant Financial Institution*, for example by checking its FATCA Global Intermediary Identification Number (GIIN) against the IRS published list of registered *Financial Institutions*.

If the *Account Holder* is a *Non-Participating Financial Institution* then payments made to such entities will be required to be reported.

10.6 Identification of an Entity Account Holder as a Specified US Person

If the *Financial Institution* identifies the *Account Holder* of a *New Entity Account* as a *Specified US Person*, the account will be a *US Reportable Account* and the *Reporting Financial Institution* must obtain a self-certification that includes a US TIN. The self-certification could be, for example on IRS form W9.As per the IRS FAQ 10, it is the position of the IRS that a *Financial Institution* should not open a new account without self-certification. While Revenue does not require *Reporting Financial Institutions* to close new accounts for which self-certification has not been provided, the IRS may deem a *Financial Institution* recalcitrant where it has opened a new account without a self-certification from the *Account Holder*.

10.7 Identification of an entity as a Non Financial Foreign Entity (NFFE)

If on the basis of a self-certification the holder of a new entity account is established as a *Passive NFFE*, the *Reporting Financial Institution* must identify the controlling persons of the entity as required under the Financial Action Task Force recommendations.

To determine whether the controlling persons of a *Passive NFFE* are citizens or residents of the United States for tax purposes, the reporting institution must obtain a self-certification from the *Account Holder* or controlling person(s).

If they are a citizen or resident of the United States, the account shall be treated as a *Reportable Account*.

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11 Reporting of Payments made to Non-Participating Financial Institutions

11.1 Introduction

Article 4(1)(b) of the Agreement requires each *Reporting Financial Institution* to report the name of each *NPFI* to which payments were made and the aggregate amount of such payments made in 2015 and 2016. The diagram at the end of this chapter illustrates the type of payments to be reported.

11.2 Payments to be reported

The payments to be reported under this provision are:

1. non-US source interest paid on a *Financial Account* held by an *NPFI*,
2. non-US source dividends paid on a shareholding held in a *Financial Account* that is held by a *NPFI*,
3. payments to an *NPFI* in respect of a *Financial Account* in connection with a securities lending transaction, sale-repurchase transaction, forward, future, option, swap, or similar transaction which is directly or indirectly contingent upon or determined by reference to, the payment of interest or a dividend from US sources, and
4. non-US source payments to an *NPFI* that are the proceeds or benefits of a *Cash Value Insurance Contract* or *Annuity Contract*.

11.3 Payments that need not be reported

A Reporting Financial Institution is only required to report payments made in respect of a Financial Account. Payments that are not required to be reported include:

- payments for services (including wages and other forms of employee compensation such as stock options), the use of property, office and equipment leases, software licenses, transport, freight, gambling winnings, awards, prizes, scholarships, and interest on outstanding accounts payable, arising from the acquisition of goods or services,

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- payments where the *Reporting Financial Institution* has only a passive role in the payment process and has no knowledge of the facts that give rise to the payment or has no control over the payment e.g. processing a cheque or arranging for the electronic transfer of funds on behalf of one of its customers, or receives payments credited to a customers account) or does not have custody of property which relates to the payment,
- capital markets payments in connection with the financial instruments or transactions referred to in paragraph 2 above that are not directly traceable to a US source,
- payments made in circumstances where the *Reporting Financial Institution* does not hold documentation to identify the payee as a *Non-Participating Financial Institution*, unless the payee is *prima facie* a *Financial Institution*.

11.4 Payments of dividends

Shareholdings in a *Financial Institution*, (other than shareholdings or equity interests in an *Investment Entity*), are not *Financial Accounts* in their own right and, as such, where a payment is made directly to an investor who is an *NPFI*, the payment will not be reportable. However, dividend payments made through a *Financial Institution* (such as a Custodian) will be reportable.

11.5 Reporting Process

A payment will be treated as being made when an amount is paid or credited to an *NPFI*. Only the aggregate amount of payments made to the payee during the calendar year are required to be reported. The amount of income to be aggregated is the net amount of the income payment made, there is no requirement to consider amounts withheld.

Where the payments cannot be separately identified as being the equivalent of a US source interest or dividend income then the entire amount of the payment made in relation to that transaction is to be reported.

These reports are to be submitted for 2015 and 2016 alongside the other reportable information on entity and individual accounts for the years 2015 and 2016.

11.6 Withholding on payments made to Non-Participating Financial Institutions

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Ireland does not have any *Financial Institution*s who are qualified intermediaries (QI's) and that have elected to assume primary withholding responsibility. There are a number of QI's in Ireland but any withholding is undertaken by a withholding agent and the primary withholding is not done by the Irish *Financial Institution* itself.

Therefore it is not expected that the provisions of Article 4(1)(d) of the Agreement will apply to Irish *Financial Institution*s. Instead, such institutions should fall within the provisions of Article 4(1)(e). This means that Irish *Financial Institution*s will not have to withhold on US source withholdable payments to a *Non-Participating Financial Institution* but they may have to report on such payments to any immediate payor.

11.7 Reporting payments of US Source Withholdable Payments to *Non-Participating Financial Institution*s

The requirement to report US source withholdable payments to *NPFIs* will fall on *Financial Institutions* other than those acting as a *Qualifying Intermediaries, Withholding Foreign Partnerships* or *Withholding Foreign Trusts* (see Article 4(1)(d) & (e) of the Agreement).

Under Article 4(1)(e) of the Agreement, where the *Financial Institution* makes a payment of, or acts as an intermediary in respect of, a US source withholdable payment to any *NPFI*, then the *Financial Institution* must provide information required for withholding and reporting to occur, with respect to the payment, to "any immediate payor" (i.e. only where there is an immediate payor). An "immediate payor" is the person with withholding and reporting obligations to the US authorities. The information required for withholding and reporting to occur is to be pooled withholding rate information (i.e. as would be the case for information reported under the QI regime).

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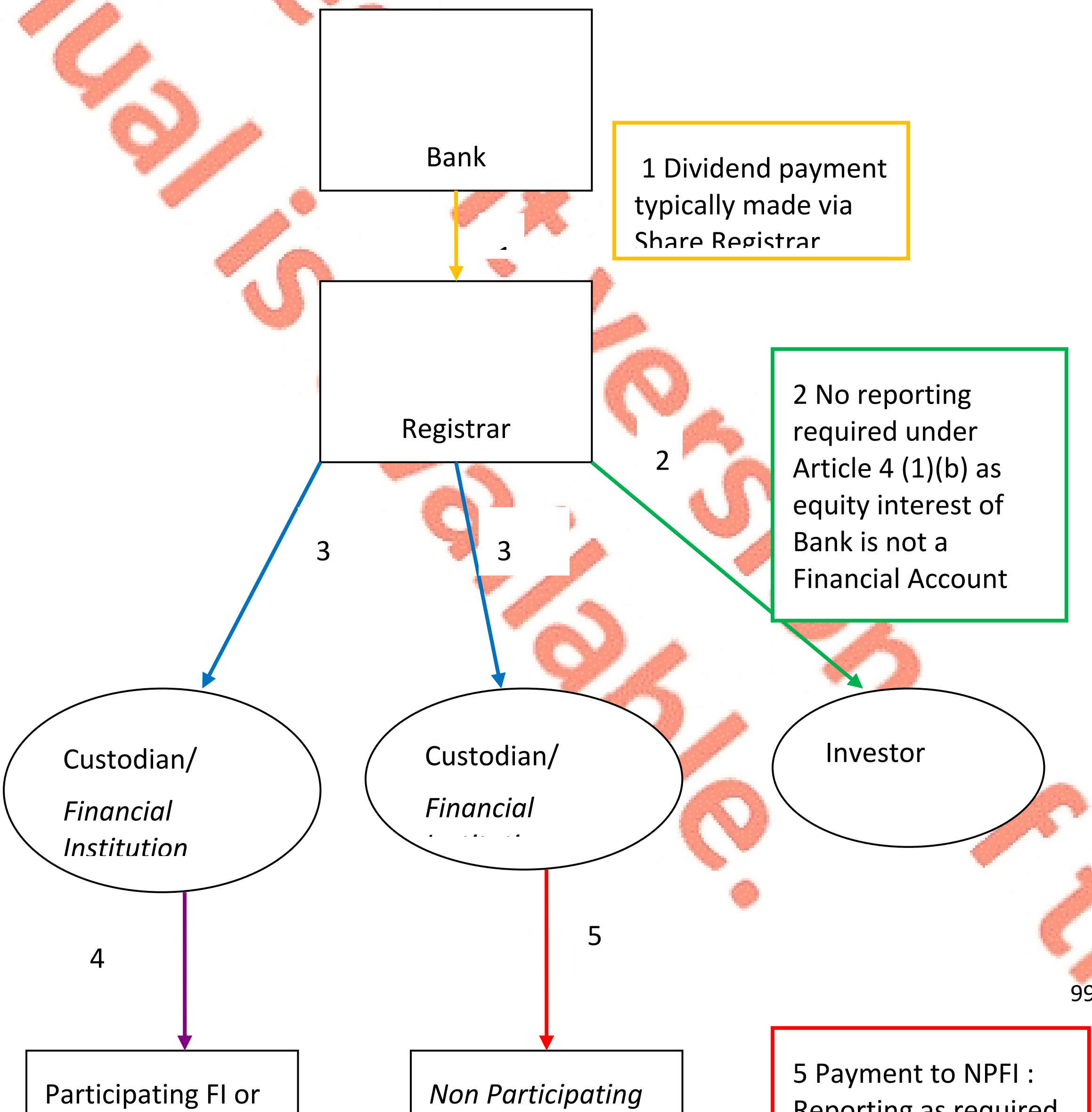

12 Miscellaneous Issues

12.1 Change of Circumstance

A change of circumstances includes any change that results in the addition or alteration of information or otherwise conflicts with the self-certification or other previous documentation associated with an account. However, the change will only be relevant if it indicates that an *Account Holder*'s status has changed i.e. it either indicates that they are a *US Person* or that they are no longer a *US Person*. For instance, a change of address will only be a change in circumstances if it changes to an address in the United States.

Where an *Account Holder* indicates that they are no longer a US person, for example due to renouncing their US citizenship, the Financial Institution should verify the *Account Holder's* actual status and whether or not they are reported will be determined on when their status is confirmed.

Example:

An *Account Holder* has been identified as a specified US person in July 2015, however during August 2015, the *Account Holder* notifies the *Financial Institution* of a change of circumstance and provides supporting documentation to state that they have renounced their US Citizenship, the *Account Holder* would not be reportable for FATCA purposes for year ended 31 December 2015 as they had confirmed via a valid document that they have renounced their US Citizenship before the end of the reporting period.

If there is a change of circumstances that causes the *Financial Institution* to know or have reason to know that the original self-certification is incorrect or unreliable, the *Financial Institution* cannot rely on the original self-certification and the *Financial Institution* should obtain a new self-certification that establishes whether the *Account Holder* is a US citizen or US tax resident.

In the event that there is a change of circumstance which indicates an account belongs to a *Specified US Person* the *Financial Institution* should

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verify the *Account Holders*' actual status within a period of 90 days from the date the *Financial Institution* was made aware of the change in circumstance.

If the *Account Holder* fails to respond to a *Financial Institution*'s requests for a self- certification or other documentation to verify the *Account Holder*'s status then the *Financial Institution* should treat the account as a *Reportable Account* until the *Financial Institution* is provided with the necessary information to be able to correctly verify the status of the *Account Holder*.

12.2 Third Party Service Providers

A *Financial Institution* can rely on third party service providers to fulfil its obligations under the legislation however, where it does so, the obligations remain the responsibility of the *Financial Institution* and any failure to comply with the Regulations will be seen as a failure on the part of the *Financial Institution*.

For example, a fund may use a Transfer Agent to fulfil its due diligence requirements or a company may use a business process outsourcing provider to fulfil its due diligence requirements. However in the event of any irregularities or failure to meet the legislative requirements the *Financial Institution* will be held accountable.

12.3 Format of Return and Filing a Return with Revenue

FATCA returns should be in xml format and details on the format and the applicable business rules are available on the IRS website. *Reporting Financial Institutions* should also take note of the Revenue issued guidance on the naming conventions which are applicable for certain fields within a FATCA file and which are available in the Revenue guide to filing a FATCA return. The format to be used is mandatory and applies to both nil returns and returns which contain information on *Reportable Accounts*. Returns in any other format will not be accepted. All FATCA returns (including nil returns) are required to be filed with Revenue via ROS and further information on the process for filing returns is available on the Revenue FATCA webpage.

12.4 Penalties

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Where a *Reporting Financial Institution* fails to provide the required information or where it provides inaccurate information, section 891E of the Taxes Consolidation Act, 1997, enables the Revenue Commissioners to impose penalties on the institution.

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12.5 Errors

In the case of errors being detected in a return, the IRS will contact the Irish Competent Authority (i.e. Revenue). Revenue will then contact the *Reporting Financial Institution* concerned.

12.5.1 Minor Errors

The IRS may contact Revenue in circumstances where there are minor errors in the return. The IRS will not contact *Reporting Financial Institutions* directly – all contacts will be between the Competent Authorities (i.e. the IRS and Revenue). Examples of minor errors could include:

- data fields missing or incomplete;
- data that has been corrupted;
- an incompatible format has been used.

In any case where this contact leads to the information having to be resubmitted, the revised return will have to be submitted via the Revenue Commissioners.

Continual and repeated administrative or minor errors could be considered as significant non-compliance where they continually and repeatedly disrupt and prevent transfer of the information

12.5.2 Other errors/enquiries

Specific enquiries, for instance regarding a specific individual or entity, will be addressed via the Irish Competent Authority. In such cases, the IRS will contact Revenue, which will then contact the *Reporting Financial Institution* to obtain the required information.

12.6 Significant Non-Compliance

Significant non-compliance may be determined from either an IRS or a Revenue Commissioners perspective. In either event, the relevant Competent Authorities will

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notify the other regarding the circumstances. Where one Competent Authority notifies the other of significant non-compliance, there is an 18 month period in which the *Financial Institution* must resolve the non-compliance.

Where the IRS notifies Revenue of significant non-compliance by an Irish *Financial Institution*, Revenue will apply any relevant penalties under the implementing legislation. Revenue will also engage with the *Reporting Financial Institution* to:

- discuss the areas of non-compliance,
- discuss remedies/solutions to prevent future non-compliance,
- agree measures and a timetable to resolve its significant non-compliance,
- apply non compliance procedures, including penalties (as stated above) where appropriate, and

where appropriate, will inform the IRS of the outcome of these discussions.

In the event that the issues remain unresolved after a period of 18 months then the *Financial Institution* will be treated as a *Non-Participating Financial Institution*. The IRS will publish a list of entities that are to be treated as *Non-Participating Financial Institutions*. Details of how such an entity can correct its status will be published at a later date.

12.7 Examples of what would be regarded as significant non-compliance

- The intentional provision of substantially incorrect information.
- The deliberate or negligent omission of required information.
- Ongoing or repeated failure to register, supply accurate information or establish appropriate governance or due diligence processes.
- Repeated failure to file a return or repeated late filing.

12.8 Anti Avoidance

Section 891E of the Taxes Consolidation Act 1997 includes an anti avoidance measure which is aimed at arrangements taken by any person to avoid the obligations placed upon them by the implementing legislation (either section 891E or the Regulations).

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It is intended that 'arrangements' will be interpreted widely and the effect of the rule is that the Regulations will apply as if the arrangements had not been entered into.

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Appendix 1 - Non-Reporting Financial Institutions

1. Introduction

Certain *Financial Institution*s are deemed to be compliant for FATCA purposes and as such will either be exempt from all requirements or its obligations may be reduced. The following entities qualify under the *Non-Reporting Financial Institution* (*NPFI*) heading:

1. the *Exempt Beneficial Owners* described in Appendix 1.2,
2. the *Self-Certified Deemed Compliant Financial Institution*s described in Appendix 1.3, and
3. the *Registered Deemed Compliant Financial Institution*s described in Appendix 1.4.

2. Exempt Beneficial Owner

An entity falling within the *Exempt Beneficial Owner* category will not have to register with the IRS nor will they have any reporting requirements in relation to any *Financial Accounts* that they maintain. *Reporting Financial Institutions* will not be required to review or report on accounts held by such *Exempt Beneficial Owners*.

The categories of *Exempt Beneficial Owner* are set out in Part I of Annex II to the Agreement and are as follows:

A. Irish Governmental Organisations

The Irish Government, any political subdivision of the Irish Government or any wholly owned agency or instrumentality of any one or more of the foregoing including:

- The National Treasury Management Agency,
- The National Pensions Reserve Fund and the National Pensions Reserve Fund Commission, and
- The National Asset Management Agency.

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B. The Central Bank

The Central Bank and Financial Services Authority of Ireland as established under The Central Bank and Financial Authority of Ireland Acts 2003 and 2004 together with the Central Bank Reform Act 2010 and the Central Bank Act 1942.

C. International Organisations

The office in Ireland of any institution of the European Union, of the European Investment Bank, the European Bank for Reconstruction and Development, or of any organisation to which the Diplomatic Relations and Immunities Acts 1967 – 2006 apply.

Inter-governmental or supra-national organisations would generally fall within this definition.

D. Retirement Funds

A pension trust and any other organisation, as referred to in Article 4(1)(c) (Residence) of the Double Taxation Treaty between Ireland and the United States of America, which is established in Ireland and is maintained exclusively to administer or provide retirement or employee benefits.

3. Self-Certified Deemed Compliant Financial Institutions

Entities falling within the descriptions below qualify as *Self-Certified Deemed Compliant Financial Institution*s. The entities described in paragraphs 3(A) to 3(C) are Deemed Compliant entities because they are included in Annex II to the Agreement. The entities described in paragraphs 3(D) to 3(H) are not included in the Agreement. However, they qualify as *Certified Deemed Compliant* entities under the US Treasury Regulations. As such, paragraph 1(q) of Article 1 of the Agreement enables *Irish Financial Institution*s that comply with the conditions outlined to qualify for the exemption.

Unless specifically stated, a *Financial Institution* falling within any of the following categories will not have to register or submit returns under FATCA.

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A. Non-Profit Organisations

These are:

- Charitable organisations approved in accordance with section 848A and Schedule 26A of the Taxes Consolidation Act 1997.
- A body established for the promotion of athletic or amateur games or sports that has been granted exemption from tax in accordance with section 235 of the Taxes Consolidation Act 1997 by the Revenue Commissioners.

Charities and sports clubs coming within the descriptions above will not be required to register, report or carry out any due diligence in relation to their accounts. If the charity or club has US source income, it should supply the US payor with a self-certification, in order to avoid the US FATCA withholding tax on that income.

B. Financial Institutions with a Local Client Base

A *Financial Institution* that complies with all of the requirements listed below will not be required to register or report under FATCA unless it maintains *Reportable Accounts* described in Chapter 4. Where the due diligence exercise required by paragraphs 7 and 8 below, shows that the *Financial Institution* maintains some *Reportable Accounts*, it will be required to register for FATCA and report those accounts only. Other non-reportable accounts held by the entity will remain exempt from FATCA.

There are 10 conditions that must all be met before a *Financial Institution* can claim this exemption. These are:

(1). The *Financial Institution* must be licensed and regulated under the laws of Ireland.

(2). The *Financial Institution* must have no fixed place of business outside of Ireland other than where the location outside of Ireland houses solely administrative functions and is not publicly advertised.

(3). The *Financial Institution* must not solicit *Account Holders* outside of Ireland. For this purpose, a *Financial Institution* shall not be considered to have solicited *Account Holders* outside of Ireland merely because it operates a website, provided that the website does not specifically

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indicate that the *Financial Institution* provides accounts or services to non-residents, or otherwise targets or solicits US customers. This condition does not prevent an institution from opening an account for a *US Person* who is resident in Ireland. However where the institution intentionally markets and provides accounts or services to persons who are not resident in Ireland, then this requirement would not be fulfilled.

A financial institution will also not be considered to have solicited customers outside of Ireland if it advertises in print media or on a radio or television station and the advertisement is distributed or aired outside of Ireland as long as the advertisement does not indicate that the *Financial Institution* provides services to non-residents.

The issuing of a prospectus will not, in itself, amount to soliciting *Account Holders*, even when it is available to *US Persons* in Ireland. Likewise, publishing information such as reports and accounts to comply with listing rules, disclosure or other rules to support a public listing or quotation of shares will not amount to soliciting customers outside of Ireland.

(4). The *Financial Institution* must be required under the tax laws of Ireland to perform either information reporting or withholding of tax with respect to accounts held by residents of Ireland. This would include credit unions and other entities subject to the DIRT reporting requirements as well as insurance companies that are subject to the life insurance exit tax regime or the I-E regime set out in Chapter 5 of Part 26 of the TCA and Collective Investment Schemes subject to the exit tax regime set out in Chapter 1A of Part 27 of the TCA. It would also include any other entity that is required to report on accounts held by Irish residents.

(5). At least 98 per cent of the accounts by value provided by the *Financial Institution* must be held by residents (including residents that are entities) of Ireland or another Member State of the European Union. The 98 per cent test in this paragraph can include accounts that are held by *US Persons* (both individuals and companies) who are residents of Ireland.

A *Financial Institution* will need to assess whether it meets this criteria annually. The measurement can be taken at any point of the preceding calendar year for it to apply to the following year, as long as the measurement date remains the same from year to year.

(6). Subject to subparagraph (7) below, beginning on 1 July, 2014, the *Financial Institution* does not open accounts for:

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- any *Specified US Person* (see Appendix 2) who is not a resident of Ireland (including a US person that was a resident of Ireland when the account was opened but subsequently ceases to be a resident of Ireland),
- a *Non-Participating Financial Institution*, or
- any *Passive NFFE* with controlling persons who are US citizens or residents (see Appendix 2).

Where a *Financial Institution with a Local Client Base* provides accounts to US citizens who are resident in Ireland, these accounts do not need to be reported to Revenue unless the *Account Holder* subsequently ceases to be resident in Ireland.

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(7). On or before July 1, 2014, the *Financial Institution* must implement policies and procedures to establish and monitor whether it provides any account held by a person described in paragraph (6), and if such an account is discovered, the *Financial Institution* must report such account as though the *Financial Institution* were a *reporting Irish Financial Institution* or close such account.

This means that, even if accounts have been provided to *Specified US Persons*, *Non-Participating Financial Institutions* or *Passive NFFEs* with controlling persons who are US citizens or residents prior to 1 July 2014, the *Financial Institution* can still be a *Financial Institution with a Local Client Base* provided the accounts are reported and the 98% rule has not been breached.

(8). With respect to each account that is held by an individual who is not a resident of Ireland or by an entity (whether or not resident in Ireland), and that is opened prior to the date that the *Financial Institution* implements the policies and procedures described in paragraph (7) above, the *Financial Institution* must review those accounts in accordance with the procedures described in Chapter 7 and Chapter 9 relating to *Pre-existing Accounts* in order to identify any *Reportable Account* or account held by a *Non-Participating Financial Institution*. Where any such accounts are identified, the institution must close the account, or report on the account as though the *Financial Institution* were a *Reporting Irish Financial Institution*.

Paragraphs 7 and 8 allow a *Financial Institution* that holds some *Reportable Accounts* to take advantage of the exemption provided it fulfils the requirement to report those accounts.

This allows a *Financial Institution with a local client base* to maintain its status whilst reporting on relevant accounts that were opened prior to the adoption of the requirements of this section.

(9). Each related entity of the Financial Institution, which is itself a Financial Institution, must be incorporated or organised in Ireland and must meet the requirements for Financial Institutions with a Local Client Base set forth in paragraphs 1 – 10 unless it is a Financial Institution that is a retirement plan classified as an Exempt Beneficial Owner.

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(10). The Financial Institution must not have policies or practices that discriminate against opening or maintaining accounts for individuals who are Specified US Persons and who are residents of Ireland.

Generally, the type of institution covered by this definition would include credit unions, and any other Financial Institution that deals only with Irish resident persons and that is subject to a reporting requirement.

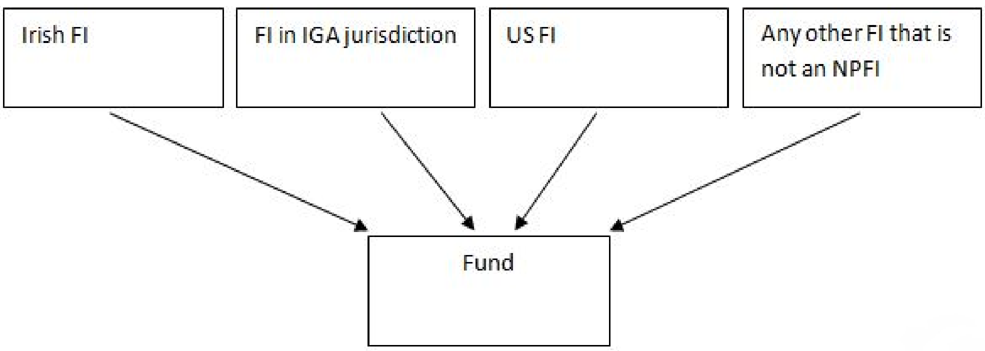
C. Certain Collective Investment Vehicles

This exemption applies to a collective investment fund that is regulated by the Central Bank and falls within the description at paragraphs 1 or 2 below.

(1). Where all of the interests in a collective investment vehicle (including debt interests in excess of $50,000) are held by or through one or more *Financial Institutions* that are not *Non-Participating Financial Institutions*, the reporting obligations of any *Investment Entity* (other than a *Financial Institution* through which interests in the collective investment vehicle are held) will be deemed fulfilled with respect to interests in the collective investment vehicle.

Example:

Where all investors in the fund are *Reporting Financial Institutions*/IGA FIs, the fund can be a *Self-Certified Deemed Compliant* FI.



(2). If the collective investment vehicle is not described in paragraph (1), and if the information required to be reported by the collective investment vehicle under the Agreement with respect to interests in the collective investment vehicle is reported by the collective investment vehicle or another *Investment Entity*, the reporting obligations of all other *Investment Entities* which have

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an obligation to report with respect to the interests in the collective investment vehicle will be deemed fulfilled with respect to such interests.

The definition of the term *Investment Entity* is quite wide and covers any entity that invests, administers or manages funds or money on behalf of other persons. The effect of such a wide definition is that several entities could have an obligation to report details of interests held in the same fund. Paragraph (2) provides that in such cases, where one of the *Investment Entities* reports the information, the obligations of all other entities in respect of that fund will be deemed fulfilled. This is in accordance with paragraph 3 of Article 5 of the Agreement which provides a facility to appoint third parties to carry out the obligations imposed by the Agreement.

D. Non-registering local bank (US Treasury Regulation 1475-5(f)(2)(i))

A *Non-Registering Local Bank* is a *Financial Institution* that is licensed and regulated by the Central Bank, operates solely in Ireland and that complies with the following conditions:

1. The *Financial Institution* operates solely as, and is licensed and regulated under, the laws of Ireland, as:
    - a bank, or
    - a credit union or similar co-operative credit organisation that is operated without profit.
2. The *Financial Institution*'s business consists primarily of receiving deposits from and making loans to unrelated retail customers.
3. The institution does not have a fixed place of business outside of Ireland. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the institution performs solely administrative support functions.
4. The institution does not solicit customers or *Account Holders* outside of Ireland. For this purpose, an institution will not be considered to have solicited customers or *Account Holders* outside its country of incorporation or organisation merely because it operates a website, provided that the website does not permit account opening, does not indicate that the institution maintains accounts for or provides services to non-residents, and does not otherwise target or solicit US customers or *Account Holders*.

    A *Financial Institution* will also not be considered to have solicited customers or *Account Holders* outside its country of incorporation

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or organisation merely because it advertises in print media or on a radio or television station that is distributed or aired primarily within its country of incorporation or organisation but is also incidentally distributed or aired in other countries, provided that the advertisement does not indicate that the *Financial Institution* maintains accounts for or provides services to non-residents and does not otherwise target or solicit US customers or *Account Holders*.

5. The *Financial Institution* does not have more than $175 million in assets on its balance sheet and, if the institution is a member of an expanded affiliated group, the group does not have more than $500 million in total assets on its consolidated or combined balance sheets.
6. With respect to a *Financial Institution* that is part of an expanded affiliated group, each member of the expanded affiliated group is incorporated or organised in Ireland and does not have a fixed place of business outside of Ireland. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the institution performs solely administrative support functions. Further, each *Financial Institution* in the group, other than an institution that qualifies under paragraph 3(v) as a *Financial Institution with only low value accounts* must meet the requirements set out in paragraphs 1 to 5 above. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the *Financial Institution* performs solely administrative support functions.

The closing rate of exchange in operation on the date on which the business makes up its balance sheet should be used for the purpose of calculating the euro equivalent of the dollar values set out in paragraph 5 above.

E. Financial Institutions with only Low-Value Accounts (US Treasury Regulation 1471-5(f)(2)(ii))

A *Financial Institution* qualifies under this heading if it holds only *Low-Value Accounts*, is licensed and regulated by the Central Bank, operates solely in Ireland and complies with the other conditions outlined below. The conditions are:

1. The *Financial Institution* is not an *Investment Entity*.
2. No *Financial Account* maintained by the *Financial Institution* (or, in the case of a *Financial Institution* that is a member of an expanded affiliated

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group, by any member of the expanded affiliated group) has a balance or value in excess of $50,000. In this connection, the balance or value of a *Financial Account* is to be determined by applying the rules described in paragraph 4 of Chapter 7.

3. The *Financial Institution* does not have more than $50 million in assets on its balance sheet as of the end of its most recent accounting year. In the case of an institution that is a member of an expanded affiliated group, the entire expanded affiliated group does not have more than $50 million in assets on its consolidated or combined balance sheet as of the end of its most recent accounting year.

Where a *Financial Institution* complies with the conditions outlined above it will qualify as a *Deemed Compliant Financial Institution* and will not have to register or report under FATCA.

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F. Sponsored closely held investment vehicles (US Treasury Regulation 1471-5(f)(2)(iii))

A *Financial Institution* qualifies under this heading if it complies with the conditions for both itself and the *Sponsoring Entity* which are outlined below.

- Conditions applicable to the Financial Institution

1. The *Financial Institution* is a *Financial Institution* solely because it is an *Investment Entity* and is not a *Qualified Intermediary, Withholding Partnership or Withholding Trust*.

2. The *Financial Institution* has a contractual arrangement with a *Sponsoring Entity* that is a *Participating Financial Institution*, a *Reporting Model 1 FFI*, or US *Financial Institution* and that agrees to fulfil all due diligence, withholding, and reporting responsibilities that the *Financial Institution* would have assumed if it were a reporting *Financial Institution*.

3. Twenty or fewer individuals own all of the debt and equity interests in the *Financial Institution*. For this purpose debt interests owned by:

   - US *Financial Institutions*,
   - *Participating Financial Institutions*,
   - *Registered Deemed Compliant Financial Institutions*,
   - *Certified Deemed Compliant Financial Institutions* and
   - equity interests owned by an entity if that entity owns 100 per cent of the equity interests in the *Financial Institution* and is itself a *Sponsored Financial Institution* under this paragraph,

   may be disregarded.

- Conditions applicable to the *Sponsoring Entity*

1. The *Sponsoring entity* has registered with the IRS as a *Sponsoring Entity* - see Appendix 2.

2. The *Sponsoring Entity* agrees to perform, on behalf of the *Financial Institution*, all due diligence, withholding, reporting, and other

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requirements that the *Financial Institution* would have been required to perform if it were itself a registered *Reporting Financial Institution* and retains documentation collected with respect to the institution for a period of six years.

3. The *Sponsoring Entity* identifies the *Financial Institution* in all reporting completed on the institution's behalf to the extent required under US Regulations.[3]

4. The *Sponsoring Entity* performs the verification procedures required by the US Regulations.[4]

5. The *Sponsoring Entity* has not had its status as a sponsor revoked by the IRS.

The IRS may revoke a *Sponsoring Entity*'s status as a sponsor with respect to all *Sponsored Financial Institutions* if there is a material failure by the *Sponsoring Entity* to comply with its obligations with respect to any *Sponsored Financial Institution*. A *Sponsored Financial Institution* will remain liable for any failure of its *Sponsoring Entity* to comply with the obligations that the *Sponsoring Entity* has agreed to undertake on behalf of that institution.

G. Limited Life Debt Investment Entities (Regulation 1.1471.5(f)(2(iv))

A *Financial Institution* qualifies as a *Limited Life Debt Investment Entity* if it is the beneficial owner of the payment (or of payments made with respect to the account) and complies with the conditions outlined below.

The conditions applicable to the *Financial Institution* are:

1. The *Financial Institution* is an *Investment Entity* that issued one or more classes of debt or equity interests to investors pursuant to a trust indenture or similar agreement and all of such interests were issued on or before 17 January 2013.

[3] See Regulation Nos 1.1471-4T(d)(2)(ii)(C) and 1.1474-1.

[4] 1.1471-4(f) and 1.1471-5(j)&(k).

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2. The *Financial Institution* was in existence as of 17 January 2013 and has entered into a trust indenture or similar agreement that requires the *Financial Institution* to pay to investors holding substantially all of the interests in the *Financial Institution* all amounts that such investors are entitled to receive from the *Financial Institution* no later than a set date or period following the maturity of the last asset held by the *Financial Institution*,

3. The *Financial Institution* was formed and operated for the purpose of purchasing or acquiring specific types of debt instruments or interests therein and holding those assets (subject to reinvestment only under prescribed circumstances) to maturity.

4. Substantially all of the assets (80% or more) of the *Financial Institution* consist of debt instruments or interests therein. Debt Instruments in this case includes notes, bonds, loans promissory notes, certificates of deposit, loan stock, debentures and any other instrument creating or acknowledging indebtedness. A *Financial Institution* should apply this test when the proceeds of the debt or equity interests have been fully invested and not during any ramp up or winding down period.

5. All payments made to the investors of the *Financial Institution* (other than holders of a *de minimis* interest) are either cleared through a clearing organisation or *Custodial Institution* that is a *Participating Financial Institution*, a *Reporting Model 1 Financial Institution*, or a US *Financial Institution* or is made through a Transfer Agent that is a *Participating Financial Institution*, a *Reporting Model 1 Financial Institution*, or a US *Financial Institution*.

6. Neither the *Financial Institution*'s trustee or fiduciary, nor any other person, is authorised through a fiduciary duty or is otherwise authorised to fulfil the obligations of a *Participating Financial Institution* under US Treasury Regulation § 1.1471-4 on behalf of the *Financial Institution*.

H. Owner Documented FFIs (Regulation 1.147-5(F)(3))

A *Financial Institution* qualifies as an *Owner Documented Financial Institution* in respect of payments or accounts for which it does not act as an intermediary and it complies with the following conditions:

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1. The *Financial Institution* is an *Investment Entity* that does not otherwise come within the definitions of *Depository Institution*, *Custodial Institution* or a *Specified Insurance Company*.

2. The *Financial Institution* is not a member of an expanded affiliated group which includes another *Financial Institution* that is a *Depository Institution*, *Custodial Institution*, or a *Specified Insurance Company*.

3. The *Financial Institution* does not maintain a *Financial Account* for any *Non-Participating Financial Institution*.

4. The *Financial Institution* provides a designated withholding agent with all of the identification documentation required by the agent and agrees to notify the withholding agent if there is a change in circumstances.

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5. The designated withholding agent agrees to report to the IRS (or, in the case of a *reporting Model 1 Financial Institution*, to the relevant foreign government or agency thereof) all of the information required [5]with respect to any Specified US Persons that own a direct or indirect equity interest in the *Financial Institution*. However, the designated withholding agent is not required to report information with respect to an indirect owner of the *Financial Institution* that holds its interest through:
    - a *Participating Financial Institution*,
    - a *Deemed-Compliant Financial Institution* (other than an *Owner Documented Financial Institution*),
    - an entity that is a US Person,
    - an *Exempt Beneficial Owner*, or
    - an *excepted* NFFE.

Where a *Financial Institution* complies with the above conditions, the institution will only be treated as an *Owner Documented Financial Institution* with respect to payments received from and accounts held with a designated withholding agent (or with respect to payments received from and accounts held with another *Financial Institution* that is also treated as an *Owner Documented Financial Institution* by such designated withholding agent).

A designated withholding agent is a US *Financial Institution*, *participating Financial Institution*, or *Reporting Model 1 Financial Institution* that agrees to undertake the additional due diligence and reporting required under US Regulations in order to treat the *Financial Institution* as an *Owner Documented Financial Institution*.

4. <u>Registered Deemed Compliant Financial Institutions</u>

The *Financial Institution*s described below are not included as *Deemed Compliant Financial Institution*s under the Agreement. However, these institutions are regarded as *Registered Deemed Compliant* entities under US Regulations. As such paragraph 1(q) of the Agreement enables *Irish Financial Institution*s that comply with the various conditions to qualify for the exemption. An institution falling within one of these categories must register with the IRS and obtain a GIIN in accordance with the arrangements set out in Appendix 3. However it is only obliged to report on accounts in specific circumstances.

The categories are:

[5] See sections 1.1471-4(d) or §1.1474-1(i) (as appropriate) of the US Tax Code.

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A. a non-reporting member of a group of related Participating Financial Institutions,
B. a Restricted Fund,
C. a Qualified Credit Card Issuer,
D. a Sponsored Investment Entity, or
E. a Controlled Foreign Corporation .

A. Non-reporting members of Participating FFI groups

A *Financial Institution* will be treated as a *Registered Deemed Compliant Financial Institution* if it meets all of the following requirements:

1. By the later of 30 June 2014 or the date it obtains a GIIN, the *Financial Institution* implements policies and procedures to allow for the identification and reporting of:
   - *Pre-existing US Reportable Accounts*;
   - US *Reportable Accounts* opened on or after 1 July 2014;
   - Accounts that become US *Reportable Accounts* as a result of a change of circumstances;
   - Accounts held by *NPFI*'s;
2. The *Financial Institution* must review accounts opened prior to the time it implements the appropriate policies and procedures. Within six months of the identification of any account as a *US Reportable Account* or when it becomes aware of a change of circumstances of the *Account Holder's* status, the *Financial Institution* must–
   - transfer the account to an affiliate that is a *Participating Financial Institution*, a *Reporting Model 1 Financial Institution*, or a US *Financial Institution*,
   - close the account, or
   - become a *Reporting Model 1 Financial Institution*.

B. Restricted Funds

A *Restricted Fund* is an investment fund that is registered with the Central Bank and that meet the requirements set out below.

1. The *Financial Institution* must be a *Financial Institution* solely because it falls within the definition of *Investment Entity*, and it is regulated in Ireland as an investment fund. A fund will be considered to be regulated as an investment fund for the purposes of this paragraph if its manager is regulated with respect to the fund in all of the countries in which the

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investment fund is registered and in all of the countries in which the investment fund operates.

2. Interests issued directly by the fund are redeemed by or transferred by the fund rather than sold by investors on any secondary market. Notwithstanding the prior sentence, a fund will not be prohibited from qualifying as a *Restricted Fund* solely because it issued interests in bearer form provided that the fund ceased issuing interests in bearer form after December 31, 2012, retires all such interests upon surrender, establishes policies and procedures to redeem or immobilize all such interests prior to January 1, 2017, and prior to payment the fund documents the *Account Holder* in accordance with the procedures set out in Chapter 8 and Chapter 10 applicable to accounts other than pre-existing accounts and agrees to withhold and report on such accounts as would be required under US Regulation §1.1471-4(b) and (d) if it were a *Participating Financial Institution*.

   For the purposes of this paragraph, interests in the *Restricted Fund* that are issued by the fund through a transfer agent or distributor that does not hold the interests as a nominee of the *Account Holder* will be considered to have been issued directly by the fund.

3. Interests that are not issued directly by the fund are sold only through distributors that are *Participating Financial Institution*s, *Registered Deemed Compliant Financial Institution*s, *Non-Registering Local Banks* or *Restricted Distributors*[6]. For the purposes of this paragraph, a distributor means an underwriter, broker, dealer, or other person who participates, pursuant to a contractual arrangement with the fund, in the distribution of securities and holds interests in the fund as a nominee.

4. The fund ensures that by the later of 30 June 2014, or six months after the date the fund registers as a *Deemed Compliant Financial Institution*, each agreement that governs the distribution of its debt or equity interests prohibits sales and other transfers of debt or equity interests in the fund (other than interests that are both distributed by and held through a *Participating Financial Institution*) to *Specified US Persons*, *Non-Participating Financial Institutions*, or *Passive NFFE*s with one or more *Substantial US owners*. In addition, by that date, the fund's prospectus and all marketing materials must indicate that sales and other transfers of interests in the fund to *Specified US Persons*, *Non-Participating Financial Institution*s, or *passive NFFE*s with one or more *Substantial US owners* are

[6] See paragraph (f)(4) of Regulation 1.1471-5

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prohibited unless such interests are both distributed by and held through a participating *Financial Institution*.

5. The fund ensures that by the later of 30 June 2014, or six months after the date the fund registers as a *Deemed Compliant Financial Institution*, each agreement entered into by the fund that governs the distribution of its debt or equity interests requires the distributor to notify the fund of a change in the distributor's Chapter 4 status within 90 days of the change. The fund must certify to the IRS that, with respect to any distributor that ceases to qualify as a distributor, the fund will terminate its distribution agreement with the distributor, or cause the distribution agreement to be terminated, within 90 days of notification of the distributor's change in status and, with respect to all debt and equity interests of the fund issued through that distributor, will redeem those interests, convert those interests to direct holdings in the fund, or cause those interests to be transferred to another distributor within six months of the distributor's change in status.

6. With respect to any of the fund's pre-existing direct accounts that are held by the beneficial owner of the interest in the fund, the fund reviews those accounts in accordance with the procedures (and time frames) described in Chapter 7 and Chapter 9 applicable to *Pre-existing Accounts* to identify any US account or account held by a *Non-Participating Financial Institution*. Notwithstanding the previous sentence, the fund will not be required to review the account of any individual investor that purchased its interest at a time when all of the fund's distribution agreements and its prospectus contained an explicit prohibition of the issuance and/or sale of shares to US entities and US resident individuals. A fund will not be required to review the account of any investor that purchased its interest in bearer form until the time of payment, but at such time will be required to document the account in accordance with procedures set forth in Chapters 8 and 10 applicable to new accounts.

7. By the later of 30 June 2014, or six months after the date the fund registers as a *Deemed Compliant Financial Institution*, the fund will be required to certify to Revenue either that it did not identify any US account or account held by a *Non-Participating Financial Institution* as a result of its review or, if any such accounts were identified, that the fund will either redeem such accounts, transfer such accounts to an affiliate or other *Financial Institution* that is a *Participating Financial Institution*, *Reporting Model 1 Financial Institution*, or US *Financial Institution*, or withhold and report on such accounts as would be required under US Regulation 1.1471-4(b) and (d) if it were a *Participating Financial Institution*.

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8. By the later of 30 June 2014 or the date that it registers as a *Deemed Compliant Financial Institution*, the fund implements the policies and procedures described in US Regulation 1.1471-4(c) to ensure that it either:
   - does not open or maintain an account for, or make a withholdable payment to, any *Specified US Person*, *Non-Participating Financial Institution*, or *passive NFFE* with one or more *substantial US owners* and, if it discovers any such accounts, closes all accounts for any such person within six months of the date that the fund had reason to know the *Account Holder* became such a person; or
   - withholds and reports on any account held by, or any withholdable payment made to, any *Specified US Person*, *Non-Participating Financial Institution*, or *Passive NFFE* with one or more *Substantial US Owners* to the extent and in the manner that would be required under US Regulation 1.1471-4(b) and (d) if the fund were a *Participating Financial Institution*.
9. For a fund that is part of an expanded affiliated group, all other *Financial Institution*s in the expanded affiliated group are *Participating Financial Institutions*, *Registered Deemed Compliant Financial Institution*s, *Sponsored Financial Institution*s described in paragraph D below, *Non-Reporting IGA Financial Institution*s, or *Exempt Beneficial Owners*.

C. Qualified credit card issuers

This category covers *Financial Institution*s that comply with the following conditions:

1. The *Financial Institution* is a *Financial Institution* solely because it is an issuer of credit cards that accepts deposits only when a customer makes a payment in excess of a balance due with respect to the card and the overpayment is not immediately returned to the customer.

2. By the later of 30 June 2014 or the date it registers as a *Deemed Compliant Financial Institution*, the *Financial Institution* must implement policies and procedures to:
   (i) prevent a customer deposit in excess of $50,000, or
   (ii) ensure that any customer deposit in excess of $50,000 is refunded to the customer within 60 days.

For this purpose, a customer deposit does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns.

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D. Sponsored Investment Entities

A *Financial Institution* qualifies as a *Sponsored Investment Entity* if:

(1) it is an *Investment Entity* that is not a *Qualified Intermediary*, *Withholding Partnership* or *Withholding Trust*,

(2) another entity has agreed to act as a *Sponsoring Entity* for it, and

(3) the *Sponsoring Entity* complies with the conditions listed below:

a. it is authorized to act on behalf of the *Financial Institution* (such as a fund manager, trustee, corporate director, or managing partner) to fulfill its FATCA compliance obligations;
b. it has registered with the IRS as a *Sponsoring Entity*;
c. it has registered the *Financial Institution* with the IRS by the later of December 31, 2016, and the date that is 90 days after a US Reportable Account is first identified;
d. it agrees to perform, on behalf of the *Financial Institution*, all due diligence, withholding, reporting, and other requirements that the *Financial Institution* would have itself been required to perform;
e. it identifies the *Financial Institution* in all reporting completed on the *Financial Institution's* behalf to the extent required in the relevant US Treasury Regulations;[7]
f. it performs on behalf of the *Financial Institution* the verification procedures required under the relevant US Treasury Regulations;[8]
g. it has not had its status as a sponsoring entity revoked.

In other words, a *Sponsoring Entity* is an entity that is authorized to act on behalf of a *Sponsored Investment Entity* to fulfill its FATCA compliance obligations. A *Sponsoring Entity* must register with the IRS and must undertake all FATCA compliance on behalf of the *Sponsored Investment Entity* (and where appropriate outsource FATCA compliance obligations to third party service providers). This will include, for example, account identification and documentation. A *Sponsoring Entity* will need to ensure that new investors in the funds it manages are appropriately documented for FATCA purpose. From 1 January 2017, when carrying out reporting with respect to

[7] Regulations 1.1471-4(d)(2)(ii)(C) and 1.1471-1

[8] Regulation 1.1471-4(f)

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the *Sponsored Entity,* a *Sponsoring Entity* will be required to use the GIIN of the *Sponsored Entity*. In order to comply with this change, a *Sponsoring Entity* will be required to register its *Sponsored Entity* with the IRS and obtain a GIIN for the *Sponsored Entity*. The GIIN of the *Sponsored Entity* should then be used in the FATCA return of the *Sponsored Entity* and only one *Sponsored Entity* can be reported in a FATCA return. This replaces the current reporting requirement which allows the use of the *GIIN* of the *Sponsoring Entity* when reporting with respect to a *Sponsored Entity*. If it is a case that a *GIIN* has not been obtained for the *Sponsored Entity* (as it has no reportable accounts), there is no change to the reporting process and it is still possible for a *Sponsoring Entity* to include more than one *Sponsored Entity* in the FATCA return.

A *Sponsoring Entity* will not be held jointly and severally liable for the *Sponsored Investment Entity*'s obligations unless the *Sponsoring Entity* is also a withholding agent that is separately liable for such obligations. Further, the IRS may revoke a *Sponsoring Entity's* status as a sponsor if it fails to comply with its obligations (paragraph D(3) above) with respect to any *Financial Institution*.

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E. Sponsored Controlled Foreign Corporations

A *Financial Institution* is a *Sponsored Controlled Foreign Corporation* if the *Financial Institution* meets the following conditions:

(1) it is a *Controlled Foreign Corporation* (CFC)[9] that is not a *Qualified Intermediary, Withholding Partnership or Withholding Trust,*

(2) it is wholly owned, directly or indirectly, by a US *Financial Institution* that agrees with the CFC to act as its *Sponsoring Entity*,

(3) the CFC shares a common electronic account system with the *Sponsoring Entity* that enables the *Sponsoring Entity* to identify all *Account Holders* and payees of the CFC and to access all account and customer information maintained by the CFC including, but not limited to, customer identification information, customer documentation, account balance, and all payments made to the *Account Holder* or payee and

(4) the *Sponsoring Entity* complies with the conditions set out below:

a) it is authorised to act on behalf of the *Sponsored Entity* to fulfil applicable registration requirements on the IRS FATCA registration website,
b) it has registered with the IRS as a *Sponsoring Entity*,
c) if the *Sponsoring Entity* identifies any *US Reportable Accounts* with respect to the *Financial Institution*, the sponsoring entity registers the *Financial Institution* pursuant to applicable registration requirements on the IRS FATCA registration website on or before the later of 31 December 2016 and the date that is 90 days after such a *US Reportable Accounts* is first identified,
d) it agrees to perform, on behalf of the *Sponsored Entity*, all due diligence, withholding, reporting, and other requirements that the *Sponsored Entity* would have been required to perform if it were a *Reporting Financial Institution*,
e) it identifies the *Sponsored Entity* in all reporting[10] completed on the entity's behalf, and
f) it has not had its status as a sponsor revoked.

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[9] See section 957(a) of the US Tax Code

[10] See Regulations 1.1471-4(d)(2)(ii)(c), 1.1474-1, and 1.471-S(f)(I)(i)(F)(3)(V)

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The IRS may revoke a *Sponsoring Entity*'s status as a sponsor with respect to all *Sponsored Financial Institution*s if there is a material failure by the *Sponsoring Entity* to comply with its obligations with respect to any Sponsored *Financial Institution*.

A *Sponsored Financial Institution* will remain liable for any failure of its *Sponsoring Entity* to comply with the obligations that the *Sponsoring Entity* has agreed to undertake on its behalf.

Appendix 2 - Definitions relevant to FATCA

1. Depository Account

A *Depository Account* is any commercial current account, any savings account evidenced by a certificate of deposit, investment certificate, certificate of indebtedness, or other similar instrument where cash is placed on deposit with an entity engaged in a banking or similar business.

The account does not have to be an interest bearing account.

This will include any credit balance on a credit card (a credit balance does not include credit balances in relation to disputed charges, but does include credit balances resulting from refunds of purchases) issued by a credit card company engaged in banking or similar business.

Where a *Financial Institution* elects to apply the threshold for *Depository Accounts*, this means that a credit card account will only be reportable where, after applying aggregation rules:

- there are no other accounts and the balance exceeds $50,000
- the total balance on all aggregated *Depository Accounts* (including the credit card balance) exceeds $50,000.

The definition of *Depository Account* also includes an amount held by an insurance company under an agreement to pay or credit interest. However, amounts held by an insurance company awaiting payment in relation to a *Cash Value Insurance Contract* where the term has ended will not constitute a *Depository Account*.

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A credit card will not be a *Depository Account* where the credit card issuer implements policies and procedures (by the later of 30 June 2014 or the date it registers as a *Financial Institution*) either to prevent a customer deposit in excess of $50,000 or to ensure that any customer deposit in excess of $50,000 is refunded to the customer within 60 days.

2. Custodial Account

A *Custodial Account* is an account (other than an *Insurance Contract* or *Annuity Contract*) for the benefit of another person that holds any financial instrument or contract held for investment.

The financial instruments / contracts held in such accounts can include but are not limited to:

- a share or stock in a corporation,
- a note, bond, debenture, or other evidence of indebtedness,
- a currency or commodity transaction,
- a credit default swap,
- a swap based upon a non-financial index,
- a notional principal contract (in general, contracts that provide for the payment of amounts by one party to another at specified intervals calculated by reference to a specified index upon a notional principal amount in exchange for specified consideration or a promise to pay similar amounts),
- an *Insurance Contract* or *Annuity Contract*, and
- any option or other derivative instrument.

A *Cash Value Insurance Contract* or an *Annuity Contract* is not to be considered to be a *Custodial Account*, but these could be assets held in a *Custodial Account*. Where they are assets in a *Custodial Account*, the insurer will only need to provide the custodian with the cash/surrender value of the *Cash Value Insurance Contract*.

A *Custodial Account* does not include financial instruments/contracts (for example, a share or stock in a corporation) held in a nominee sponsored by the issuer of its own shares, which are in every other respect analogous to those held on the issuer's share register.

Transactions which include the collection of margin or collateral on behalf of a counterparty may fall within the definition of *Custodial Account*. The exact terms of

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the contractual arrangements will be relevant in applying this interpretation however any obligations to return equivalent collateral at conclusion of the contract, and potentially make interim payments (such as interest) to counterparties during the contract term will constitute a *Custodial Account*.

3. Insurance Contract

An *Insurance Contract* is a contract, other than an *Annuity Contract*, under which the issuer agrees to make payments upon the occurrence of a specified contingency involving mortality, morbidity, accident, liability, or property risk.

An *Insurance Contract* is not to be considered to be a *Custodial Account* however it could be one of the assets that are held in a *Custodial Account*.

4. Cash Value Insurance Contract

This is an *Insurance Contract* where the cash surrender or termination value (determined without reduction of any surrender charges or policy loan) or the amount the policyholder can borrow under (or with regard to) the contract is greater than $50,000.

This definition excludes indemnity reinsurance contracts between two insurance companies. The cash value does not include an amount payable under an *Insurance Contract* in the following situations:

- the amount payable on the insured event, which includes death,
- a refund on a non-life insurance policy premium due to cancellation or termination of the policy, a reduction in amount insured, or a correction of an error in relation to the premium due,
- a policyholder on-boarding incentive or bonus.

When a policy becomes subject to a claim and an amount is payable, this does not create a new account, it is still the same policy.

5. Annuity Contract

An *Annuity Contract* is a contract under which the *Financial Institution* agrees to make payments for a period of time, determined in whole or in part by reference to the life expectancy of one or more individuals.

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The following are not considered to be an *Annuity Contract* for FATCA purposes:

- pension annuities
- immediate needs annuities
- periodic payment orders

Reinsurance of *Annuity Contracts* between two insurance companies are excluded from this definition.

6. <u>An Equity or Debt Interest in an Investment Entity</u>

Where an *Investment Entity* is only classed as such because it is an asset manager, investment advisor or other similar entity, its debt and equity interests are excluded from being a *Financial Account*. This mirrors the treatment of debt and equity interests in entities that are solely *Depository* or *Custodial Institution*s.

Debt and equity interests (other than regularly traded interests) are only *Financial Accounts* in relation to Investment Entities if:

- the entity is managed by a *Financial Institution* including another *Investment Entity* and the entity's gross income is attributable to investing, reinvesting or trading in financial assets, or
- the entity functions or holds its self out as a collective investment fund, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

In the case of a partnership that is a *Financial Institution*, the term equity interest means either a capital or profits interest in the partnership.

In the case of a trust that is a *Financial Institution*, an equity interest means either an interest held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. A *Specified US Person* shall be treated as being a beneficiary of a trust if such person has the right to receive directly, or indirectly a mandatory or discretionary distribution from the trust.

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7. Debt or Equity Interests regularly traded on an established securities market

The Agreement makes clear that with regard to *Depository* and *Custodial Institutions* and *Specified Insurance Companies* that the only debt or equity interests reportable are those where the class of interest has been established for the avoidance of reporting under the Agreement. The rules differ for *Investment Entities* that are *Financial Institutions* solely because they are an *Investment Entity*. Here the Agreement excludes those debt and equity interests that are "regularly traded on an established securities market". For the purposes of the Agreement, an equity or debt interest will be considered "regularly traded" if it is listed on a recognised stock exchange with the intention that the interests may be traded. An equity or debt interest that is listed solely for regulatory or similar purposes where there is clearly no intention to trade should not be considered as "regularly traded".

Provided that the debt or equity interest meets the required conditions for "regularly traded on an established securities market" there is no need to check annually if any transactions have been undertaken. However, where it emerges that an equity or debt interest has been listed on a recognised stock exchange solely for the purposes of avoiding reporting under FATCA, Revenue reserves the right to apply the definition of "regularly traded" as used in the US Regulations (Regulation 1.1471-5(b)(3)(iv)).

Restrictions applying to "regularly traded on an established securities market"

To prevent the risk that an entity could circumvent FATCA reporting by seeking a listing where there is no intention of the investment vehicle being widely available Revenue will in all cases treat as *Financial Accounts* those equity or debt interests established with a purpose of avoiding reporting in accordance with the Agreement - including interests that nevertheless meet the underlying criteria for regularly traded on an established securities market.

Where there is an attempt to set up a particular interest or class of interest to avoid reporting under the Agreement then all debt and equity interests will become reportable. This also should achieve the objectives of not requiring major financial institutions to report on their interests but targets reporting at where it will be of most relevance.

In assessing whether a class of interest has been set up to avoid reporting Revenue will consider a number of factors, such as, **for example**:

- whether the *Investment Entity* is subject to regulation in Ireland,
- whether the investor has any right to redeem their holding at net asset value:

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- the degree to which the assets held in the underlying portfolio are exposed to investment or trading risk, and
- whether the product is publically advertised through the issuance of a prospectus.

The above is not an exhaustive list and where appropriate Revenue will consider each case on its particular circumstances.

8. Non-Financial Foreign Entity (NFFE)

An *NFFE* is any non-US entity that is not a *Financial Institution* as defined for FATCA. There are two categories of *NFFE* – active or passive. A *Passive NFFE* is an *NFFE* that is not an *Active* NFFE.

Active NFFE

An *Active NFFE* is defined as any *NFFE* that meets one of the following criteria.

1. 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.
2. The stock of the *NFFE* is regularly traded on an established securities market or the *NFFE* is a related entity of an entity the stock of which is traded on an established securities market;
3. The *NFFE* is organised in a US Territory and all of the owners of the payee are bona fide residents of that US Territory;
4. The *NFFE* is a non-US government, a government of a US Territory, a political subdivision of such government (which, for the avoidance of doubt, includes a state, province, county, or municipality), or a public body performing a function of such government or a political subdivision thereof, an international organisation, a non-US central bank of issue, or an entity wholly owned by one or more of the foregoing;
5. Substantially all of the activities of the *NFFE* consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a *Financial Institution*, except that an *NFFE* shall not qualify for this status if the *NFFE* functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout

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fund or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;

6. The *NFFE* is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a *Financial Institution*; provided, that the *NFFE* shall not qualify for this exception after the date that is 24 months after the date of the initial organisation of the *NFFE*;
7. The *NFFE* was not a *Financial Institution* in the past five years, and is in the process of liquidating its assets or is reorganising with the intent to continue or recommence operations in a business other than that of a *Financial Institution*;
8. The *NFFE* primarily engages in financing and hedging transactions with or for related entities that are not *Financial Institution*s, and does not provide financing or hedging services to any entity that is not a related entity, provided that the group of any such related entities is primarily engaged in a business other than that of a *Financial Institution*;
9. The *NFFE* is an "*Excepted NFFE*" as defined in US Regulations (e.g. see *Direct Reporting NFFE* below); or
10. The *NFFE* meets all of the following requirements:
    (i) It is established and maintained in its country of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organization, business league, chamber of commerce, labor organization, agricultural or horticultural organization, civic league or an organization operated exclusively for the promotion of social welfare;
    (ii) It is exempt from income tax in its country of residence;
    (iii) It has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
    (iv) The applicable laws of the entity's country of residence or the entity's formation documents do not permit any income or assets of the entity to be distributed to, or applied for the benefit of, a private person or non-charitable entity other than pursuant to the conduct of the entity's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the entity has purchased; and
    (v) The applicable laws of the entity's country of residence or the entity's formation documents require that, upon the entity's liquidation or dissolution, all of its assets be distributed to a governmental entity or other non-profit organization, or escheat to the government of the entity's country of residence or any political subdivision thereof.

Passive Income

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The term “passive income” means the portion of gross income that consists of

1. Dividends, including substitute dividend amounts;
2. Interest;
3. Income equivalent to interest, including substitute interest and amounts received from or with respect to a pool of insurance contracts if the amounts received depend in whole or part upon the performance of the pool;
4. Rents and royalties, other than rents and royalties derived in the active conduct of a trade or business conducted, at least in part, by employees of the NFFE;
5. Annuities;
6. The excess of gains over losses from the sale or exchange of property that gives rise to passive income described in items 1 to 5;
7. The excess of gains over losses from transactions (including futures, forwards, and similar transactions) in any commodities, but not including-
   a. Any commodity hedging transaction described in section 954(c)(5)(A) of the US Revenue Code, determined by treating the entity as a controlled foreign corporation; or
   b. Active business gains or losses from the sale of commodities, but only if substantially all the foreign entity’s commodities are property described in paragraph (1), (2), or (8) of section 1221(a) of the US Revenue Code;
8. The excess of foreign currency gains over foreign currency losses;
9. Net income from “notional principle contracts”. These are financial instruments that provide for the payment of amounts by one party to another at specified intervals calculated by reference to a specified index upon a notional principal amount in exchange for specified consideration or a promise to pay similar amounts (NB: in the UK this would normally be a swap);
10. Amounts received under cash value insurance contracts; or
11. Amounts earned by an insurance company in connection with its reserves for insurance and annuity contracts.

However, the following amounts are excluded from any calculation of Passive Income:

1. Any income from interest, dividends, rents, or royalties that is received or accrued from a related person to the extent such amount is properly allocable to income of such related person that is not passive income. For purposes of this section, a person is a related person with respect to the NFFE if—
   a. such person is an individual, corporation, partnership, trust, or estate which controls, or is controlled by, the NFFE, or

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b. such person is a corporation, partnership, trust, or estate which is controlled by the same person or persons which control the NFFE.

2. In the case of an NFFE that regularly acts as a dealer in property described in item 6 above of this section (referring to the sale or exchange of property that gives rise to passive income), forward contracts, option contracts, or similar financial instruments (including notional principal contracts and all instruments referenced to commodities)

a. Any item of income or gain (other than any dividends or interest) from any transaction (including hedging transactions and transactions involving physical settlement) entered into in the ordinary course of such dealer's trade or business as such a dealer; and

3. If such dealer is a dealer in securities, any income from any transaction entered into in the ordinary course of such trade or business as a dealer in securities.

Passive NFFE

A *Passive NFFE* is a NFFE that is not (i) an Active NFFE, or (ii) a *withholding foreign partnership* or *withholding foreign trust* pursuant to relevant *U.S. Treasury Regulations.*

Direct Reporting NFFEs and Sponsored Direct Reporting NFFEs

US Treasury Regulation §1.1472-1(c)(3) introduces a new category of *Passive NFFE* – a *Direct Reporting NFFE*. A *Direct Reporting NFFE* will be treated as an "*Excepted NFFE*". Such a *NFFE* will be required to register with the IRS to obtain a G.I.I.N. Further, *Direct Reporting NFFEs* will be required to elect to, and report directly to the IRS certain information about its direct or indirect substantial US owners. For further information, see IRS Notice 2013-69. The Notice also sets out that an entity will be allowed to sponsor one or more Direct Reporting *NFFEs* (i.e. Sponsored Direct Reporting *NFFEs*).

9. Related Entity

For the purposes of FATCA an entity is regarded as being related to another entity if one entity controls the other, or the two entities are under common control. For this purpose Revenue regards control as including the direct or indirect ownership of more than 50 per cent of the vote and value in an entity.

Whether or not there are any related entities is relevant in the context of the obligations placed on Irish *Financial Institutions* in respect of any related entities that

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are *Non Participating Financial Institution*s (*NPFI*). Where a Irish *Financial Institution* has any related entities, that as a result of the non participation of the jurisdiction it operates in, are *NPFI*'s then the Irish *Financial Institution* must treat the related entity as an *NPFI*: and fulfil any reporting or withholding obligations in respect to that *NPFI*.

*Financial Institution*s can apply the exemption under 1471-5 (i) (3) of the US regulations and apply the definition of seed capital at 1471-5 (i) (4) for these purposes.

Investment Entities which have been provided with seed capital by a fund promoter or investment manager or member of a group to which the fund promoter or fund manager belongs will not be considered to be a Related Entity for these purposes. Seed capital investment is the original capital contribution made to an *Investment Entity* that is intended to be a temporary investment. This would generally be for the purpose of establishing a performance record before selling interests in the entity to unrelated investors or for purposes otherwise deemed appropriate by the manager.

Specifically, an *Investment Entity* will not be considered to be a Related Entity as a result of a contribution of seed capital by a member of the group if:

- the member of the group that provides the seed capital is in the business of providing seed capital to Investment Entities that it intends to sell to unrelated investors;
- the Investment Entity is created in the course of its business;
- any equity interest in excess of 50% of the total value of stock of the Investment Entity is intended to be held for no more than three years from the date of acquisition; and
- in the case of an equity interest that has been held for over three years, its value is less than 50% of the total value of the stock of the Investment Entity.

The anti avoidance provisions set out in the Irish Regulations will apply to arrangements taken by any person where the purpose is to take advantage of this exemption to avoid the obligations placed upon them by the regulations.

10. <u>US Person</u>

1. a US citizen or resident individual,

2. a partnership or corporation organised in the United States or under the laws of the United States or any State thereof,

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3. a trust if:

   (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and

   (ii) 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 United States.

The meanings of the expressions used in this definition are to be interpreted in line with the US Internal Revenue Code.

11. Specified US Person

The term *Specified US Person* is defined in the Agreement as a *US Person* other than:

(i) a corporation the stock of which is regularly traded on one or more established securities markets;
(ii) any corporation that is a member of the same expanded affiliated group[11] as a corporation described in clause (i);
(iii) the United States or any wholly owned agency or instrumentality thereof;
(iv) any State of the United States, any US Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;
(v) any organisation exempt from taxation under section 501(a) or an individual retirement plan as defined in section 7701(a)(37) of the US Internal Revenue Code;
(vi) any bank as defined in section 581 of the US Internal Revenue Code;
(vii) any real estate investment trust as defined in section 856 of the US Internal Revenue Code;
(viii) any regulated investment company as defined in section 851 of the US Internal Revenue Code or any entity registered with the Securities Exchange Commission under the Investment Company Act of 1940 (15 USC. 80a-64);
(ix) any common trust fund as defined in section 584(a) of the US Internal Revenue Code;
(x) any trust that is exempt from tax under section 664(c) of the US Internal Revenue Code or that is described in section 4947(a)(1) of the US Internal Revenue Code;
(xi) a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State; or
(xii) a broker as defined in section 6045(c) of the US Internal Revenue Code.

[11] See section 1471(e)(2) of the U.S. Internal Revenue Code,

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12. Participating FFI and Participating FFI Group

A *Participating FFI* is an FFI that has agreed to comply with the requirements of an FFI agreement, including an FFI described in a Model 2 IGA that has agreed to comply with the requirements of an FFI agreement. The term participating FFI also includes a QI branch of a US financial institution, as long as the branch is not a reporting Model 1 FFI.

A *Participating FFI Group* is an expanded affiliated group that includes one or more participating FFIs, or an expanded affiliated group in which one or more members of the group is a reporting Model 1 FFI and each member of the group that is an FFI is a registered deemed-compliant FFI, non-reporting IGA FFI, limited FFI, or retirement fund described in US Regulation §1.1471-6(f).

13. Sponsoring Entity

Pursuant to US Regulations, the term *Sponsoring Entity* means an entity that registers with the IRS and agrees to perform the due diligence, withholding, and reporting obligations of one or more FFIs pursuant to US Treasury Regulation 1.1471–5(f)(1)(i)(F) (*Sponsored Investment Entity*) or US Treasury Regulation 1.1471–5(f)(2)(iii) (*Sponsored Closely Held Investment Vehicles*).

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Appendix 3- Registration arrangements

Financial Institutions are required to register with the IRS for FATCA purposes. The IRS have developed a registration portal and details of the registration process are set out in the IRS user guide which is available at https://www.irs.gov/Businesses/Corporations/FATCA-Foreign-Financial-Institution-Registration-Tool.

Once registered, a *Financial Institution* will be issued a Global Intermediary Identification Number (GIIN) and will be included on a published list available on the IRS website. The GIIN may be used by a *Financial Institution* to identify itself to withholding agents and to tax administrations for FATCA purposes.

Irish Financial Institutions are not required to provide a GIIN to establish their FATCA status prior to 1 January 2015. Before that date Model 1 Financial Institutions can confirm their status by either:

- providing a Withholding Certificate;
- providing a pre FATCA W-8 with an oral or written confirmation that the Entity is a Model 1 Financial Institution; **or**
- informing the withholding agent that they are a Model 1 Financial Institution.

In the case of an umbrella fund which is an investment entity, registration should be done at the level of the umbrella fund. However an election can be made to register at the level of the sub-fund where this option is preferred.

In circumstances where an entity is no longer a Financial Institution and as a result no longer has an obligation to file a FATCA return (for example where a fund has closed and ceased trading) the entity should ensure that it has met all of its FATCA filing obligations before de-registering or deleting their GIIN with the IRS.

Responsible Officer

While the responsible officer title is a feature of the IRS FATCA portal registration process, registration by a *Financial Institution* in a Model 1 IGA jurisdiction does not invoke the US Treasury concept of a responsible officer. The purpose of the registration process for a Model 1 IGA *Financial Institution* is to apply for a Global Intermediary Identification Number (GIIN) and to authorise one or more Point of Contacts for the *Reporting Financial Institution*.

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