GUIDANCE NOTES ON THE IMPLEMENTATION OF FATCA IN IRELAND

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Chapter 1

FATCA Overview

1.1 Background

The Foreign Account Tax Compliance Act (FATCA) forms part of the U.S. Hiring Incentives to Restore Employment Act of 2010. The overall aim of this legislation is to combat tax evasion by improving exchange of information between tax authorities in relation to U.S. citizens and residents who hold assets off-shore. FATCA obliges all U.S. paying agents to withhold tax of 30% from payments of U.S. source income that are made to any non-U.S. financial institution **unless** that institution has entered into an agreement with the U.S. Internal Revenue Service ('IRS') to directly report certain information account holders who are U.S. persons.

On 21 December 2013, the Minister for Finance, on behalf of the Government, signed an agreement with the U.S. in relation to the implementation of FATCA in Ireland (the Agreement). The Statutory Instrument implementing the Agreement (S.I. No 33 of 2013) is included in Part 3 of Schedule 24 to the Taxes Consolidation Act 1997. This Statutory Instrument together with the Financial Account Reporting Regulations 2013 (the Regulations) and section 891E of the Taxes Consolidation Act give legislative effect to the Agreement.

The Agreement provides for the automatic reporting and exchange of information on an annual basis in relation to accounts held in Irish financial institutions by U.S. persons, and the reciprocal exchange of information regarding U.S. financial accounts held by Irish residents.

Following the Agreement, Irish Financial Institutions will not be subject to the 30% withholding tax on U.S. source income provided they comply with the requirements of the implementing Irish legislation.

1.2 Scope of FATCA

The implementing legislation applies to all Irish financial institutions that maintain financial accounts where the account holder is a:

- a specified U.S. person or
- a passive entity with controlling persons that are specified U.S. persons.

Such accounts are regarded as reportable accounts and a reporting financial institution must identify all such accounts using the due diligence procedures set out in the Agreement and then submit a return containing details of these accounts to Revenue on or before 31 March each year.

In addition and for the tax years 2015 and 2016 only, a reporting financial institution must submit details of payments made by it to non-participating financial institutions.

Provided a financial institution complies with the implementing FATCA legislation, it will not be subject to any withholding tax on its U.S. source income under S1471 of the U.S. Internal Revenue Code.

1.3 Purpose of these guidance notes

These notes are intended to provide guidance to reporting financial institutions on how to comply with their obligations under the Financial Account Reporting Regulations 2013). They do not have the force of law and do not affect any person's right of appeal. As such, the notes reflect a standard of best practice.

It is hoped that they will facilitate orderly management of the new arrangements in relation to the reporting under FATCA and minimise difficulties for reporting financial institutions, their customers and Revenue.

1.4 Interaction with U.S. Regulations

In policy terms an Irish Financial Institution should not be at a disadvantage from applying the Irish legislation implementing the Agreement as compared to the position that they would have been in if applying the US regulations another Intergovernmental FATCA Agreements entered into between the US and another jurisdiction.

However a Financial Institution must apply the Irish Regulations in force at the time and adhere to the published Revenue Guidance. Where a Financial Institution identifies an element of the US Regulations or element of a different agreement that it feels it would like to apply then it should contact Revenue to discuss the issue.

If the US authorities subsequently amend the underlying US regulations to introduce additional or broader exemptions Revenue will consider whether to incorporate these changes into its regulations or guidance. Revenue will publish any updates on its dedicated FATCA webpages [a link will be inserted here where the relevant FATCA section of Revenue.ie has been created] and make any subsequent changes to the Regulations if needed.

1.5 Revenue contact

1.5.1 Where a reporting financial institution requires further information on the issues raised in these guidelines, they may contact the Revenue Commissioners at the following address:

To be confirmed later

1.5.2 Where a reporting financial institution requires further information on the system for reporting information, they may contact the Revenue Commissioners at the following address:

Contact to be confirmed later

Chapter 2

Financial Institutions impacted by FATCA

2.1 Introduction

As stated earlier, the legislation applies to reporting Irish financial institutions. For this purpose, a financial institution is defined as:

- a custodial institution,
- a depository institution,
- an investment entity, and
- a specified insurance company.

An entity may be classified within more than one category of Financial Institution and/or offer more than one type of Financial Account. Additionally while an entity may be categorised as a Financial Institution it may not have any Financial Accounts.

2.1.1 Custodial Institution

A custodial institution is defined as any entity that holds as a substantial portion of its business, financial assets for the account of others. An entity will fall within this description where:

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

its income attributable to the holding of financial assets and the provision of related financial services is 20 per cent or greater of it gross income. For this purpose, the term related services means any ancillary service which is directly related to the holding of assets by the institution on behalf of others.

Brokers, custodial banks, trust companies, clearing organisations and nominees are all likely to fall within the definition of custodial institution.

2.1.2 Depositary Institution

A depository institution is defined as any person that accept deposits in the ordinary course of a banking or similar business.

This category would include banks, credit unions, industrial and provident societies and building societies. This is not an exhaustive list and whether or not an entity is a depository institution will depend on what activities are actually undertaken by the entity. Generally, however, an entity will fall within this definition if it accepts deposits and/or engages in other financial transactions on behalf of its customers.

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

(a) under which it will be repaid, with or without interest or premium, either on demand or at a time or in circumstances agreed by or on behalf the person making the deposit and the Financial Institution receiving it and

(b) which are not referable to the provision of property (other than currency) or services or the giving of security;

A financial institution accepts deposits in the ordinary course of a banking business if the money received by way of deposit is lent to others, or any other activity of the Financial Institution is financed wholly, or to a material extent, out of the capital of or interest on money received by way of deposit.

This would not include deposits

(i) paid by one company to another at a time when both are members of the same group or when the same individual is a majority shareholder controller of both of them, or

(ii) paid to a solicitor acting in the course of his profession.

2.1.3 **Investment Entity**

An investment entity is an entity which conducts as a business, or is managed by an entity that conducts as a business, one or more of the following activities, for or on behalf of a customer (e.g. an account holder):

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

Collective investment funds are the main type of business covered by this heading. However the definition is very wide and would include in addition to an investment fund, persons such as fund administrators, fund managers, fund distributors, custodians, etc. Although such entities are investment entities in accordance with the definition, they will only have reporting obligations, if they hold financial accounts - see Chapter 6.

2.1.4 **Specified Insurance Company**

This definition encompasses both the specified insurance company and its holding company.

An insurance company is a specified insurance company when the products written by the company are classified as cash value insurance or annuity contracts (see Annex 1) or if payments are made with respect to such contracts.

Insurance companies that only provide general insurance or term life insurance will not be financial institutions under this definition.

2.2 Irish Financial Institutions

FATCA applies to Irish resident financial institutions. This includes subsidiaries and branches of non-resident financial institutions that are located in Ireland. However, subsidiaries and branches of Irish entities that are not located in Ireland are excluded from the scope of the Agreement and will be covered by any relevant rules in the country in which they are located.

Investment Limited Partnerships and Common Contractual Funds
Such entities will be regarded as Irish financial institutions for the purposes of FATCA and will be required to report if they hold reportable accounts.

Example 1

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

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

Under the terms of the Agreement:

- ABC Bank and its subsidiary S will be Irish financial institutions and will report to the Revenue Commissioners;
- Subsidiaries D and F will be classified under the Agreement as partner jurisdiction financial institutions and will report to their respective jurisdictions;
- X will be a non- participating financial institution if its country of residence does not have an agreement with the U.S. and if it cannot or does not comply with the obligation to report directly to the U.S.;

Example 2

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

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

Under the FATCA rules, WXY Bank and Subsidiary 1will report to HRMS in the U.K. while Subsidiary 2 reports to the Danish tax authorities. Branch 1 reports to Revenue.

2.3 Non Participating Financial Institutions (NPFI)

A non participating financial institution (NPFI) is a financial institution that is not FATCA compliant. This situation will arise where: -

- the financial institution is located in a jurisdiction that does not have an Intergovernmental Agreement with the U.S. and the financial institution has not entered into a FATCA agreement with the IRS, or
- the financial institution is classified as being a NPFI due to significant non compliance with its obligations.

An Irish financial institution will only be classed as an NPFI where there is significant non compliance with the legislation and, following a period of enquiry, has not rectified that non-compliance. Where a financial institution becomes a NPFI, details will be published by the IRS.

The presence of an NPFI in its group will not preclude an Irish financial institution from being treated as a participating financial institution for FATCA purposes. Where an Irish financial institution has a related entity that, because of the jurisdiction it operates in, is a NPFI, the financial institution must treat the related entity as an NPFI and report payments made to the NPFI - see chapter 11.

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

2.4 Application to General Insurance Companies

A general insurance company is not treated as a Financial Institution under FATCA, and instead is classified as a NFFE.

For FATCA purposes, income received on assets used as capital in an insurance business should be treated as active rather than passive income.

Chapter 3

Exempted Financial Institutions

3.1 Introduction

Certain financial institutions are exempted from FATCA. Where an exemption applies, the financial institution will either be exempt from all requirements or its obligations may be reduced. The following entities qualify for exemption:

1. the exempt beneficial owners described in paragraph 3.2,
2. the self-certified deemed compliant financial institutions described in paragraph 3.3, and
3. the registered deemed compliant financial institutions described in paragraph 3.4.

3.2 Exempt Beneficial Owner

Where an entity falls within this category it will be deemed to pose a low risk of U.S. tax evasion. Such entities will not have any reporting requirements in relation to any financial accounts that they maintain, nor will reporting financial institutions be required to review or report on accounts held by such exempt beneficial owners. The categories of exempt beneficial owner are set out in Part I of Annex II to the Agreement and are as follows:

13.2.1 Irish Governmental Organisations

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

(1). The National Treasury Management Agency,

(2). The National Pensions Reserve Fund and the National Pensions Reserve Fund Commission, and

(3). The National Asset Management Agency.

3.2.2 The Central Bank

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

3.2.3 International Organisations

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

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

3.2.4 Retirement Funds

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

3.3 Self Certified Deemed Compliant Financial Institutions

Entities falling within the descriptions below qualify as self-certified deemed compliant financial institutions. The entities described in paragraphs 3.3.1 to 3.3.3 are deemed compliant entities because they are included in Annex II to the Agreement. The entities described in paragraphs 3.3.4 to 3.3.8 are not included in the Agreement. However, they qualify as certified deemed compliant entities under the U.S. FATCA Regulations. As such, paragraph 1(q) of Article 1 of the Agreement enables Irish financial institutions that comply with the conditions outlined to qualify for the exemption.

3.3.1 Non-Profit Organisations

These are:

- Charitable organisations that qualify for exemption from tax in accordance with section 848A and Schedule 26A of the Taxes Consolidation Act 1997.

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

Charities and sports clubs coming within the descriptions above will not be required to register, report or carry out any due diligence in relation to their accounts. If the charity or club has U.S. source income, it should supply the U.S. payor with a self-certification in the form set out in Annex 3, in order to avoid the U. S. FATCA withholding tax on that income.

3.3.2 Financial Institutions with a Local Client Base

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

There are 10 conditions that must all be met before a financial institution can claim this exemption. These are:

(1). The financial institution must be licensed and regulated under the laws of Ireland.

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

(3). The financial institution must not solicit account holders outside of Ireland. For this purpose, a financial institution shall not be considered to have solicited account holders outside of Ireland merely because it operates a website, provided that the website does not specifically indicate that the financial institution provides accounts or services to non-residents, or otherwise targets or solicits U.S. customers. This condition does not prevent an institution from opening an account for a U. S. person who is resident in Ireland. However where the institution intentionally markets and provides accounts or services to persons who are not resident in Ireland, then this requirement would not be fulfilled.

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

(4). The financial institution must be required under the tax laws of Ireland to perform either information reporting or withholding of tax with respect to accounts held by residents of Ireland. This would include credit unions and other entities subject to the DIRT reporting requirements as well as insurance companies that are subject to the life insurance exit tax regime. It would also include any other entity that is required to report on accounts held by Irish residents.

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

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

(6). Subject to subparagraph (7) below, beginning on January 1, 2014, the financial institution does not open accounts for:

(i) any specified U.S. person (see Annex 1) who is not a resident of Ireland (including a U.S. person that was a resident of Ireland when the account was opened but subsequently ceases to be a resident of Ireland),

(ii) a non-participating financial institution (Chapter 2), or

(iii) any passive NFFE with controlling persons who are U.S. citizens or residents (see Annex 1).

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

This means that, even if accounts have been provided to Specified US persons, a non-participating Financial Institution or any passive NFFE with controlling persons who are US citizens or residents prior to the 1 January 2014, the Financial Institution can still be a Financial Institution with a Local Client Base provided the accounts are reported and the 98% rule has not been breached.

(8). With respect to each account that is held by an individual who is not a resident of Ireland or by an entity (whether or not resident in Ireland), and that is opened prior to the date that the financial institution implements the policies and procedures described in paragraph (7) above, the financial institution must review those accounts in accordance with the procedures described in Chapters 7 and 9 relating to pre-existing accounts in order to identify any reportable account or account held by a non-participating financial institution. Where any such accounts are identified, the institution must close the account, or report on the account as though the financial institution were a reporting Irish financial institution.

Paragraphs 7 and 8 allow a financial institution that holds some reportable accounts to take advantage of the exemption provided it fullfills the requirement to report those accounts.

(9). Each related entity of the financial institution must be incorporated or organised in Ireland and must meet the requirements set forth in paragraphs 1 - 10.

(10). The financial institution must not have policies or practices that discriminate against opening or maintaining accounts for individuals who are specified U.S. persons and who are residents of Ireland.

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

3.3.3 Certain Collective Investment Vehicles

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

(1). Where all of the interests in a collective investment vehicle (including debt interests in excess of $50,000) are held by or through one or more financial institutions that are not non-participating financial institutions, the reporting obligations of any investment entity (other than a financial institution through which interests in the collective investment vehicle are held) will be deemed fulfilled with respect to interests in the collective investment vehicle.

(2). If the collective investment vehicle is not described in paragraph (1), and if the information required to be reported by the collective investment vehicle under the Agreement with respect to interests in the collective investment vehicle is reported by the collective investment vehicle or another investment entity, the reporting obligations of all other investment entities which have an obligation to report with respect to the interests in the collective investment vehicle will be deemed fulfilled with respect to such interests.

Paragraph (1) is designed to apply to funds where all of the interests in that fund are held by reporting financial institutions. In such cases, the only persons who have reporting obligations in relation to the fund are those financial institutions that are holders of the interest in the fund. However, if any of the interests in the fund are held by non-participating financial institutions, the fund must report details of these holdings.

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

3.3.4 Non-registering local bank

A non-registering local bank is a financial institution that is licensed and regulated by the Central Bank, operates solely in Ireland and that complies with the conditions outlined below. The conditions are:

1. The financial institution operates solely as, and is licensed and regulated under, the laws of Ireland, as:
    - A bank, or
    - A credit union or similar co-operative credit organisation that is operated without profit.

2. The financial institution's business consists primarily of receiving deposits from and making loans to unrelated retail customers.

3. The institution does not have a fixed place of business outside of Ireland. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the institution performs solely administrative support functions.

4. The institution does not solicit customers or account holders outside of Ireland. For this purpose, an institution will not be considered to have solicited customers or account holders outside its country of incorporation or organisation merely because it operates a website, provided that the website does not permit account opening, does not indicate that the institution maintains accounts for or provides services to non-residents, and does not otherwise target or solicit U.S. customers or account holders.
   A financial institution will also not be considered to have solicited customers or account holders outside its country of incorporation or organisation merely because it advertises in print media or on a radio or television station that is distributed or aired primarily within its country of incorporation or organisation but is also incidentally distributed or aired in other countries, provided that the advertisement does not indicate that the financial institution maintains accounts for or provides services to non-residents and does not otherwise target or solicit U.S. customers or account holders.

5. The financial institution does not have more than $175 million in assets on its balance sheet and, if the institution is a member of an expanded affiliated group, the group does not have more than $500 million in total assets on its consolidated or combined balance sheets.

6. With respect to a financial institution that is part of an expanded affiliated group, each member of the expanded affiliated group is incorporated or organised in Ireland and does not have a fixed place of business outside of Ireland. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the institution performs solely administrative support functions. Further, each financial institution in the group, other than an institution that qualifies under paragraph 3.3.5 as a financial institution with only low value accounts must meet the requirements set out in paragraphs 1 to 5 above. For this purpose, a fixed place of business does not include a location that

is not advertised to the public and from which the financial institution performs solely administrative support functions.

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

Provided a financial institution complies with all of the conditions outlined above it will qualify as a deemed compliant financial institution and will not have to register or report under FATCA.

3.3.5 <u>Financial Institutions with only low-value accounts</u>

A financial institution qualifies under this heading if it holds only low-value accounts, is licensed and regulated by the Central Bank, operates solely in Ireland and complies with the other conditions outlined below. The conditions are:

1. The financial institution is not an investment entity (see Chapter 2).

2. No financial account maintained by the financial institution (or, in the case of a financial institution that is a member of an expanded affiliated group, by any member of the expanded affiliated group) has a balance or value in excess of $50,000. In this connection, the balance or value of a financial account is to be determined by applying the rules described in paragraph 5.6 of Chapter 5.

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

Where a financial institution complies with the conditions outlined above it will qualify as a deemed compliant financial institution and will not have to register or report under FATCA.

3.3.6 <u>Sponsored closely held investment vehicles</u>

A financial institution qualifies under this heading if it complies with the conditions for both itself and the sponsoring entity which are outlined below. The conditions applicable to the financial institution are:

1. The financial institution is a financial institution solely because it is an investment entity and is not a qualified intermediary, withholding partnership or withholding trust (see definitions in Annex 1)

2. The financial institution has a contractual arrangement with a sponsoring entity that is a participating financial institution, a reporting Model 1 FFI, or U.S. financial institution and that is authorised to manage the financial institution and enter into contracts on behalf of

the institution (such as a professional manager, trustee, or managing partner), under which the sponsoring entity agrees to fulfill all due diligence, withholding, and reporting responsibilities that the financial institution would have assumed if it were a reporting 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 and equity interests in the financial institution. For this purpose debt interests owned by:

   (i) participating financial institutions,
   (ii) registered deemed-compliant financial institutions,
   (iii) certified deemed-compliant financial institutions and
   (iv) equity interests owned by an entity if that entity owns 100 percent of the equity interests in the financial institution and is itself a sponsored financial institution under this paragraph,

   may be disregarded.

The conditions applicable to the sponsoring entity are:

1. The sponsoring entity has registered with the IRS as a sponsoring entity - see Annex 2.

2. The sponsoring entity agrees to perform, on behalf of the financial institution, all due diligence, withholding, reporting, and other requirements that the institution would have been required to perform if it were itself a registered reporting financial institution and retains documentation collected with respect to the institution for a period of six years.

3. The sponsoring entity identifies the financial institution in all reporting completed on the institution's behalf to the extent required under U.S. Regulations[1].

4. The sponsoring entity has not had its status as a sponsor revoked by the IRS.

5. The IRS may revoke a sponsoring entity's status as a sponsor with respect to all sponsored financial institutions if there is a material failure by the sponsoring entity to comply with its obligations under with respect to any sponsored financial institution. A sponsored financial institution will remain liable for any failure of its sponsoring entity to comply with the obligations contained in the U.S. Regulations that the sponsoring entity has agreed to undertake on behalf of that institution.

[1] See Regulation Nos 1.1471-4(d)(2)(ii)(C), 1.1474-1 and 1.1471-5(f)(2)(iii)(E)(3)

3.3.7 Limited life debt investment entities Regulation 1.1471.5(f)(2(iv))

This is a temporary exemption that applies up to 31 December 2016. A financial institution qualifies as a limited life debt investment entity if it is the beneficial owner of the payment (or of payments made with respect to the account) and complies with the conditions outlined below.

The conditions applicable to the financial institution are:

1. The financial institution is a collective investment vehicle formed pursuant to a trust deed or similar fiduciary arrangement that is a financial institution solely because it is an investment entity that offers interests primarily to unrelated investors.

2. The institution was in existence as of December 31, 2011, and its governing documents require that the entity liquidate on, or prior to, a set date, and do not permit amendments to the governing documents, including the trust deed, without the agreement of all of the financial institution's investors.

3. The financial institution was formed for the purpose of purchasing (and did in fact purchase) specific types of indebtedness and holding those assets (subject to reinvestment only under prescribed circumstances) until the termination of the asset or the vehicle.

4. All payments made to the investors of the financial institution are cleared through a clearing organisation that is a participating financial institution, a reporting Model 1 financial institution , or a U.S. financial institution or is made through a trustee that is a participating financial institution, a reporting Model 1 financial institution, or a U.S. financial institution.

5. The financial institution's trust deed or similar fiduciary arrangement only authorises the trustee or fiduciary to engage in activities specifically designated in the trust deed, and the trustee or fiduciary is not authorised through a fiduciary duty or otherwise to fulfill the obligations that a participating financial institution is subject to under FATCA absent a legal requirement to fulfill them, even if the consequence of the trustee failing to fulfill these obligations is to cause the financial institution to suffer withholding tax on its U.S. source payments. Further, no other person has the authority to fulfill the obligations that a participating financial institution is subject to under FATCA on behalf of the financial institution.

3.3.8 Owner-documented FFIs (Regulation 1.147-5(F)(3)

A financial institution qualifies as an owner-documented financial institution in respect of payments or accounts for which it does not act as an intermediary and it complies with the conditions set out below. Where it qualifies, the institution will only be treated as an owner-documented financial institution with respect to payments received from and accounts held with a designated withholding agent (or with respect to payments received from and accounts

held with another financial institution that is also treated as an owner-documented financial institution by such designated withholding agent).
A designated withholding agent is a U.S. financial institution, participating financial institution, or reporting Model 1 financial institution that agrees to undertake the additional due diligence and reporting required under U.S. Regulations in order to treat the financial institution as an owner-documented financial institution.

The requirements are:

1. The financial institution is an investment entity that does not otherwise come within the definitions of depository institution, custodial institution or a specified insurance company.

2. The financial institution is not a member of an expanded affiliated group which includes another financial institution that is a depository institution, custodial institution, or a specified insurance company.

3. The financial institution does not maintain a financial account for any non-participating financial institution.

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

5. The designated withholding agent agrees to report to the IRS (or, in the case of a reporting Model 1 financial institution, to the relevant foreign government or agency thereof) all of the information required [2]with respect to any specified U.S. persons that own a direct or indirect equity interest in the financial institution. However, the designated withholding agent is not required to report information with respect to an indirect owner of the financial institution that holds its interest through:
    - a participating financial institution,
    - a deemed-compliant financial institution (other than an owner-documented financial institution),
    - an entity that is a U.S. person,
    - an exempt beneficial owner, or
    - an excepted NFFE.

3.4 <u>Registered deemed compliant financial institutions</u>

The financial institutions described below are not included as deemed compliant financial institutions under the Agreement. However, these institutions are regarded as registered deemed compliant entities under U.S. Regulations. As such paragraph 1(q) of the Agreement enables Irish financial institutions that comply with the various conditions to qualify for the exemption. An institution falling within one of these categories must register with the IRS for FATCA in accordance with the

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

arrangements set out in Annex 2. However it is not obliged to report on any of its accounts.

The categories are:

- a non-reporting member of a group of related participating financial institutions,
- a restricted fund,
- a qualified credit card issuer,
- a sponsored investment entity, or
- a controlled foreign corporation .

3.4.1 Non-reporting members of participating FFI groups

A financial institution that is a member of a group of participating financial institutions will qualify for this exemption if it meets all of the following requirements.

1. By the later of December 31, 2013, or the date it registers with the IRS, the financial institution implements policies and procedures to ensure that within six months of opening a U.S. account or an account held by a recalcitrant account holder or a nonparticipating financial institution, the financial institution either transfers such account to an affiliate that is a participating financial institution, a reporting Model 1 financial institution, or a U.S. financial institution, closes the account, or becomes a participating financial institution.

2. The financial institution reviews its accounts that were opened prior to the time it implements the policies and procedures (including time frames) described in paragraph 3 below, using the procedures described in Chapter 9 applicable to preexisting accounts of participating financial institutions, to identify any U.S. account or account held by a nonparticipating financial institution. Within six months of the identification of any account described in this paragraph, the financial institution transfers the account to an affiliate that is a participating financial institution, a reporting Model 1 financial institution, or a U.S. financial institution, closes the account, or becomes a participating financial institution.

3. By the later of December 31, 2013, or the date it registers as a, reporting financial institution the financial institution implements policies and procedures to ensure that it identifies any account that becomes a U.S. account or an account held by a recalcitrant account holder or a nonparticipating financial institution due to a change in circumstances. Within six months of the date on which the financial institution first has knowledge or reason to know of the change in the account holder’s status, the financial institution transfers any such account to an affiliate that is a participating financial institution, a reporting Model 1 financial institution, or a U.S. financial institution, closes the account, or becomes a participating financial institution.

3.4.2 Restricted Funds

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

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

2. Interests issued directly by the fund are redeemed by or transferred by the fund rather than sold by investors on any secondary market. Notwithstanding the prior sentence, a fund will not be prohibited from qualifying as a restricted fund solely because it issued interests in bearer form provided that:
    - the fund ceased issuing interests in bearer form after December 31, 2012,
    - retires all such interests upon surrender,
    - establishes policies and procedures to redeem or immobilize all such interests prior to January 1, 2017, and
    - prior to payment the fund documents the account holder in accordance with the procedures set out in Chapters 8 and 10 applicable to accounts other than preexisting accounts and agrees to withhold and report on such accounts as would be required under U.S. Regulation §1.1471-4(b) and (d) if it were a participating financial institution.

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

3. Interests that are not issued directly by the fund are sold only through distributors that are participating financial institutions, registered deemed-compliant financial institutions, non-registering local banks or restricted distributors[3]. For the purposes of this paragraph, a distributor means an underwriter, broker, dealer, or other person who participates, pursuant to a contractual arrangement with the fund, in the distribution of securities and holds interests in the fund as a nominee.

4. The fund ensures that by the later of June 30, 2014, or six months after the date the fund registers as a deemed-compliant financial institution, each agreement that governs the distribution of its debt or equity interests prohibits sales and other transfers of debt or equity interests in the fund (other than interests that are both distributed by and held through a participating financial institution) to specified U.S. persons,

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

nonparticipating financial institutions, or passive NFFEs with one or more substantial U.S. owners. In addition, by that date, the fund's prospectus and all marketing materials must indicate that sales and other transfers of interests in the fund to specified U.S. persons, nonparticipating financial institutions, or passive NFFEs with one or more substantial U.S. owners are prohibited unless such interests are both distributed by and held through a participating financial institution.

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

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

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

8. By the later of December 31, 2013, or the date that it registers as a deemed-compliant financial institution, the fund implements the policies and procedures described in U.S. Regulation 1.1471-4(c) to ensure that it either:
    - Does not open or maintain an account for, or make a withholdable payment to, any specified U.S. person, nonparticipating financial institution, or passive NFFE with one or more substantial U.S. owners and, if it discovers any such accounts, closes all accounts for any such person within six months of the date that the fund had reason to know the account holder became such a person; or
    - Withholds and reports on any account held by, or any withholdable payment made to, any specified U.S. person, nonparticipating financial institution, or passive NFFE with one or more substantial U.S. owners to the extent and in the manner that would be required under U.S. Regulation 1.1471-4(b) and (d) if the fund were a participating financial institution.

9. For a fund that is part of an expanded affiliated group, all other financial institutions in the expanded affiliated group are participating financial institutions, registered deemed compliant financial institutions, sponsored financial institutions described in paragraph , non-reporting IGA financial institutions, or exempt beneficial owners.

3.4.3 <u>Qualified credit card issuers</u>

This category covers financial institutions that comply with the following conditions:

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

2. By the later of December 31, 2013, or the date it registers as a deemed-compliant financial institution, the financial institution must implement policies and procedures to:
    (i) prevent a customer deposit in excess of $50,000 or
    (ii) ensure that any customer deposit in excess of $50,000 is refunded to the customer within 60 days.

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

3.4.4 Sponsored investment entities

A financial institution qualifies as a sponsored investment entity if :

(1) it is an investment entity that is not a qualified intermediary, with-holding partnership or with-holding trust,
(2) another entity has agreed to act as a sponsoring entity for it, and
(3) the sponsoring entity complies with the conditions set out in paragraph 3.4.6 below.

3.4.5 Sponsored controlled foreign corporations

A financial institution is a sponsored controlled foreign corporation if the financial institution meets the following conditions:

(1) it is a controlled foreign corporation (CFC)[4] that is not a qualified intermediary, with-holding partnership or with-holding trust,

(2) it is wholly owned, directly or indirectly, by a U.S. financial institution that agrees with the CFC to act as its sponsoring entity,

(3) the CFC shares a common electronic account system with the sponsoring entity that enables the sponsoring entity to identify all account holders and payees of the CFC and to access all account and customer information maintained by the CFC including, but not limited to, customer identification information, customer documentation, account balance, and all payments made to the account holder or payee and

(4) the sponsoring entity complies with the conditions set out in paragraph 3.4.6 below

3.4.6 Conditions applicable to Sponsoring Entity

The sponsoring entity complies with the following conditions:

a) it is authorized to manage the sponsored entity and enter into contracts on behalf of the entity i.e. it acts as a fund manager, trustee, corporate director, or managing partner of the sponsored entity,

b) it has registered with the IRS as a sponsoring entity,

c) it has registered the sponsored entity with the IRS,

d) it agrees to perform, on behalf of the sponsored entity, all due diligence, withholding, reporting, and other requirements that the sponsored entity would have been required to perform if it were a participating financial institution,

4 See section 957(a) of the U.S. Tax Code

e) it identifies the sponsored entity in all reporting[5] completed on the entity’s behalf, and

f) it has not had its status as a sponsor revoked.

The IRS may revoke a sponsoring entity’s status as a sponsor with respect to all sponsored financial institutions if there is a material failure by the sponsoring entity to comply with its obligations with respect to any sponsored financial institution.

A sponsored financial institution will remain liable for any failure of its sponsoring entity to comply with the obligations that the sponsoring entity has agreed to undertake on its behalf.

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

Reportable Accounts

4.1 Introduction

A reportable account is a financial account that is held by one or more specified U.S. persons or by a passive NFFE with one or more controlling persons that are specified U.S. persons.

4.2 Financial Account

The term financial account is defined as an account maintained by a financial institution and includes certain equity or debt interests in an investment entity. This is a very wide definition and would include for instance, a capital or profits interest in a partnership if that partnership is an investment entity. It does not include equity and debt interests that are regularly traded on a recognised securities market. There are 5 categories of financial accounts:

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

A definition of each category is included in Annex 1.

4.2.1 Trusts

In the case of a trust that is a financial institution, an equity interest means either an interest held by any person treated as a settlor or beneficiary of all or a portion of the trust, or by any other natural person exercising ultimate effective control over the trust.

A specified U.S. person will be treated as being a beneficiary of a trust if such person has the right to receive directly, or indirectly a mandatory or discretionary distribution from the trust.

4.2.2 Intermediary Accounts (Escrow Accounts)

Accounts that meet the conditions below will not be financial accounts.

Accounts held by an Irish Financial Institution for a non-financial intermediary (such as a firm of solicitors 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 ; or
- a sale, exchange, or lease of real or personal property and that 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.

4.2.3 Undesignated Accounts

Where a financial account held by the non-financial intermediary does not meet any of the conditions set out in section 4.3.3 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

the Financial Institution is required to undertake the due diligence procedures in respect of the non-financial intermediary only.

4.2.4 Designated Accounts

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

Designated client accounts typically fall into two sub-categories:

1. Consent to Rely

Designated client accounts with a consent to rely agreement (operated by regulated professional entities such as solicitors, qualified accountants, auditors, tax consultants, licensed conveyancers) permit a Financial Institution to rely on the relevant AML/KYC due diligence process undertaken by the non-financial intermediary on its underlying client or clients. Revenue will accept this as sufficient for FATCA purposes so that no additional AML/KYC is required to be carried out by the Financial Institution. As a result of the consent to rely agreement, the non-financial intermediary will provide limited information with respect to its underlying clients to the Financial Institution.

2. No Consent to Rely

Designated client accounts with no consent to rely agreement (usually operated by unregulated business entities such as estate agents and landlords) require the Financial Institution to undertake AML/KYC checks directly on the non-financial intermediary's underlying clients. Therefore, the non-financial intermediary is required to provide the necessary AML/KYC information.

4.2.5 <u>Segregated Accounts</u>
Guidance will be finalised in due course

4.2.6 <u>Dormant Accounts</u>
An Irish 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 Agreement 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 Irish 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.

Dormant Funds
When a fund is closed but there remain residual debtors and recovery actions are being pursued, the fund will be not a collective investment scheme for the purposes of this agreement.

4.2.7 <u>Accounts of Deceased Persons</u>

Accounts of Deceased Persons will not be treated as Financial Accounts on the condition that the Financial Institution has received and is in possession of formal notification of the account holder's death (for example a copy of the deceased's death certificate, a copy of the coroner's interim certificate, a copy of the will).

4.2.8 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 the predecessor 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 (including copies of documentation) that was acquired as part of the merger or acquisition, continues to support the status claimed of Account Holders. The Account Holder's status will need to be verified by the acquiring Financial Institution in accordance with the due diligence procedures should the acquirer have reason to know a status is incorrect or that there is a change in circumstance.

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

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

Mergers of Investment Entities

Mergers of Investment Entities can be different to mergers of Custodial Institutions or Depositary Institutions. Because the financial accounts of investment entities are its equity and debt interest holders, the merger of two investment entities creates in the surviving investment entity a series of new accounts.

Mergers of Investment Entities will normally involve a surviving 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 Financial Institution and whether it is a reporting or participating Financial

Institution deemed compliant or non-participating. These are considered below.

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

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 FATCA Partner Country Financial Institution or a Participating Foreign Financial Institution, the surviving fund can rely on the account identification and documentation performed by the merging fund and will not need to undertake any further account due diligence in order to comply with its FATCA obligations. The surviving fund can continue to use the same account classification as the merging fund until there is a change in circumstances for the financial account.

Merging fund is not a reporting Financial Institution
Where the merging fund is not a reporting Financial Institution, a FATCA Partner Country Financial Institution or a Participating Foreign Financial Institution (because it is a deemed compliant fund, a non-participating Irish Financial Institution or a non-participating Foreign Financial Institutions), the surviving fund will need to undertake account identification procedures on the new accounts. However, in these circumstances the account identification procedures will be limited to those that are required for pre-existing accounts and should be carried out at the latest by the 31 December following the date of the merger or 31 December of the year following the year of the merger if the merger takes place after 30 September of any calendar year.

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

4.3 <u>Exempt Accounts</u>

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

4.3.1 <u>Certain Retirement Accounts or Products</u>

This exemption covers the following products;

- A Retirement Benefit Scheme, within the meaning of section 771 of the Taxes Consolidation Act 1997, approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act.

- An annuity contract or a trust scheme or part of a trust scheme approved by the Revenue Commissioners under Chapter 2 of Part 30 of the Taxes Consolidation Act 1997.

- A PRSA contract in respect of a PRSA product, approved by the Revenue Commissioners under Chapter 2A of Part 30 of the Taxes Consolidation Act 1997.

- An Approved Retirement Fund or an Approved Minimum Retirement Fund provided for under a Retirement Benefit Scheme, an annuity contract or a PRSA as approved under Chapters 1, 2 or 2A of Part 30 of the Taxes Consolidation Act 1997.

- Those Irish approved pension schemes or contracts under Part 30 of the Taxes Consolidation Act 1997 or Approved Retirement Funds or Approved Minimum retirement Funds that are excluded from the definition of financial account pursuant to Article 1(s)(3) of the Agreement.

- An account or product excluded from the definition of financial account under an agreement between the United States and another partner jurisdiction to facilitate the implementation of FATCA, provided that such account or product is subject to the same requirements and oversight under the laws of such other partner jurisdiction as if such account or product were established in that partner jurisdiction and maintained by a partner jurisdiction Financial institution in that partner jurisdiction.

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

  Example of a qualifying pension:

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

4.3.2 <u>Certain Other Tax-Favoured Accounts or Products</u>

The following products are covered by this exemption:

- **Save As You Earn Share Option Schemes** - approved by the Revenue Commissioners under Chapter 3, Part 17 and Schedule 12A Taxes Consolidation Act 1997.

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

- **Employee Share Ownership Trusts -** approved by the Revenue Commissioners under Chapter 2, Part 17 and Schedule 12 Taxes Consolidation Act 1997.

Chapter 5

Reporting

5.1 Introduction

Reporting Financial Institutions are required to report details of Accounts maintained by the Financial Institutions.

5.1.1 Accounts maintained by Financial Institutions

For FATCA purposes "maintained" has the following meaning:

A Custodial Account is maintained by a Financial Institution where the institution holds custody over the assets in the account (this includes a Financial Institution that holds assets in street name for an account holder in such institution).

A Depositary Account is maintained by a Financial Institution that is obligated to make payments with respect to the account. This does not include an agent of a Financial Institution regardless of whether such agent is a Financial Institution under the agreement.

A 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 interest constitutes a Financial Account is treated as being maintained by that Financial Institution.

5.1.2 Reportable Accounts

A Financial Account is a 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. It follows that if there are no such accounts then there will be no Reportable Accounts.
However, a Reporting Financial Institutions with no reportable accounts will be required to make a nil return.

Chapters 6 to 11 sets out the due diligence procedures that must be followed in order to identify Reportable Accounts.

5.1.3 Account Holders

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

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

5.1.3.1 Trusts, Estates and Partnerships

Where a trust or estate is listed as the holder of a Financial Account the trust is to be treated as the Account Holder, rather than any owner or beneficiary.

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

5.1.3.2 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 advisor, or intermediary, is not treated as an Account Holder with respect to such account for purposes of this section. Instead, the person on whose behalf the account is held is the account holder.

5.1.3.3 Cash Value Insurance Contracts and Annuity Contracts

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

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

5.1.3.4 Joint life second death cash value insurance contracts

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

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

5.2 Information to be reported

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

5.2.1 Information applicable to all accounts

1. Account holder name

2. Address of the account holder

3. U.S. TIN where applicable (See paragraph 1.2)

4. The account number or the functional equivalent of an account number

5. The name and identifying number of the reporting financial institution

6. The account balance or value as of the end of the reporting period.

5.2.2 Information for Custodial Accounts

Where the account is a custodial account the following information is also required:

7. The total gross amount of interest paid or credited to the account.

8. The total gross amount of dividends paid or credited to the account.

9. The total gross amount of other income paid or credited to the account.

10. The total gross proceeds from the sale or redemption of property paid or credited to the account.

5.2.3 Information for Depository Accounts

Where the account is a depository account the following information is also required:

11. The total amount of gross interest paid or credited to the account

5.2.4 Information for accounts other than custodian or depository accounts

For accounts other than a custodial or depositary account the following information is also required:

12. The total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account

5.3 Taxpayer Identification Numbers (TINs)
Where it has been established that an account holder is a U.S. person, a financial institution is required to obtain a U.S. TIN in several instances. A U.S. TIN means a U.S. federal taxpayer identifying number.

For pre-existing individual accounts that are reportable accounts, a U.S. TIN need only be provided if it exists in the records of the reporting financial institution. In the absence of a record of the U.S. TIN, a date of birth should be provided but again only where that is held by the reporting financial institution.

For all new individual accounts that are identified as reportable accounts from 1 January 2014 onwards, the reporting institution must obtain a self-certification from account holders who have been identified as resident in the U.S. The self-certification should include a U.S. TIN. The self-certification can be made on an IRS form W9 or other similar agreed form.

Where, in the case of a new individual account that has one or more U.S. indicia, the proposed account holder fails to provide a U.S. TIN and the account becomes active, the account is to be treated as a reportable account regardless of the provision of the U.S. TIN.

Where a TIN is not available, the financial institution should supply the date of birth of the individual if that is available from its records. It should be noted that all FATCA partner countries are committed to introducing domestic legislation making the capture and reporting of a TIN mandatory from 2017.

There is no requirement for a financial institution to verify that any U.S. 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 has no reason to know that it is inaccurate.

5.4 Account Number
If there is no account number, the functional equivalent of an account number should be supplied.

5.5 Registration No
The registration number to be reported is the General International Identification Number (GIIN) that will be assigned to the institution by the IRS on registration.

5.6 Determination of the account balance or value
Generally the balance or value of a financial account is the balance or value that is calculated by the financial institution for the purposes of reporting to the account holder. The balance to be reported is the balance or value of the account at the end of the reporting period except in the case of closed accounts.
The process for closing accounts will differ between institutions and between different products and accounts. The Irish regulations provide that the account balance or value to be reported where an account is closed during a year, is the highest amount of that account balance or value in the year of closure.

The balance or value in the case of depositary accounts will be the amount in the account on 31 December unless the account is closed on a date before that.

The balance or value in the case of other financial accounts will be the amount in the account on 31 December. Where it is not possible (or usual business practice) to value an account at 31 December, a financial institution should use the normal valuation point for the account that is nearest to the 31 December.

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

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.

In arriving at the balance or value the financial institution will use the valuation methods that it applies in the normal course of its business. Any valuation method adopted must be consistent and verifiable.
The balance or value of an equity interest is the value calculated by the Financial Institution for the purpose that requires the most frequent determination of value, and the balance or value of a debt interest is its principle amount

The balance or value of the account should 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 should not be reduced by any fees, penalties, or other charges for which the account holder may be liable upon terminating, transferring, surrendering, liquidating, or withdrawing cash from the account.

5.7 <u>Joint Accounts</u>
For joint accounts the entire balance or value of the account should be attributed to each holder of the account.

For example where a jointly held account has a balance or value of $100,000 and one of the account holders is a *specified U.S. person* then the amount to be attributed to that person would be $100,000. If both account holders were *specified U.S. persons* then each would be attributed the $100,000 and reports would be made for both.

5.8 <u>Currency conversion</u>
Where accounts are denominated in a currency other than U.S. dollars, the threshold limits must be converted into the currency in which the accounts are denominated in order to determine whether the account is reportable.

The conversion rate to be used should be a published spot rate as of 31 December of the year for which the report is being prepared.

Example 1
The threshold to be applied to Euro denominated pre-existing individual depositary accounts when a published spot rate as of 31 December 2013 is 1.28 would be €39,062. ($50,000/ 1.28)
Where the balance or value is determined on another date within the calendar year, the threshold limits should still be converted by reference to the spot rate as of 31 December of the relevant year.

Example 2
A pre-existing insurance contract is valued at €200,000 as of 30 April 2013. It will be measured against the $250,000 threshold at 31 December 2013 when a published EURO/U.S.D spot rate is 1.2800.This would result in a threshold of €195,313. ($250,000/1.28) and the contract would be reportable.

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

5.9 Timetable for Reporting

The reporting requirements are phased in over a three year period starting from 2013. With respect to 2013 and 2014 the information that needs to be reported is as set out in 1-6 in paragraph 5.2.1 above.

With respect to 2015 all of the information shown in paragraph 5.2 should be reported with the exception of the gross proceeds from the sale or redemption of property paid or credited to the account.

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

Chapter 6

Identification of Account Holders - General Issues

6.1 Introduction

The main objective of the legislation is to require financial institutions to identify and report the financial accounts of specified U.S. persons.

The due diligence process requires that:

1. the financial institution identifies certain defined U.S. indicia that is linked to an account holder or
2. the account holder self-certifies their status to the institution.

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

6.2 Reporting Institution in the case of accounts held by investment funds, trusts and partnerships

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

6.2.1 Collective Investment Vehicles

The only financial accounts that are relevant to investment undertakings are the equity and debt interests in the undertaking. An entity within the definition of investment entity, by virtue of investing, administering or managing collective investment vehicles but which does not itself hold financial accounts is not required to identify or report the accounts it administers or manages.

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

Where the interests in the fund are held directly by the investors, the fund is the only financial institution that will be regarded as a reporting financial institution in relation to the fund. Where the fund interests are held through intermediaries, those intermediaries would be responsible for identifying their own direct account holders.

An entity which is regarded as an investment entity and therefore a financial institution solely because it administers or manages an investment undertaking will not be regarded as a reporting financial institution merely because of its management or administration activities. However such an entity will be a reporting financial institution if it maintains financial accounts other than those of the investment undertaking. In this respect, equity and debt interests in the fund managers/administrator itself would not be considered to be financial accounts

6.2.2 Platforms and other fund distributors

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

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

For example, fund platforms typically hold legal title to fund interests on behalf of their customers (the investors) as nominees. The customers access the platform in order to buy and sell investments and to manage their investment portfolio. The platform will back the customers' orders with holdings in the collective investment vehicles, and possibly other assets. But only the platform will appear on the shareholders' register of the collective investment vehicles.

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

6.2.3 Fund nominees - Distributors in the chain of legal ownership

Distributors that hold legal title to assets on behalf of customers, and are part of the legal chain of ownership of interests in collective investment vehicles are financial institutions. In most case they will be custodial institutions because they will be holding assets on behalf of others.

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

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 accounts maintained by the distributor, and the distributor will be responsible for ensuring it meets its obligations in respect of those accounts.

Fund nominees, fund intermediaries and fund platforms will be treated as custodial institutions unless specific factors indicate that their businesses are better characterised as falling within the definition of 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 exemption thresholds (See Chapter 7), 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.

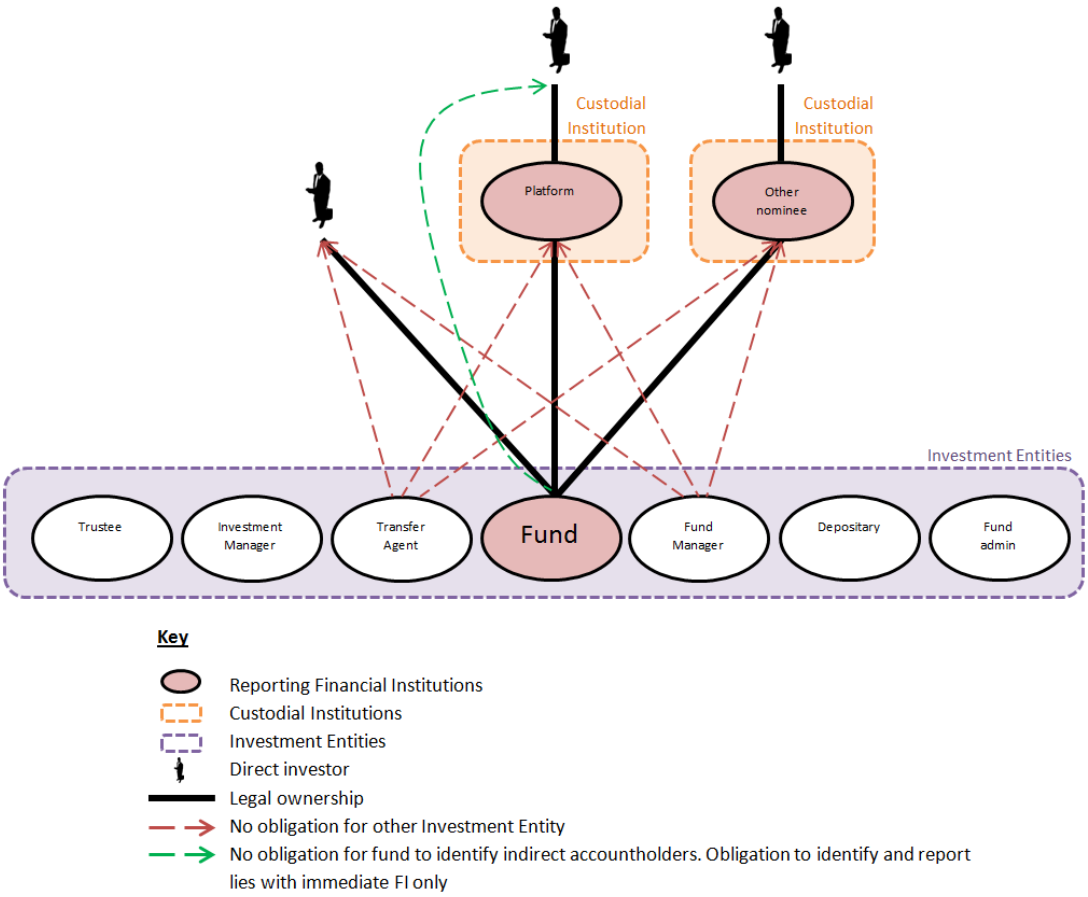
6.2.4 Advisory-only distributors

Distributors that act in an advisory-only capacity and are not in the chain of legal ownership of a collective investment vehicle will **not** be regarded as a financial institution in respect of any accounts they advise on. Such distributors, which may include some IFAs, may nevertheless be asked by financial institutions to provide assistance in identifying accountholders, and obtaining self-certifications For example, IFAs 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 advisory-only distributors would not be regarded 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 accounts.

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

6.2.5 Identification and reporting on interest in a collective investment vehicle

The diagram on the next page illustrates how Revenue believes the account identification and reporting obligations under the Regulations should work for collective investment vehicles.



Example

Authorised funds in Ireland (which are authorised unit trusts, open-ended investment companies, and tax-transparent funds) are required to have a fund manager that acts as operator of the fund and is normally assigned responsibility for fulfilling the regulatory obligations of the fund.

Therefore, the fund manager will normally have responsibility for compliance with the obligations in relation to the financial accounts of the fund under the Irish legislation. In turn, fund operators typically use third party service providers to provide fund administration, including maintaining records of investors, account balances and transactions – services provided by the transfer agent. In these cases the fund manager might appoint the third party service provider to fulfil account identification and reporting requirements as they will have the necessary records.

The fund's account identification and reporting obligations apply only to its immediate accountholders. It is required to identify all direct individual account holders pursuant to the due diligence obligations outlined in this guidance. Any indirect individual account will be held through a financial institution (e.g. a platform or other nominee), and the fund's obligation is to identify the direct accountholder (i.e. the financial institution) only. In turn the intermediary financial institution will have its own obligation to identify and report on its account holders.

In the diagram the fund would need to identify any direct individual accountholders (left hand side), and the financial institutions on the share register only. It would be required to report information on any of these that are specified U.S. persons.

In turn the custodial institutions that act as distributors (and not the fund) would be required to identify and report on their direct accountholders. The fund has no obligation to identify and report on accounts held indirectly through other financial institutions.

6.2.6 <u>Accounts held by Trusts</u>

From a regulatory perspective, the management of an authorised investment fund lies with the fund manager or the unit trust manager. Sometimes the manager will carry out these responsibilities themselves. Sometimes they will delegate this to an administrator.

The manager/operator of the scheme is the reporting financial institution. This is consistent with the actual responsibilities of fund managers in relation to FATCA for all collective investment schemes.

6.2.7 <u>Partnerships</u>

A partnership is regarded as an entity under the Agreement. Where a partnership is a financial institution it will need to identify any financial accounts it holds, this will include any equity interest. This means that a partnership will be required to identify and where necessary report on the capital or profits interest of any of the partners who are specified U.S. persons.

6.3 <u>Reporting of Non Financial Foreign Entities (NFFE)</u>

An NFFE is any non U.S. entity that is not a financial institution. Only the accounts of passive NFFEs need to be reviewed when applying the due diligence procedures to identify specified U.S. persons and reportable accounts. Unless an NFFE is an active NFFE it will be a passive NFFE.

6.4 <u>Self Certification</u>

6.4.1 <u>General</u>

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 certification in the following circumstances:

In the case of Individual account holders

- to repair the finding of U.S. indicia associated with a lower value or high value pre-existing individual account holder in order to show that that individual is not in fact a U.S. citizen or U.S. resident for tax purposes.

- to establish the status of an individual account holder of a new account and whether or not they are a U.S. citizen or U.S. resident for tax purposes.

- to obtain a U.S. TIN from a new individual account holder that is a U.S. resident for tax purposes.

In the case of entity account holders

- to verify the status of an entity where information indicates the account holder is a specified U.S. person unless a financial institution can reasonably determine that the account holder is not a specified U.S. person based on information in its possession or that is publicly available.

- to verify the status of a financial institution that is neither an Irish financial institution nor a partner jurisdiction financial institution where the status of the financial institution cannot be verified from an IRS published list.

- to establish whether an entity is a passive NFFE.

- to establish the status of a controlling person of a passive NFFE and whether or not they are a resident in the United States for tax purposes.

A self-certification cannot be relied upon if a financial institution has reason to know that it is incorrect or unreliable.

6.4.2 Self Certification for New Individual Accounts

6.4.2.1 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 is required to obtain a self-certification that would enable it to determine whether the account holder is resident in the U.S. for tax purposes. For these purposes a citizen of the U.S. is considered to be resident for U.S. tax purposes even if they may also be a tax resident in another jurisdiction.

6.4.2.2 Wording of self-certification

In determining whether an account holder of a new individual account is resident in the U.S. for tax purposes a financial institution can choose the form of wording. It should be sufficient for an account holder to confirm that they are not resident in the U.S. for tax purposes, and that they are not a U.S. citizen.

6.4.2.3 Format of the self-certification

Financial institutions may permit individuals to open accounts in various ways. For example, individuals can make investments into funds by phone applications, online applications or on written application forms. They may even invest without using any of the financial institution’s designated application processes and instead send a cheque with a covering letter (which is then followed up with the required documentation).

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

Example 1 Telephone Applications
An individual phones a financial institution requesting to open an account in line with the financial institution's normal account opening procedures.

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

Example 2 Online applications
An individual accesses the website of a financial institution to open an account in line with the financial institutions normal account opening procedures. On the account opening web page, along with information about the individual, such as name and address, the individual is asked to tick a box against the following narrative: "Tick this box if you are resident in the U.S. for tax purposes or if you are a U.S. citizen" and "Tick this box if you are not resident in the U.S. for tax purposes or a U.S. citizen".

Example 3 Paper Applications
An individual fills out an application form to open an account with a financial institution. Beside the signature box the application form includes the following wording: "Tick this box if you are resident in the U.S. for tax purposes or if you are a U.S. citizen" and "Tick this box if you are not resident in the U.S. for tax purposes or a U.S. citizen".

Example 4 Form of wording on application form
An individual fills out an application form to open an account with a financial institution. The signature box on the application form includes the following wording: "by signing this form you confirm that you are not resident in the U.S. for tax purposes and that you are not a U.S. citizen".

6.4.2.4 Confirming the self-certification
A financial institution is required to confirm the reasonableness of the self-certification based on information obtained by the financial institution. For this purpose, a financial institution may use information obtained by the financial institution pursuant to its

Anti-Money Laundering (AML) and Know Your Customers (KYC) procedures
A financial institution is required to check the self-certification against other records of the individual that are held or obtained by the financial institution. For example, where an accountholder has provided a self-certification confirming they are not U.S. resident for tax purposes, but then provides a U.S. address to the financial institution, this would require the financial institution to make further enquiries.

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

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

Example 1 Phone Applications
A financial institution has received a new account opening instruction from an individual (this may have been by phone). The financial institution has performed AML procedures by checking the identity of the individual (name, address and date of birth) against the records of a credit reference agency. The check confirmed the identity of the individual.

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

If the account opening instruction is received by phone, it is the usual practice that the account holder receives paperwork that includes their response to the self-certification question and other information provided. The account holder is requested to contact the financial institution in the event that any of the information is not correct within a specified period (say, 30 days). 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 2 Third Party Advisors
A financial institution has received a new account opening instruction from an individual who has been advised by an independent financial adviser (IFA) The financial institution has relied on an introducing IFA to perform AML and has obtained a certificate that the IFA has performed AML checks on the individual. The financial institution has no prior knowledge of the individual.

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

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

Example 3 Third Party Advisor
As per example 1 but the self-certification is obtained by the introducing IFA. The financial institution can satisfy its requirements under the Agreement by obtaining a certification from the IFA that they have confirmed the reasonableness of the self-certification against other information it has obtained from the individual, including information obtained pursuant to its AML procedures.

Example 4 Third Party Advisor
As per example 1, but the individual has been introduced by an IFA, although the financial institution has not placed reliance on the IFA's AML procedures, but instead has performed its own AML procedures as in example 1.

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

6.4.3 Self Certification for Pre-existing Individual accounts

If following an electronic record search for lower value accounts or the enhanced review procedures for high value accounts, indicia have been found that suggest the account holder is potentially a U.S. citizen or U.S. resident for tax purposes then the financial institution must treat the account as reportable. However, if the financial institution is able to obtain a self-certification from the account holder which cures the indicia, then the account is not to be treated as reportable.

The self-certification in this instance is IRS form W8 or other similar agreed form.

6.4.4 Self Certification for New Entity accounts

For entities that are passive NFFEs, the financial institution must identify the controlling persons and obtain a self-certification from them to determine whether any such person is a citizen or resident of the U.S.

This could be in achieved in the same way as described for New Individual accounts.

6.4.5 Self Certification for Pre-existing Entity accounts

Self-certification is required where:

- an entity account holder is identified as a specified U.S. person. In such cases, the financial institution will be required to treat the account as reportable unless it obtains a self-certification to determine that the account holder is not a specified U.S. person. The self-certification in this instance is IRS form W8 or W9 other similar agreed form.

- the account holder is a financial institution that is not an Irish financial institution or partner jurisdiction financial institution. In such cases a self-certification is required to establish whether the entity is a certified deemed-compliant financial institution, an exempt beneficial owner, or an excepted FFI, as defined in relevant U.S. Treasury Regulations; the self-certification could again be a form W8 or other similar agreed form.

- an entity account holder will be a passive NFFE if it is not an active NFFE (see Annex 1). Where the account holder is a passive NFFE, the financial institution must obtain a self-certification (which may be on an IRS Form W-8 or W-9, or on a similar agreed form) from the account holder to establish its status, unless it has information in its possession or that is publicly available, based on which it can reasonably determine that the entity is an active NFFE.

- the account is held by one or more NFFEs with an account balance that exceeds $1,000,000. In such cases, a self-certification from the account holder or controlling person is required. The self-certification may be on an IRS Form W-8 or W-9, or on a similar agreed form

Currently there is no similar agreed form that can be used for these purposes. In most cases this will mean that a financial institution will be required to obtain either IRS forms W8 or W9 to satisfy the relevant due diligence requirements.

6.5 Aggregation of accounts

6.5.1 Introduction

In certain circumstances, a financial institution will need to consider aggregation of accounts of both individuals and entities in order to identify whether the accounts would be reportable.

Aggregation is only required to the extent that a financial institution's computerised system can link the account by reference to a data element such as a customer or taxpayer identification number or by a name and address.

It is not necessary for the computer system to sum or total the balances of the accounts for the aggregation rule to apply. So, where accounts can be linked by a data element, but the system does not provide an aggregated balance of the accounts, aggregation will still be required

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

6.5.3 Relationship Manager

For the purposes of determining the aggregate balance or value of accounts held by a person to determine whether an account is a high value account, a financial institution shall also be required, in the case of any accounts that a relationship manager knows or has reason to know are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person, to aggregate all such accounts.

6.5.3 Exempt Products

If a product is exempt from being treated as a financial account it does not need to be taken into account for the purposes of aggregation. So if an individual held an exempt pension fund as well as several depositary accounts with the same Financial institution and the systems allowed these to be linked, then the depositary accounts would be aggregated but not the pension.

6.5.4 Funds

In the case of funds, aggregation is required at the fund level to include sub funds and different share classes within that fund. However, where two or more funds have a common third party who is fulfilling the due diligence obligations of the Funds it is not intended that aggregation will apply across the different funds.

6.5.5 Related Entities

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

Example 1

Bank A is an Irish financial institution and has a related entity Bank C which is also an Irish financial institution. Bank A can link the depositary account of U.S. person X to another depositary account in the name of U.S. person X with Bank C by virtue of their address. The aggregation exercise shows that U.S. person X is above the depositary account threshold for reporting.

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

Example 2 Aggregation of individual accounts

Two U.S. persons have 3 accounts between them, one deposit account each and a jointly held deposit account with the following balances:

U.S. Person A $35,000
U.S. Person B $25,000
Joint Account $30,000

The joint account can be associated with both A and B by reference to a data element in the financial institutions computer system. The system shows the account balances for the accounts. However, the system does not show a combined balance for the accounts.

The fact that the system does not provide a combined balance does not prevent the aggregations rules applying. The balance on the joint account is attributable in full to each of the account holders. The aggregate balance for A would be $65,000 and for B $55,000.

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

Example 3 Aggregation in the case of negative balances

Two U.S. Persons have 3 accounts with the same financial institution, one account each and a jointly held account with the following balances:
U.S. Person A $53,000
U.S. Person B $49,000
Joint Account ($8,000) to be treated as nil

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

6.5.6 Entity accounts.

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

Once an aggregation exercise has taken place and it is determined that the accounts are reportable, the amount to be reported in the case of each individual or entity, is the account balance on each account. A financial institution should not consolidate the account balances into one reportable account for reporting purposes.

6.6 Change of Circumstance

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

If there is a change of circumstances that causes the financial institution to know or have reason to know that the original self-certification is incorrect or unreliable, the financial institution cannot rely on the original self-certification and the financial institution should obtain a new self-certification that establishes whether the account holder is a U.S. citizen or U.S. tax resident.

In the event that there is a change of circumstance which indicates an account belongs to a specified U.S. person the financial institution should verify the account holders' actual status within a period of 90 days from the date the financial institution was made aware of the change in circumstance.

If the account holder fails to respond to a financial institution's requests for a self-certification or other documentation to verify the account holder's status then the financial institution should treat the account as a reportable account until the financial institution is provided with the necessary information to be able to correctly verify the status of the account holder.

6.7 Third Party Service Providers

A financial institution can rely on third party service providers to fulfil its obligations under the legislation however 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.

For example, a fund may use a transfer agent to fulfil its due diligence requirements or a company may use a business process outsourcing provider to fulfil its due diligence requirements. However in the event of any irregularities or failure to meet the legislative requirements the financial institution will be held accountable.

Chapter 7

Due Diligence Process for Pre-existing Individual accounts

7.1 <u>Introduction</u>

A pre-existing account is an account opened on or before the 31 December 2013. Pre-existing accounts will fall into one of three categories depending on the balance or value of the account. These are: -

- accounts exempted by threshold
- lower value accounts
- high value accounts.

7.2 <u>Threshold Exemptions that apply to pre-existing individual accounts</u>

The legislation allows for financial institutions to elect to apply the following exemptions when reviewing and identifying pre-existing individual accounts. If a financial institution does not make an election to apply the thresholds then it will need to review all relevant accounts.

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

- any depository accounts with a balance or value of $50,000 or less.

- pre-existing individual accounts with a balance not exceeding $50,000 at the 31 December 2013, unless the account subsequently becomes a high value account.

- 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 31 December 2013 unless the account subsequently becomes a high value account.

- all pre-existing cash value insurance contracts and annuity contracts regardless of the value or balance if sale to U.S. residents is effectively prevented by either Irish or U.S. law or regulatory procedure and Irish law requires reporting or withholding with respect to insurance products held by residents of Ireland. No Irish law prevents the sale of cash value insurance products or annuity contracts to U.S. residents. The sale of contracts to U.S. residents will be considered to be effectively prevented if the issuing insurance company is not licensed to sell insurance in any state of the United States and is not registered with the Securities and Exchange Commission.

The assignment of a pre-existing cash value insurance contract or annuity contract to another person will be treated as a new account and the above will not apply. This is to ensure that pre-existing insurance contracts assigned after 1 January 2014 to U.S. persons are correctly identified and reported where necessary.

Once the insurance company has been made aware that an assignment has been made, the insurance company will need to carry out checks on the new policy holder, before any payments are made to the account holder. If the policyholder is reluctant to self-certify their status or provide relevant documentation, the insurance company should assume the person to be a U.S. person and should provide the relevant reports to Revenue on an annual basis.

7.3 <u>Reportable accounts</u>

Pre-existing accounts will be reportable if they are not exempt and the financial institution has identified U.S. Indicia, and these indicia have not been cured or repaired

Once identified as a reportable account (unless it is a depositary account) the account will remain reportable for all subsequent years unless the account holder ceases to be a U.S. person.

Whether a depositary account is a reportable account is dependent on whether the balance or value is above the reporting threshold of $50,000. A depositary account or a cash value insurance contract are the only type of account where the reporting requirement can alter annually even where the account holder remains a U.S. person.

> **Example**
> A depositary account belonging to a U.S. person with a balance of $65,000 as of 31 December will need to be reported. The following year there is large withdrawal from the account bringing the balance down to $20,000 as of 31 December. As the balance is now below the $50,000 threshold the account does not need to be reported.

7.4 <u>Lower Value Accounts</u>

A lower value pre-existing individual account is an account with a balance or value that exceeds the appropriate threshold of $50,000 for depositary and other pre-existing individual accounts or $250,000 in the case of cash value insurance contracts and annuity contracts, but does not exceed $1,000,000.

7.4.1 <u>Electronic Record Searches and lower value accounts</u>

A financial institution must review its electronically searchable data for any of the following U.S. indicia:

- Identification of the account holder as a U.S. citizen or resident;
- Unambiguous indication of a U.S. place of birth
- Current U.S. mailing or residence address (including P.O. Box and 'care of' addresses)
- Current U.S. telephone number
- Standing instruction to transfer funds to an account maintained in the U.S.

- Current effective power of attorney or signatory authority granted to a person with a U.S. address

An 'in care of' or 'hold mail' address that is the sole address the institution holds for the account holder. An "in care of address" or "hold mail" address is not treated as U.S. indicia for the purposes of electronic searches but would be regarded as U.S. indicia where a review of paper records is required.
When carrying out an electronic search there is no requirement to search systems of related entities.

Where none of the indicia listed above are discovered through an electronic search, no further action is required in respect of lower value accounts, unless there is a change of circumstance that results in one or more U.S. indicia being associated with the account. Where that happens the account will become reportable unless further action is taken by the financial institution to attempt to cure or repair the indicia .

Where indicia are found and the financial institution attempts to verify or cure those by contacting the account holder, but there is no response then the account should be treated as reportable after 90 days of initiating contact.

An Irish financial institution that has previously obtained documentation from an account holder to establish the account holder's status in order to meet its obligations under a qualified intermediary, withholding partnership or withholding trust agreement, or to fulfil its reporting obligations as a U.S. payor under chapter 61 of the U.S. Tax Code, is not required to perform the electronic search in relation to those accounts. It will however have to apply the appropriate due diligence procedures to all other pre-existing individual accounts.

7.4.2 Unambiguous U.S. Place of Birth

Where the indicia found is an unambiguous U.S. place of birth then the account needs to be reported unless the financial institution obtains or currently maintains a record of the following:

- A self- certification showing that the account holder is neither a U.S. Citizen nor a U.S. resident for tax purposes. This may be an IRS W8 form or other similar agreed form.
- Evidence of the account holder's citizenship or nationality in a country other than the U.S. (e.g. 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 U.S. citizenship at birth.

7.4.3 Current U.S. mailing address/residence address

Where the indicia found is a current U.S. mailing address or residence address, or there are one or more U.S. telephone numbers that are the only numbers associated with the account then the account must be reported unless the financial institution obtains or currently maintains a record of the following:

- A self-certification that the account holder is neither a U.S. citizen nor a U.S. resident for tax purposes. This may be an IRS W8 form or other similar agreed form; and

- Evidence of the account holder’s citizenship or nationality in a country other than the U.S. (e.g. passport or other government-issued identification);

7.4.4 Current U.S. telephone numbers

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

- 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.

7.4.5 Standing Instructions to transfer funds to an account maintained in the U.S.

There will be a standing instruction if the account holder has mandated the financial institution to make regular transfers to another account that can clearly be identified as being an account maintained in the United States.
Where the indicia found is standing instructions to transfer funds to an account maintained in the United States, the account must be reported unless the financial institution obtains or currently maintains a record of :

1. a self-certification that the account holder is neither a U.S. Citizen nor a U.S. resident for tax purposes. This may be an IRS W8 form or other similar agreed form, and
2. acceptable documentary evidence which establishes the account holder’s non U.S. status. This evidence can be:

    - A certificate of residence issued by an appropriate tax official of the country in which the payee claims to be a resident.

    - Any valid identification issued by an authorised government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes.

    - Any financial statement, third-party credit report, bankruptcy filing, or U.S. Securities and Exchange Commission report.

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

7.4.6 Effective Power of Attorney or signatory authority

Where the indicia found is:

- a current effective power of attorney or signatory authority granted to a person with a U.S. address;
- an 'in care of' or 'hold mail' address that is the sole address the financial institution holds for the account holder or,
- one or more U.S. telephone numbers associated with the account the account must be reported unless the Irish financial institution obtains or currently maintains a record of one of the following:
  (a) A self certification showing that the account holder is neither a U.S. Citizen nor a U.S. resident for tax purposes. This may be an IRS W8 form or other similar agreed form ;or
  (b) Acceptable documentary evidence which establishes the account holder's non U.S. status.

Where none of the indicia listed above are discovered through an electronic search, no further action is required for lower value accounts unless there is subsequently a change of circumstance that results in one or more U.S. indicia being associated with the account.

Where indicia are found and the financial institution attempts to verify or cure the indicia as set out above, by contacting the account holder but there is no response, then the account should be treated as reportable after 90 days of initiating contact.

7.5 High Value Accounts

These are pre-existing individual accounts with a balance or value that exceeds $1,000,000 at 31 December 2013 or at 31 December of any subsequent year.

7.5.1 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.

However a financial institution that has previously obtained documentation from a pre-existing individual account holder to establish the account holder's status in order to meet its obligations under a qualified intermediary, withholding partnership or withholding trust agreement, or to fulfil its reporting obligations as a U.S. payor under chapter 61 of the U. S. Tax Code, is not required to perform the electronic search or the paper record search for such accounts.

Any Irish financial institution that falls into this category is required, however, to perform the relationship manager enquiry where the accounts are high value pre-existing individual accounts.

7.5.2 Paper Record search

A paper record search will be required if the electronic searchable databases do not capture details on the following:-

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

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

- the most recent documentary evidence collected with respect to the account;

- the most recent account opening contract or documentation;

- the most recent documentation obtained by the financial institution for AML/KYC Procedures or for other regulatory purposes;

- any power of attorney or signature authority forms currently in effect; and

- any standing instructions to transfer funds currently in effect.

This information should be reviewed for any U.S. indicia.

A financial institution is not required to perform the paper record search for any pre-existing individual account with respect to which it has obtained a Form W-8BEN and documentary evidence which establishes the account's status as an account other than a U.S. reportable account.

7.5.3 Relationship Manager

In addition to the electronic and paper searches the financial institution must also consider whether any relationship manager associated with the account (including any accounts aggregated with such account) has actual knowledge that would identify the account holder as a specified U.S. person. If the relationship manager does know that the account holder is a specified U.S. person then the account must be reported unless the indicia can be cured.

A financial institution must also ensure that they have procedures in place to capture any change of circumstance in relation to a high value individual account, made known to the relationship manager in respect of the account holder's status.

For example, if a relationship manager is notified that the account holder has a new mailing address in the U.S., 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.

For these purposes a relationship manger is assumed to be any person who is an officer or other employee of the financial institution who is assigned responsibility for specific account holders on an on-going basis, who advises the account holders regarding their accounts and arranges for the overall provision of financial products, services and other related assistance.

7.5.4 Effects of Finding U.S. Indicia

Where one or more of the indicia are discovered through the enhanced review procedures and none of the cures or repairs can be applied the financial institution must treat the account as a U.S. reportable account for the current and all subsequent years.

This applies for all accounts except for depository accounts unless the account holder ceases to be a specified U.S. person.

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

If there is a change in circumstances that results in one or more of the indicia listed in this section being associated with the account and none of the cures or repairs can be applied, the account must be treated as a U.S. reportable account for the year of change and all subsequent years. This applies for all such accounts except for depository accounts and unless the account holder ceases to be a U.S. citizen or resident individual.

7.6 Timing of reviews

7.6.1 Lower Value Accounts

The review of pre-existing accounts that are lower value accounts at 31 December 2013 must be completed by 31 December 2015. For pre-existing lower value accounts that are identified as reportable they are only reportable from the year in which the account is identified as such.

Example

The due diligence procedures are carried out on a lower value account during March 2015 and the account is determined as reportable:

The financial institution is only required to report information on the account for the year ending 2015 onwards.

7.6.2 <u>High Value Accounts</u>

The review of pre-existing accounts that are higher value accounts at 31 December 2013 must be completed by 31 December 2014. Once an account is identified as reportable because it has a balance of over $1m at 31 December 2013, the financial institution must report the account for both the year ending 31 December 2013 and the year ended 31 December 2014

Example

The due diligence procedures are carried out on a high value individual account during April 2014 and the account is determined as reportable:

The financial institution is required to report on the account for both calendar years 2013 and 2014.

7.7 <u>Change in circumstances</u>

If the account is reportable it will remain reportable for all subsequent years unless there is a change in circumstances that means that the account holder ceases to be a specified U.S. person.

Where the balance or value of an account does not exceed $1,000,000 as of 31 December 2013, but does exceed that amount as of the last day of 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.

Where a U.S. reportable account's balance or value does not exceed $1,000,000 as of 31 December 2013, but does as of the last day of a subsequent calendar year, the financial institution must report the required information about the account with respect to the year in which it is identified as a U.S. reportable account and subsequent years on an annual basis.

New Individual Accounts

8.1 Introduction

A new individual account is an account opened on or after 1 January 2014. Where a new account is opened by an individual account holder who already has a pre-existing account with the same entity, the financial institution does not need to apply the due diligence requirements to the new account if it can link the two accounts for the purposes of aggregation and reports the aggregated balance on the account.

Where a new account is opened prior to any pre-existing accounts being reviewed then the financial institution may use the information obtained from the due diligence procedures for the new account to review the status of the account holder's pre-existing account.

8.2 Threshold Exemptions that apply to New Individual accounts

The legislation allows financial institutions to elect to apply the following exemptions when reviewing and identifying new individual accounts:

> Depository accounts do not need to be reviewed, identified or reported unless the account balance exceeds $50,000.

If a financial institution does not make an election under the Regulations to apply the threshold exemptions, then all accounts, regardless of the balance, will need to be reviewed and then reported if they are held by specified U.S. persons.

8.3 Reportable Accounts

Where it is established that the holder of a new individual account is resident in the U.S. for tax purposes then the account must be treated as a reportable account.

8.4 Identification of New Individual accounts

For accounts that are not exempted the financial institution must carry out the following procedures upon opening an account.

- Obtain a self-certification that allows the financial institution to determine whether the account holder is U.S. 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 these purposes a U.S. citizen is considered to be resident in the U.S. for tax purposes even where they are also tax resident of another country.

8.5 **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 then 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 that a reasonably prudent person would question the claims made.

Pre-existing Entity Accounts

9.1 Introduction

Pre- existing entity accounts are those accounts held by persons other than individual that are in existence at 31 December 2013.

9.2 Threshold Exemptions that apply to Pre-existing entity accounts

The legislation allows financial institutions to elect not to review, identify or report a pre-existing entity account where the account balance or value of the account does not exceed $250,000 at 31 December 2013. This election remains valid until the account balance exceeds $1,000,000.

Accounts with balances or values that exceed $250,000 at 31 December 2013 should be reviewed to determine the status of the account and identify whether the account is reportable.

If a financial institution does not make an election under the Regulations to apply the threshold exemptions then it will need to review all relevant accounts.

9.3 Reportable Accounts

An account is only reportable where the account is held by one or more specified U.S. persons or by passive NFFEs with one or more controlling persons who are U.S. citizens or residents.

If the account holder is a non-participating foreign financial institution (NPFFI) then payments made to the NPFFI will be reportable.

Controlling persons are defined as natural persons who exercise control over an entity. In the case of a trust, such term means the settlor, the trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. In the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions. The term “controlling persons” is to be interpreted in a manner consistent with the Recommendations of the Financial Action Task Force.

9.4 US Indicia for Pre-existing Entities

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

- Classification of an account holder as a US resident in the current customer files
- A current US residence address or US mailing address
- With respect to an offshore obligation, standing instructions to pay amounts to a US address or an account maintained in the US
- A current telephone number for the entity in the US
- A power of attorney or signatory authority granted to a person with a US address

- An "in-care-of" address or "hold mail" address that is the sole address provided for the entity.

Documentary evidence required to repair US indicia
If there are US indicia described above the Financial Institution may treat the entity as non -US only if the Financial Institution obtains a withholding certificate for the entity as well as one form of acceptable documentary evidence which establishes the entity's non –US status such as a certificate of incorporation.

9.5 <u>Identification of an entity as a Specified U.S. Person</u>
Information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon in order to identify if an entity is a specified U.S. person. A U.S. place of incorporation or organisation, or a U.S. address would be examples of information indicating that an entity is a specified U.S. person.

If the account holder is determined to be a specified U.S. 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 U.S. person.

A US place of incorporation or organisation, or a US address would be examples of information indicating that an entity is a specified US person.

If the Account Holder is found to be a specified US person then the account should be treated as reportable unless a self certification is obtained from the account holder which shows that the account holder is not a specified US person.

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

9.6 <u>Identification of an entity as a Financial institution</u>
In order to identify if an entity is a financial institution, information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon.

If the entity is a financial institution then the account is not a reportable account unless the entity is a non-participating financial institution (See Chapter 11 for payments to non-participating foreign financial institutions).

9.7 <u>Identification of an entity as a Non Participating Financial institution</u>
If the entity is an Irish financial institution or a financial institution in another partner jurisdiction, no further review, identification or reporting will normally be required unless that financial institution has been identified as an NPFI following significant non-compliance.

If the account holder is a financial institution but not an Irish financial institution or a financial institution in another partner jurisdiction, then it should be treated as a non-participating financial institution unless the entity provides a self-certification stating that it is a certified deemed-compliant financial institution , an exempt beneficial owner, or an excepted financial institution. Alternatively, the financial institution may be able to verify that the entity is a participating financial institution or registered deemed-compliant financial institution for instance from its FATCA identifying number etc.

If the account holder is a non-participating financial institution then the financial institution will need to report on payments made to it (see Chapter 11).

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

When an entity account holder is not identified as either a specified U.S. person or a financial institution, the financial institution must consider whether the entity is a passive NFFE and if any of the controlling persons of that entity are a U.S. citizen or tax resident of the United States.

An entity will be a passive NFFE if it is not an active NFFE. In order 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, which enables the financial institution to reasonably determine that the entity is an active NFFE.

To identify the controlling persons of an entity, information collected and maintained pursuant to AML/KYC Procedures may be relied on.
To determine whether the controlling persons of a passive NFFE are citizens or residents of the United States for tax purposes, a financial institution may rely on:

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

9.9 Timing of reviews

The review of pre-existing entity accounts with an account balance or value that exceeds $250,000 as of 31 December 2013 must be completed by 31 December 2015.

The review of pre-existing entity accounts with a balance or value that does not exceed $250,000 at December 31, 2013, but exceeds $1,000,000 as of December 31 of any subsequent year, must be completed by 30 June of the following year.

Example

An entity account had a balance of $240,000 at 13 December 2013 so there was no requirement to review or report on the account. On 31 December 2017 the balance in the account had increased to $1.1.m. so the account must be reviewed by 30 June 2018.

Chapter 10

New Entity Accounts

10.1 Introduction

A new entity account is an account that is not held by an individual and that is opened on or after 1 January 2014.

10.2 Exemptions that apply to New Entity Accounts

Apart from cash value insurance contracts there is no de minimis threshold for new entity accounts so all new entity accounts, with the exception of cash value insurance contracts, are subject to the review and the due diligence procedures. Cash value insurance contracts are excluded from FATCA if they have a cash value greater than $50,000

10.3 Reportable Accounts

An account holder of a new entity account must be classified as either

- a specified U.S. person
- an Irish financial institution or other partner jurisdiction financial institution
- a participating FFI, a deemed-compliant FFI, an exempt beneficial owner, or an excepted FFI, as those terms are defined in relevant U.S. Treasury Regulations; or
- an active NFFE or passive NFFE.

New entity accounts will be reportable where there is an account holder :

- who is a specified U.S. person or
- that is a passive NFFE with one or more controlling persons who is a citizen or resident of the U.S..

10.4 Identification of an entity as an Irish Financial institution

A financial institution may rely on publicly available information or information within the financial institution’s possession to identify whether an account holder is an active NFFE or an Irish or 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.

10.5 Identification of an entity as a Non Participating Financial institution

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

If the account holder is a financial institution but not an Irish financial institution or a financial institution in another partner jurisdiction, then the entity is treated as a non-participating financial institution unless the financial institution 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 verify it as a participating financial institution or registered deemed-compliant financial institution for instance from its FATCA identifying number etc.

If the account holder is a non-participating financial institution then reports on certain payments made to such entities will be required.

10.6 <u>Identification of an entity account holder as a Specified U.S. person</u>

If the financial institution identifies the account holder of a new entity account as a specified U.S. person, the account will be a U.S. reportable account and the financial institution must obtain a self-certification that includes a U.S. TIN. The self-certification could be, for example on IRS form W9.

10.7 <u>Identification of an entity as a Non Financial Foreign Entity (NFFE)</u>

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 citizens or residents of the United States for tax purposes, the reporting institution must obtain a self-certification from the account holder or controlling persons.

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

Reporting of Payments made to Non-participating Financial institutions

11.1 Introduction

Article 4(1)(b) of the Agreement requires each reporting financial institution to report the aggregate amount of payments made to NPFI's in 2015 and 2016. Payments for non-financial services, goods, and the use of property that are made in the ordinary course of business do not have to be reported.
The diagram on page 74 illustrates the type of payments to be reported.

11.2 Payments to be reported

The payments to be reported under this provision are:

1. non-U.S. source interest paid on a financial account,
2. non-U.S. source dividends paid on a financial account,
3. payments 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 U.S. sources, and
4. non-U.S. source payments that are the proceeds or benefits of a cash value insurance contract or annuity contract.

11.3 Payments that need not be reported

The following payments do not need to be reported:

1. interest on outstanding accounts payable, arising from the acquisition of goods or services,
2. payments where the reporting financial institution has no knowledge of the facts that give rise to the payment or has no control over the payment or does not have custody of property which relates to the payment, or
3. payments made in circumstances where the reporting financial institution does not hold documentation to identify the payee as a non-participating financial institution, unless the payee is a prima facie financial institution.

11.4 Reporting Process

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

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

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

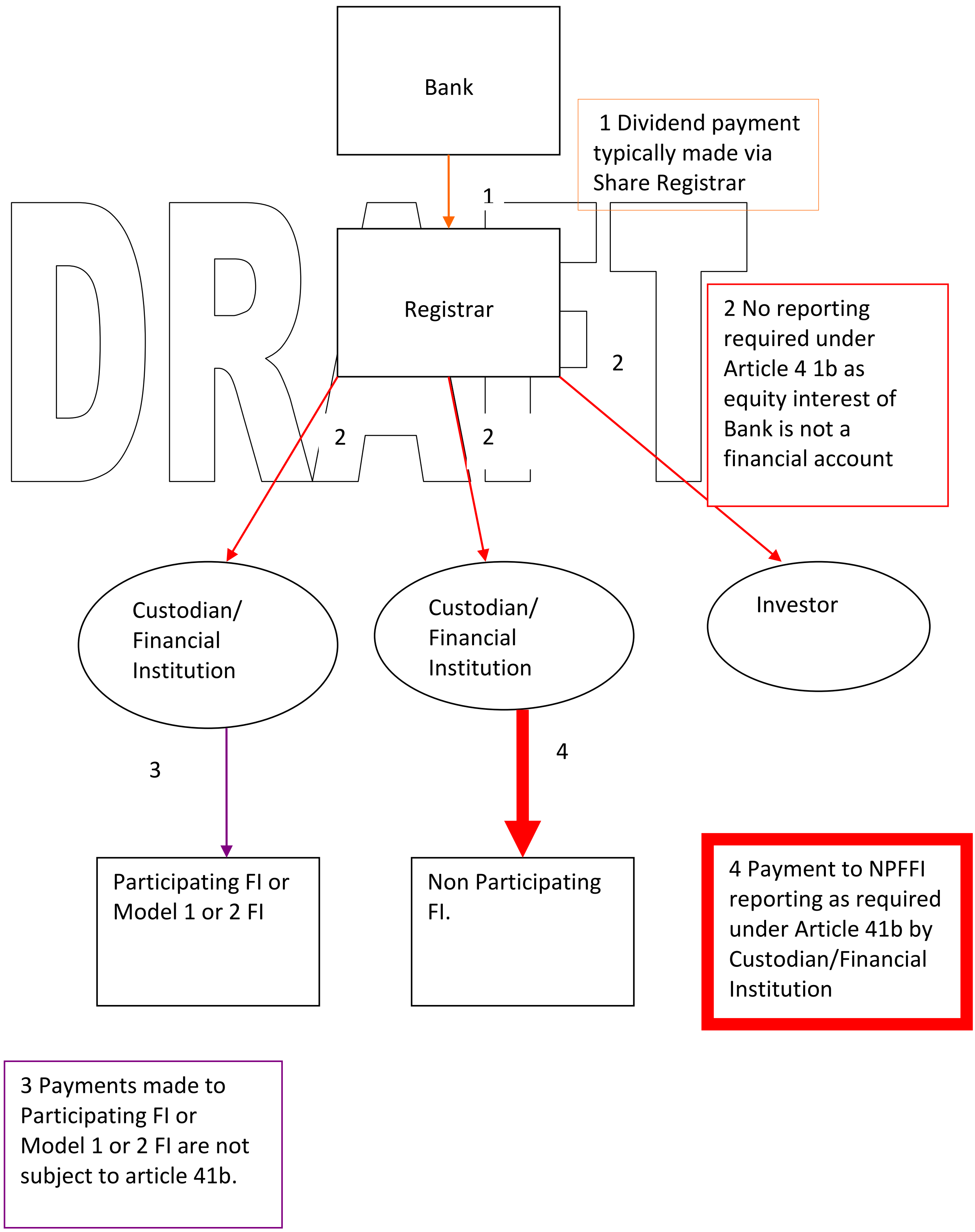
11.5 Withholding on payments made to Non-Participating Financial institutions

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

Therefore it is not expected that the provisions of Article 4(1)(d) of the Agreement will apply to Irish financial institutions. Instead, such institutions should fall within the provisions of Article 4(1)(e). This means that Irish financial institutions will not have to withhold on U.S. source withholdable payments to a non-participating foreign financial institution but they may have to report on such payments to any immediate payor.

11.6 <u>Reporting payments of U.S. Source Withholdable Payments to Non Participating Foreign Financial institutions</u>

Under Article 4(1)(e), where the financial institution makes a payment of, or acts as an intermediary, in respect of a U.S. source with-holdable payment to any NPFFI, then the financial institution must provide information required for withholding and reporting to occur, with respect to the payment, to "any immediate payor" (i.e. only where there is an immediate payor). The information required for withholding and reporting to occur is to be pooled withholding rate information (i.e. as would be the case for information reported under the QI regime).


Bank
1 Dividend payment typically made via Share Registrar
1
Registrar
2
2 No reporting required under Article 4 1b as equity interest of Bank is not a financial account
2
2
Custodian/ Financial Institution
Custodian/ Financial Institution
Investor
3
4
Participating FI or Model 1 or 2 FI
Non Participating FI.
4 Payment to NPFFI reporting as required under Article 41b by Custodian/Financial Institution
3 Payments made to Participating FI or Model 1 or 2 FI are not subject to article 41b.
DRAFT

Chapter 12

Miscellaneous Issues

12.1 Third party Service Providers

Any reporting financial institution can rely on third party service providers to meet some of its obligations under this legislation, however fulfilling all those obligations remains the responsibility of the reporting financial institution.

> **Example**
> A fund may use a transfer agent to meet its due diligence obligations or a corporation may use a Business Process Outsourcing provider. However in the event of any irregularities or failure to meet the legislative requirements the reporting financial institution will be held accountable.

12.2 Format of Return

The format in which reporting will be required is almost finalised and a copy of the proposed schema is available from:

12.3 Transmission

The way in which financial institutions will submit the information to Revenue has not yet been finalised.

12.4 Penalties

Where a reporting financial institution fails to provide the required information or where it provides inaccurate information, the implementing legislation enables the Revenue Commissioners to impose penalties on the institution.

12.5 Errors

12.5.1 Minor Errors

Where there is a minor error in the return, the IRS may contact the reporting financial institution directly to try and resolve the problem. Examples of such minor errors could include:

- Data fields missing or incomplete
- Data that has been corrupted
- An incompatible format has been used.

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

Where a reporting Irish financial institution is concerned that an enquiry from the U.S. extends beyond an enquiry on the quality or format of the data and potentially presents difficulties in respect of their obligations under the Data Protection Act or implementing the requirements of the Data Protection

Directive (Directive 95/46/EC) then they should contact the Irish Competent Authority.

12.5.2 Other errors/enquiries

Specific enquiries, for instance regarding a specific individual or entity, will have to be addressed via the Irish Competent Authority. In such cases, the IRS will contact Revenue who will then contact the financial institution to obtain the required information.

12.6 Significant Non Compliance

Significant non-compliance may be determined from either an IRS or a Revenue Commissioners perspective. In either event the relevant competent authorities will notify the other regarding the circumstances.

Where one competent authority notifies the other of significant non-compliance there is an 18 month period in which the financial institution must resolve the non-compliance.

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

- discuss the areas of non–compliance
- discuss remedies/solution to prevent future non-compliance,

and will inform the IRS of the outcome of these discussions.

In the event that the issues remain unresolved after a period of 18 months then the financial institution will be treated as a non-participating financial institution. The IRS will publish a list of entities that are to be treated as non-participating financial institutions. Details of how such an entity can correct its status will be published at later date.

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

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

12.8 Anti Avoidance

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

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.

Annex 1

Definitions relevant to FATCA

1. Depositary 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.

This will include any credit balance on a credit card issued by a credit card company engaged in banking or similar business and generally includes an amount held by an insurance company under an agreement to pay or credit interest.

2. Custodial Account

A custodial account is an account (other than an insurance contract or annuity contract) for the benefit of another person that holds any financial instrument or contract held for investment.

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

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

A Cash Value Insurance Contract or an Annuity Contract is not to be considered to be a Custodial Account, but these could be assets held in a Custodial Account.

3. Insurance Contract

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

An insurance contract is not to be considered to be a custodial account however it could be one of the assets that are held in a custodial account.

4. Cash Value Insurance Contract

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

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

- the amount payable on the insured event, which includes death,

- a refund on a non-life insurance policy premium due to cancellation or termination of the policy, a reduction in amount insured, or a correction of an error in relation to the premium due,

- a policyholder on-boarding incentive or bonus.

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

5. Annuity Contract

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

The following are not considered to be an annuity contract for FATCA purposes

- pension annuities
- immediate needs annuities
- periodic payment orders

Reinsurance of annuity contracts between two insurance companies are excluded from this definition.

An Equity or Debt Interest in an Investment Entity

Where an Investment Entity is only classed as such because it falls in the first category of Investment entities as defined in section 2.12
then its Debt and Equity Interests are excluded from being a Financial Account. This mirrors the treatment of Debt and Equity interests in entities that are solely Depositary or Custodial Institutions.

Debt and equity interests are only Financial Accounts in relation to those entities that are Investment entities because they are managed by a Financial Institution including

another Investment entity or the entity‘s gross income is attributable to investing, reinvesting or trading in Financial assets or the entity functions or holds its self out as a collective investment 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 either an interest held by any person treated as a settlor or beneficiary of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. A Specified US Person shall be treated as being a beneficiary of a trust if such person has the right to receive directly, or indirectly a mandatory or discretionary distribution from the trust.

6. Active NFFE

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

1. Less than 50 percent of the NFFE’s gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50 percent 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;

2. The stock of the NFFE is regularly traded on an established securities market or the NFFE is a related entity of an entity the stock of which is traded on an established securities market;

3. The NFFE is organised in a U.S. Territory and all of the owners of the payee are bona fide residents of that U.S. Territory;

4. The NFFE is a non-U.S. government, a government of a U.S. Territory, an international organisation, a non-U.S. central bank of issue, or an entity wholly owned by one or more of the foregoing;

5. Substantially all of the activities of the NFFE consist of holding (in whole or in part) the outstanding stock of, and providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a financial institution, except that an NFFE shall not qualify for this status if the NFFE functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes;

6. The NFFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a financial institution; provided, that the NFFE shall not qualify

for this exception after the date that is 24 months after the date of the initial organisation of the NFFE;

7. The NFFE was not a financial institution in the past five years, and is in the process of liquidating its assets or is reorganizing with the intent to continue or recommence operations in a business other than that of a financial institution;

8. The NFFE primarily engages in financing and hedging transactions with or for related entities that are not financial 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

9. 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 of reasonable compensation for services rendered, 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 other non-profit organization, or escheat to the government of the entity's country of residence or any political subdivision thereof.

<u>7. Related Entity</u>

For the purposes of FATCA An entity is regarded as being related to another entity if one entity controls the other, or the two entities are under common control.

For this purpose Revenue regards control as including the direct or indirect ownership of more than 50 per cent of the vote and value in an entity.

Whether or not there are any related entities is relevant in the context of the obligations placed on Irish Financial Institutions in respect of any related entities that are Non Participating Financial Institutions (NPFI).

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

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

An Investment entity will not be considered a member of an expended affiliated group as a result of a contribution of seed capital by a member of such expanded affiliated group if

(a) The member that owns the investment entity is an FFI that is in the business of providing seed capital to form investment entities, the interest in which it intends to sell to unrelated investors;

(b) The investment entity is created in the ordinary course of such other FFI's business;

(c) As of the date the FFI acquired the entity interest, any equity interest in the investment entity in excess of 50 percent of the total value of the stock of the investment entity is intended to be held by such other FFI (including ownership by others of such other FFI's expanded affiliated group) for no more than three years from the date on which such other FFI first acquired an equity interest in the investment entity;

(d) In the case of an equity interest that has been held by such other FFI for over three years from the date at (c) above the aggregate value of the equity interest held by such other FFI and the equity interest s held by other members of its expanded affiliated group is 50 percent or less of the total value of the stock of the investment entity;

For the purposes of (a) above Seed Capital means an intial capital contribution made to an investment entity that is intended as a temporary investment and is deemed by the manager of the entity to be necessary or appropraite for the establishment of the entity, such as for the purpose of establishing a track record of investment peformance for such entity, achieving economies of scale for diversified investment, avoiding an artifically high expense to return ratio, or similar purposes.

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

8. Specified U.S. Person

The term specified U.S. person is defined in the Agreement as a U.S. person other than:

(i) a corporation the stock of which is regularly traded on one or more established securities markets;

(ii) any corporation that is a member of the same expanded affiliated group[6] as a corporation described in clause (i);

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

(iii) the United States or any wholly owned agency or instrumentality thereof;

(iv) any State of the United States, any U.S. Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;

(v) any organisation exempt from taxation under section 501(a) or an individual retirement plan as defined in section 7701(a)(37) of the U.S. Internal Revenue Code;

(vi) any bank as defined in section 581 of the U.S. Internal Revenue Code;

(vii) any real estate investment trust as defined in section 856 of the U.S. Internal Revenue Code;

(viii) any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the Securities Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64);

(ix) any common trust fund as defined in section 584(a) of the U.S. Internal Revenue Code;

(x) any trust that is exempt from tax under section 664(c) of the U.S. Internal Revenue Code or that is described in section 4947(a)(1) of the U.S. Internal Revenue Code;

(xi) a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State; or

(xii) a broker as defined in section 6045(c) of the U.S. Internal Revenue Code.

9. U.S. Persona U.S. citizen or resident individual,

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

3. a trust if:

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

   (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States.

The meanings of the expressions Used in this definition are to be interpreted in line with the U.S. Internal Revenue Code.

Annex 2

Registration arrangements

Registration

Annex 3

Self Certification forms

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