

# Tax Information Authority



## CAYMAN ISLANDS

### **GUIDANCE NOTES ON THE INTERNATIONAL TAX COMPLIANCE REQUIREMENTS OF THE INTERGOVERNMENTAL AGREEMENTS BETWEEN THE CAYMAN ISLANDS AND THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM**

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These Guidance Notes are issued under the Tax Information Authority (International Tax Compliance) (United Kingdom) Regulations, 2014 and the Tax Information Authority (International Tax Compliance) (United States) Regulations, 2014 by the Tax Information Authority as the Competent Authority for the purposes of the legislation.

This document will be kept under review and updates will be issued periodically.

For more information, please visit [www.tia.gov.ky](http://www.tia.gov.ky)

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## Acronyms

AEOI	Automatic Exchange of Information
AML	Anti-Money Laundering
CFT	Counter Financing of Terrorism
CIMA	Cayman Islands Monetary Authority
CDO	Collateralised Debt Obligation
CLO	Collateralised Loan Obligation
CRS	Common Reporting Standard
DITC	Department for International Tax Cooperation
FATF	Financial Action Task Force
FATCA	Foreign Account Tax Compliance Act
GIIN	Global Intermediary Identification Number
HIRE Act	Hiring Incentives to Restore Employment Act (2010)
HMRC	Her Majesty's Revenue and Customs
IGA	Intergovernmental Agreement
IRS	Internal Revenue Service
KYC	Know Your Client
LLDIE	Limited Life Debt Investment Entity
NFFE	Non-Financial Foreign Entity
NPFI	Non-Participating Financial Institution
PFFI	Participating Foreign Financial Institution
PTC	Private Trust Company
SPV	Special Purpose Vehicle
TIA	Tax Information Authority

TIN	Tax Identification Number
TCSP	Trust and Company Service Provider

# 1. BACKGROUND

## 1.1. General

The Foreign Account Tax Compliance Act (FATCA) was introduced by the United States (US) in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act with the purpose of reducing tax evasion by their citizens. FATCA requires financial institutions outside the US to report information on financial accounts held by their US customers to the US Internal Revenue Service (IRS). These requirements are contained in the relevant US Treasury Regulations (US Regulations). The information to be reported by foreign financial institutions is equivalent to that required to be reported by US citizens in their US tax returns.

If financial institutions do not comply with the US Regulations, a 30% withholding tax is imposed on US source income of that financial institution. Financial institutions are also required to close accounts where their US customers do not provide information to be collected by the financial institution.

The US recognised that in some jurisdictions there are legal barriers to implementing FATCA as well as some practical difficulties for financial institutions in complying with FATCA. Two model intergovernmental agreements (Model I and Model II IGAs) were developed to overcome the legal issues and to reduce some of the burden on the financial institutions. The UK adopted a similar approach and developed UK "FATCA" IGAs for reporting of equivalent information to the UK by its Overseas Territories (OTs) and Crown Dependencies (CDs).

## 1.2. Cayman Islands Intergovernmental Agreements

On 5 November 2013, the Cayman Islands and the UK signed their [Agreement to Improve International Tax Compliance](#) (the UK Agreement) based on the US Model 1 IGA.

On 29 November 2013, the Cayman Islands and the US signed their [Agreement to Improve International Tax Compliance](#) (the US Agreement) and to Implement FATCA based on the Model I IGA. To accommodate the non-direct tax system in the Cayman Islands, the IGA is a model 1B (non-reciprocal) IGA. As an IGA partner jurisdiction, Cayman based Financial Institutions will not be subject to a 30% withholding tax on US source income, unless they fail to meet the requirements set out in the IGA and in Cayman domestic implementing legislation.

Under the terms of the UK Agreement and US Agreement (together the Agreements), Cayman Islands Financial Institutions will provide the Cayman Islands Competent Authority with the required information. The Cayman Islands Competent Authority will forward that information to the Competent Authority in the relevant jurisdiction.

The Agreements fall under the respective international instruments for exchange of information for tax purposes between the Cayman Islands and each of the US and the UK which are scheduled to the Tax Information Authority Law (2013 Revision) as amended from time to time (TIA Law). The TIA Law is the primary Cayman Islands legislation dealing with the implementation of the Agreements and the detailed rules are contained in Regulations made under the TIA Law. These are the [Tax Information Authority \(International Tax Compliance\) \(United States of America\) Regulations, 2014](#) and the [Tax Information Authority \(International Tax Compliance\) \(United Kingdom\) Regulations, 2014](#) (the Regulations).

The Agreements have the same objective in terms of delivering automatic exchange of similar information in respect of the same time periods. In addition, a Common Reporting Standard has been developed by the OECD based on the same principles, which the Cayman Islands have committed to implementing along with the UK, the OTs and CDs and multiple other jurisdictions as members of the early adopters group. The Guidance Notes and the Cayman Islands domestic implementing legislation have been prepared to deliver these overarching principles, abiding by the spirit of the Agreements and developing international standards.

### **1.3. Purpose of these Guidance Notes**

These Guidance Notes are intended to provide practical assistance to businesses, their advisers and the Competent Authority in dealing with the application of the Agreements. After consultation with representatives from the financial services industry through the joint Ministry of Financial Services and private sector FATCA Working Group, the Competent Authority has issued these Guidance Notes to accompany the implementing legislation.

A Financial Institution must comply with the Regulations in force at the time with reference to this guidance.

Certain issues may not be covered in these Guidance Notes where the Law and regulations are considered to be sufficiently clear. Where topics are covered, the Notes are not exhaustive but do seek to convey principles which can be applied to various situations and circumstances. If further guidance is required, it may be sought from the Competent Authority.

These Guidance Notes are designed to assist persons who may be affected by the legislation. They are not legal advice and should therefore not be treated as such. Professional advice should be sought if required.

In considering compliance with the Regulations, the Competent Authority shall take into account the extent to which a Financial Institution or persons have relied on these Guidance Notes.

A guiding principle in implementing the legislation, and therefore of these Guidance Notes, is the desire to avoid unnecessary administrative and cost burdens and to ensure the efficient operation of the reporting requirements. These Guidance Notes are a living document that may be amended from time to time by the Competent Authority as permitted under the Regulations. Accordingly, valid suggestions for alterations and amendments arising from the use of the Guidance Notes may be raised with the Competent Authority.



These Guidance Notes apply to anyone affected by the Agreements and the Cayman Islands legislation.

Since the Agreements are based on the same model, many of the provisions are the same and are covered by these Guidance Notes. Where applicable, differences between the Agreements are noted. In addition, Appendix 2 sets out key provisions which are different in the UK Agreement. Any party affected by the UK Agreement is recommended to review the main Guidance Notes and Appendix 2.

#### **1.4. Scope of the Agreements**

The Agreements and the Regulations apply to all Cayman Islands Financial Institutions, regardless of whether they hold any Financial Accounts for Specified Persons.

Some action will be required of all Financial Institutions that maintain Financial Accounts. The extent of that action will depend on a number of factors including whether account holders are Specified Persons (section 1.7) and the value and nature of the Financial Account.

In addition to reporting information on Reportable Accounts, Cayman Islands Financial Institutions may need to report payments made to a Non-Participating Financial Institution (NPMFI) under the US Agreement only.

Any entity that is not a Financial Institution will be a Non-Financial Foreign Entity (NFFE). A NFFE has no obligations itself under the Agreements but may have to confirm its status and provide details of controlling persons to another Financial Institution if requested to do so by the Financial Institution. A Financial Institution may have reporting obligations in respect of Financial Accounts it maintains for a Passive NFFE.

These Guidance Notes will assist entities in answering the following:

- Am I a Financial Institution?
- Do I maintain Financial Accounts?
- Do I need to register with the IRS and, if so, by when and how?
- Do I need to report any information and, if so, what information, when and how?
- I maintain a Financial Account for a NFFE. What are my obligations?

### **1.5. Interaction with US Regulations and other IGAs**

The Cayman Islands Regulations and these Guidance Notes seek to clarify any areas of uncertainty within the Agreements. Reference should also be made to relevant industry advisories issued by the Ministry for Financial Services from time to time on specific issues. While the US Regulations are US legislation, there is some cross over into the UK Agreement as set out in that Agreement.

In line with Article 4 paragraph 7 of the US IGA and Article 1 paragraph 3 of the UK IGA, the Cayman Islands may permit Financial Institutions to use a definition in the relevant US Regulations in lieu of a corresponding definition in the IGA, provided that such application would not frustrate the purposes of the Agreement. As a result, both the IGA definition and the definition detailed in the US Regulations, for certain elements, have been included in this Guidance. Financial Institutions are not required to seek approval from the Competent Authority to apply this approach.

In policy terms, a Cayman Islands Financial Institution should not be at a disadvantage from applying the Regulations implementing the Agreements, as compared to the position that they would have been in if applying the US Regulations. In certain circumstances, provisions in other Intergovernmental Agreements may also result in a change to the application of the Agreements.

In the event that the US subsequently amends the underlying US Regulations to introduce additional or broader exemptions, the Cayman Islands will incorporate these changes into the Regulations or Guidance Notes subject to the agreement of the US.

Any updates will be published and made available on the Competent Authority website.

## **1.6. The Cayman Islands Competent Authority**

The Cayman Islands Competent Authority is the Tax Information Authority (TIA) who is designated by law as the Minister with responsibility for Financial Services, or his delegate. The delegated functions of the TIA are carried out by the Director and staff of the Department for International Tax Cooperation (DITC) which is the government department responsible for the operation of all mechanisms for the exchange of information for tax purposes.

The TIA will receive the information required to be disclosed and transmit that information to the IRS in respect of the US Agreement and HMRC in respect of the UK Agreement.

The TIA does not have responsibility for the audit of the information provided by the Financial Institutions. It is the responsibility of each Financial Institution to provide the correct information in the correct format to the TIA.

The TIA will monitor compliance by Financial Institutions with domestic legal requirements and, as necessary, will enforce applicable Cayman Islands Laws and Regulations, including in cases of significant non-compliance notified to it by the US or UK Competent Authorities.

## **1.7. Specified Persons**

Reference to Specified Person in these Guidance Notes relates to either a Specified US Person or Specified UK Person as the context requires. Where a different treatment applies, these Guidance Notes will state Specified US Person or Specified UK Person as necessary.

Specified US Person and Specified UK Person are as defined in the US and UK Agreements respectively.

## 2. FINANCIAL INSTITUTIONS

### 2.1. General

Under the US Agreement, the term Foreign Financial Institution (FFI) applies to non-US entities which fall within any, or more than one, of the below categories. Under the UK Agreement the term applies to non-UK entities in the same categories. These are:

- Custodial Institution (Section 2.7)
- Depository Institution (Section 2.8)
- Investment Entity (Section 2.9)
- Specified Insurance Company (Section 2.10)

The extended definition of Financial Institution (which includes the concept of “relevant holding companies” and “treasury centres of financial groups”) included in the US Regulations published in January 2013 does not apply to Cayman Islands entities as the definition in the Agreements take priority over those in the US Regulations unless doing so puts Cayman Islands Financial Institutions in a less advantageous position. That is not considered to be the case here. However, a Cayman Islands Financial Institution may choose to use the definition in the US Regulations should they wish.

Financial Institutions in the following categories may have no or reduced registration or reporting obligations:

- Non-Reporting Financial Institutions, under the US Agreement (Section 3); or
- Non-Reporting Financial Institutions under the UK Agreement (Section 4).

Some exemptions may also apply in respect of certain products and entities (Section 5).

The first step to be undertaken by an entity or its representative is to establish whether, for the purposes of the Agreements, the entity is a Cayman Islands Financial Institution. This, together with establishing the type of Financial Institution, will determine the extent of the obligations that need to be undertaken.

US Entity Classification Elections (check-the-box elections) made to the IRS are irrelevant in determining whether an entity is within the scope of the US Agreement.

## **2.2. Cayman Islands Financial Institution**

A Cayman Islands Financial Institution is any Financial Institution organised under the laws of or resident in the Cayman Islands.

(a) For these purposes, organised under the laws of the Cayman Islands means the following:

- For a company, if the company is incorporated in the Cayman Islands.
- For trusts, if any of the trustees are incorporated, registered or licensed in the Cayman Islands (Section 6).
- For partnerships, if the partnership is established in the Cayman Islands.

(b) For these purposes, “resident in” the Cayman Islands includes being registered as a foreign company under the Companies Law (2013 Revision), or equivalent.

A dual resident entity (i.e. an entity organised under the laws of, or resident in the Cayman Islands and also resident for these purposes in another jurisdiction) will need to apply the Cayman Islands Regulations in respect of any Reportable Accounts maintained in the Cayman Islands unless it has actual knowledge that it is undertaking the appropriate reporting in the other jurisdiction.

A Financial Institution will have actual knowledge where it holds written confirmation that the Reportable Accounts have been reported for FATCA purposes or under an agreement equivalent to the US or UK Agreement.

There may be other situations involving related or unrelated entities where the reporting requirements are being met elsewhere and duplication of reporting can be avoided. In these circumstances responsibility rests with a Financial Institution to satisfy itself that

the reporting requirements are being met.

## **2.3. Reporting Cayman Islands Financial Institutions**

All Cayman Islands Financial Institutions will be Reporting Financial Institutions unless an exemption is provided in Annex II of the IGA or specifically imported from the US Regulations into these Guidance Notes and applies to classify the Cayman Islands Financial Institution as a Non-Reporting Cayman Islands Financial Institution (see Section 2.4). A Reporting Cayman Islands Financial Institution will need to register with the IRS to obtain a GIIN, and be responsible for ensuring that the due diligence requirements are met and for reporting to the TIA under the terms of the Regulations.

Specifically, a Reporting Cayman Islands Financial Institution is required to:

- Undertake due diligence procedures to identify Reportable Accounts (see Sections 12 – 16) and together with the required information report annually to the TIA in the prescribed time and manner (see Section 17)
- Report annually to the TIA payments made to Non-Participating Financial Institutions (see Section 17.6)
- Comply with registration requirements (US Agreement only, see Section 11)

In certain circumstances the due diligence, reporting obligations and registration with the IRS can be undertaken by a third party service provider although the responsibility for compliance with the Agreement and Regulations (and any liability for failure to comply) remains with the Reporting Cayman Islands Financial Institution. (See Section 17.10)

## **2.4. Non-Reporting Cayman Islands Financial Institutions**

### **2.4.1. US Agreement**

A Non-Reporting Cayman Islands Financial Institution is any Cayman Islands Financial Institution that falls within the exemptions set out in Annex II to the US Agreement or the US Regulations or one which otherwise qualifies as:

- a Deemed Compliant Financial Institution (Section 3),
- an Owner Documented Financial Institution (Section 3.4), or
- an Exempt Beneficial Owner (Section 5).

Most Non-Reporting Cayman Islands Financial Institutions will not need to register and obtain a Global Intermediary Identification Number (GIIN), or carry out the due diligence and reporting requirements under the US Agreement. They will need to provide certain documentation to withholding agents to certify their status.

Some Non-Reporting Cayman Islands Financial Institutions will have some registration and/or reporting obligations under the US Agreement. These are Registered Deemed Compliant Financial Institutions (see Section 3.2).

#### **2.4.2. UK Agreement**

A Non-Reporting Cayman Islands Financial Institution is any Cayman Islands Financial Institution that falls within the exemptions set out in Annex II to the UK Agreement. See Section 5 for further information.

### **2.5. Withholding Tax – US Agreement only**

Cayman Islands Financial Institutions will not be subject to the withholding tax imposed on US source receipts by section 1471 of the US Internal Revenue Code, provided they comply with the Regulations.

US withholding tax that applies on US source income under other parts of the US Internal Revenue Code will continue to apply.

### **2.6. Closing Recalcitrant Accounts – US Agreement only**

Cayman Islands Financial Institutions will not be required to close recalcitrant accounts, provided they comply with the Regulations.

## 2.7. Custodial Institution

A Custodial Institution is any entity that earns a substantial portion (at least 20 percent) of its gross income from the holding of financial assets for the accounts of others and from related financial services. This test applies to the last three accounting periods or the period since commencement, if shorter.

Related financial services include any service which is directly related to the holding of assets by the institution on behalf of others and includes:

- custody, account maintenance and transfer fees;
- execution and pricing commission and fees from 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.

Such institutions could include brokers, custodial banks, trust companies and clearing organisations. Generally, insurance brokers do not hold assets on behalf of clients and so should not fall within the scope of this provision.

An execution only broker that simply executes trading instructions, or receives and transmits such instructions to another executing broker will not hold assets for the account of others should not fall to be custodial institutions (although it is possible that they could be an investment entity).

## 2.8. Depository Institution

A Depository Institution is broadly any entity that is engaged in a banking or similar business.

A Depository Institution is one that accepts deposits in the ordinary course of banking or similar business and regularly engages in one or more of the following activities:

- Provision of credit through personal, mortgage, industrial or other loans or other



extensions of credit;

- Purchases, sells, discounts or negotiates of accounts receivable, instalment obligations, notes, drafts, cheques, bills of exchange, acceptances, or other evidence of indebtedness;
- Issues letters of credit and negotiates drafts drawn thereunder;
- Provides trust or fiduciary services;
- Finances foreign exchange transactions; or
- Enters into, purchases, or disposes of finance leases or leased assets.

This will include all entities licensed under the Banks and Trust Companies Law (2013 Revision) provided they also undertake one of the other activities listed above.

The following would not be expected to fall within the definition of depository institution:

- Insurance brokers
- Attorneys at law
- Factoring or invoice discounting businesses
- Entities that complete money transfers by instructing agents to transmit funds.
- Entities that solely provide asset based 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 similar financing arrangements, between that entity and the person making the deposit

#### **2.8.1. Cayman Branches Reporting to the IRS via Form 1099 – US Agreement only**

Where all US reportable accounts of a Cayman branch of a US or foreign banking institution are already being reported to the IRS on Form 1099 annually, the Cayman branch is not required to file a report locally.

A Cayman branch of a US banking institution that meets this criterion is required to comply with the notification requirements in the regulations and complete the Cayman AEOI portal notification. Additionally, the Cayman branch must record and retain

documentary evidence of the US reporting, and the decision not to file a return locally, to be made available to the Competent Authority when required.

## **2.9. Investment Entity**

The term Investment Entity is clearly defined in the Agreements. However, the definitions in the US Regulations and the CRS differ. As the CRS is substantially similar to the US Regulations definition, this is covered in the Regulations. Entities have a choice of which definition to apply.

An Investment Entity does not include any entity that is an Active NFFE because it meets any of the criteria in section 9.3 subparagraphs d) through to g).

### **2.9.1. Definition under the Agreements**

An Investment Entity is an entity that 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, trading in:

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

This definition should be interpreted in a manner consistent with similar language set forth in the definition of 'financial institution' in the Financial Action Task Force Recommendations.

In practice, when applying this definition, an entity that is professionally managed will generally be an Investment Entity, by virtue of the managing entity being an Investment

Entity. This is referred to in these Guidance Notes as the “managed by” test.

For the purposes of the “managed by” test, a distinction should be made between one entity ‘managing’ another and one entity ‘administering’ another. For instance the following services provided by an entity to another will not constitute the latter entity being “managed by” the former:

- Provision of co-secretary and/or company secretarial services
- Provision of registered office
- Preparation of final financial statements (from company books and records)
- Preparation of Tax returns
- Provision of bookkeeping services

For the purposes of clarification and for this Guidance solely, any of the activities such as those defined under the Companies Management Law as "business of company management" does not constitute managed by an Investment Entity.

Where a Cayman Islands company’s directors are employees of a Cayman Islands TCSP which itself is a Financial Institution and the Cayman Islands company is administered by that Cayman Islands TCSP Financial Institution, the Cayman Islands company may in certain circumstances be treated as being managed by a Financial Institution and so be an Investment Entity itself.

### **2.9.2. Definition under the CRS**

An Investment Entity is any entity:

- a) that primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:
  - i. trading in money market instruments (cheques, bills, certificates of deposit, derivatives etc); foreign exchange; exchange, interest and index instruments; transferable securities; or commodity futures trading;
  - ii. individual and collective portfolio management; or
  - iii. otherwise investing, administering, or managing Financial Assets or money on behalf of other persons; or

- b) the gross income of which is primarily attributable to investing, reinvesting, or trading in Financial Assets, if the Entity is managed by another Entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company or an Investment Entity described in a) above.

An entity is treated as primarily conducting as a business one of the activities described in a) above, or an Entity's gross income is primarily attributable to investing, reinvesting, or trading in Financial Assets for the purpose of b) above, if the Entity's gross income attributable to the relevant activities equals or exceeds 50% of the Entity's gross income. This test applies to three years ended 31 December of the year preceding the year in which the determination is made or the period since commencement, if shorter.

Therefore an entity whose gross income is primarily attributable to non- financial assets such as real property, even if managed by a Financial Institution, would not be an Investment Entity.

Where an entity is managed by an individual who performs the activities prescribed above, the managed entity will not necessarily be an Investment Entity as an individual is not a Financial Institution. In this case it is necessary to look at the activities of the entity itself.

Although trusts, sponsored entities, investment advisers, investment managers and collective investment vehicles might fall within this definition, in certain circumstances they will be Non-Reporting Financial Institutions and, for the purpose of the US Agreement, are also treated as deemed-compliant FFIs. Some trusts may also not be Investment Entities, particularly where the trust holds only non-financial assets or is managed by an individual. Please refer to the Sections dealing with these types of entity for further information.

### 2.9.3. Definition under the US Regulations

An Investment Entity is any entity that is described in a), b) or c):

- a) The entity primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer—(1) Trading in money market instruments (checks, bills, certificates of deposit, derivatives, etc.); foreign currency; foreign exchange, interest rate, and index instruments; transferable securities; or commodity futures; (2) Individual or collective portfolio management; or (3) Otherwise investing, administering, or managing funds, money, or financial assets on behalf of other persons. or
- b) The entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets and the entity is managed by another entity (that is a Financial Institution). For purposes of this paragraph an entity is managed by another entity if the managing entity performs, either directly or through another third-party service provider, any of the activities described in paragraph a) of this section on behalf of the managed entity.
- c) The entity functions or holds itself out as a collective investment vehicle, 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.

### **Financial Assets**

The term "Financial Assets" includes, but is not restricted to:

- a security (for example a share of stock in a corporation; partnership, or beneficial ownership interest in a widely held or publicly traded partnership or trust; note, bond, debenture, or other evidence of indebtedness);
- partnership interest;
- commodity;
- swap (for example interest rate swaps, currency swaps, basis swaps, interest rate caps, interest rate floors, commodity swaps, equity swaps, equity interest swaps and similar arrangements);

- Insurance Contract or Annuity Contract; or
- any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, swap, Insurance Contract or Annuity Contract.

The following would not be considered to be financial assets:

- Cash
- Real property
- A non-debt, direct interest in real property.

Direct interest in this case means direct-line of ownership (and for an Entity which does not hold itself out to be a collective investment vehicle this can include real property that is indirectly held through companies).

Please note that for the avoidance of doubt, although cash will not be viewed as a Financial Asset for the purposes of classifying an entity using the CRS or US Regulations definition of an Investment Entity, it may be a Financial Account and thus be subject to the normal due diligence procedure by the Financial Institution that maintains that account.

### **Examples – using CRS or US Regulations Definitions**

- A non-financial trading company, for example a real estate company, managed by a TCSP would not be an Investment Entity as although it is managed by an Investment Entity, the TCSP, its gross income is not primarily attributable to investing, reinvesting or trading in financial assets.
- The holding company of a group of non-financial trading companies is not an Investment Entity whether or not managed by another Financial Institution, unless it is a collective investment vehicle, as it does not conduct as a business any of the activities in a) above.
- Non-financial groups administered or managed by TCSP are not treated as Investment Entities, provided the gross income of the group is primarily attributable

to non-financial assets.

## **2.10. Specified Insurance Company**

An insurance company is a Specified Insurance Company when the products written are classified as Cash Value Insurance or Annuity Contracts or if payments are made with respect to such contracts.

Insurance companies that only provide General Insurance or term Life Insurance should not be Financial Institutions 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 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 insurance holding company will in itself issue, or will be obligated to make payments with respect to Cash Value Insurance or Annuity Contracts.

Although insurance brokers are part of the payment chain, they should not be classified as a Specified Insurance Company because they are not obligated to make payments under the terms of the Insurance or Annuity Contract.

## **2.11. Captive Insurance Companies**

A Captive Insurance Company which does not issue cash value insurance contracts or annuity contracts will not be a specified insurance company.

Generally, the Captive Insurance Company will neither be a Depository Institution nor a Custodian Institution.

Captive Insurance Companies are required to hold investments in order to meet

potential claims. Holding and managing those investments on behalf of an insurance company is rarely a major part of the activities performed by the insurance manager. Accordingly, it is not expected that any manager's profits arising from administering the investments will be equal to or exceed 50% of the manager's gross profits.

Equally, whilst some of the services provided by insurance managers to insurance companies may be considered "otherwise...administering or managing funds or money", these services are typically ancillary to the role of managing the insurance business which is much more concerned with the management of claims and premiums.

Therefore, when applying the definition under the US regulations of an Investment Entity, Insurance Managers are unlikely to be categorised as Financial Institutions.

If a Captive Insurance Company is not categorised as a Financial Institution, it will be an NFFE. It is likely that only investment income arising from capital in excess of the amount of capital required to be maintained by the company for regulatory purposes will be viewed as passive income. The premiums received by the company will be viewed as trading income. Therefore, the likelihood is that less than 50% of the company's gross income will be viewed as passive income and less than 50% of the assets held by the company will be viewed as assets that produce or are held for the production of the passive income. As such, the company would be categorised as an active NFFE.

There may however be circumstances where the income arising from the excess capital will exceed 50% of the company's gross profits in which case the company might be categorised as a passive NFFE.

#### **2.11.1. US Internal Revenue Code Section 953(d) Captive Insurance Companies**

For the purposes of both the US and UK agreement, any Cayman Islands captive insurance company which meets the following requirements will not be treated as a Cayman Islands entity for FATCA purposes. Instead, the entity will be treated as a US



corporation (and thus complete Form W-9 if requested) provided it meets the specified criteria noted below.

The updated definition of a U.S. person in the US Regulations includes a foreign insurance company that has made a Section 953(d) election as long as it either:

1. Is not a specified insurance company and is not licensed to do business in any State; or
2. Is a specified insurance company and is licensed to do business in any State.

## **2.12. Nominee Companies**

Subsidiary companies of licensed corporate and trust service providers, which are dormant and only act as nominee shareholders of companies administered by the corporate and trust service providers, can be disregarded. This treatment is optional and such companies can be treated as Financial Institutions if preferred. (See section 7.5.1 for Fund nominees)

## **2.13. Subsidiaries and branches**

A subsidiary or branch of a non-Cayman Islands entity (including a US entity) carrying on a business, as a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company in the Cayman Islands, will be a Reporting Cayman Islands Financial Institution.

Subsidiaries and branches of Cayman Islands Financial Institutions that are not located in the Cayman Islands are outside the scope of the Agreement and will not be treated as Cayman Islands Financial Institutions.

Those entities will be covered by the relevant rules in the jurisdiction in which they are located. Those rules will either be the US Regulations or the legislation introduced to implement an IGA between the US and that jurisdiction. A Cayman Islands branch of a non-Cayman Islands Financial Institution is a Cayman Islands Financial Institution and must report in accordance with the Agreements.

Where a Cayman Islands Specified Insurance Company has an overseas branch it may not be immediately apparent whether the policies in respect of the branch are reportable under the Agreements or not, due to the fact that assets backing all policies form part of the Long Term Business Fund of the Cayman Islands Specified Insurance Company. Whether they are reportable will be dependent on factors such as:

- Whether the branch issues the policy or merely acts as an introducing agent or marketing entity
- Where the risk is accepted
- The governing law of the policy
- Whether the insurer has registered the overseas branch as a Financial Institution

Where the policies are issued by the overseas branch and where the branch is registered as a Financial Institution, those policies would not form part of the Agreements, but would be subject to the reporting requirements (if any) of the jurisdiction in which the branch is situated.

Where the branch acts as an introducer to policies that are issued in the Cayman Islands, then those policies will be governed by the Agreements.

### **Example 1**

Cayman Bank & Insurance Limited, located in the Cayman Islands, has within its group the following entities:

- Its parent (P), located in the UK
- A foreign subsidiary (B) located in Model 1 Partner Jurisdiction
- A foreign branch (C) located in Model 2 Partner Jurisdiction
- A foreign subsidiary (X) located in a non IGA jurisdiction
- A foreign branch (Z) in a Model 1 Partner Jurisdiction
- A foreign branch (Q) in a non IGA jurisdiction

Under the terms of the US Agreement:

- P will report on Specified US Persons for whom it holds Financial Accounts to

HMRC.

- Cayman Bank & Insurance Limited will report on Specified US Persons for whom it holds Financial Accounts to the TIA
- B will report to its respective jurisdiction's competent authority
- C will report directly to the IRS
- X will be a Limited FFI and will have to identify itself as a Non-Participating Foreign Financial Institution for withholding and reporting purposes **if** it has not entered into an FFI agreement directly with the IRS. However X must undertake the obligations required under the US Regulations as far as it is legally able
- Z will report to its respective jurisdiction's competent authority
- Q will be a Limited FFI and will have to identify itself as a Non-Participating Foreign Financial Institution for withholding and reporting purposes if it has not entered into an FFI agreement directly with the IRS. However Q must undertake the obligations required under the US Regulations as far as it is legally able.

Under the terms of the UK Agreement:

- Cayman Bank & Insurance Limited will report on Specified UK Persons for whom it holds Financial Accounts to the TIA.
- On the basis that none of the subsidiaries or branches are in jurisdictions that have entered into an IGA with the UK or the Cayman Islands, there are no reporting obligations for those entities in respect of accounts held by Specified UK Persons.

## **Example 2**

Foreign Bank has a branch J located in the Cayman Islands.

Under the terms of the US Agreement:

- J is a Cayman Islands Financial Institution and will need to comply with the Regulations and report information on any reportable US Financial Account to the TIA.

Under the terms of the UK Agreement:

- J is a Cayman Islands Financial Institution and will need to comply with the Regulations and report information on any reportable UK Financial Account to the TIA.

Please refer to Section 12.19 in respect of subsidiaries and branches acting as introducers with regard to a Financial Account.

## **2.14. Related Entities and Expanded Affiliated Groups**

### **2.14.1. Definition under the US Agreement**

In accordance with the US Agreement, an entity is a “Related Entity” of another entity if either entity controls the other entity, or the two entities are under common control. For this purpose control includes direct or indirect ownership of more than 50 percent of the vote or value in an entity. Notwithstanding the foregoing, the Cayman Islands may treat an entity as not a Related Entity of another entity if the two entities are not members of the same expanded affiliated group as defined in section 1471(e)(2) of the U.S. Internal Revenue Code.

### **2.14.2. Definition under the US Regulations**

Whilst the concept of an expanded affiliated group is not applicable in the Cayman Islands, Financial Institutions are permitted under the Agreements to use the definition of “control” and “expanded affiliated group” included in the US Regulations.

### **2.14.3. Related Entities**

Investment Entities which have been provided with seed capital by a member of a group to which the Investment Entity 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.

In respect of the US Agreement only, the concept of Related Entity is relevant in the context of the reporting obligations of the Cayman Islands Financial Institutions in respect of any Related Entities that are Non-Participating Financial Institutions (NPFIs). See Section 3.14 for information on when a Financial Institution is treated as a NPFI.

When a Cayman Islands Financial Institution has any Related Entity that, as a result of the jurisdiction in which they operate, is unable to comply with US Regulations, then in order to maintain compliance the Cayman Islands Financial Institution must fulfil the obligations set out in the US Agreement. Further information is set out in Section 17.6.

## **2.15. Non-Participating Financial Institution – US Agreement only**

A Non-Participating Financial Institution (NPFI) is a Financial Institution that is not compliant with US Regulations by virtue of either:

- the Financial Institution is located in a jurisdiction that does not have an Intergovernmental Agreement with the US and the Financial Institution has not

entered into an agreement with the IRS, or,

- the Financial Institution is classified by the IRS as being a NPFI following the conclusion of the procedures for significant non-compliance being undertaken as set out in Article 5(2)(b) of the US Agreement.

Payments made by a Cayman Islands Financial Institution to a NPFI, whether resident in the Cayman Islands or otherwise, must be reported by the Cayman Islands Financial Institution. See Sections 15.7 and 16.6 for details on how to identify a NPFI and Sections 17.6, 17.8 and 17.9 for details on reporting and withholding requirements.

### **3. NON-REPORTING FINANCIAL INSTITUTIONS – US AGREEMENT ONLY**

#### **3.1. General**

All Cayman Islands Financial Institutions will be Reporting Financial Institutions unless an exemption is provided in Annex II of the IGA or specifically imported from the US Regulations into these Guidance Notes to allow the Financial Institution to be treated as Non-Reporting.

Annex II of the US Agreement classifies certain entities as "Exempt Beneficial Owners" and "Deemed Compliant Financial Institutions", which are collectively regarded as "Non-Reporting Financial Institutions ", as well as describing certain excluded accounts (e.g. for retirement and pension plans or term life insurance contracts).

In addition, there are certain categories of Deemed Compliant Financial Institutions separately recognised under the US Regulations and these exemptions have been specifically imported into these Guidance Notes.

Financial Institutions referred to as Registered Deemed Compliant will be obliged to register with the IRS and obtain a GIIN. Financial Institutions referred to as Certified Deemed Compliant will not need to register with the IRS (save for certain limited exceptions). Rather than register with the IRS, Certified Deemed Compliant Financial Institutions should self-certify with withholding agents to evidence their status and avoid the imposition of 30% withholding on US source payments.

Section 1.1471-5(f)(2) of the US Regulations provides that “A certified deemed-compliant FFI also includes any non-reporting IGA FFI. A certified deemed-compliant FFI is not required to register with the IRS”.

Accordingly, Deemed Compliant Financial Institutions are Financial Institutions identified as Certified Deemed Compliant under Annex II, or otherwise qualify as Certified or Registered Deemed Compliant, or an Owner Documented Deemed Compliant, under the US Regulations.

Exempt Beneficial Owners and Deemed Compliant Financial Institutions have no reporting obligations in respect of Financial Accounts that they maintain under the US Agreement.

### **3.2. Registered Deemed Compliant Financial Institutions**

The Registered Deemed Compliant categories noted in this section are inserted from the US Regulations. They should be considered in conjunction with the Certified Deemed Compliant categories noted in the next section, which arise largely under Annex II of the US Agreement, but also include those categories of certified Deemed Compliant under the US Regulations.

A Cayman Financial Institution that qualifies as one of the Registered Deemed Compliant categories below will need to register with the IRS to obtain a GIIN, or be registered by another entity. Such a Financial Institution will not need to report but details of Financial Accounts maintained by the Financial Institution may be reported by another entity.

#### **3.2.1. Non-reporting members of Participating Financial Institution Groups (US Regulations 1471-5(f)(1)(i)(B))**

This category applies to a non-reporting Financial Institution that is a member of a group of entities which includes at least one Participating Financial Institution. It allows that Non-Reporting Financial Institution to be Registered Deemed-Compliant, and so not have any reporting obligations, if certain criteria are met. This might apply for example where a member of a group of Financial Institutions has no Reportable Accounts but subsequently opens a Reportable Account.

Essentially the non-reporting member must review accounts and where such accounts are identified as Reportable Accounts or Accounts held by NPFIs, they are required to either close the account, transfer the account to a Reporting Financial Institution or become a Participating, and hence Reporting, Financial Institution in its own right.



Such a Financial Institution that meets the following requirements can be treated as Registered Deemed Compliant:

- 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 Reportable Accounts
  - Reportable Accounts opened on or after 1 July 2014
  - Accounts that become Reportable Accounts as a result of a change in circumstances
  - Accounts held by NPFIs
- After the Financial Institution has carried out the required review of accounts opened prior to implementing the appropriate policies and procedures, the Financial Institution
  - identifies the account as a US Reportable Account; or
  - becomes aware of a change in circumstance of the account holder's status, such that the account becomes a US Reportable Account;

then within six months of either of the above events, the Financial Institution closes the account or transfers it to a Model I Financial Institution, or US Financial Institution or reports the account to the TIA.

### **3.2.2. Qualified Collective Investment Vehicles (US Regulations 1471-5(f)(1)(i)(C))**

The Qualified Collective Investment Vehicle category is intended to provide relief for Investment Entities that are owned solely through Participating Foreign Financial Institutions or directly by large institutional investors not typically subject to FATCA withholding or reporting obligations, such as retirement funds and non-profit organisations.

A Qualified Collective Investment Vehicle must satisfy the following criteria:

- It is an Investment Entity, established and regulated as an investment fund in the Cayman Islands and every other country in which it operates. An investment fund is considered to be regulated if its manager is regulated with respect to the investment fund in all of the countries in which the investment fund is registered and in all of the countries in which the investment fund operates.
  - All of the investors are limited to:
    - equity investors
    - direct debt investors with an interest greater than \$50,000, and
    - any other Financial Account holder
  - All of which are either:
    - Participating Foreign Financial Institutions
    - Registered Deemed Compliant Foreign Financial Institutions
    - retirement plans classified as Exempt Beneficial Owners under Annex II (see Section 5)
    - persons who are not Specified Persons
    - Non-Reporting IGA Foreign Financial Institutions, or
    - other Exempt Beneficial Owners under Annex II.

Those with other types of investors may still be Registered Deemed Compliant if they qualify as a Restricted Fund (see Section 3.2.3).

- If it is part of a group of Related Entities, all Foreign Financial Institutions in that group must be:
  - a Participating Foreign Financial Institution
  - a Registered Deemed Compliant Foreign Financial Institutions
  - a Sponsored Foreign Financial Institution
  - a Non-Reporting IGA Foreign Financial Institutions, or
  - an Exempt Beneficial Owner under Annex II.

### 3.2.3. Restricted Funds (US Regulations 1471-5(f)(1)(i)(D))

Restricted fund status can apply to Investment Entities that impose prohibitions on the sale of units to Specified Persons, Non-Participating Financial Institutions and Passive NFFEs with Controlling Persons that meet the following requirements:

- It is an Investment Entity and is regulated as an investment fund in the Cayman Islands and every other country in which it operates. An investment fund is considered to be regulated if its manager is regulated with respect to the investment fund in all of the countries in which the investment fund is registered and in all of the countries in which the investment fund operates.
- Interests issued directly by the investment fund are redeemed or transferred by the investment fund and not sold by investors on a secondary market.
- Interests that are not issued directly by the investment fund are sold only through distributors that are:
  - Participating Foreign Financial Institutions
  - Registered Deemed Compliant Foreign Financial Institutions
  - non-registering local banks or
  - restricted distributors (see US Regulations 1471-5(f)(4)). A distributor includes an underwriter, broker, dealer or other person who participates, pursuant to a contractual arrangement with the Financial Institution, in the distribution of securities and holds interests in the Financial Institution as a nominee.
- By the later of 30 June 2014 or six months after the date it registers as a Deemed Compliant Financial Institution, the Financial Institution:
  - ensures that each agreement that governs the distribution of its debt or equity interests, all prospectuses and marketing materials prohibit the sale or transfer to Specified Persons, Non- Participating Financial Institutions or Passive NFFEs with one or more substantial US owner, other than those that are distributed by and held through a Participating Financial Institution;

- ensures that each agreement that governs the distribution of its debt or equity interests requires the distributor to notify the Financial Institution of a change in the distributor's Chapter 4 status;
- The Financial Institution must certify to the TIA with respect to any distributor that ceases to qualify as a distributor (as defined above) that the Financial Institution will terminate its agreement with the distributor, or will cause the distribution agreement to be terminated, within 90 days of notification of the distributor's change in status. In addition, within six months of the distributor's change in status, with respect to all debt and equity interests of the Financial Institution issued through that distributor, the Financial Institution will redeem those interests, convert the interests into direct holdings in the fund, or cause those interests to be transferred to another compliant distributor.
- With respect to any of the Financial Institution's pre-existing direct accounts that are held by the beneficial owner of the interest in the Financial Institution, the Financial Institution must review those accounts in accordance with the procedures and time frames applicable to preexisting accounts to identify any Reportable Account or account held by a Non-Participating Financial Institution. Notwithstanding the previous sentence, the Financial Institution will not be required to review the account of any individual investor that purchased its interest at a time when all of the Financial Institution'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.
- By the later of 30 June 2014 or six months after the date it registers as a Deemed Compliant Financial Institution, the Financial Institution is required to notify the TIA that either it did not identify any Reportable 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 Financial Institution will either redeem such accounts, transfer such accounts to an affiliate or other Financial Institution that is a participating Financial Institution, a reporting Model 1 Financial

Institution, or U.S. Financial Institution.

- By the later of 30 June 2014, or the date that it registers as a Deemed Compliant Financial Institution, the Financial Institution implements policies and procedures to ensure that it either:
  - does not open or maintain an account for, or make a withholdable payment to, any specified 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 Financial Institution had reason to know the account holder became such a person; or
  - 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 if the Financial Institution were a participating Financial Institution.
- If the Financial Institution is part of a group of Related Entities, all Foreign Financial Institutions in that group must be:
  - a Participating Foreign Financial Institutions
  - a Registered Deemed Compliant Foreign Financial Institutions
  - a Sponsored Foreign Financial Institution
  - a Non-Reporting IGA Foreign Financial Institutions, or
  - an Exempt Beneficial Owner under Annex II.

### **3.3. Certified Deemed Compliant Financial Institutions / Annex II Exemptions**

A Cayman Islands Financial Institution that qualifies as one of the Certified Deemed Compliant categories below will not need to register to obtain a GIIN, save in limited circumstances outlined below. It will need to certify its status by providing

documentation regarding its owners to withholding agents, where relevant.

### **3.3.1. Financial Institution with a Local Client Base**

The following criteria must **all** be met before a Financial Institution can be treated as a Local Client Base Financial Institution. A Financial Institution should self-assess whether it meets these criteria and maintain appropriate records to support its assessment. The criteria are listed below:

- a) The Financial Institution must be licensed and regulated under the laws of the Cayman Islands.
- b) The Financial Institution must have no fixed place of business outside the Cayman Islands other than where the location outside of the Cayman Islands houses solely administrative functions and is not publically advertised to customers. This applies even if the fixed place of business is within a jurisdiction that has entered into an IGA with the US.
- c) The Financial Institution must not solicit potential Financial Account holders outside the Cayman Islands. For this purpose, a Financial Institution shall not be considered to have solicited such customers outside of the Cayman Islands merely because it operates a website, provided that the website does not specifically indicate that the Financial Institution provides accounts or services to non-Cayman residents or otherwise target or solicit US customers.

A Financial Institution will also not be considered to have solicited potential Financial Account holders outside of the Cayman Islands if it advertises in either print media or on a radio or television station and the advertisement is distributed or aired outside of the Cayman Islands, as long as the advertisement does not specifically indicate that the Financial Institution provides services to non-residents.

Also a Financial Institution issuing a prospectus will not, in itself, amount to soliciting Financial Account holders, even when it is available to US Persons in the Cayman Islands. Likewise, publishing information such as Reports and Accounts

to comply with the Listing Rules of the Cayman Islands Stock Exchange to support a public listing or quotation of shares will not amount to soliciting customers outside the Cayman Islands.

d) The Financial Institution is:

- required under the laws of the Cayman Islands to perform information reporting, or the withholding of tax with respect to accounts held by residents of the Cayman Islands, **or**
- is required to identify whether account holders are resident in the Cayman Islands as part of the AML/KYC procedures.

e) At least 98 per cent of the Accounts by value, provided by the Financial Institution must be held by people who reside in the Cayman Islands.

The 98 per cent threshold can include the Accounts of US Persons if they are resident in the Cayman Islands. It applies to both Individual and Entity Accounts. 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.

f) Subject to subparagraph g) below, beginning on 1 July 2014, the Financial Institution does not provide Financial Accounts to:

- any Specified US Person who is not a resident of the Cayman Islands (including a US Person that was a resident of the Cayman Islands when the account was opened, but subsequently ceases to be a resident of the Cayman Islands);
- a Non-Participating Financial Institution; or
- any Passive NFFE with Controlling Persons who are US citizens or resident for tax purposes who are not resident in the Cayman Islands.

Where a Local Client Base Financial Institution provides Financial Accounts to US citizens who are resident in the UK, these Financial Accounts do not need to be

reported to the TIA unless the account holder subsequently ceases to be a resident of the Cayman Islands.

- g) On or before 1 July 2014, the Financial Institution must implement policies and procedures to establish and monitor whether it provides (meaning opens and maintains) Financial Accounts to the persons described in subparagraph (f) above. If any such Financial Account is discovered, the Financial Institution must either report that account as though the Financial Institution were a Reporting Cayman Islands Financial Institution, or close the account, or transfer the account to a Participating Foreign Financial Institution, Reporting Model 1 Foreign Financial Institution or a US Financial Institution.

This means that even if Financial Accounts have been provided to Specified US Persons, a Non-Participating Financial Institution or any Passive NFFE with Controlling Persons who are US citizens or residents prior to the 1 July 2014, the Financial Institution can still be a Financial Institution with a Local Client Base provided that the appropriate reporting is carried out.

- h) With respect to each Financial Account that is held by an individual who is not a resident of the Cayman Islands or by an entity, and that is opened prior to the date that the Financial Institution implements the policies and procedures described in subparagraph (g) above, the Financial Institution must review those accounts in accordance with the procedures applicable to Pre-existing Accounts, described in Annex I of the Agreement, to identify any US Reportable Account or Financial Account held by a Non- Participating Financial Institution. Where such accounts are identified, they must be closed, or transferred to a Participating Foreign Financial Institution, Reporting Model 1 Foreign Financial Institution or a US Financial Institution or the Financial Institution must report those accounts as if it were a Reporting Cayman Islands Financial Institution. This allows a Financial Institution with a Local Client Base to maintain its status whilst reporting on relevant Financial Accounts that were opened prior to the adoption of the requirements set out in this section.



- i) Each Related Entity of the Financial Institution, where the Related Entity is itself a Financial Institution, must be incorporated or organised in the Cayman Islands and must also meet the requirements for a Local Client Base Financial Institution with the exception of a retirement plan classified as an Exempt Beneficial Owner.
- j) 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 the Cayman Islands.

### **3.3.2. Local bank**

Non-registering local banks are generally small regulated local banks, credit unions and similar entities that are primarily Depository Institutions. They may, but are not required to, operate without a profit. They have no reporting obligations.

They must not have a fixed place of business outside of the Cayman Islands. A fixed place of business outside the Cayman Islands does not include a location that is not advertised to the public and from which the Financial Institution performs solely administrative support functions.

Non-registering local banks must have policies and procedures prohibiting the solicitation of customers outside the Cayman Islands.

Total assets held by the Financial Institution cannot exceed \$175 million for a single entity and \$500 million for a group of Related Entities. Any Related Entities of the non-registering local bank must also satisfy these requirements. In that case, reference to fixed place of business relates to the jurisdiction in which the Related Entity operates otherwise than by way of administrative support functions.

### **3.3.3. Financial Institution with only low value accounts**

To fall within this category, the Financial Institution must not:

- be an Investment Entity
- maintain any Financial Accounts exceeding \$50,000
- have more than \$50 million in assets on its balance sheet at the end of its most recent accounting period; and
- have more than \$50 million in assets on its consolidated or combined balance sheet where it is in a group with Related Entities.

The Financial Institution has no reporting obligations.

#### **3.3.4. Qualified credit card issuers**

A qualified credit card issuer is an entity that:

- 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; and
- by the later of 30 June 2014, or the date it registers as a Deemed Compliant Financial Institution, implements policies and procedures to either 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.

The terms applying to qualified credit card issuers also apply to other card and electronic money issuers.

#### **3.3.5. Trustee-Documented Trust**

A trust established under the laws of the Cayman Islands to the extent that the trustee of the trust is a Reporting US Financial Institution, Reporting Model 1 FFI (e.g. a Reporting Cayman Islands Financial Institution), or Participating FFI, and reports all information required to be reported pursuant to the US Agreement with respect to all US Reportable Accounts of the trust.

### 3.3.6. Sponsored Investment Entities and Controlled Foreign Corporations

This category can assist in consolidating the due diligence, reporting and withholding for a group of Financial Institutions under or through, for example, a trustee, fund manager, fund administrator, general partner, corporate director, transfer agent, company service provider, authorized third party, or US Financial Institution (with regard to its Controlled Foreign Corporations), being the Sponsoring Entity. Unless otherwise described herein, the following principles for a Sponsored investment Entity apply equally to a Sponsored Controlled Foreign Corporation

A Sponsoring Entity must be authorised to act on behalf of the Sponsored Investment Entity to fulfill the registration and related requirements, if applicable. A Sponsoring Entity does not need to be a Financial Institution and does not need to be otherwise registered with the IRS as a Reporting Financial Institution (although, as noted below, it will need to register with the IRS as a Sponsoring Entity).

A Sponsored Investment Entity is an Investment Entity, which is not a US Qualified Intermediary, Withholding Foreign Partnership or Withholding Foreign Trust, that has agreed with the Sponsoring Entity to act on its behalf.

A Sponsored Controlled Foreign Corporation<sup>1</sup> is (a) organized under the laws of the Cayman Islands (b) is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to the US Regulations; (c) is wholly owned, directly or indirectly, by a Reporting US Financial Institution that agrees to act, or requires an affiliate of the Financial Institution to act, as a Sponsoring Entity for the Financial Institution; and (d) the Financial Institution shares a common electronic account system with the Sponsoring Entity that enables the Sponsoring Entity to identify all Account Holders and payees of the Financial Institution and to access all account and customer information maintained by the Financial Institution including, but not limited to, customer identification information, customer documentation, account balance, and all payments

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<sup>1</sup> A "controlled foreign corporation" means any foreign corporation if more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, or the total value of the stock of such corporation, is owned, or is considered as owned, by "United States shareholders" on any day during the taxable year of such foreign corporation. The term a "United States shareholder" means, with respect to any foreign corporation, a United States person who owns, or is considered as owning, 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation.

made to the Account Holder or payee.

The Sponsoring Entity must register with the IRS as a Sponsoring Entity and, to the extent that the Sponsored Investment Entities hold US Reportable Accounts, the Sponsoring Entity must register each of the Sponsored Investment Entities that it is authorised by.

The Sponsoring Entity must also undertake all of the required compliance, such as account identification and documentation, on behalf of the Sponsored Investment Entities for which it acts, or where appropriate it can use a third party to undertake the obligations on its behalf. The Sponsoring Entity will need to ensure that new investors in the Sponsored Investment Entities are appropriately documented.

Where a Sponsoring Entity acts on behalf of a range of Sponsored Investment Entities, 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 Sponsoring Entity (e.g. the fund manager) and not the Sponsored Investment Entity (e.g. the fund). This will avoid the need for a Sponsoring Entity to have to obtain documentation from the same account holder repeatedly, where that account holder is invested in more than one of the Sponsored Investment Entities.

Where a Sponsoring Entity is able to link accounts held by the same account holder, the accounts will need to be aggregated for the purposes of determining whether the account is a low or high value account. See section 12.14 for more information on aggregation of accounts.

A Sponsoring Entity will report to the TIA on all of the Sponsored Investment Entities that maintain US Reportable Accounts.

### **3.3.7. Sponsored Closely Held Investment Vehicles**

This category is very similar to the Sponsored Investment Entity category of Deemed

Compliant Financial Institution. The Sponsoring Entity must register with the IRS but does not need to register the Sponsored Investment Vehicles that it manages.

The Financial Institution must be an Investment Entity, which is not a US Qualified Intermediary, Withholding Foreign Partnership or Withholding Foreign Trust, that has authorised another entity, the Sponsoring Entity, to act on its behalf.

The Sponsoring Entity must be a Participating Financial Institution, a Reporting Model 1 Financial Institution or a US Financial Institution.

The Sponsoring Entity must undertake all due diligence, withholding and reporting responsibilities that the Sponsored Investment Vehicle would have if it were a reporting Financial Institution. Therefore although the Sponsored Investment Vehicle does not report on its own behalf, the Reportable Accounts maintained by the Sponsored Investment Vehicle are reported by the Sponsoring Entity. The Sponsoring Entity must also retain all documentation for a period of six years even after it has ceased to be a Sponsoring Entity for the Financial Institution.

The Sponsored Investment Vehicle must satisfy the following criteria:

- it does not hold itself out as an investment vehicle for unrelated parties; and
- it has 20 or fewer individuals that own directly or indirectly its debt and equity interests, disregarding debt interests owned by Participating Financial Institutions, Registered and Certified Deemed Compliant Financial Institutions and the equity interest owned by an entity that owns 100% of the equity and itself is a Sponsored Closely Held Investment Vehicle.

#### **3.3.8. Collective Investment Vehicle**

An Investment Entity established in the Cayman Islands that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of \$50,000) are held by or through one or more exempt beneficial owners or Active NFFEs described in subparagraph B of

section VI of Annex I and, for the U.S. Agreement only, U.S. Persons that are not Specified U.S. Persons, or Financial Institutions that are not Nonparticipating Financial Institutions.

For the purposes of these Guidance Notes and the US Agreement an Investment Entity is "regulated" as a collective investment vehicle where it satisfies the definition of a "regulated mutual fund" under the Mutual Funds Law (2013 Revision), as amended and revised from time to time.

See Section 7 for further explanation.

#### **3.3.9. Investment Advisers and Investment Managers**

An Investment Entity established in the Cayman Islands that is a Financial Institution solely because it:

- renders investment advice to, and acts on behalf of;
- or 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 Non-participating Financial Institution will be treated as a Certified Deemed Compliant Financial Institution.

An entity that also conducts other businesses that are auxiliary to rendering investment advice or manages portfolios (for example, acts as a general partner to a Limited Partnership) will not jeopardise its status as a Certified 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. These are likely to be NFFEs, as they are service providers and will not meet the financial assets test.

### **3.3.10. Limited Life Debt Investment Entities (US Regulations 1471-5(f)(2)(iv))**

This Section applies where the Financial Institution is the beneficial owner of the payment, or of payments made with respect to the account, and the Financial Institution meets the following requirements:

- a) 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, trust deed or similar agreement and all of such interests were issued on or before January 17, 2013;
- b) The Financial Institution was in existence as of January 17, 2013, and has entered into a trust indenture, trust deed or similar agreement that requires the Financial Institution to pay to investors holding substantially all of the interests in the Financial Institution, no later than a set date or period following the maturity of the last asset held by the Financial Institution, all amounts that such investors are entitled to receive from the Financial Institution;
- c) 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; and
- d) Substantially all of the assets of the Financial Institution consist of debt instruments or interests therein.

The term "substantially all" means 80% or more of all the assets by value.

The term "debt instruments" includes notes, bonds, loans, promissory notes, certificates of deposit, loan stock, debentures and any other instrument creating or acknowledging indebtedness. Cash held by the Financial Institution should also be treated as being a debt instrument for this purpose.

The term "interests therein" includes (a) equity interests in wholly owned

subsidiaries that own debt instruments; (b) any equity interests in an entity which invests substantially all of its assets in debt instruments such as a money market fund; (c) credit default or total return swaps which reference debt instruments.

A Financial Institution should apply this test when the proceeds of the debt or equity interests issued to investors have been fully invested and not during any ramp up or winding down period.

- e) All payments made to the investors of the Financial Institution (other than holders of a de minimis interest) are either cleared through a clearing organization or custodial institution that is a participating Financial Institution, Reporting Model 1 FI, or U.S. Financial Institution or made through a transfer agent that is a Participating FFI, Reporting Model 1 FI, or U.S. Financial Institution;
- f) The Financial Institution's trustee or fiduciary is not authorised under the applicable trust indenture, trust deed or similar agreement through a fiduciary duty or otherwise to fulfill the obligations of a Participating FI under 1.1471-4 and no other person under that agreement has the authority to fulfill the obligations of a Participating FI under 1.1471-4 on behalf of the Financial Institution.

The reference to the Financial Institution's fiduciary does not include the Financial Institution's board of directors or, in the case of an exempted limited partnership, the general partner.

Where a Financial Institution has issued all of its debt or equity interests to investors on or before 1 March 2010, the requirement in (f) will be deemed to have been met and therefore assuming all other requirements in (a) to (e) are met, the Financial Institution can be treated as a LLDIE.



For Financial Institutions which have issued debt or equity interests to investors after 1 March 2010 - In determining whether or not the Financial Institution's trustee or fiduciary is authorised as contemplated by (f), the ability of the Financial Institution and/or the trustee or fiduciary to make amendments to the trust indenture, trust deed or similar agreement to give the trustee or fiduciary the necessary authority without investor consent shall be treated as the trustee or fiduciary being so authorised for the purposes of (f) (and therefore the Financial Institution should not be treated as an LLDIE).

Any wholly owned subsidiary formed by an LLDIE for the purpose of holding assets for the benefit of the LLDIE shall also be deemed to be an LLDIE for these purposes.

See section 8 for general comments on securitisations.

#### **3.3.11. Excepted inter-affiliate FFI**

To mirror the categories in the U.S. Regulations certain group companies (likely to be holding companies or treasury centres of international groups) will be regarded as Certified Deemed Compliant Financial Institutions.

This category applies to an entity that is a member of a participating FFI group if –

- a) The entity does not maintain financial accounts (other than accounts maintained for members of its expanded affiliated group);
- b) The entity does not hold an account with or receive payments from any withholding agent other than a member of its expanded affiliated group;
- c) The entity does not make withholdable payments to any person other than to members of its expanded affiliated group that are not limited FFIs or limited branches; and
- d) The entity has not agreed to report under §1.1471-4(d)(1)(ii) or otherwise act as an agent for chapter 4 purposes on behalf of any financial institution, including a member of its expanded affiliated group.

### 3.4. Owner Documented Financial Institutions (US Regulations 1471-5(f)(3))

This category is intended to reduce the burden of meeting the obligations under the Agreements for closely held passive investment vehicles that fall within the definition of Investment Entity. It is not however restricted to those cases.

In order to qualify under this category the Investment Entity must satisfy the following:

- It must not maintain a Financial Account for any Non-Participating Financial Institution;
- It must not be owned by, nor be a member of, a group of Related Entities with any member that is a Depository Institution, Custodial Institution or Specified Insurance Company (i.e. it can only be affiliated to other Investment Entities); and
- It must provide the required documentation regarding its owners and agree to notify any changes in its circumstances to the Financial Institution that is undertaking the reporting obligations on its behalf.

The Financial Institution that has agreed to undertake the reporting obligations on behalf of the Investment Entity must agree to report the information relating to Specified Persons but will not report in respect of any indirect owner that holds its interest through a Participating Financial Institution, Model 1 Financial Institution,

Deemed Compliant Financial Institution (other than another Owner Documented Financial Institution), an entity that is a US Person, an Exempt Beneficial Owner or an Excepted NFFE.

## **4. NON-REPORTING FINANCIAL INSTITUTIONS – UK AGREEMENT ONLY**

### **4.1. General**

The concept of Non-Reporting Financial Institutions applies to both Agreements. This section deals with those entities that are treated as Non-Reporting Financial Institutions by virtue of Annex II of the UK Agreement.

### **4.2. Small or Limited Scope Financial Institutions that Qualify as Non-Reporting Cayman Islands Financial Institutions**

The following Financial Institutions are Non-Reporting Cayman Islands Financial Institutions:

#### **4.2.1. Local Credit Unions**

A Financial Institution satisfying all of the following requirements:

1. The Financial Institution carries on business solely as a Credit Union;
2. It is licensed and regulated under the laws of the Cayman Islands;
3. It has no fixed place of business outside of the Cayman Islands; and
4. All accounts maintained by the Financial Institution are held by residents of the Cayman Islands.

#### **4.2.2. Financial Institution with Only Low-Value Accounts**

A Cayman Islands Financial Institution satisfying the following requirements:

1. The Financial Institution is not an Investment Entity;
2. No Financial Account maintained by the Financial Institution or any Related Entity has a balance or value in excess of \$50,000, applying the rules set forth in paragraph C of section VI Annex I for account aggregation and currency translation; and
3. The Financial Institution does not have more than \$50 million in assets on its balance sheet, and the Financial Institution and any Related Entities, taken together, do not have more than \$50 million in total assets on their consolidated or combined

balance sheets.

#### **4.2.3. Qualified Credit Card Issuer**

A Cayman Islands Financial Institution satisfying the following criteria:

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; and
2. Beginning on or before 1 July 2014, the Financial Institution implements policies and procedures to either prevent a customer deposit in excess of \$50,000, or to ensure that any customer deposit in excess of \$50,000, in each case applying the rules set forth in Annex I for account aggregation and currency translation, 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.

### **4.3. Investment Entities that Qualify as Non-Reporting Cayman Islands Financial Institutions and Other Special Rules**

The Financial Institutions described in this section are Non-Reporting Cayman Islands Financial Institutions.

#### **4.3.1. Trustee-Documented Trust**

A trust resident in the Cayman Islands to the extent that the trustee of the trust is a Reporting Cayman Islands Financial Institution and reports all information required to be reported pursuant to the Agreement with respect to all UK Reportable Accounts of the trust.

#### **4.3.2. Sponsored Investment Entity**

A Financial Institution described in point 1 below having a sponsoring entity that complies with the requirements of point 2.

1. A Financial Institution is a sponsored investment entity if (a) it is an Investment Entity established in the Cayman Islands; and (b) an Entity has agreed with the Financial Institution to act as a sponsoring entity for the Financial Institution;
2. The sponsoring entity is authorised to act on behalf of the Financial Institution (e.g. such as fund manager, trustee, corporate director, or managing partner) and complies with the following requirements:
  - a) The sponsoring entity is a Cayman Islands Financial Institution;
  - b) The sponsoring entity performs, on behalf of the Financial Institution, all due diligence, reporting and other requirements that the Financial Institution would have been required to perform if it were a Reporting Cayman Islands Financial Institution;
  - c) The sponsoring entity identifies the Financial Institution in all reporting completed on the Financial Institution's behalf; and
  - d) The sponsoring entity has notified the TIA of its status as a sponsor in respect of the Financial Institution and has not had its status as a sponsor revoked by the TIA.

#### **4.3.3. Sponsored Closely Held Investment Vehicle**

A Cayman Islands Financial Institution satisfying the following requirements:

1. The Financial Institution is a Financial Institution solely because it is an Investment Entity;
2. The sponsoring entity is a Reporting Cayman Islands Financial Institution, is authorised to act on behalf of the Financial Institution (such as a professional manager, trustee, or managing partner), and agrees to perform, on behalf of the Financial Institution, all due diligence, reporting and other requirements that the Financial Institution would have been required to perform if it were a Reporting Cayman Islands Financial Institution;
3. The Financial Institution does not hold itself out as an investment vehicle for unrelated parties;

4. Twenty or fewer individuals own all of the debt interests and Equity Interests in the Financial Institution (disregarding debt interests owned by 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 described in this paragraph; and
5. The sponsoring entity complies with the following requirements:
  - a. The sponsoring entity is a Cayman Islands Financial Institution;
  - b. The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, reporting and other requirements that the Financial Institution would have been required to perform if it were a Reporting Cayman Islands Financial Institution and retains documentation collected with respect to the Financial Institution for a period of six years;
  - c. The sponsoring entity identifies the Financial Institution in accordance with the applicable registration requirements of the TIA in all reporting completed on the Financial Institution's behalf; and
  - d. The sponsoring entity has notified the TIA of its status as a sponsor in respect of the Financial Institution and has not had its status as a sponsor revoked by the TIA.

#### **4.3.4. Investment Advisors and Investment Managers**

An Investment Entity established in the Cayman Islands, the sole activity of which is (1) to render investment advice to, and act on behalf of, or (2) to manage portfolios for, and act 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 will be a non-reporting FI.

An entity that also conducts other businesses that are auxiliary to rendering investment advice or manages portfolios (for example, acts as a general partner to a Limited Partnership) will not jeopardise its status as a non-reporting FI.

#### **4.3.5. Collective Investment Vehicle**

An Investment Entity established in the Cayman Islands that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of \$50,000) are held by or through one or more exempt beneficial owners or Active NFFEs described in subparagraph B.6. of section VI of Annex I.

See Section 7 for further explanation.

#### **4.3.6. Special Rules for reporting interests of Investment Entities in Collective Investment Vehicles**

The following rules apply to an Investment Entity:

1. Where an Investment Entity (other than a Financial Institution through which interests in the collective investment vehicle are held) has an interest in a collective investment vehicle as described in part III of Annex II of the UK Agreement, the reporting obligations of that Investment Entity in respect of its interest in that collective investment vehicle shall be deemed to have been met.
2. Consistent with paragraph 3 of Article 4 of the Agreement (third-party service providers), for interests held in an Investment Entity established in the Cayman Islands that is not as described in part III of Annex II of the UK Agreement, the reporting obligations of all Investment Entities with respect to their interests in that Cayman Islands Investment Entity shall be deemed to be satisfied if the information required to be reported under the Agreement with respect to all such interests is reported by the Cayman Islands Investment Entity itself or another person.

## **5. EXEMPT BENEFICIAL OWNERS**

### **5.1. General**

Entities regarded as Exempt Beneficial Owners (and therefore Non-Reporting Financial Institutions) and Excluded Accounts are set out in Annex II to the US and UK Agreement. This section sets out those entities and products that are treated as Exempt Beneficial Owners for the Cayman Islands, but this is not an exhaustive list. Consideration should be given to the criteria set out in the Annexes noted and if the entity or product qualifies, it will be treated as exempt. If any such entities or products are identified and not listed below, please contact the TIA for inclusion.

The section applies to both Agreements unless otherwise stated.

### **5.2. Governmental Entities**

For the Cayman Islands this includes:

- Cayman Islands Monetary Authority

### **5.3. Retirement/pension funds**

The following will be Non-Reporting Cayman Islands Financial Institutions for the purpose of the Agreements:

- Broad and Narrow Participation Retirement Funds which meet the criteria set out in Annex II of the Agreements. For the purpose of the Agreements, retirement funds are 'subject to government regulation' if they are registered with the Cayman Islands National Pensions Office; and
- Pension Funds managed and administered by the Public Service Pensions Board as these are Pension Funds of an Exempt Beneficial Owner.

Exempt Beneficial Owners will not need to register for a GIIN.

### **5.4. Limited Capacity Exempt Beneficial Owners**

An addition has been made to Annex II in the UK Agreement, by adding a new



section, “Limited Capacity Exempt Beneficial Owners” at Annex II.I.G under Additional Entities (*extracted below*). This new section ensures that the Controlling Persons of a charity shall be treated as Exempt Beneficial Owner solely in their capacity as a Controlling Person of that charity, therefore removing the requirement to ‘look through’ the charity to the Controlling Persons. This brings the treatment under the UK Agreement in line with the treatment under the US Agreement.

## ***Annex II***

### **Non-Reporting Cayman Islands Financial Institutions**

*I. **Exempt Beneficial Owners.** The following Entities are exempt beneficial owners and are treated as Non-Reporting Cayman Islands Financial Institutions.*

*G. **Additional Entities.** Any additional entities agreed between the UK Government and the Cayman Islands.*

***Limited Capacity Exempt Beneficial Owners.** The Controlling Persons of an NFFE that meets all of the following requirements shall be treated as an Exempt Beneficial Owner solely in their capacity as a Controlling Person of that NFFE:*

- i. It is established and operated in its jurisdiction 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 organisation, business league, chamber of commerce, labour organisation, agricultural or horticultural organization, civic league or an organisation operated exclusively for the promotion of social welfare;*
- ii. It is exempt from income tax in its jurisdiction 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 NFFE's jurisdiction of residence or the NFFE's formation documents do not permit any income or assets of the NFFE 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 NFFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFFE has purchased; and*
- v. *The applicable laws of the NFFE's jurisdiction of residence or the NFFE's formation documents require that, upon the NFFE's liquidation or dissolution, all of its assets be distributed to a governmental entity or other non-profit organisation, or escheat to the government of the NFFE's jurisdiction of residence or any political subdivision thereof.*

## 6. TRUSTS

This Section applies to all Cayman Islands resident trusts regardless of form except for Collective Investment Vehicles established as a trust (see Section 7) or trusts that are treated as exempt (see Section 4).

References in the rest of this Section to a trust are to a Cayman Islands resident trust unless otherwise specified. See Section 6.2 for definition of Cayman Island resident trust.

**NOTE: Trust and Company Service Providers (TCSP) and any trustee that is considered to be a Financial Institution in its own right will be subject to registration obligations under the US Agreement even if no Specified US Persons are identified in relation to the trusts that they manage or administer.**

### 6.1. How do the Agreements apply to Cayman Island resident trusts?

The reporting obligations imposed under the Agreements only apply to Cayman Island resident trusts (as defined in 6.2. of these Guidance Notes) where any of the following persons falls within the definition of a Controlling Person under 9.7. is identified as a Specified Person (see Section 1.7 for definition of Specified Person):

- settlor
- beneficiary or class of beneficiary
- trustee
- protector
- any other natural person exercising ultimate effective control over the trust

Alternatively, it is possible to use the persons described under the definition of "equity interest" under the US Regulations § 1.1471-5(b)(3)(iii)(B).

If any of the above is identified as a Specified Person, information in relation to the trust may need to be reported. How this is reported, and by whom, will depend on whether the trust is a Financial Institution or a NFFE. How trusts are categorised and the extent

to which registration or reporting is required will be determined by a number of factors as set out in the following Sections.

If none of the above is identified as a Specified Person, no further reporting action is required in respect of the trust (although as noted above, the Trustee if a TCSP must register with the IRS under the US Agreement).

## **6.2. What is a Cayman Islands resident trust?**

A trust is resident in the Cayman Islands, for the purpose of the Agreements, if it has a trustee that is a trust corporation which is incorporated, registered or licensed in the Cayman Islands, or, in the case of an individual trustee, the person is resident in the Cayman Islands. A Cayman Islands resident trust may be established under Cayman Islands law or under the law of another jurisdiction. (See section 2.2)

Accordingly a trust which is established or governed under Cayman Islands law or administered in the Cayman Islands but has no Cayman Islands resident trustees does not fall within the scope of the Agreements.

## **6.3. Multi-jurisdictional trustees**

In circumstances where there are trustees in different jurisdictions, there is a risk of duplicate reporting. The Reporting Cayman Islands Financial Institution/Cayman Islands resident trustee must undertake the reporting obligations in respect of a Cayman Islands resident trust, where required, unless it has actual knowledge that the information that is required to be reported under the Agreements is being reported by another Financial Institution, whether that Financial Institution is a Cayman Islands Financial Institution or not.

A Cayman Islands resident trustee will have actual knowledge where they hold written confirmation from the trustee in the other jurisdiction that the trust has been reported for the purposes of the US or UK Agreement. There is no need for the Cayman Islands resident trustee in this case to report to the TIA in respect of that trust. This

does not remove the responsibility for the Cayman Islands resident trustee to ensure that a report has been made. Should it be determined that no report has been made by any Reporting Financial Institution in respect of a trust that is a Reportable Account then a report must be filed by the Cayman Islands resident trustee. Where the Cayman Islands resident trustee has received a written annual confirmation from the Reporting Financial Institution, then the responsibility of the Cayman Islands resident trustee for reporting has been discharged.

#### **6.4. How are trusts categorised for the purposes of the Agreements?**

The Agreements set out that a Trust is, for these purposes, to be treated as an Entity.

A trust may either be a Financial Institution or a Non-Financial Foreign Entity (NFFE).

A trust could fall within any of the definitions of Financial Institution depending on the nature of its activities and the assets it holds. It is expected that a trust will be treated as a Financial Institution most commonly where it meets the definition of an Investment Entity. This section sets out how a trust would be treated if it was an Investment Entity or an NFFE. It does not deal with those that would be another type of Financial Institution.

##### **6.4.1. Trusts as Investment Entities**

See Section 2.9 for a full definition of Investment Entity and comment on what is meant by “managed by”. As there is a choice of definition of Investment Entity, a trust could be an Investment Entity under one definition but not under another. It will be a policy decision of the entity to determine which definition to apply.

In practice, where the trust assets are “managed by” a licensed or registered TCSP, or any other Financial Institution, the trust itself will be an Investment Entity under the Agreements. If the trust uses the US Regulation or CRS definitions then the trust must also satisfy the financial assets test as defined in Section 2.9. A trust may also be an Investment Entity if it otherwise qualifies as an Investment Entity as defined in 2.9.

Otherwise it will be an NFFE and its activity will determine whether it is a Passive or Active NFFE.

When using the US Regulations or CRS definitions of an investment entity, in determining whether a trust's gross income is primarily attributable to Financial Assets, it is important to consider the underlying source of the income. For example, while a real estate trust may hold its property through companies and so receives its income in the form of dividends, the underlying activity is property holding which is not a financial asset for this purpose. The trust would not be an Investment Entity in this case.

The status of any trust that is not managed by a TCSP or where the trust's assets are not managed by another Financial Institution will be determined by its activity. It could still be a Financial Institution or a Passive or Active NFFE.

A trust that is managed by an individual will not be an Investment Entity under the 'managed by' condition but may still fall to be an Investment Entity by virtue of its activity.

The holding of a Financial Account by the trustee, such as a bank account, with a Financial Institution where that Financial Institution does not participate in the management of the trust or Financial Assets does not in itself make the trust an Investment Entity.

With regard to Trusts, the test of being managed by a Financial Institution will be met where the Trust or its activities are being "professionally managed" (this would typically be where either one of the trustees is a Financial Institution, or the trustees have appointed a discretionary fund manager to manage the trust's assets).

### **Example 1 Trust managed by an individual.**

X, an individual, establishes Trust A, for the benefit of X's children, Y and Z. X appoints Trustee A, an individual, to act as the trustee of Trust A. Trust A's assets consists solely of financial assets, and its income consists solely of income from those

financial assets. Pursuant to the terms of the trust instrument, Trustee A manages and administers the assets of the trust. Trustee A does not hire any entity as a third-party service provider to perform any of the activities described in Section 3.9.

Under the definition in the Agreements, Trust A is not an Investment Entity because it does not conduct as a business any of the activities in 2.9.1 and it is not managed by a Financial Institution.

Under the US Regulations and CRS definitions, Trust A is not an investment Entity because it is managed solely by Trustee A, an individual.

**Example 2 Trust managed by a trust company.**

The facts are the same as in Example 1, except that X hires Trust Company, a Financial Institution, to act as trustee on behalf of Trust A. As trustee, Trust Company manages and administers the assets of Trust A in accordance with the terms of the trust instrument for the benefit of Y and Z.

Under the definition in the Agreements, Trust A is an Investment Entity because it is managed by a TCSP (or another Financial Institution).

Under the US Regulations and CRS definitions, Trust A is an Investment Entity because it is managed by a Financial Institution and all of its income is attributable to financial assets.

**Example 3 Trust managed by a trust company - only asset is real estate.**

Y, an individual establishes Trust B, for his two grandchildren. Y hires Trust company, a Financial Institution, to act as trustee of Trust B. Trust B's assets consist solely of 100% of the shares of Cayman holding company. Cayman holding company's only asset is real estate.

As Trust B's only indirect holdings are real estate, which is not a financial asset, Trust B is an NFFE. The fact that Trust B has a professional trust company as trustee is not

relevant in this example as the underlying assets are not financial assets.

### **Simplified reporting and registration requirements**

A trust that is an Investment Entity may be able to utilise one of the following categories of Financial Institution to simplify the registration and reporting process.

- A Trustee-Documented Trust (Section 6.4.1.1)
- A Sponsored Investment Entity (Section 6.4.1.2)
- Owner Documented Financial Institution (Section 6.4.1.3)
- See 4.3.3 for Sponsored Closely Held Investment Vehicles

In these cases, the trust will be a Non-Reporting Financial Institution.

If none of these categories apply, and the trust is not an NFFE, the trust will be a Reporting Financial Institution and will need to register and report in accordance with the rules that apply to Reporting Cayman Islands Financial Institutions as an Investment Entity (see 2.9).

#### **6.4.1.1. Trustee-Documented Trust**

If a trustee of a trust is any of the following:

- A Reporting US Financial Institution;
- A Reporting UK Financial Institution;
- A Reporting Cayman Islands Financial Institution;
- A Reporting Model 1 Financial Institution; or
- A Participating Foreign Financial Institution;

and the trustee agrees to report all the information required to be reported with respect to the trust, the trust may be treated as a Trustee-Documented Trust.

Under the US Agreement, the trust itself is not required to register. The trustee will register by virtue of being a Financial Institution but will not have to register the trust.



In practice, all Cayman Islands resident trusts that are managed by a TCSP may qualify as a Trustee-Documented Trust, provided the trustee meets one or more of the requirements set out above.

#### **6.4.1.2.      Sponsored Investment Entity**

##### **US Agreement**

Any trust that is an Investment Entity, even if professionally managed, may appoint a sponsor to undertake its due diligence, registration and reporting responsibilities, except where it is a withholding foreign trust in accordance with US Regulations.

If a sponsoring entity is appointed by a trust, no registration of the trust is required unless there is a US Reportable Account. If a US Reportable Account is identified, the sponsoring entity must register the trust on or before the later of 31 December 2015 or 90 days after the Reportable Account is identified. This contrasts with a Trustee-Documented Trust which is not required to be registered at any time.

See 3.3.6 for further information on the obligations of a sponsoring entity under the US Agreement.

##### **UK Agreement**

Any Cayman Islands resident trust that is an Investment Entity, even if professionally managed, may appoint a Cayman Islands sponsoring entity to undertake its due diligence and reporting responsibilities. The Cayman Islands sponsoring entity must identify the trust in the reporting completed on behalf of the trust and notify the TIA of its status as sponsor.

See section 4 for further information on the obligations of a sponsoring entity under the UK Agreement.

#### **6.4.1.3.      Owner Documented Financial Institution**

This option will be available under the US Agreement to trusts that are Investment Entities if appropriate. (See Section 3.4)

#### 6.4.2. Trusts as NFFEs

A trust that is not a Financial Institution will be an NFFE. Depending on the trust activities, it will either be a Passive NFFE or an Active NFFE.

For further information on the reporting obligations in respect of these trusts, refer to the Section on NFFEs (Section 9).

##### **A Passive NFFE**

A trust that is not an Investment Entity and has 50% or more passive assets and/or income is treated as a Passive NFFE. See Section 9.5 for definition of passive income.

This might, for example, apply to a family trust that is not professionally managed and has no income or predominately passive income. A trust, whether or not professionally managed, that only holds real estate for example, may be treated as a Passive NFFE.

##### **An Active NFFE**

A trust that is not an Investment Entity and satisfies the criteria as set out in Section 9.3 will be treated as an Active NFFE. There are no reporting requirements in respect of these trusts.

#### 6.5. Registration – US Agreement only

**A trustee will be required to register in its own right if it is a Financial Institution even if it does not identify a Specified US Person in any of the trusts that it manages or administers.**

The registration requirements for trusts depend on how the trust is categorised.

If a trust is a Trustee-Documented Trust, the trustee is obliged to register in its own right as it is a Financial Institution. There is no requirement for details of the trust to be registered.

If a trust utilises the Sponsored Investment Entity category the sponsoring entity may have to register the trust in certain circumstances. See Section 6.4.1.2.

If a trust utilises the Sponsored Closely held Investment Vehicle category there is no requirement for details of the trust to be registered.

If a trust is treated as a Reporting Cayman Islands Financial Institution in accordance with Section 2.3 and does not utilise the Trustee-Documented Trust, Sponsored Investment Entity, Sponsored closely held Investment Vehicle or Owner Documented Financial Institution categories, it is required to register.

There are no registration requirements for a trust treated as an NFFE (other than if the trust has elected to be classified as a 'Direct-Reporting NFFE').

See Section 11 for further details on registration under the US Agreement. There are no registration requirements for any entity under the UK Agreement.

## **6.6. Reporting obligations**

If a trust utilises the Trustee-Documented Trust, Sponsored Investment Entity (without reportable accounts), Sponsored Closely Held Investment Vehicle or Owner Documented Financial Institution categories, it is a Non-Reporting Cayman Islands Financial Institution. For the purposes of the US Agreement only it will also be treated as Deemed Compliant. In both of these cases, the trustee, sponsoring entity or other Reporting Financial Institution that has taken on the reporting obligations, is responsible for reporting the information required under the Agreements (see Section 17 for general information on reporting).

If a trust is a Reporting Cayman Islands Financial Institution in its own right and cannot utilise any of the categories to make it a Non-Reporting Cayman Islands Financial Institution, it is required to undertake the reporting obligations.

A trustee or trust which is a Reporting Cayman Islands Financial Institution can use third party service providers to undertake the reporting on their behalf but the responsibility for reporting remains with the Reporting Cayman Islands Financial Institution.

If a trust is a Passive NFFE, the Financial Institution where the trust holds Financial Accounts will be required to undertake the necessary due diligence procedures to determine if the account is a Reportable Account.

### **6.7. Information to be reported – trusts as Investment Entities**

This Section relates to trusts that are Investment Entities. Trusts that are NFFEs (other than Direct-Reporting NFFEs) do not have any reporting obligations themselves although any Financial Institution that holds a Financial Account for such a trust which has a Specified Person as a Controlling Person will need to report the information as set out in Section 9.

The Debt or Equity Interest in the trust is the Financial Account. The Financial Account will depend on the nature of the trust and the relationship between the trust and the account holder as described below in this section. In determining the value of the Financial Account consideration must be given to the value of the property which is subject to the Financial Account. This will include underlying companies and other assets owned by the trust in relation to the equity interest of the account holder.

A loan made to a trust which is an Investment Entity is a Financial Account because the lender holds a Debt Interest in that Investment Entity. Provided the lender is not itself a Financial Institution the loan would be reportable whether or not it is made by a settlor or beneficiary.

Where a loan has been made to a settlor or beneficiary, the outstanding loan is considered a debt due to the Trustees for the benefit of the Trust. The debt due is an asset of the Trust, and no distribution arises. If and when the loan is written off, then there is a distribution of that amount (written off) to the debtor, which should be

reported.

Where any of the trust property is a non-financial asset, such as real estate which is considered to be a non-financial asset under the US Regulations, the value of this asset should be included in valuing the Reportable Account where it forms part of the account holder's equity interest in the trust.

Exempt Products can be excluded from valuing the Reportable Account where they form part of the account holder's equity interest in the trust but can be included if it is easier to do so due to the record keeping procedures of the trustee.

The following information must be reported in respect of any person listed in 6.1 who has been identified as a Specified Person.

- a. Name, address and TIN/National Insurance Number (where applicable)
- b. Account number or functional equivalent
- c. Name and GIIN of the Reporting Financial Institution
- d. Equity Interest (balance or value) in the trust at the end of the calendar year or other appropriate reporting period
- e. Total gross amount paid or credited to the Specified Person during the calendar year or other appropriate reporting period.

In practice, the following will be treated as having an equity interest in the trust and reporting will apply to those individuals who are identified as a Specified Person:

- i. A settlor of the trust;
- ii. A beneficiary that is entitled to a mandatory distribution (directly or indirectly) from the trust;
- iii. A beneficiary that receives a discretionary distribution (directly or indirectly) from the trust in the calendar year; and
- iv. Any person that exercises ultimate effective control over the trust (see 9.6).

The amounts reported under d) and e) above will depend on the nature of the trust and

the interest held by the Specified Person. Sections 6.8 to 6.9 set out the amounts to be reported in each case. The amounts reported are not ascribable for the purposes of determining a tax liability.

#### **6.8. Equity Interest (balance or value)**

The Equity Interest in a trust is the value of the proportion of the trust assets in which any person set out in 6.1 has an interest. The value of the Equity Interest will be the most recent value of the trust calculated by the Financial Institution and should include the value of all assets, financial and non-financial, but can exclude Exempt Products.

The total value of the assets of the trust must be consistent with that used by the trustees for valuation purposes and should be based on a recognised accounting standard. Listed securities should be valued at the appropriate market rate on the day concerned. Unlisted securities may be valued at the original book value unless another accounting basis was used by the trust for normal valuation purposes.

The Equity Interest attributable to the settlor of any trust where the settlor can revoke the Trust or has a power of appointment to appoint the assets in favour of the settlor or is the beneficiary of the trust is the whole value of the trust. Where a settlor is excluded from the trust, the Equity Interest can be considered to be nil but will still be a Financial Account and hence reportable.

The Equity Interest of a beneficiary that is entitled to mandatory distributions (directly or indirectly) from a trust will be the net present value of amounts payable in the future and should be measured on a recognised actuarial basis. It is recognised that this may be difficult and expensive to calculate in which case it is permitted to use the accounting net asset value of the assets in which the beneficiary has an interest.

For a discretionary trust, the Equity Interest attributable to a beneficiary in receipt of a distribution will be the amount of the distribution made in the relevant reporting year.

In the case of a pre-existing account, the amount of distributions (directly or indirectly) made to a discretionary beneficiary during the period 1 July 2013 to 30 June 2014 should form the base of determining the value or balance of an equity interest attributable to the beneficiary as at 30 June 2014.

Where a discretionary beneficiary receives a distribution (directly or indirectly) after 1 July 2014, the equity interest in the trust may be treated as a pre-existing account if the beneficiary has received previous distributions (directly or indirectly) during the year 30 June 2013 to 1 July 2014 and the trustee has current KYC documentation on the beneficiary.

#### **6.9. Amounts paid or credited to the Specified Person**

The amounts to be reported as paid or credited to a Specified Person are the total gross amounts paid or credited to any person who receives a mandatory or discretionary distribution from the trust, including a revocation from the trust or an appointment of trust assets out of the trust.

#### **6.10. Treatment of companies underlying Cayman Island resident trusts**

This Section is relevant for registration requirements under the US Agreement.

Where a Cayman Islands resident trust that is a Financial Institution is treated as a Non-Reporting Financial Institution, then any underlying related Entities (see section 2.13) that are Financial Institutions may also be treated as Non-Reporting Financial Institutions. In that case, the trustee of the trust will be the Reporting Financial Institution and will be required to report in respect of those companies.

Subject to being classified as Financial Institutions, underlying companies in the circumstances described above are not required to register although in certain circumstances may choose to register, for example where they require a GIIN to be recognised as a Financial Institution.

### **6.11. Trusts that hold Non-Financial Assets**

Under the US Regulations or CRS definitions of an Investment Entity, a trust where at least 50% of its gross income is derived non-financial assets (see section 2.9) is not considered to be a Financial Institution but will be a NFFE. Where the non-financial asset is held through a company or other entity, it is possible to ignore the company/entity and treat the structure as a whole in determining whether the 'gross income' test is met.

This test applies to the three years ended 31 December of the year preceding the year in which the determination is made or the period since commencement if shorter.

If a trust owns non-financial assets and financial assets, all of the trust's investments and activities will need to be considered when determining whether it is a Financial Institution or NFFE, and not just those that are carried out by the entity that holds the non-financial assets.

Alternatively the trust may use the definition of an Investment Entity in the Agreements and disregard the necessity of considering the 'financial assets' test as detailed above.

This also applies to company holding structures where non-financial assets are held through subsidiary/nominee entities.

### **6.12. Employee Benefit Trusts (EBTs)**

EBTs should be considered in the same way as any trust and categorised accordingly. A beneficiary to an employee benefit trust has an interest with a positive net asset value only to the extent that the value of the assets set aside in trust are sufficient to currently pay all employee benefit obligations in which the beneficiaries are vested. However, with respect to beneficiaries who are receiving current payments from the employee benefit trust, the amount reportable is the amount of any payments made to the



beneficiary.

### **6.13. Non-professional trustees/family trusts/family offices**

The obligations of the trust and trustees will depend on the nature of the trust. Each trust will need to be analysed to determine whether it is a Financial Institution or an NFFE.

A trust that is managed by an individual may not be a Financial Institution and so may be a Passive or Active NFFE depending on the nature of its activities.

### **6.14. Private Trust Company**

A Private Trust Company (PTC) which is registered, or a similar trust company which is licensed, and conducting business in or from within the Islands, may be considered a Financial Institution for these purposes.

In the case of a trust of which a PTC is the trustee and the trust has all its income derived from financial assets, under the definitions of Investment Entity outlined in Section 2.9, the trust may be a Financial Institution. If the trust is not a Financial Institution, it will be an NFFE, and its activity will determine whether it is a Passive or Active NFFE. If a trust is a Passive NFFE, the Financial Institution where the trust holds Financial Accounts will be required to undertake the necessary due diligence procedures to determine if the account is a Reportable Account.

### **6.15. Charitable trusts**

Under the US Agreement, Cayman Islands charitable trusts may be viewed as Active NFFEs under the religious, charitable, scientific, artistic, cultural or educational purposes clause (see section 9.3). Under the UK Agreement, such trusts will also be viewed as Active NFFEs where all of the trust's beneficiaries are limited capacity exempt beneficial owners (see 6.5) and the trust deed does not permit and income or assets to be distributed to, or applied for the benefit of, any person other than limited

capacity exempt beneficial owners.

## **6.16. Unit trusts**

A unit trust that is a regulated or unregulated fund as defined in Section 7 will be treated as a Collective Investment Vehicle. Where a unit trust is not a Collective Investment Vehicle it should be categorised in the same way as any other trust as set out in this section.

## **6.17. UK Resident Non Domiciled Specified UK Person – UK Agreement only**

This relates to the Alternative Reporting Regime (ARR) under the UK Agreement which is an optional regime. See Appendix 2 for further information on the ARR.

As noted above, the equity interest in a trust is the Financial Account which, if the settlor, beneficiary or person with ultimate effective control is a Specified UK Person, is the UK Reportable Account. This remains the case where that Specified Person is a UK Resident Non-Domiciled Person.

The Reporting Cayman Islands Financial Institution, which in the case of a professionally managed trust is the trustee, has to report gross payments and movement of assets from a UK source or from a jurisdiction that cannot be determined to the Reportable Account, i.e. the equity interest in the trust. It also has to report gross payments from the trust to a UK destination or destination in an undetermined jurisdiction.

No disclosure is required in respect of interest or other income arising in the trust.

## **7. COLLECTIVE INVESTMENT VEHICLES**

### **7.1. Definition of a Collective Investment Vehicle**

Generally, for the purposes of the Agreements, Collective Investment Vehicles includes but is not restricted to any entity which is defined under the Mutual Funds Law (2013) as amended and revised from time to time.

Any entity treated as a Collective Investment Vehicle for these purposes will be an Investment Entity, and hence a Financial Institution under the definition in the Agreements.

Under the US Regulations and CRS definitions, the entity will need to consider its investment strategy and gross income position to determine whether it is classed as an Investment Entity. For example, a Collective Investment Vehicle that invests primarily in non-financial assets such as real property would not be classed as an Investment Entity (see section 2.9).

### **7.2. How the Agreements apply to fund entities**

Investment entities, as defined in 2.9 that are organised under the laws of, or resident in the Cayman Islands, may include:

- Collective Investment Vehicles (as defined above);
- Fund managers;
- Investment managers;
- Fund administrators;
- Transfer agents; and
- Depositories and trustees of unit trusts.

However, the only Financial Accounts relevant to the Agreements are the Equity Interests and Debt Interests issued in Collective Investment Vehicles.

Where an Investment Entity is a Collective Investment Vehicle constituted by a person, only the Collective Investment Vehicle will have reporting responsibilities in relation to

the Financial Accounts (i.e. the Equity & Debt Interests) issued in that Collective Investment Vehicle.

Generally, any Investment Entity which is part of a fund structure other than:

- a Collective Investment Vehicle; or
- a manager or operator of a Collective Investment Vehicle that is not constituted as a person,

will not have any reporting responsibilities in relation to the interests in the Collective Investment Vehicle unless it is the trustee of a trustee-documented trust or is a Sponsoring Entity of a Sponsored Investment Entity with US Reportable Accounts.

### **Example 1**

For example, a fund administrator that only provides accounting services or Registrar and Transfer Agency services and does not otherwise custody, control or hold assets on behalf of a Collective Investment Vehicle will not be considered to be administering funds or money on behalf of other persons by virtue of acting for a Collective Investment Vehicle. Nevertheless, a fund administrator may meet the definition of a Financial Institution by virtue of other activity and have registration and reporting obligations.

### **7.3. Reporting Obligations**

For US Reportable Accounts, if a Collective Investment Vehicle takes advantage of the Sponsored Investment Entity Financial Institution categories, it is a Non-Reporting Cayman Islands Financial Institution. In these cases, the Sponsoring Entity or other Financial Institution that has taken on reporting obligations is responsible for reporting the information required under the Agreement.

A Collective Investment Vehicle may look to delegate their obligations under the Agreements to a Third Party Service Provider. This arrangement is permitted by the Agreements, although ultimate responsibility may not be delegated and will remain with the Collective Investment Vehicle as the Reporting Financial Institution

If a Collective Investment Vehicle is a Reporting Cayman Islands Financial Institution it will be subject to reporting requirements.

Various entities may fall within the definition of Investment Entity. However, provided the fund is a Collective Investment Vehicle, only the Collective Investment Vehicle will have obligations under the Agreements. The fund will need to determine which Investment Entity carries out the obligations to identify, verify and report on Account Holders that are Specified Persons, by reference to the principal documents, information particulars and other agreements by which the vehicle is constituted.

#### **7.3.1. Information to be reported**

This section relates to Collective Investment Vehicles that are Investment Entities.

The Reportable Account in a Collective Investment Vehicle is the Equity or Debt Interest issued in that Collective Investment Vehicle except where the interests are regularly traded on an established securities market.

The following information must be reported in respect of any person who has been identified as a Specified Person under the relevant Agreement.

The information to be reported is that set out in section 17 but with the following clarification in the context of Collective Investment Vehicles.

- 'Account balance or value' means Equity Interest (balance or value) in the Collective Investment Vehicle at the end of the calendar year or other appropriate period; and
- The total gross amount paid or credited to the Account Holder (in respect of the Reportable Account) including the aggregate amount of any redemption payments, or similar type payments made to the Account Holder by the Collective Investment Vehicle in respect of the Reportable Account during the calendar year or other appropriate reporting period.

## 7.4. Related Entities

Refer to section 2.14 for information on Related Entities.

## 7.5. Platforms and other distributors of Funds

Fund distributors may include:

- Placement Agents/Distributors
- Independent Financial Advisers
- Fund platforms
- Wealth managers
- Brokers (including execution-only and prime brokers)
- Banks
- Building societies
- Members of an insurance group may fall within the definition of Investment Entity because of their role in distributing a Collective Investment Vehicle as defined for the purposes of the Agreement.

There are two different types of fund distributors:

- those that act as an intermediary in holding the legal title to the interests in Collective Investment Vehicle (such as nominee); and
- those that act on an advisory basis.

Where a customer appears on the Collective Investment Vehicle's register, the responsibility to report on that customer lies with the fund. As shown in the following example, if a customer invests via a fund platform, the responsibility to report on the customer may lie with the platform.

### Example 1

Fund platforms typically hold legal title to Interests in a Collective Investment Vehicle on behalf of their customers (the investors) as nominee who 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 Vehicle, and

possibly other assets. But only the platform will appear on the register of investors in the Collective Investment Vehicle. Where this is the case the platform will be responsible for reporting on its interests in the Collective Investment Vehicle as Financial Accounts.

Where financial advisers' activities do not go beyond the provision of investment advice to their customers and/or acting as an intermediary between the Collective Investment Vehicle, or fund platform and the customer, then they will not hold legal title to the assets and therefore are not in the chain of legal ownership of a Collective Investment Vehicle. Such financial advisers will not be regarded as the Financial Institution that maintains the Financial Account in respect of the accounts on which they advise (see 7.5.2 below).

A platform may have a 'mixed business' i.e. it acts as an adviser or 'pure intermediary' between the investor and the underlying Financial Institution (such as a Collective Investment Vehicle), 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.

#### **7.5.1. 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 Vehicles are Financial Institutions. In most cases they will be Custodial Institutions because they will be holding assets on behalf of others.

When considering whether such a distributor meets the condition requiring 20 per cent of the entity's gross income to derive from holding of financial assets and from related financial services, so as to be considered as a Custodial Institutions for the purposes of the Agreements, consideration should be given as to whether the income derived from

acting as nominee arises in another group company, or whether income is derived from commission, discounts or other sources.

Fund nominees, fund intermediaries and fund platforms will nevertheless still be Financial Institutions because they would otherwise be within the definition of Investment Entity. In this case the Financial Accounts will be the Financial Accounts maintained by the distributor, and the distributor will be responsible for ensuring it meets its obligations in respect of those accounts.

The TIA will treat fund nominees, fund intermediaries and fund platforms as Custodial Institutions unless specific factors indicate that their businesses are better characterised as falling within the definition of an Investment Entity. Normally, the primary business of a fund nominee, fund intermediary or fund platform will be to hold financial assets for the account of others.

For the purpose of aggregating accounts to determine whether any Pre-existing Custodial Accounts are below the de minimis threshold, 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 Vehicles.

#### **7.5.2. Advisory only distributors**

Such distributors, which may include Financial Advisors may nevertheless be asked by Financial Institutions to provide assistance in identifying Account Holders and obtaining self-certification.

For example, Financial Advisors will often have the most in-depth knowledge of the investor and direct access to the customer so will be best placed to obtain self-certifications. However, the TIA does not regard such advisory only distributors as Financial Institutions and they will only have obligations pursuant to contractual agreements with those Financial Institutions where they act as a third party service provider in relation to those Financial Accounts.



## **7.6. Deemed Compliant Collective Investment Vehicles**

Qualified Collective Investment Vehicles are treated as Registered Deemed Compliant Financial Institutions (see section 3.2.2).

Certain Collective Investment Vehicles are treated as Certified Deemed Compliant Financial Institutions (see section 3.3.8).

This category is intended to provide relief for Investment Entities that are owned solely by or through one or more Cayman Islands Financial Institutions, Financial Institutions in an IGA jurisdiction, PFFIs under the US Regulations, or directly by large institutional investors not typically subject to FATCA withholding or reporting.

An Investment Entity with other types of investors may qualify as deemed compliant if meeting the requirements of a Restricted Fund. See Section 3.2.3.

A Qualified Collective Investment Vehicle must be an Investment Entity and must be regulated as an Investment Entity in the Cayman Islands and every other country in which it operates. A Fund is considered to be regulated if its manager is regulated with respect to the Collective Investment Vehicle in all of the countries in which the Collective Investment Vehicle is registered and in all of the countries in which the investment fund operates.

A Qualified Collective Investment Vehicle's investors are limited to equity investors, direct debt investors with an interest greater than \$50,000 and other Financial Account Holders are limited to Participating Foreign Financial Institutions, Registered Deemed Compliant Foreign Financial Institutions, retirement funds classified as Exempt Beneficial Owners, US Persons that are not Specified US Persons, Non-reporting IGA Foreign Financial Institutions, or other Exempt Beneficial Owners.

Each member of the group of Related Entities must be a Participating Foreign Financial Institution, a Registered Deemed Compliant Foreign Financial Institution, a Sponsored Foreign Financial Institution, a Non-reporting IGA Foreign Financial Institution or an

Exempt Beneficial Owner.

## **7.7. Sponsored Investment Entities**

Any Financial Institution which is an Investment Entity, even if professionally managed, may appoint a sponsor to undertake all of its registration, due diligence and reporting responsibilities, except where it is a Qualified Intermediary or Withholding Foreign Partnership or Withholding Foreign Trust in accordance with US Regulations. In doing so, the Financial Institution will become a Sponsored Investment Entity. A Collective Investment Vehicle's manager, for example, may be appointed as a sponsor to that vehicle and in that capacity will be a Sponsoring Entity to the Collective Investment Vehicle.

In relation to the US Agreement, where a Sponsoring Entity has been appointed it must register as such with the IRS.

A Sponsor must undertake all due diligence and reporting obligations under the Agreements on behalf of the Sponsored Investment Entity (and where appropriate outsource such obligations to third party service providers). This will include account identification and documentation. A Sponsor will need to ensure that new investors in the vehicle it sponsors are appropriately documented for meeting its obligations as a sponsor and fulfilling all due diligence reporting obligations under the Agreements for the purposes of its Sponsored Investment Entities.

Where a Sponsor acts on behalf of a range of Collective Investment Vehicles, the classification of an account as a New Account or Pre-existing Account can be done by reference to whether the account is new to the Sponsor (e.g. the manager of the Collective Investment Vehicle) and not the Collective Investment Vehicle itself. This will prevent the Sponsor from having to seek appropriate documentation from the same account holder repeatedly, where the account holder is invested in more than one of the Collective Investment Vehicles. Where a sponsor is able to link accounts in this manner, the account will also need to be aggregated.

Where the Sponsoring Entity subsequently identifies a US Reportable Account in respect of the Collective Investment Vehicle, the Sponsoring Entity must register the Sponsored Entity on or before the later of 31 December 2015 or 90 days after the US Reportable Account is identified.

If a Sponsoring Entity is appointed by an Investment Entity, no registration of the Sponsored Investment Entity is required, unless a US Reportable Account is identified.

The Sponsoring Entity will report to the TIA on all of the Account Holders of the Sponsored Investment Entities.

#### **7.7.1. Sponsored Offshore Collective Investment Vehicles**

In practice, a manager may act for Collective Investment Vehicles located in a number of jurisdictions. When acting as Sponsor, the manager will need to act on behalf of the Sponsored Collective Investment Vehicle ranges independently, with respect to each tax authority in which they are domiciled.

#### **Example 1**

A Cayman Islands fund manager manages funds in the Cayman Islands (A), another Model 1 IGA Country (B) and a non-IGA Country (C). The Cayman Islands manager can register as Sponsor for all or some of the Collective Investment Vehicles in each of these jurisdictions. The Sponsor would:

- Report to the Cayman Islands on behalf of the Cayman Islands Collective Investment Vehicles (A);
- Report to the relevant authority in IGA Country (B) on behalf of the Collective Investment Vehicles established there (subject to the law of Country B in relation to data protection, duties of confidentiality etc); and
- Report directly to the IRS on behalf of the funds domiciled in the non-IGA country (C), (subject to the law of Country (C) in relation to data protection, duties of confidentiality etc).

## 7.8. Registration

Current IRS documentation (IRS Form 8957), relating to the registration process for FATCA, indicates that the application form makes reference to a Financial Institution's country for tax residence purposes.

Where the Financial Institution is a member of an Expanded Affiliated Group, current IRS procedures require that the lead of this group registers and has obtained their GIIN so that when other group members/ Related Entities are registering they are also able to use this information

See also section 11, which sets out the timetable for registration.

### 7.8.1. Equity & Debt Interest in an Investment Entity

Where an Investment Entity is an asset manager, investment advisor, administrator or other similar Investment Entity, then their Debt and Equity Interests issued in such Investment Entity, are excluded from being a Financial Account. This mirrors the treatment of Debt and Equity Interests in Entities that are solely Depository or Custodial Institutions.

Debt and Equity Interests (other than interests that are regularly traded interests) are only Financial Accounts in relation to those Entities that are Investment Entities because:

- the Entity's gross income is attributable to investing, reinvesting or trading in financial assets, and they are managed by a Financial Institution including another Investment Entity, or
- the Entity functions or holds itself out as a Collective Investment Vehicle, mutual fund, exchange traded fund, private equity fund, or any similar investment vehicle established with an investment strategy or 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 unit trust that is a Financial Institution, an Equity Interest means an interest held by a unit holder.

A Specified Person under an Agreement shall be treated as being a beneficiary of a trust if such a person has the right to receive directly, or indirectly a mandatory or discretionary distribution from the Trust.

#### **7.8.2. Debt or Equity interest regularly traded on an established securities market**

For the purposes of the Agreements the term listed on a recognised stock exchange, in respect of shares and securities, will take its meaning as set out in section 10.9 in respect of the UK Agreement and section 10.10 in respect of the US Agreement:

### **7.9. Aggregation of Accounts**

For the purposes of determining whether an Equity or Debt Interest in a Collective Investment Vehicle represents a Low or High Value Account for due diligence purposes it is necessary for the reporting Cayman Islands Financial Institution to aggregate all Equity and Debt Interests held by an identified Specified Person in any Financial Account for which the Financial Institution is the Reporting Financial Institution but only where the accounts are linked by a computerised system.

For the purpose of aggregating accounts to determine whether any Pre-existing Custodial Accounts are below the de minimis threshold (i.e. those maintained by the distributor), a Custodial Institution will need to consider all the Financial Accounts of its customers without reference to whether the customer's underlying interests are held in different Collective Investment Vehicles.

### **7.10. Transfer Agents or Service Provider**

Where a Transfer Agent or Service Provider has been appointed FATCA services provider to a number of Financial Institutions, the Transfer Agent or Service Provider 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 or Service Provider. The Transfer Agent or Service Provider may obtain one set of FATCA due-diligence documentation for an Investor to validate the same investor's status in all Financial Institutions serviced by that Transfer Agent.

## **8. OTHER SPECIFIC VEHICLES**

### **8.1. Partnerships**

For the purposes of the Agreement, partnerships fall within the definition of an entity. The type of entity will depend on the activities undertaken by the partnership but a partnership may fall into any of the categories of Financial Institution. Where a partnership is a Financial Institution it will need to identify any Financial Accounts it holds, including any equity interest in the partnership itself. The equity interest will be the capital or profits interest in the partnership of any partners who are Specified Persons.

### **8.2. Securitisation or Structured Finance Vehicles**

See Section 3.3.10 on LLDIEs and Section 8.4 on Segregated Portfolio Companies and Multi-issuance Entities

Structured finance structures are in many instances legally remote from the Financial Institution that arranges the transaction in which the entity is involved as issuer or otherwise. A typical structure will include an issuing entity (an SPV), noteholders, a Financial Institution that acts as arranger, seller or originator (in the case of a securitisation), trustee, collateral manager (in the case of a CLO), swap counterparty, other service providers, e.g. paying agent, collateral administrators and often other counterparties.

The common principles in section 2 as to whether an entity meets the definition of a Financial Institution should be applied to all entities within a structured finance structure. More specifically, the expectation would be that issuing entities are likely to be classified as Investment Entities on the basis of their activities.

Those entities that are likely to fall within the definition of Investment Entity would include

- collateralised loan obligation (CLO) or CLO transaction;
- collateralised debt obligation (CDO) or CDO transaction;

- a catastrophic bond or insurance linked securities transaction ("Cat Bonds");
- a repackaging or other form of structured finance transaction where some form of financial assets or receivables are acquired from the proceeds of the notes or bonds issued to finance the transaction and repayment on those notes or bonds are made from and is limited to the financial assets of receivables ("Repacks").

In such cases, the SPV may be considered to fall within Article 1(j) of the IGA between the Cayman Islands and the US.

As a general matter any form of discretionary authority exercised by a third party manager of the SPV or granted by the SPV to an agent to the structure over the composition of the financial assets or receivables is sufficient for the SPV to be classified as an Investment Entity, there is no need for a formal investment management agreement to be in place. Furthermore, a SPV should also be classified as an Investment Entity where an agent is engaged (whether through a formal agreement or otherwise) to administer, monitor or service the financial assets or receivables of the SPV. (It should be noted that corporate administration services provided to a SPV by a TCSP acting in the ordinary course of its business would not ordinarily amount to 'administering' for the purposes of Article 1(j)(3) of the IGA.)

Please note that an entity within a structured finance structure which does not clearly fall either within or outside of the definition of Investment Entity (including taking account of the guidelines provided above and below) may register as an Investment Entity and become a Reporting Cayman Islands Financial Institution.

Entities that may not fall within the definition of an Investment Entity include Asset Finance SPVs. Asset Finance SPVs are entities which own one or more aircraft, ships or other form of moveable asset of a similar nature and finance the acquisition of such asset(s) through debt financing. Such asset is then leased out to an operator, e.g. an airline. An Asset Finance SPV would also act as a pass through entity between the airline and the financiers and would not take any credit or repayment risk on the debt



financing being repaid from receivables paid by the operator under the terms of the lease of the asset. As there is unlikely to be any form of discretionary authority over the assets as the asset(s) are identified prior to the Asset Finance SPV taking part in the transaction, and the Asset Finance SPV itself does not take any risk on the repayment, it is likely that the Asset Finance SPV will be categorised as a Passive NFFE.

Please note that as a Passive NFFE, the Asset Finance SPV would be required to certify whether it has any Financial Accounts held by Specified US Persons or Non-US Entities with Controlling Persons that are Specified Persons. In determining whether or not the Asset Finance SPV has any Specified Persons or Non-US/UK Entities with Controlling Persons that are Specified Persons, such entity shall be required to review its register of members to determine the holders of any shares (being the Cayman Islands equivalent to stock) and apply applicable Cayman Islands anti money laundering legislation in determining any beneficial owners of such shares.

Trusts should be classified in accordance with the trust principles set out within Section 6.

A structured finance vehicle that is a Financial Institution will need to consider if it has any Financial Accounts that may be reportable.

### **8.3. Personal Investment Companies**

Personal Investment Companies will need to consider whether they are within the definition of Investment Entity. Where a Personal Investment Company is managed by a Financial Institution it will be an Investment Entity.

### **8.4. Segregated Portfolio Companies, Umbrella Funds and Multi-issuance Entities**

Segregated Portfolio Companies, umbrella funds and multi-issuance entities may be considered as a whole and categorised accordingly. It is not necessary to treat each segregated portfolio, fund or series separately unless the entity wishes to do so. If one

or more of such segregated portfolio, fund or series elects to avail itself of an exemption, such election shall not prevent the entity (as a whole) from electing to register and report in its own right with respect to its general assets and/or one or more other segregated portfolios, funds or series, as the case may be.

## **8.5. Capital Raising Subsidiary Entities**

Where a legal entity incorporates or establishes a subsidiary or affiliated entity that is incorporated or registered in the Cayman Islands for the purpose of raising capital (whether through the issue of Debt or Equity Interests) and that Cayman Islands entity on-lends or otherwise transfers (by loan or commercial transaction) the proceeds (or substantially all proceeds) of such issuance to its parent entity or an affiliate thereof, such a Cayman Islands entity is not to be regarded as an Investment Entity (irrespective of whether it is managed by another Investment Entity) and accordingly neither the parent or affiliate, nor any holder of such Debt or Equity interests, is not to be regarded as the "customer" of the Cayman Islands entity.

## **9. NON FINANCIAL FOREIGN ENTITIES (NFFEs)**

### **9.1. General**

A NFFE is any non-US entity under the US Agreement and any non-UK entity under the UK agreement that is not treated as a Financial Institution. This applies to any Cayman Islands company, partnership, trust, foundation or any other legal entity that is not a Financial Institution.

There are two categories of NFFE:

- a) Active NFFE
- b) Passive NFFE

An NFFE, whether Passive or Active, has no registration or reporting obligations to the TIA. However, the entity is required to determine its FATCA/IGA classification and, where necessary, self-certify its classification to any Financial Institution that maintains Financial Accounts held by that NFFE. A passive NFFE may also be required to obtain self-certification from a Controlling Person of that NFFE.

Passive NFFEs can however choose to be 'direct reporting NFFEs' and 'sponsored direct reporting NFFEs' as modified by the Temporary Regulations issued by the IRS in February of 2014. The definition of 'excepted NFFE' has been updated to include these two types of NFFEs.

An NFFE may be asked to certify its status as a Passive NFFE to a Financial Institution which holds a Financial Account for the NFFE in accordance with the due diligence obligations in Annex I.

A Financial Institution only has to report Financial Accounts that are held by Passive NFFEs with Controlling Persons that are Specified Persons. See section 9.7.

### **9.2. Passive NFFE**

A Passive NFFE is any NFFE that is not:

- a) an Active NFFE; or
- b) in relation to the US Agreement, a qualified intermediary, a withholding foreign partnership or withholding foreign trust.

### 9.3. Active NFFE

An Active NFFE is any NFFE that meets any of the following criteria:

- a) Less than 50% of the NFFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50% 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;
- b) The stock of the NFFE is regularly traded on an established securities market (see Section 10.9 for the US Agreement and 10.10 for the UK Agreement) or the NFFE is a Related Entity of an entity the stock of which is traded on an established securities market;
- c) In respect of the US Agreement only, the NFFE is organised in a US Territory and all of the owners of the payee are bona fide residents of that US Territory. A US Territory is defined in Article 1(1)(b) of the US Agreement;
- d) The NFFE is a government, a political subdivision of a government (which includes a state, province, county or municipality), an international organisation, a non-US central bank of issue, or an entity wholly owned by one or more of the foregoing.
- e) 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. However, an entity will not qualify as an NFFE if the NFFE functions, or holds itself out, as an investment fund, such as a Private Equity Fund, Venture Capital Fund, Leveraged Buyout 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.

- f) 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;
- g) The NFFE was not a Financial Institution in the past five years, and is 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;
- h) The NFFE 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
- i) For the US Agreement ONLY, the NFFE meets all of the following requirements:
  - a. It is established and maintained in its country of residence exclusively for religious, charitable, scientific, artistic, cultural or educational purposes;
  - b. It is exempt from income tax in its country of residence;
  - c. It has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
  - d. 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 representing the fair market value of property which the entity has purchased; and
  - e. 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 non-profit organisation, or escheat to the government of the entity's country of residence or any political subdivision thereof.

- j) An active NFFE also includes any 'excepted NFFE' as described in the US regulations.

#### **9.4. Direct Reporting NFFEs and Sponsored Direct Reporting NFFEs**

In Notice 2013-69 and subsequent changes to the US Regulations, a new category of Passive NFFE was introduced - a Direct Reporting NFFE. A Direct Reporting NFFE is described at §1.1472-1(c)(3) of the US Regulations and will be treated as an Excepted NFFE. It is a Passive NFFE that elects to report certain information about its direct or indirect substantial U.S. owners directly to the IRS as opposed to providing such information to the Cayman Islands Financial Institution at which an account is held.

The Direct Reporting NFFE will also be required to register with the IRS to obtain its Global Intermediary Identification Number (GIIN).

The US Regulations also allow an entity to serve as a sponsor for one or more Direct Reporting NFFEs (Sponsored Direct Reporting NFFEs), which will require the sponsoring entity to report information about a Sponsored Direct Reporting NFFE's direct or indirect substantial U.S. owners directly to the IRS.

#### **9.5. Passive Income**

Passive income means income other than trading income and would include, for example:

- a) Distributions
- b) Interest
- c) Dividends
- d) Income equivalent to interest, including amounts received in lieu of interest
- e) Rents and royalties

- f) Annuities
- g) Foreign currency gains

Passive income does not include:

- h) Any income from interest, dividends, rents or royalties that is received or accrued from a related person if that amount is properly derived from income of that related person that is not passive income. For this purpose, related person has the meaning given to Related Entity (see Section 2.14), substituting person for entity

## **9.6. Value of assets**

For the purpose of this Section, the value of an NFFE's assets is the fair market value or book value of the assets that is reflected on the NFFE's balance sheet.

## **9.7. Controlling Person**

For this purpose, a Controlling Person means a natural person who exercises direct or indirect control over an entity. This term corresponds to the term 'beneficial owner' as described in Recommendation 10 and the Interpretative Note on Recommendation 10 of the Financial Action Task Force Recommendations (as adopted in February 2012), and must be interpreted in a manner consistent with such Recommendations, with the aim of protecting the international financial system from misuse including with respect to tax crimes.

This includes the natural person on whose behalf a transaction is being conducted and those persons who exercise ultimate effective control by means of control other than direct control.

For trusts this includes the settlor, the trustees, the protector, the identifiable beneficiaries or class of beneficiaries and other natural person exercising ultimate effective control over the trust.

In the case of any other legal arrangement, Controlling Person means a person in equivalent or similar positions.

For this purpose, and in relation only to NFFEs, a 25% ownership threshold applies for companies, partnerships, trusts and foundations. For trusts this would only apply to beneficiaries, settlors when they are also beneficiaries and protectors where they have the power to change the trustees, thereby influencing the distribution of trust assets.

## **9.8. Examples**

### **Example 1**

A non-financial trading company that is managed by a TCSP may be an NFFE rather than an Investment Entity under the US Regulations and CRS definitions. Whether it is an Active or Passive NFFE would depend on the activity of the company but most companies that are not Investment Entities, other than property companies or those involved in trading in certain commodities are likely to be Active NFFEs. For example, a retail business would be an Active NFFE.

### **Example 2**

The holding company of a trading company that is an Active NFFE that receives only dividend income from that trading company and bank interest would be treated as an active NFFE. This is because, although the income of the holding company is dividend income and so prima facie passive as defined, that dividend is sourced from income that is active in nature according to section 9.3 above.

### **Example 3**

A company that invests solely in real estate and receives rental income and realises capital gains on the sale of such property would be a Passive NFFE, provided either at least 50% of the income is rental income (section 9.5(e) applies) or the capital gains arises from the sale of the property that generated the rental income.

### **Example 4**

A real estate trust may be treated as a Passive NFFE, provided at least 50% of the



gross income is passive income or at least 50% of the trust's assets produce passive income, even if that trust is managed by an Investment Entity or the property is held through a company under the US Regulations and CRS definitions.

## 10. FINANCIAL ACCOUNTS

### 10.1. General

Under the Agreements, Reporting Cayman Islands Financial Institutions must provide information to the TIA on an annual basis in relation to Financial Accounts held by Specified Persons. In the US Agreement these are referred to as US Reportable Accounts and in the UK Agreement as UK Reportable Accounts.

A Financial Institution, unless otherwise exempt, must identify:

- Whether it maintains any Financial Accounts;
- The type of Financial Account maintained; and
- Whether the account holder of those Financial Accounts is a Specified Person or a Passive NFFE with one or more Controlling Persons who are Specified Persons.

For the purposes of the Agreements, the term Financial Account is broadly defined and may include products or obligations that would not normally be regarded as a Financial Account in other Cayman Islands law or in everyday commercial use.

For the purposes of the Agreements, a Financial Account is an account that is maintained by a Financial Institution. See Section 10.1.1 for the meaning of 'maintained'.

However, not all accounts held by the Financial Institution will be Financial Accounts for these purposes. Some products are exempt from the definition of Financial Account.

There are five categories of Financial Account:

- Depository Accounts (Section 10.3)
- Custodial Accounts (Section 10.4)
- Cash Value Insurance Contracts (Section 10.6)
- Annuity Contracts (Section 10.7)
- Equity and Debt Interests (Section 10.8)

Each category of Financial Account is subject to exclusions and exemptions and further details can be found in the relevant Sections indicated above.

For the purposes of reporting to the TIA under the Agreements, the Financial Account must be a US or UK Reportable Account and, in relation to a Depository Account, Custodial Account, Cash Value Insurance or Annuity Contract, must be maintained by a Cayman Islands Financial Institution.

Shareholdings and loan/debenture stock holdings can be 'financial instruments/contracts' and are reportable if held in a Custodial Account (see Section 10.4).

Where a Financial Institution is acting as an executing broker, and simply executing trading instructions, or receiving and transmitting such instructions to another executing broker, (either through a recognised exchange, multilateral trading facility or 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 instruction, or receiving and transmitting such instructions, as a Financial Account under the Agreements. 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;

- The account is established and used solely to secure the obligation of

the parties to the transaction.

- 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.
- The assets of the account, including the income earned thereon, is paid or otherwise distributed for the benefit of the parties when the transaction is completed.

#### **10.1.1. Accounts ‘maintained’ by Financial Institutions**

In relation to each type of Financial Account, ‘maintained’ has the following meaning:

- A Depository Account is maintained by the Financial Institution which is obliged to make payments with respect to that account.
- A Custodial Account is maintained by the Financial Institution that holds custody over the account, including a Financial Institution that holds assets in the name of a broker (‘in street name’) for an account holder.
- A cash value Insurance Contract or an Annuity Contract is maintained by the Financial Institution that is obligated to make payments with respect to the contract.
- Any 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 maintain Custodial Accounts as well as Depository Accounts.

When 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.

A Financial Account maintained by a non-Cayman Islands branch of a Cayman Islands Financial Institution is not reportable by the Cayman Islands Financial Institution and there shall be no liability or penalty on the Cayman Islands Financial Institution for failure to comply.

#### **10.1.2. Reportable Accounts**

A Financial Account is a US Reportable Account where it is held by one or more Specified US Persons or by a non-US Entity with one or more Controlling Persons that are Specified US Persons. If the account holder of a US Reportable Account ceases to be a Specified US Person, or the Controlling Persons of a Non-US Entity cease to be Specified US Persons, then the Financial Account will cease to be a US Reportable Account.

A Financial Account is a UK Reportable Account where it is held by one or more Specified UK Persons or by a non-UK Entity with one or more Controlling Persons that are Specified UK Persons. If the account holder of a UK Reportable Account ceases to be a Specified UK Person, or the Controlling Persons of a Non-UK Entity cease to be Specified UK Persons, then the Financial Account will cease to be a UK Reportable Account.

Where a Financial Institution engages a third party to carry out the Financial Institutions' due diligence and reporting obligations then those obligations remain with the Financial Institution.

#### **10.1.3. Ceasing to be a Reportable Account**

If the account holder of a Reportable account ceases to be a Specified US/UK Person, or the Controlling Persons of a Non-US/UK Entity ceases to be Specified US/UK Person, then the Financial Account will cease to be a Reportable Account.

If the account holder, or the Controlling Persons of a Non-US/UK Entity, are Specified US/UK Persons at any point in the reportable period then the Financial Account will be a Reportable Account for that period.

However, following a change in circumstance, if the Financial Institution is not in a position to review multiple statuses held during the reportable period when preparing their return (for instance if the account holder has had one or more changes in address) then the Financial Institution should treat the Financial Account as a Reportable Account or not based on the status at the end of the reportable period.

## **10.2. Account Holders**

In order to identify the person or entity that is the account holder under the terms of the Agreement, a Financial Institution may need to consider the type of account and the capacity in which it is held.

### **10.2.1. Trusts and Estates**

Where a Trust or Estate is listed as the holder of a Financial Account then they are to be treated as the account holder, rather than any settlor or beneficiary.

The US Temporary Regulations issued in February of 2014 confirmed that a grantor trust is treated as the account holder of any account, not the grantor of the trust. This does not remove the requirement to identify the Controlling Persons of a Trust or Estate, where the Trust or Estate is a Passive NFFE.

In relation to a share register, where an issuer's share register has been the subject of an acquisition, (for example a takeover by Company A of Company B) and shareholders of Company B 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 Section 10.8 applies.

#### **10.2.2. Partnerships**

Where a Financial Account is held in the name of the partnership it will be the partnership that is the account holder rather than the partners in the partnership.

#### **10.2.3. Accounts held by persons other than a Financial Institution**

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

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

is not treated as an account holder with respect to such account for purposes of the Agreement. Where the Financial Account does not meet the conditions relating to Intermediary Accounts (Section 10.15) then the person on whose behalf the account is held is the account holder.

#### **Example 1**

Where a parent opens an account for a child, the child will be the account holder.

#### **10.2.4. Joint Accounts**

Where a Financial Account is jointly held, the balance or value in the account is to be attributed in full to all joint holders of the account. This will apply for both aggregation and reporting purposes.

If an account is jointly held by an individual and an entity, the Financial Institution will

need to apply separately both the individual and entity due diligence requirements in relation to that account.

#### **10.2.5. Cash Value Insurance Contracts and Annuity Contracts**

An Insurance or Annuity Contract is held by each person entitled to access the contract's value (for example, through a loan, withdrawal, surrender, or otherwise) or with the ability to 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.

#### **10.2.6. 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 insured is a Specified Person (and the other is not a Specified Person) this will be a Reportable Account which is reported annually. If the Specified Person dies during the term of the insurance it will cease to be a Reportable Account.

### **10.3. Depository Account**

A Depository Account is any commercial current account, and 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. A Depository Account 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.

However, credit cards will not be considered to be Depository Accounts where the issuer of the credit card 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.

Where a Financial Institution elects to apply the threshold for Depository Accounts this will mean that a credit card account will only be reportable where, after applying the aggregation rules (See Section 12.14):

- there are no other accounts and the balance exceeds \$50,000; and
- the total balance on all aggregated Depository Accounts (including the credit card balance) exceeds \$50,000. See Section 3.3.4 regarding the US Agreement and section 4.2.3 regarding the UK Agreement for information in respect of entities that are credit card issuers.

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.

#### **10.4. 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.

Financial instruments/contracts which can be 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 credit loan obligation
- 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. These are 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 for the benefit of another person.

A Cash Value Insurance Contract or an Annuity Contract is not 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.

#### **10.4.1. Collateral**

Notwithstanding the above, the Custodial Accounts definition includes all accounts which are maintained for the benefit of another, or arrangements pursuant to which an obligation exists to return cash or assets to another.

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 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 for the purposes of the Agreements.

### **10.5. 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 but it could be one of the assets held in a Custodial Account.

### **10.6. Cash Value Insurance Contract**

A Cash Value Insurance Contract is an Insurance Contract (as defined in 10.5) where the cash surrender or termination value (determined without the deduction for 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. The \$50,000 limit only applies under the UK Agreement if the Financial Institution makes the appropriate election.

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; or
- 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.

### **10.7. 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. The term Annuity Contract also includes a contract that is considered to be such in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

An Annuity Contract is not to be considered to be a custodial account but it could be one of the assets that are held in a custodial account.

The following are not considered to be an Annuity Contract for these purposes.

- Pension annuities – see section 5.
- Immediate needs annuities.
- Periodic payment orders.
- Reinsurance of Annuity Contracts between two Insurance Companies.

### **10.8. Equity or debt interest in an Investment Entity**

Where an Investment Entity is an asset manager, investment advisor or other similar entity then the Debt and Equity Interests in that entity are generally excluded from being a Financial Account. This mirrors the treatment of Debt and Equity interests in entities that are solely Depository or Custodial Institutions. Debt and Equity Interests (other than regularly traded interests – see 10.9 and 10.10) are only Financial Accounts if they are issued in entities that are Investment Entities because:

- the entity's gross income is attributable to investing, reinvesting or trading in financial assets, and they are managed by a Financial Institution including another Investment Entity, or

- the entity functions or holds itself out as a Collective Investment Vehicle, 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 an interest (if any) held in that Trust by the following persons:

- i. A settlor of the trust;
- ii. A beneficiary that is entitled to a mandatory distribution or benefit (directly or indirectly) from the trust;
- iii. A beneficiary that receives a discretionary distribution or benefit from the trust in the calendar year; and
- iv. Any person that exercises ultimate effective control over the trust.

#### **10.9. Equity or Debt Interests regularly traded on an established securities market – UK Agreement**

Equity or Debt Interests that are regularly traded on an established securities market are not Financial Accounts for the purposes of the Agreements.

For the purposes of the UK Agreement, an equity or debt interest is ‘regularly traded’ if it is listed and/or available for trading on an established securities market. There is no need to check annually whether any transactions have been undertaken.

The Cayman Islands Stock Exchange is not considered to be an established securities market for these purposes.

#### **10.10. Equity or Debt Interests regularly traded on an established securities market – US Agreement**

For the purposes of the US Agreement, an equity or debt interest is ‘regularly traded’ if there is a meaningful volume of trading with respect to that interest on an ongoing basis.

An interest is not “regularly traded” if the holder of the interest (other than a Financial Institution acting as an intermediary) is registered on the books of such Financial Institution. This exclusion does not apply to interests registered on the books of the Financial Institution prior to 1 July 2014 and, with respect to interests so registered after 1 July 2014, a Financial Institution is not required to apply this exclusion prior to 31 December 2015.

The Cayman Islands Stock Exchange is not considered to be an established securities market for these purposes.

#### **10.11. Products Exempt from being Financial Accounts**

Annex II the Agreements set out certain products that have been agreed as low risk (in terms of the likelihood of being used for tax evasion) and which are exempt from being treated as Financial Accounts. As such, Financial Institutions will have no reporting obligations under the Agreements in respect of these accounts or products.

The Agreements also provide the capacity for the respective Annexes to be updated, either to allow for other low risk products to be added or to remove products that are no longer deemed low risk.

Sections 10.12 to 10.15 detail identified Cayman Islands accounts that are exempt from being a Financial Account.

#### **10.12. Retirement Accounts and Products**

Consideration should be given to the criteria set out in Annex II of the Agreements in

relation to retirement accounts and products.

The following are treated as exempt accounts for the purpose of the Agreements by virtue of being a Pension Fund of an Exempt Beneficial Owner (see section 5).

#### **10.13. Certain other Tax Favoured Accounts or Products - Cayman Islands Specific**

There are currently no other Tax Favoured Accounts or Products identified as being exempt. Consideration should be given to the criteria set out in Annex II of the Agreements. Should accounts or products be identified as potentially qualified, the TIA should be notified and will consider including in this Section.

#### **10.14. Accounts of deceased persons**

Accounts of deceased persons will not be Financial Accounts if the Cayman Islands Financial Institution that maintains them has received and is in possession of a formal notification of the account holder's death (for example a copy of the deceased's death certificate, a copy of the coroner's interim certificate or a copy of the will). Such an account will not be reportable in the year of the account holder's death and subsequent years.

Where the Estate is established by a Grant of Probate in respect of deceased persons account(s) the Reporting Cayman Islands Financial Institution is required (as per Section 10.2.1) to identify the Controlling Persons of the Estate.

#### **10.15. Intermediary/Escrow Accounts**

Accounts that meet the conditions below will not be Financial Accounts.

Accounts held by a Cayman Islands Financial Institution for a non-Financial Intermediary (such as a firm of attorneys or estate agents) and 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;
- a sale, exchange, or lease of real or personal property where it also meets the following conditions:
  - The account holds only 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;
  - 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.
- An obligation of a Financial Institution servicing a loan secured by real property to set aside a portion of a payment solely to facilitate the payment of taxes or insurance related to the real property at a later time; or
- An obligation of a Financial Institution solely to facilitate the payment of taxes at a later time.

Accounts provided by a non-Financial Intermediary as an intermediary (such as non-legal Escrow type accounts) that meet the conditions above will also not be Financial Accounts.

Where the Financial Account does not meet the above conditions then please refer to Section 10.16.

## **10.16. Undesignated accounts**

Where a Financial Account held by a non-Financial Intermediary such as an attorney



does not meet any of the conditions set out in Section 10.15, but is an account holding, on a pooled basis, the funds of underlying clients of the non-Financial Intermediary where:

- 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, then the Financial Institution is only required to undertake the due diligence procedures in respect of the non-Financial Intermediary.

A designated client account is an account held with a Financial Institution, operated by a non-Financial Intermediary but where the underlying client or clients of the intermediary are listed or can be identified by the Financial Institution.

### **10.17. Segregated accounts**

Where an investment manager is appointed to provide investment management services directly by the legal owner of assets as segregated accounts, then these are not Financial Accounts of the investment manager. Instead they will be Custodial Accounts of a Custodian, who will need to treat the investors as their account holders as there is no interposing fund. Note that in cases where a discretionary investment manager also holds assets on behalf of clients (by acting as Custodian), reporting will be required on those accounts by virtue of the investment manager falling within the definition of a Custodial Institution.

This also applies to discretionary investment managers who arrange for custody as agent on their clients' behalf, where the custody accounts are pooled nominee accounts.

There may be situations where an investment manager does not hold custody for its customers (e.g. investment managers who arrange for custody as agent on their

customers' behalf or where the custody accounts are pooled nominee accounts) but holds the information required for due diligence and reporting.

The investment manager will be the reporting Financial Institution for those accounts by virtue of its status as an Investment Entity where:

- it alone has direct knowledge of its customers and their accounts and
- it alone carries out the AML/KYC procedures on those accounts.

#### **10.17.1. Fully disclosed clearing and settlement (Model B)**

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 (the 'tripartite relationship') 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 its 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 in respect of the underlying client required under the Agreement and the relevant legislation is the responsibility of the broker.

The clearing firm however will 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 executing, placing or transmitting orders and would therefore include Financial Accounts if their business is more than simply advisory.

#### **10.18. Dormant accounts**

A Cayman Islands Financial Institution may apply its existing normal operating procedures to classify an account as dormant. Where normal operating procedures are not applicable, then the Financial Institution is to classify an account as dormant for the purposes of the Agreements where:

- there has been no activity on the account in the past three years;
- the account holder has not contacted the Financial Institution regarding that account or any other account in the past six years;
- the account is not linked to an active account belonging to the same account holder.

The 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 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:

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

The Financial Institution would then have to ensure it establishes the account holders' status as if the account were a New Account.

#### **10.18.1. Dormant and Liquidating Investment Entities**

When an Entity that has been an Investment Entity is closed (i.e. there are no remaining participating investors, or equivalent, in the Investment Entity, and the Investment Entity is not open to further investors), or a Liquidator has been formally appointed, but there remain residual assets and debtors, and realisation or recovery actions are being pursued, the Investment Entity will not be an Investment Entity for the purposes of the Agreements. Where any Investment Entity was closed, or in liquidation before 30 June 2014, it will have no registration or reporting obligations in relation to that business. However, when the Entity is no longer considered an Investment Entity after 1 July 2014, a final return should be made in accordance with the reporting requirements if applicable by or before the next reporting deadline.

#### **10.19. Rollovers**

Where some or all of the proceeds of a maturing fixed term product are rolled over, automatically or with the account holder's interaction, into a new fixed term product this shall not be deemed to be the creation of a New Account.

#### **10.20. Syndicated Loans**

In relation to syndicated loan activities an Entity acting as a lead manager/fronting bank/agent (Agent) of a syndicated Invoice Finance facility would not in itself be sufficient to bring that entity into the Investment Entity or Custodian Institution definition as a Financial Institution, provided no other business activities would bring the entity into that classification.

Where a borrower requires a large or sophisticated facility, or multiple types of facility, this is commonly provided by a group of lenders, known as a syndicate, under a syndicated loan agreement.

To facilitate the process of administering the loan on a daily basis, one bank from the

syndicate is typically appointed as Agent. The Agent's role is to act as the agent for the lenders, (i.e. not of the borrower) and to coordinate and administer all aspects of the loan once the loan agreement has been executed, including acting as a point of contact between the borrower and the lenders in the syndicate and monitoring the compliance of the borrower with certain terms of the facility.

In essence, the Agent performs exclusively operational functions. For example, the borrower makes all payments of interest and repayments of principal and any other payments required under the loan agreement to the Agent and the Agent then passes these monies back to the lenders to which they are due. Similarly, the lenders advance funds to the borrower through the Agent. The terms of a syndicated loan agreement usually entitle the Agent to undertake the roles described above in return for a fee.

In these circumstances the participation of a lender in a syndicated loan, where a Cayman Islands Financial Institution Agent acts for and on behalf of a syndicate of lenders which includes that lender, does not lead to the creation of a Custodial Account held by the Cayman Islands Agent.

The lenders hold their interests in a loan directly rather than through the Agent and, therefore, the participation of a lender does not amount to a Custodial Account held by a Cayman Islands Agent.

#### **10.21.      Electronic money issuers (E-Money)**

The following table details some types of E-Money formats.

<b>Product</b>	<b>'Financial Account' ?</b>	<b>Comments</b>
<b>E-voucher</b>	No	None

<b>Pay card</b>	Yes	Where cash is retained in credit, this causes the arrangement to fall within scope of financial account. This is a depository account, and could only benefit from an exemption if the manufacturing FFI meets the qualified credit card issuers exemption.
<b>Prepaid credit card</b>	Yes	Where cash is retained in credit, this causes the arrangement to fall within scope of financial account. This is a depository account, and could only benefit from an exemption if the manufacturing FFI meets the qualified credit card issuers exemption.
<b>Merchant services account</b>	Possibly	<p>If cash is retained within a merchant account then this is not a depository account, but is a custodial account.</p> <p>If merchant services payments simply flow through systems but were not retained in an account, such payments would not be financial accounts. If in scope, the only comparable exemption in the US legislation is escrow account exemption, but these are not escrow accounts.</p>

In addition to the above, any account that would otherwise fall within the definition of a financial account (depository, investment, custodial, insurance) shall not fail to qualify as a financial account just because it is maintained in an e-Money format. For example, an online depository account (sometimes known as an 'e-wallet') is treated the same way as a traditional depository account.

## **11. REGISTRATION**

### **11.1. General requirements**

Registration is only required under the US Agreement and references to registration refer to registration with the IRS on the IRS FATCA portal under the US Regulations.

### **11.2. Who needs to register**

All Cayman Islands Reporting Financial Institutions and Registered Deemed Compliant Financial Institutions as defined under the US Agreement (see Section 3.2) must register and obtain a GIIN from the IRS.

A Cayman Islands Financial Institution can be a Cayman Islands Reporting Financial Institution and so be required to register even if it does not identify any Specified Persons as holders of Financial Accounts.

A Financial Institution with a Local Client Base that has a reporting obligation, because it has some Reportable Accounts, will require a GIIN and so will need to register.

A Sponsored Investment Entity that has Reportable Accounts will also need to be registered by its Sponsoring Entity.

Entities that are Reporting Financial Institutions and also acting as a sponsor for other entities or the trustee of a Trustee Documented Trust will need to register separately for each of these roles.

### **11.3. Which Financial Institutions do not need to register**

The following entities do not need to register:

- Any Non-Reporting Financial Institution as described in Annex II of the US Agreement
- Any Deemed Compliant Financial Institution, except a Registered Deemed Compliant Financial Institution (see Section 3.2)

- Any entity that qualifies as a Exempt Beneficial Owner (see Section 5)
- Any Active or Passive NFFE (unless a Direct or Sponsored Direct Reporting NFFE) (see Section 9)

#### 11.4. Timetable for registration

The registration service for Financial Institutions is open, and GIINs will be assigned to registered entities from January 2014. The IRS has published guidance regarding the registration process (IRS Publication 5118 – Rev. 12-2013) which serves as a User guide for the FATCA Registration process. Financial Institutions in a Model 1 jurisdiction are not required to provide verification of a GIIN to withholding agents in order 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 (which will be supported by a list of IGA jurisdictions published by the IRS).
- providing a FATCA W8-BEN-E (once final version is released) certifying the Entity's FATCA classification and other required information

A reporting Financial Institution under a Model 1 IGA will be able to register and obtain a GIIN prior to 1 July 2014 and may generally find it convenient to do so. Nonetheless, such a Financial Institution is not required to provide a GIIN to withholding agents prior to 1 January 2015 and therefore has time beyond 1 July 2014 to register and obtain a GIIN.

In order to be on the IRS List by 1 January 2015, a reporting FI under a Model 1 IGA would need to register and obtain a GIIN by 22 December 2014.

In addition, a reporting Financial Institution under a Model 1 IGA must register prior to 1 July 2014 (1) if it maintains one or more branches (other than a Limited Branch or US



branch) in jurisdiction(s) that are not covered by a Model 1 IGA; (2) if it is renewing its QI, WP or WT Agreement; or (3) if it intends to be a Lead FI for one or more Member Financial Institutions that are not established in, and operating exclusively in, other Model 1 IGA jurisdictions.

It is important to carefully examine a Cayman Islands Reporting Financial Institution's facts and circumstances before deciding on an appropriate registration date. For example, certain funds may have side letters with earlier commitments and some US investment banks may have internal policies to obtain GIIN's from all clients before 1 July 2014.

### **11.5. Registration changes**

Any Cayman Islands Reporting Financial Institution submitting its registration information may subsequently choose to revoke its status by revisiting its account and deleting its registration (if its GIIN has not yet been issued) or cancelling its registration (if its GIIN has already been issued).

## 12. DUE DILIGENCE REQUIREMENTS

### 12.1. General

Financial Institutions are responsible for the identification and reporting of Financial Accounts held by Specified Persons or by Passive NFFEs with one or more Controlling Persons who are Specified Persons or by Non-Participating Financial Institutions. This Section sets out the procedures Financial Institutions must carry out to identify those account holders.

It is important that Financial Institutions follow the procedures set out in the Agreements, and in these Guidance Notes, rather than those set out in the US Regulations.

A 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 Financial Institution and so any failure will be seen as a failure on the part of the Financial Institution.

A Financial Institution will need to follow one or more of these three processes for identification of account holders depending on whether the account holder is an individual or an entity and whether the account is pre-existing or not:

a) Indicia search

Searching for relevant indicia by reference to documentation or information held or collected in accordance with opening or maintaining an account. This may include information held for the purpose of compliance with Cayman Islands AML/CFT rules.

b) Self-certification

Requesting self-certification from an account holder or a Controlling Person of a Passive NFFE where applicable.

c) Publicly available information (for entities only)

Searching publicly available information to determine the FATCA status of an entity, for example whether it is an Active NFFE or a Financial Institution that has registered and obtained a GIIN.

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

## **12.2. Self-Certification**

As part of the process of identifying the status of Account Holders and entities and identifying the controlling persons of entities Financial Institutions can rely on self-certifications.

Self-certification may be used by a Financial Institution in relation to individual account holders as follows:

- a) To capture the name, permanent residential address and country of birth of the individual
- b) To establish the countries where a new individual account holder is resident for tax purposes;
- c) To obtain a TIN (or a date of birth in lieu of TIN) or similar identification number such as National Insurance Number or Social Security Number from a New Individual account holder for each country where they are resident for tax purposes; or
- d) In order to show that an individual is not in fact a resident for tax purposes in a country, even if indicia are found indicating such residence in respect of a Lower Value or High Value Pre-existing Individual Account that they hold.

Self-certification is required in relation to entities as follows, if the Financial Institution cannot determine the status from information in its possession or that is publicly available:

- a) To capture the entity name and country of incorporation or organization
- b) To establish the status of an entity where a Financial Institution cannot reasonably determine that the account holder is not a Specified Person.

- c) To establish the status of a Financial Institution that is neither a Cayman Islands Financial Institution nor a Financial Institution in an IGA jurisdiction, unless a Financial Institution's status can be established from an IRS published list.
- d) To establish whether an entity is a Passive NFFE.
- e) To establish the status of a Controlling Person of a Passive NFFE and whether or not they are a resident in a relevant country for tax purposes.

The form must be signed by the account holder and dated. The form can include other information required for other purposes such as AML due diligence and can be in paper or electronic format.

Self-certification can be in any format and can include the use of withholding certificates or other similar agreed forms.

A self-certification provided by an account holder cannot be relied upon if a Financial Institution has reason to know that it is incorrect, unreliable or there is a change in circumstance which changes the account holder's status.

#### **12.2.1. Where a self-certification is already held**

If the Financial Institution already holds a self-certification for the account holder, for instance, if one has been obtained for another Financial Account, then provided the Financial Institution is able to access this document they will be held to have 'obtained' this document. However, if there has been a change in circumstance since this self-certification was obtained, or any of the information obtained when the new account is opened indicates the previous self-certification can no longer be relied upon, then a new self-certification must be obtained.

#### **12.2.2. Timing of a self-certification**

It is expected that a self-certification will be requested as part of the account opening procedure for new customers. It is not mandatory that the self-certification must be obtained before the account can be opened, however the Financial Institution should

request and obtain the self-certification within a reasonable period (90 days or a reasonable length of time determined by the circumstances).

If for some reason the Financial Institution is unable to obtain a valid self-certification on opening of the account by the time that the account would need to be reported (e.g. an assignment of an insurance contract where the Financial Institution is unable to refuse the account even though no self-certification is provided, the self-certification provided cannot be relied upon, or the account holder has simply not yet replied) then the account should be treated as reportable from the date it is opened until documentation is received to evidence otherwise.

### **12.3. IRS withholding certificates (US Agreement)**

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 renewed.

### **12.4. Self-certification for New Individual Accounts**

The requirements for self-certification for New Individual Accounts are focused on establishing the tax residency or residencies of the account holder, and for the specific purposes of the Agreements.

#### **12.4.1. Obtaining a self-certification**

Unless the Financial Account is of a type that does not need to be reviewed, identified or reported, a Financial Institution must obtain a self-certification that would enable it to determine where the account holder is tax resident and, in the case of the US Agreement, whether or not they are a US citizen. The self-certification process and documentation should allow for cases where the account holder is a tax resident of more than one country.

Citizenship is important when considering the US Agreement as a US citizen is

considered a US resident for tax purposes even if they are also tax resident elsewhere.

For the UK Agreement, residence in the UK is important and citizenship is not relevant.

For the purposes of the US Agreement, where a self-certification determines that a New Individual account holder is a US citizen or resident for tax purposes, there is also a requirement to obtain a US TIN from the account holder.

For the purposes of the UK Agreement, where a self-certification determines that a New Individual account holder is a UK resident for tax purposes, there is also a requirement to obtain the date of birth and National Insurance Number from the account holder.

#### **12.4.2. Wording of self-certification**

A Financial Institution can choose the form of wording it uses to determine the tax residence of a New Individual account holder. However the wording must be sufficient for an account holder to confirm the country or countries where they are tax resident and, in respect of the US Agreement, if they are a US citizen.

#### **12.4.3. Format of self-certification**

Financial Institutions may permit individuals to open accounts in various ways. For example individuals can make investments or purchase financial products by telephone, online or on paper application forms. They may even invest without using any of the Financial Institution's set application processes and instead send a payment with a covering letter, which is then followed up with required documentation. The method of self-certification does not necessarily have to follow the existing account opening or application method.

Self-certifications can be obtained in any of these account opening procedures. The following examples are intended to illustrate how these may operate, but are not exhaustive.

### **Example 1 - Telephone Applications**

An individual makes a telephone call to a Financial Institution, asking to open an account in line with the Financial Institution's normal account opening procedures.

The Financial Institution asks the account holder to state the countries in which they are tax resident and whether they are a US citizen. The individual provides this information on the phone and the Financial Institution records the confirmation on its system. Subsequent paperwork sent to the investor to confirm the account opening should include their response to these self-certification questions and require them to contact the Financial Institution in the event that it is not correct.

### **Example 2 - Online Applications**

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 select the appropriate country or countries in which they are tax resident and whether they are a US citizen.

## **12.5. Self-certification for Pre-existing Individual Accounts**

If indicia are found suggesting that the account holder is potentially a US citizen or resident for tax purposes in a country with which the Cayman Islands has an Agreement, then the Financial Institution must treat the account as a Reportable Account under the relevant Agreement.

However, if the Financial Institution obtains a self-certification from the account holder confirming that the indicia do not properly reflect their actual status (for example the indicia suggests that they are a US citizen but the self-certification states that they are not) and obtains or has previously reviewed and recorded details of any other documents required under the due diligence procedures applicable to Pre-Existing Individual Accounts, then the account would not be treated as reportable.

## **12.6. Self-certification for New Entity Accounts**

Unless a Financial Institution can identify or rely on information it holds or that is publicly available, it should obtain a self-certification from the Entity account holders who are identified as one of the following:

- a) Specified Person;
- b) a Financial Institution that is neither a Cayman Islands Financial Institution nor a Financial Institution in an IGA jurisdiction, a Participating Financial Institution, a Deemed Compliant Financial Institution or an Exempt Beneficial Owner (as these will not be Reportable Accounts);
- c) a Passive NFFE.

For entities that are Passive NFFEs, the Financial Institution must identify the Controlling Persons and obtain a self-certification from the account holder or any Controlling Persons to determine whether they are a US citizen, in respect of the US Agreement, or where they are resident for tax purposes.

This determination can be achieved in the same way as described for New Individual Accounts in Section 12.4 above.

## **12.7. Self-certification for Pre-existing Entity Accounts**

Self-certification is required for Pre-existing Entity Accounts in the following situations.

- a) An entity account holder is identified as a Specified Person. The Financial Institution will be required to treat the account as reportable unless it obtains a self-certification showing that the account holder is not a Specified Person.
- b) The entity account holder is a Financial Institution that is not a Cayman Islands Financial Institution or Financial Institution in an IGA jurisdiction or a Participating FFI whose GIIN can be verified on the published IRS FFI list. The Financial Institution will be required to treat the account as reportable (and as a Non-Participating Financial Institution, for the purposes of the US Agreement) unless it obtains a self-certification that the entity is a Certified Deemed Compliant Financial Institution, an Exempt Beneficial Owner or an excepted FFI, as defined



in relevant U.S. Treasury Regulations.

- c) The entity Account Holder is a Passive NFFE (an entity account holder will be a Passive NFFE if it is not an Active NFFE – see Section 9). 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.

For the purposes of determining whether a Controlling Person of a Passive NFFE is a Specified Person a Cayman Islands Financial Institution may rely upon:

- a) information collected and maintained pursuant to AML/KYC procedures if the account balance of value does not exceed \$1,000,000; or
- b) If the account balance held by one or more Passive NFFEs exceeds \$1,000,000, a self-certification from the account holder or Controlling Person can be accepted as evidence of status of the Controlling Person.

## **12.8. Confirming the Reasonableness of Self-certification**

A Financial Institution receiving a self-certification must consider other information it has obtained concerning the account holder, including any documentation collected pursuant to AML/KYC procedures, to check whether the self-certification is reasonable. In instances where there is an apparent conflict, the Financial Institution is required to make further enquiries.

### **Example 1**

Where an account holder provides one of the US indicia, such as a US address, to the Financial Institution but then provides a self-certification confirming they are not US resident for tax purposes, the Financial Institution would need to make further enquiries to establish whether or not the self-certification is reasonable.

Where a Financial Institution relies on AML procedures performed by other parties and no self-certification is provided directly to the Financial Institution, the Financial Institution may request that the third party should obtain a self-certification for the

purposes of the legislation. The third party should then confirm the reasonableness of the self-certification based on information that it has obtained.

For the avoidance of doubt, where self-certification is received directly by the Financial Institution, there is no requirement to ensure that any third party that carried out AML procedures has confirmed its reasonableness. The Financial Institution is required to confirm the self-certification provided to it based on any other information it alone has obtained or holds. So where e.g. a financial advisor has performed AML checks, the Financial Institution is not deemed to have seen any documentation the financial adviser has seen, unless the documentation is also provided to the Financial Institution.

## **Example 2**

A Financial Institution has received a new account opening instruction from an individual (that may have been by telephone) which includes a self-certification regarding the account holder's residence status. The Financial Institution has performed AML procedures by checking the identity of the individual (name, address and date of birth) against the records of, for example, a credit reference agency. The check confirmed the identity of the individual.

The Financial Institution can satisfy its obligations under the Agreements 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 information in the account opening instruction alone.

If the account opening instruction is received by telephone, the account holder may receive paperwork that includes their response to the self-certification question and other questions asked. The account holder should be requested to contact the Financial Institution in the event that any of the information is not correct within a specified period. Provided the 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 3**

A Financial Institution has received new account opening documentation from an individual who has been advised by a financial adviser. The Financial Institution is unaware of any previous contact with the individual and has not delegated the financial adviser to carry out due diligence procedures on its behalf. However, the Financial Institution can rely on the introducing financial adviser to perform the necessary AML checks to identify the individual and is provided with a confirmation by the financial adviser that they have done so.

The Financial Institution must ensure it identifies the account holder's status for FATCA purposes. The documents received regarding the account opening contains 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, for example, in the US for tax purposes, and is not a citizen of the US.

The Financial Institution can satisfy its requirements under the Agreements 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. The Financial Institution is not deemed to have seen any documentation the financial adviser has seen.

### **Example 4**

As per example 2, but the Financial Institution has delegated the financial adviser to perform the FATCA due diligence procedures on its behalf.

The introducing financial adviser carries out the AML checks and obtains a self-certification from the individual confirming their FATCA status. The Financial Institution can satisfy its requirements under the Agreements by obtaining confirmation from the financial adviser that they have confirmed the reasonableness of the self-certification.

### **Example 5**

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

The Financial Institution can satisfy its requirements under the Agreements 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.

### **12.9. Acceptable documentary evidence**

A Financial Institution, or the third party service provider acting on behalf of the Financial Institution, can accept documentary evidence to support an account holder's status provided the documentation meets one of the following criteria:

- A certificate of residence issued by an authorised government body of the country in which the account holder claims to be resident, for example a certificate of tax residence issued by the tax authority.
- For individuals, any valid identification issued by an authorised government body that includes the name of the individual and is typically used for identification purposes, for example a passport or driving licence.
- For entities, any official document issued by an authorised government body that includes the name of the entity and either the principal office address in the country in which the entity claims to be resident or the jurisdiction in which the entity was incorporated or formed.
- Any financial statement, third party credit report or US Securities and Exchange Commission report.
- Any of the documents referenced in the Cayman Island's attachment to the QI Agreement as follows:
  - For a natural person
    - i. Passport, or

- ii. National identity card, or
  - iii. Driving licence that bears a photograph.
- For legal persons
  - i. For partnerships; a copy of the partnership agreement and any subsidiary or subsequent agreement evidencing the appointment and powers of the current partners, or certified copies of extracts therefrom covering the appointment and powers of the partners.
  - ii. For corporations; a copy of the Certificate of Incorporation or the Memorandum and Articles of Association (or foreign equivalent).
  - iii. For trusts: a copy of the trust deed and any subsidiary or subsequent deed evidencing the appointment and powers of the current trustees, or certified copies of extracts from the Trust deeds therefrom covering the appointment and powers of the trustees.

#### **12.10. Retention of Documentary Evidence**

A Financial Institution, Sponsoring Entity or Third Party Service Provider undertaking due diligence on behalf of a Financial Institution, must retain records of the documentary evidence, or a notation or record of documents reviewed and used to support an account holder's status for six years following the end of the year in which the status was established. Financial Institutions may want to review their document retention policies to ensure they are compliant.

The documentary evidence can be retained as originals, photocopies or in an electronic format.

A Financial Institution that is not required to retain copies of documentation reviewed under AML due diligence procedures, by virtue of not being covered by the AML Regulations, will be treated as having retained a record of such documentation if it retains a record noting:

- a) The date the documentation was reviewed;
- b) Each type of documentation reviewed;
- c) The document's identification number where present, such as a

passport number; and

d) Whether any relevant indicia were identified.

For High Value Pre-existing Accounts where a Relationship Manager enquiry is required, records of electronic searches, requests made and responses to Relationship Manager enquiries should be retained for six years following the end of the year in which the due diligence was undertaken. Guidance on the identification and role of a Relationship Manager are in Section 13.11.

#### **12.11. 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.

#### **12.12. Document sharing**

Documentation is required to support the status of each Financial Account held. However in the following circumstances documentation obtained by a Financial Institution can be used in relation to more than one Financial Account.

##### **12.12.1. Single branch system**

Where an existing customer opens a new Financial Account with the same Financial Institution and both accounts are treated as a single account or obligation or as held by the same account holder it may be possible to rely on existing documentation.

##### **12.12.2. Universal account systems**

A Financial Institution may rely on documentation furnished by a customer for an account held at another branch location of the same Financial Institution or at a branch location of a related entity of the Financial Institution if:

- the Financial Institution treats all accounts that share documentation as a single account or obligation or as held by the same account holder; and
- the Financial Institution and the other branch location or related entity are part

of a universal account system that uses a customer identifier that can be used to retrieve systematically all other accounts of the customer.

In this scenario a Financial Institution must be able to produce to the TIA, if requested, the necessary records and documentation relevant to the status claimed, or a notation of the documentary evidence reviewed, if the Financial Institution is not required to retain copies of the documentary evidence for AML purposes.

### **12.12.3. Shared account systems**

A Financial Institution may rely on documentation provided by a customer for an account held at another branch location of the same Financial Institution, or at a branch location of a member of the expanded affiliated group of the Financial Institution, if:

- the Financial Institution treats all accounts that share documentation as consolidated accounts or as held by the same account holder; and
- the Financial Institution and the other branch location or expanded affiliated group member share an information system, electronic or otherwise, that is described below.

A shared account system must allow the Financial Institution to easily access data about the nature of the documentation, the information contained in the documentation (including a copy of the documentation itself), and the validity status of the documentation.

If the Financial Institution becomes aware of any fact that may affect the reliability of the documentation, the information system must allow the Financial Institution to easily record this data in the system.

Additionally the Financial Institution must be able to show how and when it transmitted data regarding such facts into the information system and demonstrate that any data it has transmitted to the information system has been processed and the validity of the documentation subjected to appropriate due diligence.

A Financial Institution that opts to rely upon the status designated for the account holder in the shared account system, without obtaining and reviewing copies of the documentation supporting the status, must be able to produce upon request by the TIA all documentation, or a notation of the documentary evidence reviewed, if the Financial Institution is not required to retain copies of the documentary evidence for AML purposes, relevant to the status claimed.

### **12.13.      Aggregation**

To identify 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 in certain circumstances.

#### **12.13.1.      When do the aggregation rules apply?**

For purposes of determining the aggregate balance or value of Financial Accounts, all accounts belonging to an individual or entity will need to be aggregated unless the Financial Institution has elected under the legislation to not apply the thresholds set out in Annex I of the agreements.

Note: Financial Institutions should only aggregate accounts that are held by the same account holder. All accounts held by any Individual, or Entity, are required to be aggregated. However, if an Individual who holds accounts in their own name, is also a controlling person of an Entity, then the accounts of the Individual and the Entity for whom they are a controlling person should not be aggregated.

A Financial Institution is required to aggregate all Financial Accounts, belonging to an individual or entity, maintained by it or by a Related Entity, but only to the extent that the Financial Institution's current computerised systems link the Financial Accounts by reference to a data element, for example a customer or taxpayer identification number, and allow account balances or values to be aggregated. Each holder of a jointly held



Financial Account shall be attributed the entire balance or value for the purposes of applying the aggregation requirements.

#### **12.13.2. Relationship Manager**

For the purposes of determining if a Financial Account should be treated as a High Value Account, an inquiry should be made to the Financial Account Holder's relationship manager, where one has been assigned, to determine if the relationship manager knows, or has reason to know, of other Financial Accounts that are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person. In such cases and for the purposes of determining a High Value Account all such accounts should be aggregated. (See section 13.11)

A Financial Institution may appoint a relationship manager for a customer's accounts. The due diligence requirements vary where there is a relationship manager depending on the value of accounts held by the customer.

#### **Example 1 – Lower Value Account**

An individual holds a number of accounts with Bank A and has been assigned a relationship manager. Bank A can aggregate the accounts by virtue of a taxpayer identification number found during the due diligence process. The aggregated balance of accounts exceeds \$50,000 and is less than \$1 million.

Bank A must apply due diligence procedures relevant to Lower Value Accounts (see 13.5). There is no need for Bank A to carry out the relationship manager enquiry as the \$1 million High Value Account threshold has not been exceeded.

#### **Example 2 – High Value Accounts**

The facts are as in Example 1 above but the aggregated balance exceeds \$1 million. As the aggregate balance of all Financial Accounts linked by a common data element and held by the individual exceeds \$1,000,000 the Financial Institution must also make enquiry of any relationship manager(s) assigned to that individual to

establish whether the relationship manager(s) knows of any additional accounts that are directly or indirectly owned, controlled or established (other than in a fiduciary capacity) by the same person.

#### **12.13.3. Exempt products**

If a product is exempt from being treated as a Financial Account, it does not need to be included for the purposes of aggregation. If however the exclusion of exempt products creates an additional burden, such products can be aggregated.

#### **12.13.4. Related Entities**

Where a computer system links accounts across Related Entities, irrespective of where they are located, the Financial Institution will need to aggregate in considering whether any of the reporting thresholds apply. However, once it has considered the thresholds, the Financial Institution will only be responsible for reporting on the accounts it holds. The following example sets out how this could work in practice.

##### **Example 1**

Bank A is a Cayman Islands Financial Institution and has a related entity Bank C which is also a Cayman Islands Financial Institution. Bank A can link the Depository Account of Specified Person X to another Depository Account in the name of Specified Person X with Bank C, by virtue of the taxpayer identification number. The aggregation exercise shows that Specified US Person X is above the Depository Account threshold for reporting.

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

If Bank C is located in another jurisdiction it would have to report on the account it holds if it is a Reporting Financial Institution under the FATCA arrangements of that jurisdiction.

## **Example 2**

Bank A is a Cayman Islands Financial Institution and has a related entity Bank B which is also a Cayman Islands Financial Institution. Bank A can link the Depository Account of US Person X to a Custodial Account in the name of the same US Person X with Bank B, by virtue of the taxpayer identification number found during the due diligence process. The accounts have balances as follows:

Depository Account with Bank A - \$30,000

Custodial Account with Bank B - \$40,000

As the aggregated balance or value is \$70,000 the accounts are potentially reportable. However, the Depository Account balance is below the \$50,000 threshold for Depository Accounts and is therefore not reportable.

The Custodial Account in this example is reportable because the aggregated total exceeds \$50,000 and there is no Custodial Account exemption that can apply.

### **12.13.5.      Aggregation of Pre-Existing Individual Accounts - Examples**

The following examples provide illustrative outcomes that could occur from the aggregation process.

#### **Example 1 – Application of the \$50,000 threshold**

Bank A applies the relevant thresholds in Annex 1. It can link the following accounts of Specified Person X by a taxpayer identification number.

A Depository Account with a balance of \$25,000

A Custodial Account with a balance of \$20,000.

The aggregated total is below \$50,000; therefore regardless of the types of account neither account will be reportable.

#### **Example 2 – Application of the \$50,000 threshold**

In this scenario the account balances of Specified Person X are:

A Depository Account with a balance of \$45,000

A Custodial Account with a balance of \$7,000.

As the aggregated balance or value is \$52,000 then the accounts are potentially reportable. However, the Depository Account balance is below the \$50,000 threshold for Depository Accounts and is therefore not reportable by virtue of Annex 1, II, A, 4. If both accounts were Depository Accounts, both would need to be reported as the aggregated amount is above \$50,000.

The Custodial Account in this example is reportable because the aggregated total exceeds \$50,000 and there is no Custodial Account exemption that can apply.

### **Example 3 – Application of the \$250,000 Cash Value Insurance Contract threshold**

Company B is a Cayman Islands Financial Institution and applies the relevant thresholds in Annex 1. It can link the following accounts of Specified Person Y by a client number:

A Cash Value Insurance Contract with a value of \$230,000

A Custodial Account with a balance of \$30,000

The aggregated balance or value indicates the accounts are potentially reportable (aggregated value above \$50,000). However, as the Cash Value Insurance Contract is below the threshold of \$250,000 that applies to that type of account (Annex 1, II, A, 2), it is not reportable.

There is no Custodial Account exemption; therefore the Custodial Account is reportable.

### **Example 4 – Application of the \$1 million threshold for High Value Accounts**

Bank A can link the accounts of US Person Z by a taxpayer identification number found during the due diligence process:

A Depository Account with a balance of \$40,000

A Custodial Account with a balance of \$980,000.

As the aggregated total is in excess of \$1 million US Person Z is identified as a holder of a High Value Account. However, the Depository Account balance is below the \$50,000 threshold for Depository Accounts and is therefore not reportable. The Custodial Account in this example is reportable as a High Value Account.

Depending on the application of de minimis thresholds, not all accounts aggregated are reported for the purposes of determining a High Value Account (invoking an enhanced review).

#### **Example 5 – Aggregation involving joint accounts**

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

Specified Person A \$35,000

Specified Person B \$25,000

Joint Account \$30,000

A data element in the Financial Institution's computer system allows the joint account to be associated with both A and B. The system shows the individual balances of the accounts; and a combined balance.

The balance on the joint account is attributable in full to each of the account holders. In this example the aggregate balance for A would be \$65,000 and for B \$55,000. As the amounts after aggregation are in excess of the \$50,000 threshold, both account holders will be reportable. Although the Depository Accounts themselves are each below \$50,000, the exemption in Annex 1, II, A, 4 does not apply as the aggregated balance of Depository Accounts has to be taken into account.

If A was not a Specified Person then only B would be reportable following an aggregation exercise.

### **Example 6 – Aggregation of negative balances**

Two Specified Persons have three accounts between them, one account each and a jointly held account, all with the same Financial Institution with the following balances:

Specified Person A \$53,000

Specified Person B \$49,000

Joint Account (\$8,000) – treated as nil

The accounts can be linked and therefore must be aggregated, but for the purposes of aggregation the negative balances should be treated as nil.

Therefore the only reportable account after applying the thresholds would be that for A.

#### **12.13.6. Reporting**

Once aggregation has taken place and it is determined that the accounts are reportable, the accounts should be reported individually. A Financial Institution should not consolidate the accounts for reporting purposes.

### **Example 7 – Separate account reporting**

Specified Person Y holds three Depository Accounts with bank Z. The balances are as follows:

Account 0001 \$3,000

Account 0002 \$32,000

Account 0003 \$25,000

The aggregated balances total \$60,000 and all the accounts are reportable. Bank Z should report on the three accounts individually and not consolidate the information into a single entry for reporting purposes.

#### 12.13.7. Aggregation of Pre-existing Entity Accounts

##### **Example 8**

Specified Person A has an individual Depository Account with Bank X. Specified Person A also controls 100% of entity Y and 50% of entity Z both of which also have Depository Accounts with Bank X. The balances are as follows:

Individual Depository Account \$35,000

Entity Y Depository Account \$130,000

Entity Z Depository Account \$90,000

Bank X applies the relevant thresholds in Annex 1 and all of these accounts can be linked in Bank X's system.

The individual Depository Account is not reportable as it is below the \$50,000 threshold. There is no need to aggregate Depository Accounts held by entities controlled by an individual with those held directly by that individual to determine whether the \$50,000 exemption applies under Annex 1, II, A, 4.

Entity Y's and Entity Z's Depository Accounts are also non reportable as the aggregated balances are below the \$250,000 threshold that applies to Pre-existing Entity Accounts. In calculating the aggregated amount 100% of each entity's Depository Account is taken into account and so the aggregated amount in this case is \$220,000 which is below the threshold.

##### **Example 9**

Specified Person A has an individual Depository Account with Bank X. Specified Person A also controls 100% of entity Y and 20% of entity Z both of which also have Depository Accounts with Bank X. The balances are as follows:

Individual Depository Account \$35,000

Entity Y Depository Account \$330,000

Entity Z Depository Account \$90,000

Bank X applies the relevant thresholds in Annex 1 and all of these accounts can be

linked in Bank X's system.

The individual Depository Account is not reportable as it is below the \$50,000 threshold. There is no need to aggregate Depository Accounts held by entities controlled by an individual with those held directly by that individual to determine whether the \$50,000 exemption applies under Annex 1, II, A, 4.

Entity Y's Depository Accounts is reportable as it exceeds the \$250,000 threshold that applies to Pre-existing Entity Accounts. Entity Z's Depository Account is not reportable as Specified Person A is not a Controlling Person since he owns less than 25% of Entity Z (assuming Entity Z is a low/medium risk entity).

#### **Example 10**

Specified Person A has an individual Depository Account with Bank X. Specified Person A also controls 100% of entity Y and 65% of entity Z both of which also have Depository Accounts with Bank X. The balances are as follows:

Individual Depository Account \$35,000

Entity Y Depository Account \$130,000

Entity Z Depository Account \$170,000

Bank X applies the relevant thresholds in Annex 1 and all of these accounts can be linked in Bank X's system.

The individual Depository Account is not reportable as it is below the \$50,000 threshold. There is no need to aggregate Depository Accounts held by entities controlled by an individual with those held directly by that individual to determine whether the \$50,000 exemption applies under Annex 1, II, A, 4.

Entity Y's and Entity Z's Depository Accounts are both reportable as the aggregated balances is above the \$250,000 threshold that applies to Pre-existing Entity Accounts. In calculating the aggregated amount 100% of each entity's Depository Account is taken into account and so the aggregated amount in this case is \$300,000 which is



above the threshold. It is not correct to take 65% of Entity Z's Depository Account which would have given an aggregated balance of \$240,500, below the threshold.

#### **12.14.      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 the ultimate responsibility for these obligations remain 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 and aggregation would only be 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 system links accounts).

#### **12.15.      Currency Conversion**

Where accounts are denominated in a currency other than US dollars then the threshold limits must be converted into the currency in which the accounts are denominated before determining if they apply.

This should be done using a published spot rate of 31 December, or where the 31 December falls on a weekend or non-working day, the published rate for the last working day prior to 31 December, of the year being reported upon, or in the case of an insurance contract or annuity contract, the most recent contract anniversary date when applicable.

In the case of closed accounts the spot rate to be used is the rate on the date the account was closed.

### **Example 1**

The threshold to be applied to GBP denominated Pre-existing Individual Depository Accounts when a published spot rate as of 31 December 2013 is 1.6500 would be £30,303. ( $\$50,000/1.6500$ )

### **Example 2**

A Pre-existing Insurance Contract is valued at £155,000 as of 30 April 2013. In order to be measured against the \$250,000 threshold, the Financial Institution can use the spot rate at 30 April 2013.

Alternatively a Financial Institution could convert non-US dollar balances into US dollars and then apply the thresholds. Regardless of the method of conversion, the rules for determining the spot rate apply.

The method of conversion must be applied consistently.

Examples of acceptable published exchange rates include, Reuters, Bloomberg and Financial Times.

## **12.16. Change of circumstances**

A change in circumstances includes any change to or addition of information in relation to the account holder's account (including the addition, substitution, or other change of an account holder) or any change to or addition of information to any account

associated with such account.

A change of circumstance will only have relevance if the change to or addition of information affects the status of the account holder for the purposes of the Agreements. For instance, a change of address within the same jurisdiction would not indicate a change of circumstances.

Associated accounts are those accounts that are associated through the aggregation rules or where a New Account is treated as being a pre-existing obligation. See Section 12.14 for aggregation and Sections 13 and 15 for pre-existing obligation rules.

### **Example 1**

Where an account holder with a Pre-existing Account opens a New Account that is linked to the Pre-existing Account in the Financial Institution's computer systems and, as part of the account opening process, a US telephone number is provided, then this is a change in circumstance with respect to the Pre-existing Account.

The change will only be relevant if it indicates that an account holder's status has changed. That is, it either indicates that they are a Specified Person or that they are no longer a Specified Person.

If there is a change of circumstances that causes the Financial Institution to know or have reason to know that the original self-certification (such as one obtained on the opening of a New Individual Account) is incorrect or unreliable, the Financial Institution can no longer rely on the original self-certification.

The Financial Institution should then obtain a new self-certification that establishes whether the account holder is a US citizen or where he is tax resident.

In the event that there is a change in circumstance which indicates a change in the account holder's status, the Financial Institution should verify the account holder's actual status in sufficient time to allow it to report the account, if required, in the next reportable period.

If the account holder fails to respond to a Financial Institution's requests for a self-certification or for other documentation to verify the account holder's status, then the Financial Institution should treat the account as a Reportable Account until such time as the Financial Institution is given the necessary information to be able to correctly verify the status.

#### **12.17. Assignment or Sale of Cash Value Insurance Contract**

A Cash Value Insurance Contract such as an endowment policy may be the subject of assignment or sale by the beneficial owner of the policy. Such an assignment or sale will result in the Reporting Financial Institution having to consider the reportable status of the new beneficial owner of the policy.

##### **Example 1**

An individual holds a mortgage with lender A, and as part of their mortgage arrangements they hold an endowment policy. This endowment was taken out by the individual borrower and although the endowment is part of the mortgage arrangements it is the individual who is beneficially entitled to receive sums payable on the surrender or redemption of the policy (for instance they may be able to keep amounts payable under the endowment if they are able to pay off the mortgage from an alternative source). The borrower takes out a mortgage with a new lender but under the terms of the mortgage agreement they keep their existing endowment. In this case the endowment policy has not been assigned, even if the policy is named in the underlying mortgage arrangement. The endowment is an individual account and continues to be held by the same beneficial owner (the borrower).

##### **Example 2**

The same individual holds a mortgage with lender B, and as part of their mortgage arrangements they have taken out an endowment policy. However in this case mortgage lender B (which is a Financial Institution) has the direct benefit of the endowment policy such that they are beneficially entitled to receive sums payable on the surrender or redemption of the policy, or the sum insured in the event of the

death of the borrower. In this case mortgage lender B is an Entity Account Holder. The borrower takes out a new mortgage with mortgage lender C, repays the existing loan and the financial institution assigns the benefit of the policy to mortgage lender C. The account with mortgage lender C is treated as a new account; the Reporting Financial Institution must determine the status of the new account holder mortgage lender C. In all likelihood, mortgage lender C will also be a Cayman Islands Financial Institution or other Financial Institution in an IGA jurisdiction, which can be identified on the basis of publicly available information.

### **Example 3**

Individual X holds an endowment policy with a Reporting Financial Institution. This is a Financial Account. Individual X sells the benefit of the policy to another person - Individual Y. Individual Y will be subject to the due diligence procedures as a new individual account holder. This is a different situation from a new account being opened where the Financial Institution has direct contact with the individual and if that individual does not provide the necessary information the Financial Institution can simply turn down the business. Where there is an assignment the Financial Institution has no choice in the matter and must therefore take reasonable steps to obtain the necessary information from the new owner of the policy. If the new owner fails to provide a valid self-certification, despite the reasonable efforts of the Financial Institution to obtain one, the account would become reportable.

## **12.18.      Introducing**

Under the Cayman Islands AML Regulations a Cayman Islands Financial Institution may accept business from an introducer provided the Financial Institution has an agreement with that introducer that it can access the KYC information that the introducer has collected. The Financial Institution is not required to hold that information directly.

For the purposes of applying the Agreements, the Financial Institutions are not required to undertake any further due diligence than is required by the Cayman Islands AML Regulations unless specifically set out in the Agreements. Therefore if the Financial

Institution does not hold the KYC information and as a result cannot identify any indicia, it will be unable to report in respect of that account. This does not mean that the account is not reportable but recognises that the Financial Institution may not be in a position to undertake that reporting.

## **12.19. Mergers or Bulk Acquisitions of Accounts**

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 a predecessor that is a Reporting Model 1 Financial Institution, US withholding agent, or a Participating Financial Institution for a period of six months. This is provided that the predecessor Financial Institution has met its due diligence obligations.

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 (or copies of documentation) that was acquired as part of the merger or acquisition, continues to support the claimed status of account holders. An 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 that it is incorrect or if there is a change in circumstance.

Where a Non-Reporting Financial Institution becomes part of a group as the result of a merger or acquisition, the status of any account maintained by the Non-Reporting Financial Institution can be relied upon unless there is a change in circumstance in relation to the account.

### **12.19.1. Merger of Investment Entities**

Mergers of Investment Entities can be different to mergers of Custodial Institutions or Depository Institutions. Because the Financial Accounts of Investment Entities are its Equity and Debt Interest, the merger of two such entities creates a series of New Accounts in the surviving entity.

Mergers of Investment Entities will normally involve a surviving fund taking over the assets of the merging fund in exchange for issuing shares or units to the investors of the merging fund. The shares or units in the merging fund are then extinguished. The new shares in the surviving 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 Cayman Islands Financial Institution and whether it is a Reporting or Participating Financial Institution Deemed Compliant Financial Institution or Non-Participating Financial Institution. These are considered below.

**Example 1 - More than one fund sponsored by the same Cayman Islands sponsor**

Where both funds are sponsored Cayman Islands funds with the same Cayman Islands sponsor, no New Accounts are created. This is because for Sponsored Financial Institutions, whether a Financial Account is a New Account or not 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 (the fund).

**Example 2 - Merging fund is a Reporting Financial Institution**

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 Financial Institution in an IGA jurisdiction 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.

### **Example 3 - Merging fund is not a Reporting Financial Institution**

Where the merging fund is not a Reporting Financial Institution, a Partner Jurisdiction Financial Institution or a Participating Foreign Financial Institution (because it is a Deemed Compliant fund, a Non-Participating Cayman Islands Financial Institution or a Non-Participating Foreign Financial Institution), 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 (see Sections 13 and 15) 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.

#### **12.19.2. Mergers and Acquisitions in relation to Pre-existing Cash Value Insurance Contracts**

It is fairly common for Insurance Companies to sell off “backbooks” of business to another company, especially when the Insurance Company no longer sells that type of business. Where this relates to Pre-existing Accounts, the transferor can continue to rely on the original identification of the transferee company. Therefore, provided the transferee company was prohibited from selling the business into the US in relation to the US Agreement the policies will remain out of scope, and the transferor company does not need to undertake any further due diligence checks.

#### **12.20. Discretionary trusts**

It is recognised, specifically in the case of discretionary trusts, that the individual beneficiaries are not always identified under AML procedures until such time as the first distribution is made to that beneficiary by the trust.

If the trust has made no such distributions and the beneficiaries have not been identified through AML procedures as they are not required to be so identified under Cayman Islands law or cannot be determined due to the discretionary nature of the



trust, no further due diligence or reporting procedures are required.

Each time a distribution is made, the trustee must ensure that all recipients who have not previously been identified are so identified and should undertake the due diligence procedures for identifying Specified US Persons.

## **13. PRE-EXISTING INDIVIDUAL ACCOUNTS**

### **13.1. General**

The information in this section applies to both Agreements except in relation to indicia. Separate sections covering indicia for the UK and US Agreements have been included.

A Pre-existing Individual Account is a Financial Account maintained by a Financial Institution as of 30 June 2014.

Pre-existing Individual Accounts will fall into one of four categories depending on the balance or value of the account. These are:

- a) Financial Accounts below the threshold exemption limit (13.3)
- b) Cash Value Insurance Contracts and Annuity Contracts unable to be sold to US residents (US Agreement only) (13.4)
- c) Lower Value Accounts (13.5 and 13.6)
- d) High Value Accounts (13.7 to 13.11)

### **13.2. Reportable Accounts**

Pre-existing Individual Accounts will be reportable (subject to the thresholds if the Financial Institution does not elect to discard them) if they are not exempt and the Financial Institution has identified relevant indicia, and those indicia have not been cured or repaired.

Where a Pre-existing Lower Value or High Value Individual Account closes prior to the Financial Institution carrying out its due diligence procedures, the account still needs to be reviewed (other than where the account was closed prior to 30 June 2014 as in that case it is not a Pre-existing Account). Where, following the due diligence procedures the account is found to be reportable, the Financial Institution must report the information for the closed account as required.

Once an account is identified as a Reportable Account the account will remain reportable for all subsequent years unless the account holder ceases to be a Specified Person (including death), unless it is a Depository Account.

Whether a Depository Account is a Reportable Account is dependent on whether the balance or value is above the reporting threshold of \$50,000 and an election has not been made to disregard the threshold exemption limit. A Depository Account is the only type of account where the reporting requirement can alter annually even where the account holder remains a Specified Person.

### **Example**

A Depository Account belonging to a Specified Person with a balance of \$65,000 at 31 December will need to be reported. The following year there is a large withdrawal from the account bringing the balance down to \$20,000 at 31 December. As the balance is now below the \$50,000 threshold the account does not need to be reported.

### **13.3. Threshold Exemptions that apply to Pre-existing Individual Accounts**

The Regulations allow for Financial Institutions to elect to disregard the threshold exemptions when reviewing and identifying Pre-existing Individual Accounts. The election can apply to all Financial Accounts or to a clearly identifiable group of accounts, such as by line of business or the location of where the account is maintained.

The following accounts do not need to be reviewed, identified or reported to the TIA unless the Cayman Islands Financial Institution has elected not to apply the thresholds and instead review all accounts.

- a) Any Depository Accounts with a balance or value of \$50,000 or less;
- b) Pre-existing Individual Accounts with a balance not exceeding \$50,000 at the

30 June 2014, unless the account subsequently becomes a High Value Account;

- c) 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 the 30 June 2014, unless the account subsequently becomes a High Value Account.

#### **13.4. Pre-existing Cash Value Insurance Contracts or Annuity Contracts unable to be sold to US residents – US Agreement only**

Pre-existing Cash Value Insurance Contracts or Annuity Contracts that are unable to be sold to US residents because of legal or regulatory restrictions or are unable to be sold to US residents by way of express prohibition language in the policy document do not need to be reviewed, identified or reported. This also applies to Insurance policies written in Trust or assigned to a Trust on or before 30 June 2014.

This exemption only applies where both of the following conditions are met:

- The Financial Institution's Cash Value Insurance Contracts and Annuity Contracts cannot be sold into the US without legal or regulatory authority; and
- Local law requires reporting or withholding in respect of these products.

No existing Cayman Islands 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 effectively prevented if the issuing Specified Insurance Company (not including any US branches) is not licensed to sell insurance in any state of the US and the products are not registered with the Securities and Exchange Commission or are unable to be sold to US residents by way of express prohibition language in the policy document.

##### **13.4.1. Assignment of Pre-existing Insurance Contracts**

When a Pre-existing Cash Value Insurance Contract or Annuity Contract is assigned to

another person then this will be treated as a New Account. This is to ensure that Pre-existing Insurance Contracts assigned after 1 July 2014 to US Persons are correctly identified and reported where necessary.

Once the Insurance Company becomes aware that an assignment has been made, the Insurance Company will need to carry out checks on the New account holder within the timescales for New Accounts. If the policyholder is reluctant to self-certify their status or provide relevant documentation, the Cayman Islands Insurance Company will assume the person to be a US Person and will provide the relevant reports to the TIA on an annual basis.

### 13.5. Lower Value Accounts

These are Pre-existing Individual Accounts with a balance or value that exceeds \$50,000 or \$250,000 for Cash Value Insurance Contracts and Annuity Contracts, but does not exceed \$1,000,000.

### 13.6. Electronic Record Searches and Lower Value Accounts

#### 13.6.1. Identifying indicia - US Agreement

A Financial Institution must review its electronically searchable data for any of the following US indicia:

- a) Identification of the account holder as a US citizen or resident;
- b) Unambiguous indication of a US place of birth;
- c) Current US mailing or residence address (including a US PO Box);
- d) Current US telephone number;
- e) Standing instruction to transfer funds to an account maintained in the US;
- f) Current effective power of attorney or signatory authority granted to a person with a US address;
- g) An 'in care of' or 'hold mail' address that is the sole address the Financial Institution holds for the account holder. An 'in care of' or 'hold mail' address is **not** treated as US indicia for the purposes of electronic searches, but is a US indicia where a review of paper records is required.

Where none of the indicia listed above are discovered through an electronic search, no further action is required in respect of Lower Value Accounts, unless there is a subsequent 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. (See Section 13.6.2)

A Financial Institution will not be treated as having reason to know that an account holder's status is incorrect because it retains information or documentation that may conflict with its review of the account holder's status if it was not necessary under the procedures described in this Section to review that information or documentation.

### **Example**

For Lower Value Accounts, where only an electronic search is required and no US indicia are identified, the Financial Institution will not have reason to know that the account holder was a US Person even if it held a copy of a US passport for the account holder but this was not referenced in the electronic search. This applies only if the Financial Institution was not required to or had not previously reviewed that documentation or information in accordance with the Agreements.

### **13.6.2. Curing indicia - US Agreement**

Where any of the indicia listed in 13.6.1 are found, the presumption is that the account is reportable. In certain circumstances however the indicia can be cured such that evidence shows that the account holder is not a Specified US Person.

Where the indicium 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;

- evidence of the account holder's citizenship or nationality in a country other than the US (for example passport or other government issued 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.

Where the indicia found fall within 13.6.1 c), d), e) the account must be reported unless the Cayman Islands 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**
- a form of acceptable documentary evidence which establishes the account holder's non-US status. See Section 12.9.

Where the indicia found falls within 13.6.1 d) (but has a non-US telephone number also associated with the account), f) or g) the account must be reported unless the Cayman Islands 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; or
- a form of acceptable documentary evidence which establishes the account holder's non-US status. See Section 12.9.

Where there is uncertainty whether a phone number is US (for example a mobile phone number) a Financial Institution should take reasonable steps (in accordance with the relevant due diligence requirements for the type of account) to establish whether or not it is a US phone number. It should not then be treated as a US phone number if its status remains uncertain.

In the case of any number that is known not to relate to a telephone, for example a permanent fax number, the number should not be treated as a US indicia. However if

there is any doubt over the function, or the number has a combined function at least one of which is as a phone number, the number should be treated as US indicia if it is a US number.

There will be a standing instruction if the account holder has mandated the Financial Institution to make repeat payments without further instruction from the account holder, to another account that can clearly be identified as being an account maintained in the US.

Instructions to make an isolated payment will not be a standing instruction even when given significantly in advance of the payment being made.

#### **13.6.3. Identifying indicia - UK Agreement**

A Financial Institution must review its electronically searchable data for any of the following UK indicia.

- a) Identification of the account holder as a UK tax resident;
- b) Current UK mailing or residence address (including UK PO Box, 'in care of' or 'hold mail' address);
- c) Current effective power of attorney or signatory authority granted to a person with a UK address;
- d) For accounts that are not Depository Accounts the Reporting Financial Institution must also review electronically searchable data maintained by them for standing instructions to transfer funds to an account maintained in the UK.

Where none of the indicia listed above are discovered through an electronic search, no further action is required in respect of Lower Value Accounts, unless there is a subsequent change of circumstance that results in one or more UK 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. (See Section 13.6.4)

A Financial Institution will not be treated as having reason to know that an account



holder's status is incorrect because it retains information or documentation that may conflict with its review of the account holder's status if it was not necessary under the procedures described in this Section to review that information or documentation.

#### **13.6.4. Curing indicia - UK Agreement**

Where any of the indicia listed in 13.6.3 are found, the presumption is that the account is reportable. In certain circumstances however the indicia can be cured such that evidence shows that the account holder is not a Specified UK Person.

Where Account Holder information contains a current mailing or residence address (including a post office box, 'in-care-of' or 'hold mail' address) in the other Party, the Reporting Financial Institution obtains or has previously reviewed and maintains a record of:

- 1) a self-certification that the Account Holder is not resident in the UK for tax purposes; and
- 2) either:
  - a) a certificate of residence for tax purposes issued by an appropriate official of the country or jurisdiction in which the Account Holder claims to be resident; or
  - b) the provision of a local tax identification number of the country or jurisdiction in which the Account Holder claims to be resident, and, a passport issued by the jurisdiction in which the Account Holder claims to be resident.

Where Account Holder information contains a currently effective power of attorney or signatory authority granted to a person with an address in the UK, or in the case of Financial Accounts other than Depository Accounts where Account Holder information contains standing instructions to transfer funds to an account maintained in the UK, the Reporting Financial Institution obtains or has previously reviewed and maintains a record of:

- (1) a self-certification that the Account Holder is not resident in the UK for tax purposes; and
- (2) documentary evidence establishing the Account Holder's non-residence

status.

### **13.7. High Value Accounts**

High Value Accounts are Pre-existing Individual Accounts with a balance or value that exceeds \$1,000,000 at 30 June 2014 or at 31 December of any subsequent year.

### **13.8. Electronic Record Searches and High Value Accounts**

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

### **13.9. Paper Record Searches and High Value Accounts**

#### **US Agreement**

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

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

For this purpose, electronically searchable means that the Financial Institution has a system that is capable of capturing this data even if the searchable databases do not include these specific fields, for example optical recognition systems.

The paper record search, where necessary, 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 Financial

Institution within the last 5 years.

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

These should be reviewed for any US indicia as set at section 13.6.1. A Financial Institution can rely on the review of High Value Accounts performed by third party distributors, for example financial advisers, on their behalf where there is a contract obligating the distributor to perform the review.

### **UK Agreement**

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

- a) the account holder's residence address and mailing address currently on file;
- b) in the case of Financial Institutions other than Depository Accounts whether there are standing instructions to transfer funds in the account to another account;
- c) whether there is a current 'in-care-of' address or 'hold mail' address for the account holder; and
- d) whether there is any power of attorney or signatory authority for the account.

For this purpose, electronically searchable means that the Financial Institution has a system that is capable of capturing this data even if the searchable databases do not include these specific fields; for example optical recognition systems.

The paper record search, where necessary, 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 Financial Institution within the last 5 years.

- a) the most recent documentary evidence collected with respect to the account;
- b) the most recent account opening contract or documentation;
- c) the most recent documentation obtained by the Financial Institution for AML/KYC procedures or for other regulatory purposes;
- d) any power of attorney or signature authority forms currently in effect; and
- e) in the case of Financial Institutions other than Depository Accounts any standing instructions to transfer funds currently in effect.

These should be reviewed for any UK indicia as set at section 13.6.3

A Financial Institution can rely on the review of High Value Accounts performed by third party distributors, for example financial advisers, on their behalf where there is a contract obligating the distributor to perform the review.

#### **13.9.1. Exceptions**

A Financial Institution is not required to perform the paper record search for any Pre-existing Individual Account for which it has retained a withholding certificate and acceptable documentary evidence which establishes the account holder's non-US status.

#### **13.10. Qualified Intermediaries**

A Financial Institution that has previously established an 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 IRS Code, can rely on that status for the purposes of the Agreement where the account holder has received a reportable payment under those regimes. The Financial Institution is not required to perform the electronic search, or in respect of High Value Accounts a paper record search, in relation to those accounts. Any Cayman Islands 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.

### **13.11. Relationship Manager**

In addition to the electronic and paper searches, the Financial Institution must also consider whether any Relationship Manager associated with the High Value Account (including any accounts aggregated with such account) has actual knowledge that would identify the account holder as a Specified Person.

If the Relationship Manager has actual knowledge that the account holder is a Specified Person then the account must be reported unless the indicia can be cured.

For these purposes a Relationship Manager is assumed to be any person who is an officer or other employee of the Financial Institution assigned responsibility for specific account holders on an ongoing basis, and who advises the account holders regarding their accounts and arranges for the overall provision of financial products, services and other related assistance.

A person is only considered a Relationship Manager for these purposes with respect to an account with a balance or value exceeding \$1,000,000, taking into account the aggregation rules.

A Financial Institution must also ensure that it has 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.

#### **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 Financial Institution would either need to report the account or obtain the appropriate documentation to cure or repair that indicia.

The electronic search and paper search only need to be done once for each account identified as a High Value Account, but the responsibilities of Relationship Managers to

ensure that any knowledge regarding the account holder's status or aggregation of accounts is captured are constant and ongoing.

### **13.12. Effects of Finding US or UK Indicia**

Where one or more indicia are discovered through the enhanced review procedures and none of the cures or repairs can be applied, the Financial Institution must treat the account as a Reportable Account for the current and all subsequent years.

Where no 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 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, it must be treated as a Reportable Account for the year of change and all subsequent years. This applies for all accounts except Depository Accounts, unless the account holder ceases to be a Specified Person.

### **13.13. Timing of reviews**

#### **13.13.1. Lower Value Accounts**

The review of Pre-existing Individual Accounts that are Lower Value Accounts at 30 June 2014 must be completed by 30 June 2016.

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

#### **Example**

The due diligence procedures are carried out on a Lower Value Account during March 2015 and the account is determined as reportable. The Financial Institution is

only required to report on the account information for the year ending 31 December 2015 onwards.

#### **13.13.2. 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.

#### **Example**

Where the balance or value of an account does not exceed \$1,000,000 as of 30 June 2014, but does as of the last day of 31 December 2015 or a subsequent calendar year, the 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.

## **14. NEW INDIVIDUAL ACCOUNTS**

### **14.1. General**

A New Individual Account is an account opened on or after 1 July 2014.

When opening a New Individual Account, the Financial Institution must obtain the TIN for Specified US Persons and/or the date of birth, and the date of birth and National Insurance Number (where available) for Specified UK Persons. See sections 17.2.2 and 17.2.3 respectively.

### **14.2. Reportable Accounts**

Where it is established that the holder of a New Individual Account is a Specified Person then the account must be treated as a Reportable Account.

In this instance, in respect of Specified US Persons, the Financial Institution is required to retain a record of an IRS form W-9 or US TIN. The US TIN may be retained in any manner and does not need to be on an IRS form. There is no equivalent requirement for Specified UK Persons.

### **14.3. Threshold Exemptions that apply to New Individual Accounts**

The Regulations allows for Financial Institutions to elect to disregard the threshold exemptions when reviewing and identifying New Individual Accounts, in the same way as for Pre-existing Individual Accounts (see 13.3).

The election can apply to all Financial Accounts or to a clearly identifiable group of accounts, such as accounts held by a line of business.

The threshold exemption for New Individual Accounts is \$50,000 for Depository Accounts and Cash Value Insurance Contracts. These do not need to be reviewed, identified or reported unless the account balance exceeds \$50,000.



There is no threshold exemption for any other type of Financial Account.

If a Financial Institution makes an election under the Agreement to disregard the threshold exemptions for Reportable Accounts, it will need to review and identify the status of all of its New Individual account holders.

#### **14.4. New Accounts for holders of Pre-existing Accounts**

Where a Pre-existing account holder wishes to open a New Account with the same Financial Institution, there is no need to re-document the account holder as long as:

- the appropriate due diligence requirements have already been carried out, or there is reliable evidence that the appropriate due diligence requirements are in the process of being carried out for the Pre-existing Account; and
- the accounts are treated as linked or as a single account or obligation for the purposes of applying any of the due diligence requirements.

This means that the standards of knowledge to be applied, the change of circumstances rules and aggregation requirements will apply to all accounts held by the account holder.

Therefore where there is a change of circumstance or where the Financial Institution has reason to know that the account holder's status is inaccurate in relation to one account, this will apply to all other accounts held by the account holder.

Where the Financial Institution applies thresholds, the accounts must be treated as linked for aggregation purposes. This can also be applied on a group basis where documentation is shared within the group. See section 12.13.

#### **14.5. Identification of New Individual Accounts**

For accounts that are not exempt, and for accounts that previously qualified for the threshold exemption, but now have a balance or value above the threshold, the Financial Institution can carry out the following procedures to determine the account

holder's status:

- Obtain a self-certification (See section 12.4) that allows the Financial Institution to determine where the account holder is tax resident; and
- Confirm the reasonableness of this self-certification based on the information the Financial Institution obtains in connection with the opening of the account, including any documentation obtained for AML/KYC procedures.

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

In the absence of a valid self-certification being provided by the account holder, the account would become reportable.

If the information provided during the account opening process contains any of the indicia described in section 13.6.1 then the account will become reportable unless further action is taken by the Financial Institution to attempt to cure or repair the indicia (see section 13.6.2).

The identification of these accounts should be completed as soon as practicable after the account has been opened and in any event amounts cannot be transferred to the account until such time as the AML procedures have been completed. The expectation would be that this would follow AML/KYC time limits. For accounts that were previously exempt because of the threshold exemptions being applied but no longer are, the Financial Institution must determine the account holder's status in sufficient time to report the account, if necessary, for the year in which the account ceased to be exempt.

#### **14.6. Group Cash Value Insurance Contracts or group Annuity Contracts**

A Financial Institution can treat an account that is a group Cash Value Insurance Contract or a group Annuity Contract, and that meets the requirements set out below,

as a non-US account until the date on which an amount is payable to an employee/certificate holder or beneficiary, provided the Financial Institution obtains a certification from an employer that no employee/certificate holder (account holder) is a US Person.

A Financial Institution is not required to review all the account information collected by the employer to determine if an account holder's status is unreliable or incorrect. The requirements are that:

- the group Life Insurance Contract or group Annuity Contract is issued to an employer and covers twenty-five or more employees/certificate holders;
- the employee/certificate holders are entitled to receive any contract value; and to name beneficiaries for the benefit payable upon the employee's death; and
- the aggregate amount payable to any employee/certificate holder or beneficiary does not exceed \$1,000,000.

#### **14.7. Accounts held by beneficiaries of a Cash Value Insurance Contract that is a Life Insurance Contract**

A 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.

#### **14.8. Reliance on Self-certification and Documentary evidence**

Where information already held by a Financial Institution conflicts with any statements or self-certification, or the Financial Institution has reason to know that the self-certification or other documentary evidence is incorrect, it may not rely on that evidence or self-certification.

A 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; a reasonably prudent person would know this to be the case.

## **15. PRE-EXISTING ENTITY ACCOUNTS**

### **15.1. General**

Pre-existing Entity Accounts are those accounts that are in existence at 30 June 2014.

### **15.2. Reportable Accounts**

An account holder of a Pre-existing Entity Account must be classified as either:

- a) a Specified Person;
- b) a US or UK Person other than a Specified Person;
- c) a Cayman Islands Financial Institution or other Financial Institution in an IGA jurisdiction;
- d) a Participating FFI, a Deemed Compliant FFI or an Exempt Beneficial Owner;
- e) an Active NFFE or Passive NFFE; or
- f) a Non-Participating Financial Institution.

A Pre-existing Entity Account is only reportable where the account is held by one or more entities that are Specified Persons or by Passive NFFEs with one or more Controlling Persons who are Specified Persons. See section 9.7 for more information on Controlling Person.

Under the due diligence procedures in Annex 1 of the Agreement, any account held by an entity that is a Participating FFI, Partner Jurisdiction Financial Institution or Cayman Islands Financial Institution shall not be held to be a reportable account, regardless of the identity of the controlling persons.

If the account holder is one of those listed below then the account is not a Reportable Account:

- a) a US or UK Person other than a Specified Person;
- b) a Cayman Islands Financial Institution or other Financial Institution in an IGA jurisdiction;

- c) a Participating FFI, a Deemed Compliant FFI or an Exempt Beneficial Owner;
- d) an Active NFFE; or
- e) a Passive NFFE where none of the Controlling Persons are Specified Persons.

Where a Pre-existing Entity Account closes prior to the Financial Institution carrying out its due diligence procedures, then the account is still required to be reviewed. Where following the due diligence procedures the account is found to be reportable, the Financial Institution must report the information as required. This should only apply to accounts that exist at 30 June 2014 and close before 30 June 2016 as all accounts should have been reviewed by that date. This will not apply to accounts that are closed prior to 30 June 2014.

If the account holder is a Non-Participating Financial Institution, only payments made to the Non-Participating Financial Institution will be reportable.

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 publically available. In this situation the account should continue to be reported until such time that the entity's status is correctly identified.

### **15.3. Threshold Exemptions that apply to Pre-existing Entity Accounts**

The Regulations allow for Financial Institutions to elect to disregard the threshold exemptions when reviewing and identifying Pre-existing Entity Accounts in the same way as for Individual Accounts.

The election can apply to all Financial Accounts or to a clearly identifiable group of accounts, such as accounts held by a line of business.

If the threshold exemption is applied and where the account balance or value does not exceed \$250,000 at 30 June 2014 there is no requirement to review, identify or report

the account until the account balance exceeds \$1,000,000, at 31 December of a subsequent calendar year.

If a Financial Institution makes an election under the Agreement to disregard the threshold exemption, it will need to review and identify all Pre-existing Entity Accounts.

#### **15.4. Standardised Industry Codes and indicia for Pre-existing Entities**

A Financial Institution can rely on information previously recorded in its files in addition to standardised industry codes, in determining the status of an entity. For these purposes, a standardised industry code may be any coding system employed by the Financial Institution.

The term standardised industry code means a code that is part of a coding system used by the Financial Institution to classify account holders by business type and was in use by the later of 1 January 2012, or six months after the date the Financial Institution was formed or organised.

Where a standardised industry code is used, the Financial Institution is unable to rely on this to determine the entity's status if there are identifying US or UK indicia, as described in sections 13.6.1 and 13.6.3 respectively.

If there are indicia, the Financial Institution may treat the entity as non-reportable only if the Financial Institution obtains a self-certification for the entity and one form of acceptable documentary evidence which establishes the entity's non-US or non-UK status as appropriate such as a Certificate of Incorporation.

#### **15.5. Electronic Searches**

Electronic searches may be sufficient provided all of the Cayman Islands AML information is stored electronically and can be mined to identify the relevant information. If this is not the case, the search must include a paper review.

## **15.6. Identification of an entity as a Specified Person**

In order to identify if an entity is a Specified Person, information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon.

A place of incorporation or organisation, or address or the indicia listed above in 13.6.1 or 13.6.3 would be examples of information indicating that an entity is a Specified Person of a particular jurisdiction.

If the account holder is found to be a Specified 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 a Specified Person or it can be reasonably determined from information held or that is publicly available, that the account holder is not a Specified Person.

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

## **15.7. Identification of an entity as a Financial Institution**

In order to identify whether 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, including Non-Reporting Financial Institutions, that account is not a Reportable Account for the purposes of the Financial Institution that holds the Financial Account on behalf of the entity.



### **15.8. Identification of an entity as a Non-Participating Financial Institution (NPFI) (US Agreement Only)**

If the account holder is a Financial Institution, but not a Cayman Islands Financial Institution, a Financial Institution in another Partner Jurisdiction or a Participating Financial Institution, then it should be treated as a Non-Participating Financial Institution.

This applies unless the entity provides a self-certification stating that it is a Certified Deemed Compliant Financial Institution or an Exempt Beneficial Owner, or unless the Reporting Financial Institution is able to verify that the entity is a participating Financial Institution or Registered Deemed Compliant Financial Institution, for instance from its Global Intermediary Identification Number.

If the account holder is a Non-Participating Financial Institution then the Reporting Financial Institution will need to report on payments made to it.

### **15.9. Identification of an entity as a Non-Financial Foreign Entity (NFFE)**

When an entity account holder is not identified as either a Specified 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 Specified Persons.

To determine whether the entity is a Passive NFFE, the Financial Institution must obtain a self-certification from the account holder establishing its status unless it has information in its possession or that is publicly available that enables the Financial Institution to reasonably determine whether or not the entity is an Active NFFE.

To identify the Controlling Persons of an entity, a Financial Institution may rely on information collected and maintained pursuant to AML/KYC procedures.

To determine whether the Controlling Persons of a Passive NFFE are Specified Persons, Financial Institutions may rely on:

- Information collected and maintained pursuant to AML/KYC procedures in the case of an account held by one or more Passive NFFEs, with a balance that does not exceed \$1,000,000, or
- A self-certification from an account holder or such Controlling Person in the case of an account held by one or more Passive NFFEs, with a balance that exceeds \$1,000,000.

#### **15.10.      Timing of reviews**

The review of Pre-existing Entity Accounts with an account balance or value that exceeds \$250,000 at 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 31 December 2015 or of any subsequent year, must be completed by 30 June of the following year.

## 16. NEW ENTITY ACCOUNTS

### 16.1. General

A New Entity Account is an account opened by or for an entity on or after 1 July 2014.

### 16.2. Reportable Accounts

An account holder of a New Entity Account must be classified as either:

- a) a Specified Person;
- b) US or UK Person other than a Specified Person;
- c) a Cayman Islands Financial Institution or Partner Jurisdiction Financial Institution;
- d) a Participating FFI, a Deemed Compliant FFI or an Exempt Beneficial Owner;
- e) an Active NFFE or Passive NFFE; **or**
- f) a Non-Participating Financial Institution.

New Entity Accounts will only be reportable where there is an account holder who is a Specified Person or is a Passive NFFE with one or more Controlling Persons who are Specified Persons, as with Pre-existing Entity Accounts.

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

- a) a US or UK Person other than a Specified Person;
- b) a Cayman Islands Financial Institution or Partner Jurisdiction Financial Institution;
- c) a Participating FFI, a Deemed Compliant FFI or an Exempt Beneficial Owner;
- d) an Active NFFE; **or**
- e) a Passive NFFE where none of the Controlling Persons are Specified Persons.

### **16.3. Exemptions that apply to New Entity Accounts**

There are no threshold exemptions that apply to New Entity Accounts so there will be no need to apply any aggregation or currency conversion rules.

However, where a Financial Institution maintains credit card accounts, these do not need to be reviewed, identified or reported where the Financial Institution has policies or procedures that prevent the account holder establishing a credit balance in excess of \$50,000.

### **16.4. New Accounts for Pre-Existing Entity account holders**

Where a New Account is opened by an entity account holder who already has a Pre-existing Account the Financial Institution may treat both accounts as one account for the purposes of applying AML/KYC due diligence. In these circumstances, the Financial Institution may choose to apply the identification and documentation procedures for either Pre-existing or New Accounts to derive the classification for any New Account or Accounts opened on or after 1 July 2014 by the same entity.

### **16.5. Identification of an entity as a Financial Institution**

A Financial Institution may rely on publicly available information, a GIIN or information within the Financial Institution's possession to identify whether an account holder is an Active NFFE, Participating FFI, a Cayman Islands Financial Institution or a Partner Jurisdiction Financial Institution. In all other instances the Financial Institution must obtain a self-certification from the account holder to establish the account holder's status.

It is possible that the name of the entity with the GIIN does not reflect the name of the account holder. This might be the case for example with respect to a trust which is a Non-Reporting Financial Institution or a Sponsored Entity. A Financial Institution can rely on the self-certification from the Non-Reporting Financial Institution however should still confirm the validity of the GIIN of the Trustee or of the Sponsoring entity.

## **16.6. Identification of an entity as a Non-Participating Financial Institution (US Agreement Only)**

If the entity is a Cayman Islands Financial Institution or a Partner Jurisdiction Financial Institution, no further review, identification or reporting will normally be required. The exception to this is if the Financial Institution becomes a Non-Participating Financial Institution following significant non-compliance.

If the account holder is a Financial Institution, but not a Cayman Islands Financial Institution, Partner Jurisdiction Financial Institution or a Participating Financial Institution, then the entity is treated as a Non-Participating Financial Institution.

This applies unless the Reporting Financial Institution:

- 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; **or**
- verifies its status as a Participating Financial Institution or Registered Deemed Compliant Financial Institution for instance by obtaining a GIIN.

If the account holder is a Non-Participating Financial Institution, then reports on certain payments made to such entities will be required.

## **16.7. Identification of an entity account holder as a Specified Person**

If the Financial Institution identifies the account holder of a New Entity Account as a Specified Person, the account will be a Reportable Account and the Financial Institution must obtain a self-certification.

## **16.8. 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 Financial Institution must identify the Controlling Persons of the entity as determined under AML/KYC procedures.

To determine whether the Controlling Persons of a Passive NFFE are Specified Persons the Reporting Financial Institution must obtain a self-certification from the account holder or Controlling Person.

If they are Specified Persons, the account shall be treated as a Reportable Account.

## 17. REPORTING OBLIGATIONS

Once a Financial Institution has identified Reportable Accounts then it must report certain information regarding those accounts to the TIA in accordance with the timetable in section 17.5.

Separate reports are required to be submitted to the TIA in respect of US and UK Reportable Accounts.

### 17.1. Information required

#### 17.1.1. Specified Persons and Controlling Persons of certain Entity Accounts

In relation to each Specified Person that is the holder of a Reportable Account and in relation to each Controlling Person of certain Entity Accounts (i.e. a Passive NFFE) who is a Specified Person, the information to be reported is:

- a) Name;
- b) Address;
- c) Tax Identification Number (TIN) (for Specified US Persons, where available);
- d) Date of birth and National Insurance Number (for Specified UK Persons, where available);
- e) The account number or functional equivalent in the absence of an account number;
- f) The name and Global Intermediary Identification Number of the Reporting Cayman Islands Financial Institution;
- g) The account balance or value as of the end of the calendar year or other appropriate period (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value). Or if the account was closed during the year, immediately before the account was closed.

In relation to f) for the UK Agreement only, where the Reporting Cayman Islands Financial Institution does not have a GIIN, it should report a local reference number instead. A local reference number will be generated by the TIA during the online

notification process by the Financial Institution.

In relation to g) if the account was closed during the year, the amount transferred from the account before the account was closed.

### **Account number or functional equivalent**

If the Reportable Account has a unique identifying number or code then this 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 Financial Institution to identify that Reportable Account in future.

If the Reportable Account does not have a unique identifying number or code then any functional equivalent should be reported. This may include non-unique identifiers that relate to a class of interests. A non-unique identifier should be sufficient to enable the 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 a description sufficient for the Financial Institution to identify the Reportable Account held by the named account holder in future should be reported.

### **17.1.2. Custodial Accounts**

In addition to a) to g) above, where the account is a Custodial Account the following information is also required in relation to the calendar year or other appropriate reporting period:

- h) The total gross amount of interest paid or credited to the account;
- i) The total gross amount of dividends paid or credited to the account;
- j) The total gross amount of other income paid or credited to the account;
- k) The total gross proceeds from the sale or redemption of property paid or credited to the account.



Items h) to j) are only required to be reported in respect of Reporting Year 2015 onwards. Item k) is required to be reported in respect of Reporting Year 2016 onwards.

#### **17.1.3. Depository Accounts**

In addition to a) to g) above, where the account is a Depository Account the following information is also required:

- l) the total amount of gross interest paid or credited to the account in the calendar year or other appropriate period, in respect only of Reporting Year 2015 onwards.

#### **17.1.4. Cash Value Insurance Contracts**

In addition to a) to f) above and if the account is still in existence at the end of the year the following information must be reported each year from Reporting Year 2015 onwards:

- m) the annual amount reported to the policyholder as the 'surrender value' of the account; or
- n) the amount calculated by the Specified Insurance Company as at 31 December; and
- o) any part surrenders taken throughout the policy year.

#### **17.1.5. Purchased Life Annuities (PLAs)**

A Cayman Islands Purchased Life Annuity which does not have a cash/surrender value has no account balance to report. A Specified Insurance Company will only be required to report the amount paid out or credited to the policy holder.

#### **17.1.6. Deferred Annuities**

In the Cayman Islands, deferred annuities have two stages:

- The accumulation phase where the product is similar to a Cash Value Insurance Contract and should be treated as such for reporting as set out above.

- The pay-out phase where the annuity becomes a PLA and should be treated as such for reporting as set out above.

When a deferred annuity is ending its accumulation phase, some contracts provide the option for the account holder to take the surrender value of contract, instead of converting the account into a PLA; this is the amount that should be reported.

#### **17.1.7. Other Accounts**

For accounts other than Custodial or Depository Accounts, in addition to a) to g) above, for other accounts the following information is also required in respect of Reporting Year 2015 onwards:

- p) The total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account holder during the calendar year or other appropriate reporting period.

#### **17.1.8. Account closures and transfers**

In addition to 17.1 a) to f) above, in the case of a Depository or Custodial Account closed or transferred in its entirety by an account holder during a calendar year the payments made with respect to the account shall be:

- q) The payments and income paid or credited to the account that are described earlier in this Section for Custodial, Depository and Other Accounts.
- r) The amount or value withdrawn or transferred from the account in connection with the closure or transfer of the account.

In the case of a Cash Value Insurance Contract that has been fully surrendered during the calendar year the Specified Insurance Company will need to report the total amount paid out to the account holder or nominated person at the close of the account. This will include any amount of interest following maturity where the amount is awaiting payment.

In the case of a Purchased Life Annuity, if the annuitant has died or the term has

ended, the Specified Insurance Company will have no further reporting requirement if the annuitant died at a time before the annual payment has been made.

## **17.2. Explanation of information required**

### **17.2.1. Address**

The address to be reported with respect to an account held by a Specified Person is the residence address recorded by the Reporting Financial Institution for the account holder or, if no residence address is associated with the account holder, the address for the account used for mailing or other purposes by the Reporting Financial Institution.

In the case of Controlling Persons of a Passive NFFE, the address required will be the address of each Controlling Person who is reportable.

### **17.2.2. Taxpayer Identification Numbers (TINs) – US Agreement**

Where it has been established that an account holder is a US Person a Financial Institution is required to obtain a US TIN in several instances. When referred to, a US TIN means a US Federal Taxpayer Identification Number.

For Pre-existing Individual Accounts that are Reportable Accounts then a US TIN need only be provided if it exists in the records of the Reporting Financial Institution. In the absence of a record of the US TIN, a date of birth should be provided, but again only where it is held by the Reporting Financial Institution.

The Regulations require Reporting Financial Institutions to obtain the US TIN for relevant Pre-existing Individual Accounts from 1 January 2017.

For all New Individual Accounts that are identified as Reportable Accounts from 1 July 2014 onwards, the Reporting Financial Institution must obtain a self-certification from account holders identified as resident in the US that includes a US TIN. This self-certification could be on for example, IRS forms W-9 or on another similar agreed form.

Where for a New Individual Account the proposed account holder fails to provide a US TIN or evidence of non-US status and the account becomes active, the account is to be treated as reportable.

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

### **17.2.3. Date of Birth and National Insurance Numbers – UK Agreement**

Where it has been established that an account holder is a UK Person a Financial Institution is required to obtain a Date of Birth and National Insurance Number in several instances.

For Pre-existing Individual Accounts that are Reportable Accounts then this information need only be provided if it exists in the records of the Reporting Financial Institution.

The Regulations require Reporting Financial Institutions to obtain the information for relevant Pre-existing Individual Accounts from 1 January 2017.

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 identified as resident in the UK that includes this information. In respect of the National Insurance Number this information must be obtained by 1 January 2017.

Where for a New Individual Account the proposed account holder fails to provide the information and the account becomes active, the account is to be treated as reportable.

There is no requirement for a Financial Institution to verify that any of this information provided is correct. A Financial Institution will not be held accountable where information supplied by an individual proves to be inaccurate and the Financial Institution had no reason to know.

#### **17.2.4. Account Number**

The account number to be reported with respect to an account is the identifying number assigned to the account or other number that is used to identify the account within the Financial Institution.

#### **17.2.5. Account balance or value**

The account balance or value of an account may be reported in US dollars or in the currency in which the account is denominated.

For Depository Accounts, the balance or value will be that shown on the 31 December, unless the account is closed prior to that date. For example, a reportable Depository Account the balance or value to be reported will be the balance or value as of the 31 December 2014. This will be reported in 2015.

For other Financial Accounts, the balance or value will either be that shown on 31 December of the year to be reported or where it is not possible to or usual to value an account at 31 December, the normal valuation point for the account that is nearest to 31 December is to be used.

#### **Example**

When a Specified Insurance Company has chosen to use the anniversary date of a policy for valuation purposes, if for example the policy was opened on 3 June 2013, it will be valued on 2 June 2014. If it exceeds the reporting threshold then it is the 2 June 2014 value that will be reported for the year ending 31 December 2014. This will be reported to the TIA in 2015.

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

The balance or valuation of a Financial Account is the balance or value calculated by the Financial Institution for purposes of reporting to the account holder.

The balance or value of an Equity Interest is the value calculated by the 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 is not to 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 is not to 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.

#### **17.2.6. Jointly held Financial Accounts**

Where a Financial Asset is jointly held the balance or value to be reported in respect of the Specified Person is the entire balance or value of the account. The entire balance or value will be attributable to each holder of the account. The same applies for the Controlling Persons of NFFEs that jointly hold accounts.

##### **Example 1**

Where a jointly held Depository Account has a balance or value of \$100,000 and one of the account holders is a Specified Person then the amount to be attributed to that person would be \$100,000.

If both account holders were Specified Persons then each would be attributed the \$100,000 and reports would be made for both.

##### **Example 2**

Where a Specified Person owns 50% of the shares in a company, the full value of the company is reported as being the Financial Account held by that Specified Person.

#### **17.2.7. Account Closures**

The process for closing accounts will differ between institutions and between different products and accounts. The intention is to capture the amount withdrawn from the account in connection with the closure process, as opposed to the account balance at the point of closure given there is an expectation the balance will be reduced prior to point of closure. For these purposes it is acceptable for the Financial Institution to:

- record the balance or value within five business days of when they receive instructions from the account holder to close the account; or
- record the most recent available balance or value that is obtainable following receipt of instructions to close the account, where a Financial Institution is unable to record the balance or value at the time of receiving instructions to close the account. This may include a balance or value that predates the instructions to close the account if this is the balance or value that is the most readily available.

#### **17.3. Nil returns**

The filing of nil returns is non-mandatory under the Regulations, although there is the facility for financial institutions to submit nil returns via the AEOI Portal at their own option. Financial institutions with no reportable accounts will still need to complete the notification requirement via the AEOI Portal.

#### **17.4. Multiple Financial Institutions – duplicate reporting**

It is likely that a number of unconnected Financial Institutions could have a reporting obligation in respect of the same account which could result in duplicate reporting. Each Financial Institution has an obligation to report all Reportable Financial Accounts unless it has actual knowledge that the account is being reported by another Financial Institution, whether that Financial Institution is a Cayman Islands Financial Institution or not. For this purpose, the Cayman Islands Financial Institution has actual knowledge where they hold written confirmation from the Reporting Financial Institution in the other jurisdiction that the Financial Account has been reported for FATCA purposes or under an agreement equivalent to the UK Agreement. There is no need for the Cayman

Islands Financial Institution in this case to report anything to the TIA in respect of that Financial Account. This does not remove the responsibility for the Cayman Islands Financial Institution to ensure that a report has been made. Should it be determined that no report has been made by a Reporting Cayman Islands Financial Institution in circumstances where a report should have been made, the TIA may consider using compliance and enforcement powers.

## 17.5. Timetable for reporting

### US Agreement

Reporting Year	In respect of	Information to be reported	Reporting date to the TIA
<b>2014</b>	Each Specified US Person either holding a Reportable Account <b>Or</b> as a Controlling Person of an Entity Account	<ul style="list-style-type: none"> <li>i. Name</li> <li>ii. Address</li> <li>iii. US TIN (where applicable or DoB for Pre-existing Accounts)</li> <li>iv. Account number or functional equivalent</li> <li>v. Name and identifying number of Reporting Financial Institution</li> <li>vi. Account balance or value</li> </ul>	31 May 2015



<b>2015</b>	As 2014 plus payments to NPFi	<p>As 2014 plus:</p> <p><b>Custodial Accounts</b> Total gross amounts of interest, dividends and other income paid or credited to the account</p> <p><b>Depository Accounts</b> Total amount of gross interest paid or credited to the account in the calendar year or other reporting period</p> <p><b>Cash Value Insurance contracts</b></p> <ul style="list-style-type: none"> <li>i. Surrender value; or</li> <li>ii. Amount calculated by the Specified Insurance Company; and</li> <li>iii. Any part surrenders.</li> </ul> <p><b>All other accounts</b> The total gross amount paid or credited to the account including the aggregate amount of any redemption payments.</p>	31 May 2016
<b>2016</b>	As 2015	<p>As 2015 plus:</p> <p><b>Custodial Accounts</b> Total gross proceeds from the sale or redemption of property paid or credited to the account</p>	31 May 2017
<b>2017 onwards</b>	As 2014	All of the above	31 May following the end of the reporting year

#### UK Agreement – Full reporting

Reporting Year	In respect of	Information to be reported	Reporting date to the TIA

<b>2014</b>	Each Specified UK Person either holding a Reportable Account  <b>Or</b>  as a Controlling Person of an Entity Account	<ul style="list-style-type: none"> <li>i. Name</li> <li>ii. Address</li> <li>iii. Date of birth and National Insurance number (where applicable for Pre-existing Accounts)</li> <li>iv. Account number or functional equivalent</li> <li>v. Name and identifying number (GIIN or local tax identification number) of Reporting Financial Institution</li> <li>vi. Account balance or value</li> </ul>	31 May 2016
<b>2015</b>	As 2014	<p>As 2014 plus:</p> <p><b>Custodial Accounts</b> Total gross amounts of interest, dividends and other income paid or credited to the account</p> <p><b>Depository Accounts</b> Total amount of gross interest paid or credited to the account in the calendar year or other reporting period</p> <p><b>Cash Value Insurance contracts</b></p> <ul style="list-style-type: none"> <li>i. Surrender value; or</li> <li>ii. Amount calculated by the Specified Insurance Company; and</li> <li>iii. Any part surrenders.</li> </ul> <p><b>All other accounts</b> The total gross amount paid or credited to the account including the aggregate amount of any redemption payments.</p>	31 May 2016
<b>2016</b>	As 2014	<p>As 2015 plus:</p> <p><b>Custodial Accounts</b> Total gross proceeds from the sale or redemption of property paid or credited to the account</p>	31 May 2017

<b>2017 onwards</b>	As 2014	All of the above	31 May following the end of the
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## **UK Agreement - Annex III Alternative Reporting Regime** (See Appendix 2)

### **17.6. Reporting on Non-Participating Financial Institutions – US Agreement only**

Where a Reporting Financial Institution makes payments to a Non-Participating Financial Institution (NPFI), under the Agreements it is required to report the name and the aggregate value of payments made to each NPFI for the years 2015 and 2016.

This obligation was included as a temporary solution to the requirement to withhold on 'foreign pass thru payments' which is included in the US provisions.

Under the Agreement, a Cayman Island Financial Institution, providing that it complies with its due diligence and reporting obligations, is not subject to withholding.

Whether or not this reporting requirement continues will need to be considered alongside any discussion on the longer term solution that delivers the underlying policy objectives of pass thru payments, but which removes the legal problems for Financial Institutions outside the US.

The payments that are to be reported are:

- a) Non-US source interest paid on a Financial Account held by a NPFI;
- b) Non-US source dividends paid on a shareholding held in a Financial Account held by a NPFI;
- c) Payments to an NPFI (with respect to a Financial Account only) in connection with a securities lending transaction, sale-repurchase transaction, forward, future, option, swap, or similar transaction which are directly or indirectly contingent upon or determined by reference to, the payment of interest or a dividend from US sources; and

- d) Non-US source payments, to a NPFI, that are the proceeds or benefits of a Cash Value Insurance Contract or Annuity Contract.

Only payments that relate to the Financial Account maintained by the Reporting Cayman Islands Financial Institution for the Non-Participating Financial Institutions must be reported.

#### 17.6.1. Exceptions

The following do not need to be reported:

- i. Any payments made that are not in respect of a Financial Account held by the Financial Institution;
- ii. Payments for the following: services (including wages and other forms of employee compensation such as stock options), the use of property, office and equipment leases, software licenses, transportation, freight, gambling winnings, awards, prizes, scholarships, and interest on outstanding accounts payable arising from the acquisition of goods or services;
- iii. Payments where the Reporting Financial Institution has only a passive role in the payment process and so, alternatively either no knowledge of the facts that give rise to the payment or no control over the payment or no custody of the property which relates to 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 customer's account) or does not have custody of property which relates to the payment;
- iv. Capital markets payments in c) above that are not directly traceable to a US source;
- v. Payments where the Reporting Cayman Islands Financial Institution does not hold documentation to identify the payee as a NPFI, unless the payee prima facie is an FFI.

#### 17.6.2. Reporting

1. A payment will be treated as being made when an amount is paid or credited to

an NPFI.

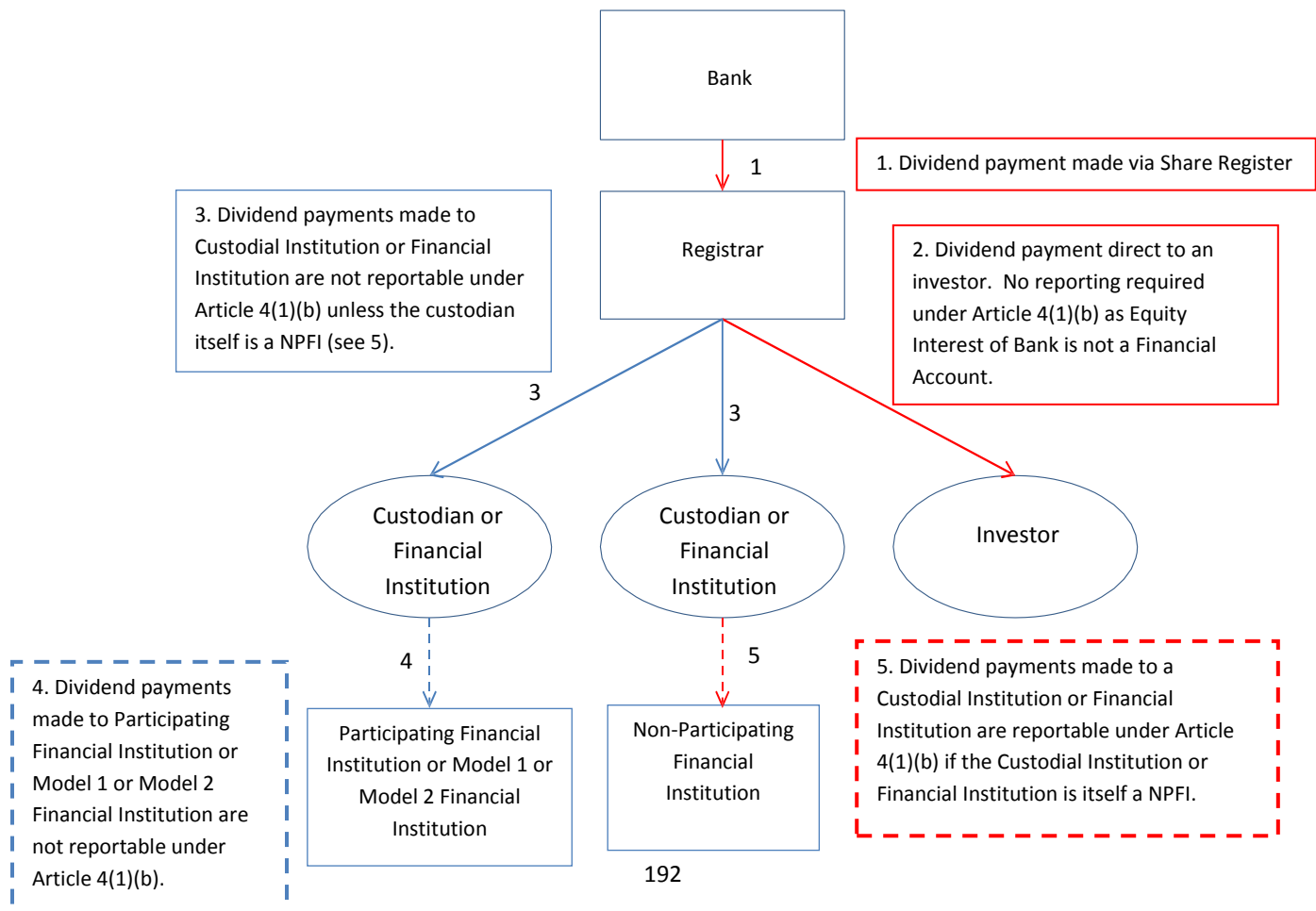
2. Only the aggregate amount of payments made to the payee during the calendar year need to be reported.

### 17.7. Payments of Dividends made by a Financial Institution

Dividend payments made by a Financial Institution to its shareholders will only be reportable where the shareholding is held in a Financial Account, for example where the shareholding is held in a Custodial Account of an NPFI.

Shareholdings of a Financial Institution, other than shareholdings or equity interest in certain Investment Entities, are not deemed to be 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.

The diagram below shows where the reporting for dividend payments will apply:



#### **17.8. Withholding on US Source Withholdable Payments paid to Non-Participating Financial Institutions – US Agreement only**

It is not expected that Article 4(1)(d) of the US Agreement will apply to Cayman Islands Financial Institutions, who should instead fall within the provisions of Article 4(1)(e). This means that Cayman Islands Financial Institutions 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.

#### **17.9. Reporting payments of US Source Withholdable Payments paid to Non- Participating Financial Institutions – US Agreement only**

The requirement to report US Source Withholdable Payments to Non-Participating Financial Institutions will fall on Financial Institutions other than those acting as qualifying intermediaries, withholding foreign partnerships or withholding foreign trusts (see Article 4(1)(d)&(e) of the Agreement).

Where such a Financial Institution pays, or acts as an intermediary for the payment of a US Source Withholdable Payment to a Non-Participating Financial Institution, the Financial Institution is required to provide information to the ‘immediate payor’ of that income. The immediate payor is the person with withholding and reporting obligations to the US authorities.

The information that must be provided in respect of the payment is that required for withholding and reporting to occur.

#### **17.10. Third party service providers**

Under the Agreements, third party service providers may be used by Reporting Cayman Islands Financial Institutions to undertake their reporting obligations but the responsibility for ensuring that the reporting is complete, correct and timely remains with the Reporting Cayman Islands Financial Institution.

#### **17.11. Format of reporting**

The format in which the reporting will be required will be in accordance with the published reporting Schema issued by the IRS and will also be consistent with the format used by the UK which is being developed with the OECD for the Common Reporting Standards. The reporting format will be mandatory, and reports submitted in any other format will not be accepted.

#### **17.12. Transmission to the TIA**

Reporting Cayman Islands Financial Institutions will report the required data to the TIA electronically in the required format.

#### **17.13. Penalties**

Penalties for failure to comply with the reporting obligations are set out in the Regulations.

## **18. COMPLIANCE**

### **18.1. Minor errors**

In the event that the information reported is corrupted or incomplete, the recipient country will notify the TIA. The TIA will contact the Reporting Cayman Islands Financial Institution to resolve the problem. Examples of minor errors could include:

- a) Data fields missing or incomplete;
- b) Data that has been corrupted;
- c) Use of an incompatible format.

Where this leads to the information having to be resubmitted this will be via the TIA.

Compliance measures may be exercised by the TIA if the error is considered to contravene the Regulations.

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

### **18.2. Significant non compliance**

Significant non-compliance may be determined by the IRS (in respect of the US Agreement), HMRC (in respect of the UK Agreement) or the TIA. In any event the relevant Competent Authorities will 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 TIA is notified of or identifies significant non-compliance by a Reporting Cayman Islands Financial Institution, the TIA may exercise any compliance measures under the Regulations.

The TIA will also engage with the Reporting Cayman Islands Financial Institution to:



- discuss the areas of non-compliance;
- discuss remedies/solution to prevent future non-compliance;
- agree measures and a timetable to resolve its significant non-compliance.

The TIA will inform the Competent Authority of the other party of the outcome of these discussions.

The following are examples of what would be regarded as significant non-compliance:

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

In the event that the issues remain unresolved after a period of 18 months then the Reporting Cayman Islands Financial Institution will be treated as a Non-participating Financial Institution under the US Agreement. Details of how such an entity can correct its status will be published at later date. There is no equivalent sanction under the UK Agreement but compliance measures may be exercised by the TIA under the Regulations.

## **19. PREVENTION OF AVOIDANCE**

The Regulations include an anti-avoidance measure which is aimed at arrangements taken by any person to avoid the obligations placed upon them by the Regulations.

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.

## **APPENDIX 1**

### **RELEVANT DOCUMENTS**

#### **US Agreement**

Intergovernmental Agreement

<http://tia.gov.ky/pdf/BilateralAgreementsArrangements.pdf>

Tax Information Exchange Agreement

<http://tia.gov.ky/pdf/BilateralAgreementsArrangements.pdf>

US Treasury FATCA Regulations

<http://www.irs.gov/PUP/businesses/corporations/TD9610.pdf>

Tax Information Authority (International Tax Compliance) (United States) Regulations,  
2014

[http://www.gazettes.gov.ky/sites/default/files/extraordinary-gazettes-supplements/Es432014\\_web.pdf](http://www.gazettes.gov.ky/sites/default/files/extraordinary-gazettes-supplements/Es432014_web.pdf)

#### **UK Agreement**

Intergovernmental Agreement

<http://tia.gov.ky/pdf/BilateralAgreementsArrangements.pdf>

Double Tax Arrangement

<http://tia.gov.ky/pdf/BilateralAgreementsArrangements.pdf>

Tax Information Authority (International Tax Compliance) (United Kingdom)  
Regulations, 2014

[http://www.gazettes.gov.ky/sites/default/files/extraordinary-gazettes-supplements/Es442014\\_web.pdf](http://www.gazettes.gov.ky/sites/default/files/extraordinary-gazettes-supplements/Es442014_web.pdf)

## APPENDIX 2

### UK AGREEMENT – SPECIFIC ELEMENTS

#### 1. Annex III – Alternative Reporting Regime for UK Resident Non-Domiciled Individuals

##### A. General

Annex III to the UK Agreement includes provisions for the Alternative Reporting Regime (ARR). This ARR applies only to UK Resident Non-Domiciled (RND) individuals that have claimed the remittance basis of tax under Part 14 Chapter A1 Income Tax Act 2007.

The ARR is elective by both the Reporting Cayman Islands Financial Institution and the RND. In the absence of an election by both parties (see paragraph B below), and self-certification by the RND (see paragraph C below) the full reporting under the UK Agreement applies.

If the Reporting Cayman Islands Financial Institution and RND have elected for the ARR to apply, and the self-certification has been completed by the RND, the ARR must be applied to all UK Reportable Accounts held with that Reporting Cayman Islands Financial Institution by that RND, whether directly or indirectly through an entity of which the RND is a Controlling Person.

##### B. Elections

In order for the ARR to apply, two elections need to be made.

#### 1. Reporting Cayman Islands Financial Institution

The Reporting Cayman Islands Financial Institution must submit an election to the TIA confirming that it is offering the ARR to its RND clients. The election must be made by 30 April following the end of the first Relevant Tax Year in respect of which it offers the ARR, except for 2015 where the election may be made by 30 September 2015. The election will remain valid until it is revoked by the Reporting Cayman Islands Financial

Institution.

## 2. RND

The RND must submit an election to the Reporting Cayman Islands Financial Institution that will be reporting in respect of Financial Accounts held by the RND and maintained by that Reporting Cayman Islands Financial Institution. The election must be made annually and by 30 April following end of the Relevant Tax Year, except for 2015 where the election may be made by 30 September 2015.

The Reporting Cayman Islands Financial Institution may determine that the election should be made by an earlier date provided they notify their client in advance such as when they notify the client that they can offer the ARR. This might be preferable if the Financial Institution cannot obtain electronically all of the information required to be reported under the full reporting or ARR and has to collate it through manual file searches, for example.

The format of the election can be determined by the Reporting Cayman Islands Financial Institution.

### **C. Self-certification**

The RND electing for the ARR to apply to his accounts must provide written and signed confirmation of the following to the Reporting Cayman Islands Financial Institution by 28 February following the end of the Relevant Tax Year:

- that the RND's UK tax return for the Relevant Tax Year:
- contains a claim or statement that the RND is not domiciled anywhere in the UK; and
- includes a claim to be taxed under the remittance basis under Part 14 Chapter A1 Income Tax Act 2007 and, if appropriate, the tax chargeable under section 809H Income Tax Act 2007 has been paid, or any such equivalent sections in any successor legislation; and
- to the best of their knowledge, the domicile status and claim to be taxed on

the remittance basis is not being formally disputed by HMRC.

The format of the self-certification can be determined by the Reporting Cayman Islands Financial Institution but must be in writing and signed by the Specified Person. The document must be retained by the Reporting Cayman Islands Financial Institution for a period of 6 years following the end of the Relevant Tax Year.

#### **D. Information to be provided**

The following information should be provided in respect of the Relevant Reporting Period instead of the information to be provided under Article 2 of the UK Agreement.

- Name, address, date of birth and National Insurance Number.

In the case of date of birth and National Insurance Number, this information is only reported where it is available. This information should be obtained for all new accounts established after 1 July 2014. In respect of accounts that exist at 30 June 2014, Reporting Cayman Islands Financial Institutions should have in place mechanisms to obtain this information by 1 January 2017 so that this information can be included in reporting for the Relevant Tax Year ended 5 April 2018.

In the case of an account holder being an entity that is identified as having one or more Controlling Persons that is a RND, the name and address of the entity must also be reported in addition to the information above in respect of the RND Controlling Persons.

- Instead of income and account balance information that is required to be reported under the UK Agreement, the following financial information is to be reported in respect of the Relevant Tax Year:
  - Gross Payments and Movements of Assets from an originating UK source into the UK Reportable Account;
  - Gross Payments and Movements of Assets from an originating source territory or jurisdiction that cannot be determined;
  - Gross Payments from the UK Reportable Account to an ultimate UK

destination; and

- Gross Payments from the UK Reportable Account to an ultimate territory or jurisdiction that cannot be determined.
- Where gross payments and movements of assets have been made during the Relevant Tax Year, the Financial Institution must also report the following:
    - The account number, or functional equivalent.
    - The name of the Reporting Cayman Islands Financial Institution and, where available, the Global Intermediary Identification Number (obtained if the Reporting Cayman Islands Financial Institution registers with the IRS under the US Agreement).

#### **E. Ultimate destination and originating source**

The use of the words 'ultimate' and 'originating' was to deal with the situation where payments were made via UK clearing institutions. It is not intended that the Reporting Cayman Islands Financial Institution has to trace the funds or assets through every possible future or previous location.

If a payment is made or an asset is moved directly from the UK Reportable Account to a UK account it should be assumed that the UK is the ultimate destination and so the transaction is reportable, unless there is evidence that the payment or asset is destined for another identifiable jurisdiction.

Evidence in this case for example would be assumed if the Reporting Cayman Islands Financial Institution has instructions to transfer the funds or assets from a Cayman Islands account to an account in France but the funds are transferred via a UK clearing account.

If a payment is made or an asset is moved from the UK Reportable Account to an account in another jurisdiction, and that jurisdiction is identifiable (which would be expected to be the case), then the transaction is not reportable, unless there is

evidence that the payment or asset is destined for the UK. The Reporting Cayman Islands Financial Institution is not required to enquire with the Specified UK Person as to whether the funds will be transferred elsewhere.

Evidence in this case for example would be assumed if the Reporting Cayman Islands Financial Institution has instructions to transfer the funds from a Cayman Islands account to an account in France and then from the French account to an account in the UK. This would be treated as being a transfer to an ultimate UK destination.

#### **F. ARR reporting periods**

The reporting period for the ARR is aligned with the UK tax year and is referred to as the Relevant Tax Year in the Agreement.

The first reporting period for ARR is for 2014 and covers the period from 30 June 2014 to 5 April 2015. This information must be reported to the TIA by 31 May 2016 for onward submission to HMRC by 30 September 2016.

The reporting period for 2015 covers the period from 6 April 2015 to 5 April 2016 and must be reported to the TIA by 31 May 2017 for onward submission to HMRC by 30 September 2017. In all subsequent years, the reporting follows this pattern.

If a RND elects for ARR to apply but does not complete the self-certification process, the Reporting Cayman Islands Financial Institution must report the information set out in Article 2 of the UK Agreement. This will necessarily result in a 12 month delay in the information being reported.

For example, taking the reporting period for 2016 (6 April 2016 to 5 April 2017), the RND will have elected for ARR to apply by 30 April 2017. The self-certification by the RND is needed by 28 February 2018. If the self-certification is not provided, the Reporting Cayman Islands Financial Institution must report to the TIA by 31 May 2018 the income, gains and account balances as set out in Article 2 for the 2016 calendar year in respect of the accounts held by that RND so that this can be reported to HMRC



by 30 September 2018.

#### **G. Additional reporting for Reporting Cayman Islands Financial Institutions**

For each year for all clients who have elected for the ARR to apply, regardless of whether the RND has provided the self-certification, the Reporting Cayman Islands Financial Institution must provide the following information to the TIA by 31 May following the end of the Relevant Tax Year:

- Name, address and, where available, the date of birth and National Insurance Number.

Therefore, for all RNDs who have made the election in respect of the tax year ended 5 April 2017, a list of those persons must be sent to the TIA by 31 May 2017 so that it can be submitted to HMRC by 30 September 2017 in accordance with paragraph E.1. of Annex III. It is recognised that this might result in some duplicate reporting when the Gross Payments and Movement of Assets is reported in respect of the same period 12 months later.

## Summary timetable for ARR elections and self-certification

Reporting period	Period covered	Election/self-certification made by:	Election made to:	Deadline for making election
<b>2014</b>	30 June 2014 to 5 April 2015	i) Reporting Cayman Islands Financial Institution - election  ii) RND – election  iii) RND – self-certification	i) The TIA  ii) Reporting Cayman Islands Financial Institution  iii) Reporting Cayman Islands Financial Institution	i) 30 September 2015  ii) 30 September 2015  iii) 28 February 2016
<b>2015</b>	6 April 2015 to 5 April 2016	i) Reporting Cayman Islands Financial Institution - election  ii) RND – election  iii) RND – self-certification	i) The TIA  ii) Reporting Cayman Islands Financial Institution  iii) Reporting Cayman Islands Financial Institution	i) 30 April 2016  ii) 30 April 2016  iii) 28 February 2017
<b>2016</b>	6 April 2016 to 5 April 2017	i) Reporting Cayman Islands Financial Institution - election  ii) RND – election  iii) RND – self-certification	i) The TIA  ii) Reporting Cayman Islands Financial Institution  iii) Reporting Cayman Islands Financial Institution	i) 30 April 2017  ii) 30 April 2017  iii) 28 February 2018
<b>2017 onwards</b>	Same pattern as 2016	Same pattern as 2016	Same pattern as 2016	Same pattern 2016

## Summary timetable for ARR reporting

Reporting period	In respect of:	Information to be reported	Period covered	Reporting date to the TIA
2014	i) Each Specified UK Person who has elected for the ARR to apply	i) Name, address, DoB and NI Number  <b>and if no self-certification made</b>  full reporting as set out in section 17.5	i) 30 June 2014 to 5 April 2015	31 May 2016
			1 January 2014 to 31 December 2014	31 May 2016
	ii) Each Specified UK Person who has elected for the ARR to apply <u>and has completed the self-certification process</u>	ii) Name, address, DoB and NI Number; and  Gross Payments and Movements of Assets as set out in paragraph D	ii) 30 June 2014 to 5 April 2015	31 May 2016
2015	As for 2014	i) Name, address, DoB and NI Number  <b>and if no self-certification made</b>  full reporting as set out in 17.5	i) 6 April 2015 to 5 April 2016	31 May 2016
			1 January 2015 to 31 December 2015	31 May 2017
		ii) Name, address, DoB and NI Number; and  Gross Payments and Movements of Assets as set out in paragraph D	ii) 6 April 2015 to 5 April 2016	31 May 2017

<b>2016</b>	As for 2014	i) Name, address, DoB and NI Number  <b>and if no self-certification made</b>  full reporting as set out in 17.5  ii) Name, address, DoB and NI Number; and  Gross Payments and Movements of Assets as set out in paragraph D	i) 6 April 2016 to 5 April 2017  1 January 2016 to 31 December 2016  ii) 6 April 2016 to 5 April 2017	31 May 2017  31 May 2018  31 May 2018
<b>2017 onwards</b>	As for 2014	i) Name, address, DoB and NI Number  <b>and if no self-certification made</b>  full reporting as set out in 17.5  ii) Name, address, DoB and NI Number; and  Gross Payments and Movements of Assets as set out in paragraph D	Following the same pattern as 2016	Following the pattern as above

## H. Trusts

The interest in a trust is the Financial Account which, if the settlor, beneficiary or person with ultimate effective control is a Specified UK Person, is a UK Reportable Account. This remains the case where that Specified Person is a UK Resident Non-Domiciled person.

The Reporting Cayman Islands Financial Institution, which in the case of a professionally managed trust is the trustee, has to report Gross Payments and Movement of Assets from a UK source or from an undeterminable jurisdiction to the UK

Reportable Account, i.e. the trust. The Reporting Cayman Islands Financial Institution also has to report Gross Payments from the UK Reportable Account, i.e. the trust, to a UK destination or destination in an undetermined jurisdiction.

No disclosure is required in respect of interest or other income arising in the trust.

## **APPENDIX 3**

### **CAYMAN ISLANDS AUTOMATIC EXCHANGE OF INFORMATION (AEOI) PORTAL**

The AEOI Portal User Guide can be accessed via the following link:

[http://tia.gov.ky/pdf/User\\_Guide.pdf](http://tia.gov.ky/pdf/User_Guide.pdf)