



# Foreign Account Tax Compliance Act (FATCA)

## Registration guidance notes



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# Objective of the Foreign Account Tax Compliance Act

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1. The HIRE Act 2010 introduced legislation requiring financial institutions outside of the United States (U.S.) to provide details relating to U.S. citizens' financial accounts to the U.S.'s Internal Revenue Service (IRS). This legislation was subsequently complemented with the Foreign Account Tax Compliance Act (FATCA) U.S. Treasury Regulations, issued in January 2013. The purpose of FATCA is to reduce and combat tax evasion by U.S. citizens, by requiring certain foreign financial institutions (FFIs) to register with the IRS, carry out due diligence on their financial accounts, and provide details to the IRS about reportable accounts held by U.S. citizens/residents (and certain entities that are controlled by U.S. citizens/residents), and Non-participating Financial Institutions (NPFIs). Where an FFI fails to comply with its FATCA disclosure requirements, a 30% withholding<sup>1</sup> is imposed on certain U.S. sourced payments made to that non-complying FFI.<sup>2</sup>
2. The Intergovernmental Agreement (IGA) between the U.S. and New Zealand to improve international tax compliance and to implement FATCA was signed on 12 June 2014. The domestic legislation required to give effect in New Zealand to FATCA reporting received Royal Assent on 30 June 2014 and the IGA and the associated domestic legislation have effect from 1 July 2014. The IGA has been brought into effect by Order in Council and came into force on 3 July 2014.
3. A fundamental aspect of the IGA is that New Zealand Financial Institutions (NZFIs) with FATCA obligations will need to be registered with the IRS, carry out due diligence on their financial accounts from 1 July 2014, and report to Inland Revenue<sup>3</sup> information about U.S. Reportable Accounts (financial accounts held by U.S. citizens/residents or certain entities<sup>4</sup> that are controlled by U.S. citizens/residents and that are not exempted or excluded) and accounts held by NPFIs. The Inland Revenue will in turn, exchange this information with the IRS.

## Purpose of these guidance notes

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4. The purpose of these guidance notes is to set out which NZFIs will need to register with the IRS (and will have such FATCA obligations). The starting point to answering this question is to differentiate between Reporting New Zealand Financial Institutions (Reporting NZFIs) and those that are Non-Reporting New Zealand Financial Institutions (Non-Reporting NZFIs) as defined in the IGA.
5. Reporting NZFIs are required to register with the IRS, carry out FATCA due diligence to identify U.S. Reportable Accounts and accounts held by NPFIs, and to report at least annually to Inland Revenue about any such accounts that they identify.
6. In contrast, Non-Reporting NZFIs generally do not have FATCA registration, due diligence, and reporting obligations. However, as explained in detail below, New Zealand sponsored investment entities and sponsored controlled foreign corporations, and NZFIs with a local client base are examples of types of Non-Reporting NZFIs that can (depending on the circumstances) be required<sup>5</sup> to register with the IRS, and carry out FATCA due diligence and reporting. Non-Reporting NZFIs that are Registered Deemed Compliant FFIs<sup>6</sup> (as defined in the U.S. Treasury Regulations) will also need to register with the IRS.
7. Therefore, in summary, Inland Revenue understands that:
  - Reporting NZFIs are required to register with the IRS;
  - Non-Reporting NZFIs that are New Zealand sponsored investment entities, sponsored controlled foreign corporations, or New Zealand financial institutions with a local client base can (depending on the circumstances) be required to register with the IRS. [The circumstances in which such entities will need to be registered are explained in detail below]; and
  - Non-Reporting NZFIs that are Registered Deemed Compliant FFIs will need to register with the IRS.
8. The focus of these guidance notes is on the issue of **which** NZFIs should register with the IRS. Inland Revenue will be issuing further guidance notes on: FATCA due diligence, FATCA reportable accounts, and how FATCA applies to trusts and collective investment vehicles.

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1 Financial institutions that beneficially own such payments will not be permitted a credit or refund on withheld taxes unless there is a treaty override: see 26 U.S.C. 1474(b)(2) of the Internal Revenue Code.

2 As explained below, such non-complying FFIs are defined as NPFIs for FATCA purposes.

3 The IGA also provides scope for this information to be reported by other entities (such as sponsors) on behalf of the underlying entity. We have outlined below how the sponsoring regime will work for FATCA purposes.

4 Financial institutions only need to report on accounts held by entities (that are not themselves financial institutions) if the entities are passive NFFEs that are controlled by US citizens/residents and the accounts are not otherwise exempted or excluded. We have set out the definitions of financial institution, NFFE, and passive NFFE in detail below.

5 As explained below, these registration, due diligence, and reporting obligations can sometimes be carried out by a sponsor on behalf of the underlying entity.

6 FFI is a defined term in the U.S. Treasury Regulations and has a meaning similar to the meaning of financial institution in the IGA (outlined below). The meaning of Registered Deemed Compliant FFI is also outlined below.

9. The guidance notes are divided into five parts:
  - (i) Part I – provides a brief description of the U.S./NZ IGA.
  - (ii) Part II – provides a general discussion of what financial institutions constitute Reporting NZFIs. These are categorised as one of four types: custodial institution, depository institution, investment entity or specified insurance company.
  - (iii) Part III – provides a general description of what financial institutions are Non-reporting NZFIs. These institutions are of three types: Exempt Beneficial Owner, Deemed Compliant FFI, or institutions identified in Annex II of the IGA.
  - (iv) Part IV – explains how FATCA will apply to certain entities and funds in the New Zealand context.
  - (v) Part V – explains how NZFIs are able to register on the IRS's FATCA Registration Portal.

## Part I - The Inter-governmental Agreement ("IGA")

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10. The New Zealand Government signed an IGA with the U.S. on 12 June 2014 and the relevant enabling legislation was passed on 30 June 2014, effective from 1 July 2014. The IGA has been brought into effect by Order in Council and came into force on 3 July 2014.
11. The purpose of entering into the IGA and accompanying enabling legislation is to lighten the FATCA compliance burden for NZFIs (relative to how FATCA would otherwise apply to NZFIs under the U.S. FATCA legislation/U.S. Treasury Regulations). For example, the IGA:
  - Overcomes New Zealand legal impediments preventing NZFIs from compliance with FATCA. The IGA enables NZFIs to provide information on U.S. citizens' accounts to Inland Revenue for passing onto the IRS, rather than the FIs having to provide it directly to the IRS (see Articles 2(4) of the IGA).
  - Provides NZFIs with extended timeframes for reporting under FATCA (see Article 3 of the IGA).
  - Provides a number of exemptions from FATCA for certain low tax risk schemes and institutions. These exemptions are set out in Annex II of the IGA and are explained in detail below.
12. Key elements of the IGA are:
  - (i) NZFIs are defined in the IGA as either Reporting NZFIs or Non-Reporting NZFIs. Reporting NZFIs will be required to register with the IRS, carry out FATCA due diligence on the financial accounts that they maintain (unless the accounts are exempted or excluded) and report to Inland Revenue on reportable accounts held (or controlled) by U.S. citizens and accounts held by NPFIs. Non-Reporting NZFIs generally do not need to register with the IRS. However, certain Non-Reporting NZFIs can be required to register with the IRS and carry out FATCA due diligence and reporting. These types of Non-Reporting NZFIs are set out below.
  - (ii) Inland Revenue will be required to obtain certain prescribed information<sup>7</sup> on all U.S. Reportable Accounts held with each Reporting NZFI [including the name, address, and U.S. TIN (U.S. federal taxpayer identifying number)<sup>8</sup> of each specified U.S. person who is an account holder or controller<sup>9</sup>] and accounts held by NPFIs. Inland Revenue will be required to provide this information to the IRS on an automatic and annual basis (exchange of information obligations).
  - (iii) A Reporting NZFI will not be subject to the 30% withholding where certain criteria are met, including that the Reporting NZFI identifies U.S. Reportable Accounts and accounts held by NPFIs and reports annually to Inland Revenue (to enable Inland Revenue to meet its exchange of information obligations under the IGA) and the Reporting NZFI complies with U.S. registration requirements for FATCA.
  - (iv) Inland Revenue will be required to ensure that Reporting NZFIs (and certain Non-Reporting NZFIs) apply the due diligence procedures contained in Annex I of the IGA for identifying and reporting on U.S. Reportable Accounts and accounts held by NPFIs (explained below).
  - (v) A Reporting NZFI will be subject to 30% withholding if it does not comply with its reporting obligations and is a NPFI (explained below). What amounts to a NPFI is discussed more fully at paragraphs 41 to 44 below.

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7 A full list of this information is set out at Article 2(2) of the IGA.

8 In the case of pre-existing individual accounts (and pre-existing entity accounts held by a passive NFFE with controlling persons which are U.S. citizens or tax residents) that are U.S. Reportable accounts a Reporting NZFI is (subject to Article 6(4) of the IGA – discussed below) only required to supply the Inland Revenue with the individual or controlling person's TIN, if such information is held by the Reporting NZFI (refer to Article 3(4) of the IGA). This concession from providing a pre-existing account holder's (or controlling person's) TIN where they are a Specified U.S. Person is only temporary because of the requirements on the Inland Revenue in terms of Article 6(4)(b). Article 6(4)(b) of the IGA requires the Inland Revenue to establish rules by 1 January 2017, for pre-existing accounts, requiring Reporting NZFIs to obtain the U.S. TIN from each Specified U.S. Person for the 2017 and subsequent years. The Inland Revenue intends to treat the enabling legislation and entry into the IGA as the effective rule for requiring Reporting NZFIs to obtain a U.S. TIN from a Specified U.S. Person in this way for the 2017 and subsequent years. In other words, for pre-existing accounts reporting NZFIs will be obliged to obtain the US TIN from such persons for the 2017 and subsequent years.

9 This applies to accounts that are held by passive NFFEs with U.S. controlling persons.

- (vi) An entity that is not a financial institution may still be reported on by Reporting NZFIs in which that non-financial entity is an account holder, where the account holder is classified as a passive non-financial foreign entity (passive NFFE) under the IGA (explained below).
- (vii) The IGA is reciprocal in nature. The IRS will provide Inland Revenue with additional information relating to U.S. sourced income paid to New Zealand residents, thereby assisting Inland Revenue in identifying potential tax evasion or tax avoidance of New Zealand tax.

## Interpreting the IGA

13. A NZFI, when interpreting how FATCA applies to them, should be aware of the following information, legislation and provisions:
- (i) The text of the IGA entered into between New Zealand and the U.S. Notable Articles of the IGA to consider are:
    - Article 1(2) of the IGA, which provides that any term not otherwise defined in the IGA shall, unless the context otherwise requires or the Competent Authorities agree to a common meaning (as permitted by domestic law), have the meaning that it has at that time under the law of the Party applying the IGA, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party. This means that New Zealand tax definitions can be relevant when interpreting the IGA.
    - Article 4(7) of the IGA, which provides that a NZFI may use a definition in the U.S. Treasury Regulations in substitution for a corresponding definition in the IGA, where this is permitted by the New Zealand Government or its delegate.
    - Article 7 of the IGA, which provides that any more favourable terms under Article 4 or Annex I afforded to another Partner Jurisdiction signing a subsequent agreement where the Partner Jurisdiction generally commits to the same obligations as New Zealand in our IGA, shall be treated as automatically applying to New Zealand. The U.S. is required to notify New Zealand of any more favourable terms.
  - (ii) U.S. Treasury Regulations (REG – 121647-10) – issued 21 January 2013 and the various updates to these Regulations.
  - (iii) Supplementary Information issued by the U.S. Treasury and IRS (Supplementary Information) to the Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities.
  - (iv) The Financial Action Task Force (FATF) Recommendations.

## Part II - Reporting New Zealand Financial Institutions

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14. A Reporting New Zealand Financial Institution is a New Zealand Financial Institution that is not a Non-Reporting New Zealand Financial Institution (see below).
15. Reporting NZFIs will need to register with the IRS for FATCA and comply with their FATCA due diligence and reporting requirements in terms of the IGA. There are two key definitions that feed into the definition of Reporting NZFI; New Zealand Financial Institution and Financial Institution.
16. The term New Zealand Financial Institution is defined in the Article 1(1)(l) of the IGA to mean:
- Any financial institution resident in New Zealand excluding any branches located outside New Zealand; and
  - Any branch of a financial institution not resident in New Zealand, if the branch is located in New Zealand.
17. For example, MW Bank Ltd is incorporated in New Zealand and carries on a banking business, which includes deposit taking and on-lending. MW Bank Ltd conducts the same business through a branch in Partner Jurisdiction 1 and operates through a subsidiary (not resident in New Zealand) in Partner Jurisdiction 2. MW Bank Ltd is a Reporting NZFI and will be required to report to Inland Revenue on its U.S. Reportable Accounts and payments to NPFIs. It will not be required to report to New Zealand on such accounts held by its branch or subsidiary in Partner Jurisdictions 1 and 2 respectively. The branch and subsidiary will report to the tax authorities of the relevant Partner Jurisdictions.
18. A financial institution is, in turn, defined in Article 1(1)(g) of the IGA to mean:
- A custodial institution;
  - A depository institution;
  - An investment entity; or
  - A specified insurance company.

## What is an "entity"?

19. Each of the above types of financial institutions has within their respective definitions in the IGA a reference to the term entity. That expression is in turn, defined in Article 1(1)(gg) of the IGA as meaning a legal person or a legal arrangement such as a trust. An entity for the purposes of FATCA covers any legal arrangement, whether or not a separate legal entity is created. It therefore covers e.g. companies, joint ventures, partnerships, limited partnerships, and trusts (including unit trusts and discretionary trusts). As will be explained in more detail below, whether such entities are financial institutions (and, if so, the type of financial institution that they are) will turn on the nature of the activities that they undertake. An entity can also be a financial institution under the IGA where it is managed by an investment entity (even if it is not otherwise a financial institution on the basis of the activities that it undertakes).

## Business

20. Another key aspect of each of these types of financial institutions is that the entity is undertaking a business<sup>10</sup> (or, in the case of an investment entity, is managed by an entity that conducts such a business). This qualification is likely to exclude entities that have engaged in transactions on an isolated or irregular basis. In short, they will not satisfy the financial institution definition and will not need to register with the IRS (under FATCA) and will have no reporting-on obligations under the IGA.

## Custodial Institution

21. A custodial institution is defined in Article 1(1)(h) of the IGA as meaning any entity that holds, as a substantial portion of its business, financial assets for the account of others. Custodial activities are a substantial portion of an institution's business if the gross income attributable to the holding of financial assets and related financial services equals or exceeds 20% of the entity's gross income during the shorter of:
- the entity's last three accounting periods; or
  - the period during which the entity has been in existence.
22. There is a special rule for start-up entities, who would not otherwise meet the 20% threshold. An entity will be treated as a custodial institution where it is expected to meet the 20% gross income threshold based on anticipated functions, assets and employees.
23. Custodial institutions would include, for instance, nominee entities, trust companies, that hold, as a substantial portion of their businesses, financial assets for the account of others and meet the threshold test outlined above.
24. For example, a company carries on a business pursuant to which it holds the legal title to various debt and equity instruments (financial assets) as custodian on bare trust for a unit trust (and performs various related financial services for the unit trust). The company has been in existence for five years. 80% of the company's gross income in the preceding 3 years was attributable to the holding of these financial assets (and related financial services). The company is a custodial institution, and, therefore, a financial institution.

## Depository Institution

25. A depository institution is defined in Article 1(1)(i) of the IGA as meaning any entity that accepts deposits in the ordinary course of a banking or similar business.
26. An entity is considered to be engaged in a banking or similar business if, in the ordinary course of its business with customers, the entity accepts deposits or other similar investments of funds and regularly engages in one or more of the following activities:
- Makes personal, mortgage, industrial, or other loans or provides other extensions of credit;
  - Purchases, sells, discounts, or negotiates accounts receivable, instalment obligations, notes, drafts, checks, bills of exchange, acceptances, or other evidences of indebtedness;
  - Issues letters of credit and negotiates drafts drawn thereunder;
  - Provides trust or fiduciary services;
  - Finances foreign exchange transactions; or enters into, purchases, or disposes of finance leases or leased assets.
27. An entity which accepts deposits from persons as collateral or security pursuant to a lease, loan, or similar financing arrangement is not a depository institution.
28. The Supplementary Information confirms that, to satisfy the definition of depository institution:
- An entity must both accept deposits and undertake one or more of the listed activities i.e. accepting deposits is necessary but not sufficient to meet the depository institution definition.
  - An entity must engage on a regular basis in one or more of the listed activities.
  - An entity that completes money transfers by instructing agents to transmit funds is not a banking or similar business because it does not accept deposits.

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<sup>10</sup> Although the expression business is not used in the definition of specified insurance company in Article 1(1)(k) of the IGA, the contextual connotations are that the identified policies are issued in an overall business context.



29. In New Zealand, a depository institution which accept deposits<sup>11</sup> as part of its ordinary banking or similar business will include:
- A registered bank under the Reserve Bank Act 1989 undertaking such activity;
  - Non-bank deposit takers supervised by the Reserve Bank e.g. credit unions and mutual building societies; and
  - Treasury centres.

## Investment Entity

30. An investment entity is defined in Article 1(1)(j) of the IGA as meaning any entity that conducts as a business (or is managed by an entity that conducts such a business) one or more of the following activities or operations for or on behalf of a customer:<sup>12</sup>
- (i) trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
  - (ii) individual and collective portfolio management; or
  - (iii) otherwise investing, administering, or managing funds or money on behalf of other persons.
31. This definition should be interpreted in a manner consistent with similar language in the definition of financial institution in the FATF Recommendations (see Appendix 1).
32. This definition would include:
- Pooled funds managed in certain unit trusts (collective portfolio management), private equity funds and hedge funds. This would include managed investment schemes as defined in the Financial Markets Conduct Act 2013.
  - Entities that carry on a business that include the provision of discretionary investment management services (DIMS services) for customers. [However, as explained below, such entities may (depending on the circumstances) be Non-Reporting NZFIs]; and
  - Entities that carry on a business of facilitating transactions for other persons and, in the process of doing so, engage in portfolio management or otherwise invest, administer, or manage funds or money on behalf of other persons.
33. For example, a unit trust (an entity for FATCA purposes) carries on a business pursuant to which it receives funds from investors and invests those funds. The unit trust issues units to the investors in consideration for this investment. The unit trust makes periodic payments of income to the unit holders. The unit trust is an investment entity, and, therefore, a financial institution.

## Specified Insurance Company

34. A specified insurance company is defined in Article 1(1)(k) of the IGA as meaning any entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.
35. The term cash value is, in turn, defined in Article 1(1)(z) of the IGA as meaning the greater of (i) the amount that the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan), and (ii) the amount the policyholder can borrow under or with regard to the contract. Notwithstanding the foregoing, the term Cash Value does not include an amount payable under an Insurance Contract as:
- (i) a personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against;
  - (ii) a refund to the policyholder of a previously paid premium under an Insurance Contract (other than under a life insurance contract) due to policy cancellation or termination, decrease in risk exposure during the effective period of the Insurance Contract, or arising from a redetermination of the premium due to correction of posting or other similar error; or
  - (iii) a policy holder dividend based upon the underwriting experience of the contract or group involved.
36. The term insurance contract is defined in Article 1(1)(w) as meaning a contract (other than an Annuity Contract) under which the issuer agrees to pay an amount upon the occurrence of a specified contingency involving mortality, morbidity, accident, liability, or property risk.
37. The term Cash Value Insurance Contract is defined in Article 1(1)(v) of the IGA as meaning an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value greater than \$ U.S. 50,000.
38. The effect of the definition of Cash Value Insurance Contract is that an insurance company which either issues or is an obligor of insurance contracts relating to for example: home insurance, contents insurance, motor vehicle insurance and loss of earnings insurance arising from a personal injury or sickness of the insured, should not be a specified insurance company. This is because of the exclusion from cash value of any amount payable under a personal injury or sickness benefit or benefit providing indemnification of an economic loss. Therefore, such contracts will not be Cash Value Insurance Contracts.

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<sup>11</sup> The reference to accepts deposits in the definition of depository institution would cover entities that accept conventional deposits. It would also cover entities that, for instance, routinely issue bonds and notes to raise funding.

<sup>12</sup> If an entity (such as a holding company) merely holds shares in another entity this would not be sufficient (by itself) for the holding company to satisfy the definition of investment entity or indeed any other type of financial institution. However, a holding company could still come within the definition of investment entity if it carries on a business and the requisite activities (or is managed by an entity carrying on a business and the requisite activities) coming within the definition of investment entity.

39. The term Annuity Contract is defined in Article 1(1)(x) of the IGA as meaning a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals. The term also includes a contract that is considered to be an Annuity Contract in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.
40. Companies that provide only general insurance<sup>13</sup>, and that do not issue (or have obligations to make payments with respect to) Cash Value Insurance Contracts or Annuity Contracts as defined in the IGA, will not satisfy the definition of specified insurance company.

## Non-Participating Financial Institution

41. Any Reporting NZFI which does not comply with FATCA can be subject to the 30% withholding on withholdable payments if they are treated by the IRS as a NPFI.
42. In the circumstances where there is significant non-compliance by a Reporting NZFI and Inland Revenue has been notified by the IRS of such non-compliance, Inland Revenue will investigate and apply such enforcement action as necessary to address the non-compliance.
43. Examples of significant non-compliance could include:
  - (i) ongoing or repeated failure to register as a Reporting NZFI;
  - (ii) the deliberate or negligent failure to identify U.S. Reportable Accounts;
  - (iii) ongoing or repeated failure to adopt and implement appropriate due diligence procedures to identify U.S. Reporting Accounts; or
  - (iv) repeated failure to provide to Inland Revenue details of U.S. Reportable Accounts by the due date.
44. Where enforcement action by Inland Revenue against a Reporting NZFI does not resolve the significant non-compliance, the U.S. will treat the Reporting NZFI as being a NPFI, which, in turn, will mean the entity can be subject to U.S. withholding.

## Part III - Non-Reporting New Zealand Financial Institutions

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45. Non-Reporting NZFIs generally do not have FATCA registration, due diligence, and reporting obligations. [However, as explained in detail below, New Zealand sponsored investment entities and sponsored controlled foreign corporations, and NZFIs with a local client base coming within Annex II of the IGA are examples of types of Non-Reporting NZFIs that can (depending on the circumstances) be required to register with the IRS and carry out FATCA due diligence and reporting<sup>14</sup>. Registered Deemed Compliant FFIs (as defined in the U.S. Treasury Regulations and explained in detail below) will also need to register with the IRS.]
46. The term Non-Reporting New Zealand Financial Institution is defined in Article 1(1)(q) of the IGA to mean any NZFI (or other entity resident in New Zealand) that is:
  - (i) An exempt beneficial owner under relevant U.S. Treasury Regulations; or
  - (ii) A deemed-compliant FFI under relevant U.S. Treasury Regulations; or
  - (iii) Described in Annex II of the IGA as a Non-Reporting NZFI that is an exempt beneficial owner or deemed compliant FFI.
47. NZFIs should carefully consider all the types of entities described in paragraph 46 to see whether they qualify as a Non Reporting NZFI. Importantly a NZFI is not required to obtain the Inland Revenue's permission to apply the exempt beneficial owner or deemed-compliant FFI definitions in the U.S. Treasury Regulations. If a NZFI satisfies any of the entity definitions in Article 1(1)(q) of the IGA, they will be a Non-Reporting NZFI.
48. To assist NZFIs, Inland Revenue provides a brief summary below of the definitions of exempt beneficial owner and deemed-compliant FFI as contained in the U.S. Treasury Regulations. Many of these definitions are highly technical and prescriptive (with a number of exceptions/exclusions). Inland Revenue provides a more detailed (albeit not exhaustive) description of exempt beneficial owners and deemed compliant FFIs in [Appendix 2](#). NZFIs should consult the U.S. Treasury Regulations themselves to determine whether they qualify for one of these exemptions. [This summary and the description set out at Appendix 2 should be read in conjunction with the recent amendments (of 6 March 2014) to the U.S. Treasury Regulations, which are set out in the U.S. Treasury document [TD 9657](#).<sup>15</sup> For instance, the updated U.S. Treasury Regulations set out various changes to the limited

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13 Examples of general insurance contracts in this context are: home insurance, contents insurance, motor vehicle insurance and loss of earnings insurance arising from personal injury or sickness of the insured.

14 As explained below, there is scope for these obligations to sometimes be carried out by a sponsor on behalf of the underlying entity.

15 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)



life debt investment entities category, restricted funds category, qualified credit card issuers category, sponsored investment entity and controlled foreign corporation category, non-registering local bank category, and include a further category that will apply to certain investment advisers and investment managers<sup>16</sup> that do not maintain financial accounts (and that can be a type of deemed compliant FFI). We have referred briefly to these amendments below. We intend to update these guidance notes when the U.S. issues updated consolidated U.S. Treasury Regulations incorporating the amendments set out in TD 9657.]

49. Inland Revenue also sets out further below the types of Non-Reporting financial institutions that are described in Annex II of the IGA.

## Exempt Beneficial Owner – U.S. Treasury Regulations

50. The definition of Non-Reporting New Zealand Financial Institution in the IGA includes exempt beneficial owners under the U.S. Treasury Regulations. These institutions are Non-Reporting NZFIs. Such owners are exempt from the 30% withholding as they are considered as persons posing a low risk of US tax evasion, either by the entity itself, or by U.S. citizens holding accounts in such entities. An exempt beneficial owner (in their capacity as exempt beneficial owner)<sup>17</sup> does not need to register with the IRS and does not have to report on any financial accounts that they maintain. Furthermore, Reporting NZFIs will not be required to review or report on financial accounts held by such exempt beneficial owners in this capacity. The current list of exempt beneficial owners are:

- (i) Any foreign government e.g. the Crown as defined in the *Public Finance Act 1989*;
- (ii) Any international organization e.g. The International Monetary Fund;
- (iii) A foreign central bank e.g. the Reserve Bank of New Zealand;
- (iv) Any government of a US territory as defined in the U.S. Treasury Regulations;
- (v) Certain foreign retirement funds:
  - (a) *Treaty-qualified retirement funds*: A fund which is operated principally to administer or provide pension or retirement funds, where that fund is entitled to benefits (or would be entitled to such benefits if it derived such income) under the New Zealand/U.S. Double Tax Convention on income sourced from the U.S.
  - (b) *Broad participation retirement fund*: A fund established to provide retirement, disability, or death benefits to current or former employees (or other designated person) for services rendered. Among the other criteria is that no single beneficiary has a more 5% right to the fund's assets.
  - (c) *Narrow participation retirement fund*: A fund established to provide retirement, disability, or death benefits to current or former employees (or other designated person) for services rendered. Among the other criteria is that that fund has fewer than 50 participants and employee and employer contributions to the fund are limited by reference to earned income and compensation of the employee.
  - (d) *A fund formed pursuant to a plan similar to a section 401(a) plan* (a type of retirement fund related to section 401(a) of the Internal Revenue Code)
  - (e) *Investment vehicles exclusively for retirement funds*: A fund established to earn income for a retirement fund described under bullet points (a) to (d) or a retirement of pension account described in the U.S. Treasury Regulations.
  - (f) *Pension fund of an exempt beneficial owner*: A fund established and sponsored by an exempt beneficial owner (foreign government, international organization, central bank or government of a U.S. territory) to provide retirement, disability, or death benefits to current or former employees of the exempt beneficial owner (or persons designated by such employees), or that are not current or former employees, but the benefits are provided in regard to personal services performed for the exempt beneficial owner;
- (vi) Entities specified in the U.S. Treasury Regulations that are wholly owned by one or more exempt beneficial owner; and
- (vii) Any person treated as an exempt beneficial owner in terms of the IGA.

## Deemed Compliant FFI – U.S. Treasury Regulations

51. The definition of Non-Reporting New Zealand Financial Institution in the IGA also covers deemed compliant FFIs set out in the U.S. Treasury Regulations that are considered to be of low risk of U.S. tax evasion. These institutions would constitute Non-Reporting NZFIs. The current list of deemed compliant FFIs includes:

**Registered deemed compliant FFIs:** These FFIs are a type of deemed compliant FFI that will need to register with the IRS to qualify as this type of FFI. However, they do not need to enter into an agreement with the IRS:

- (i) *Local FFIs*: This includes certain locally focused FFIs that are licensed and regulated as a financial institution under the laws of its country of incorporation or organization (which must be a FATF compliant jurisdiction at the time the FFI registers for deemed-compliant status), do not have a fixed place of business outside its country of incorporation or organization,

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<sup>16</sup> This category may (depending on the circumstances) be relevant to investment entity DIMS providers (and other entities) that facilitate investment between customers and financial institutions.

<sup>17</sup> The U.S. Treasury Regulations provide that, subject to exceptions, certain exempt beneficial owners (such as foreign governments) will not be treated as an exempt beneficial owner with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by an insurance company, custodial institution, or depository institution (including the accepting of deposits).

do not solicit customers or account holders outside its country of incorporation or organization, and that comply with the various due diligence and procedural requirements set out in the U.S. Treasury Regulations. A local FFI can be any type of financial institution e.g. a depository institution, custodial institution, investment entity or insurance company. However, the Supplementary Information confirms that this local FFI exception is intended to have a narrow scope because of the requirement that there be a minimum of 98% New Zealand resident account holders by value. The local FFI exception is not intended to apply to FFIs that serve a significant number of non-resident account holders.

- (ii) *Non-reporting members of participating FFI groups*: This category covers certain non-reporting FFIs that are members of a participating FFI group. These entities can register as deemed compliant because they implement account cleansing policies and procedures in relation to U.S. accounts, accounts held by recalcitrant account holders and accounts held by non-participating FFIs such that within the requisite timeframes (set out in the U.S. Treasury Regulations) the FFI either transfers such account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI. The Supplementary Information confirms that the FFI is allowed to close a U.S. account or an account of a non-participating FFI. The FFI also needs to comply with certain procedural requirements set out in the U.S. Treasury Regulations.
- (iii) *Qualified collective investment vehicles*: The Supplementary Information confirms that the primary purpose of this category is to provide relief for certain investment entities that are owned solely through participating FFIs or directly by large institutional investors, payments to which would not be subject to withholding or reporting under chapter 4 of the Internal Revenue Code (as referred to in the U.S. Treasury Regulations). The entity also needs to comply with certain procedural requirements set out in the U.S. Treasury Regulations. The types of investors that are permitted in such an entity include certain retirement plans and certain non-profit organizations.
- (iv) *Restricted funds*: The primary purpose of this category is to cover certain funds that are restricted in the sense that they only target foreign (in relation to the U.S.) investors and comply with the procedural requirements set out in the U.S. Treasury Regulations.

[Various aspects of this category have now been amended<sup>18</sup> as set out in the U.S. Treasury document TD 9657.]<sup>19</sup>

- (v) *Qualified credit card issuers*: This category covers certain credit card issuers that accept deposits (with restrictions related to the quantum of such deposits) associated with the credit card and comply with the procedural requirements set out in the U.S. Treasury Regulations. A key criteria is that the credit card issuer prevents a customer from having a deposit in excess of \$US 50,000.

[Various aspects of this category have now been amended<sup>20</sup> as set out in the U.S. Treasury document TD 9657.]<sup>21</sup>

- (vi) *Sponsored investment entities and controlled foreign corporations*: This category covers certain sponsored FFIs (i.e. an investment entity or controlled foreign corporation (CFC)) for which the sponsoring entity agrees to perform all due diligence, withholding, reporting, and other requirements the sponsored FFI would have been required to perform if it were a participating FFI, and complies with certain other requirements. The Supplementary Information confirms that one of the reasons for this category was that in many cases it may be preferable for a trustee or fund manager to perform the due diligence and reporting for all of its investment entities which it manages on a consolidated basis.

[Various aspects of this category have now been amended<sup>22</sup> as set out in the U.S. Treasury document TD 9657.]<sup>23</sup>

- (vii) A registered deemed-compliant FFI also includes a qualified intermediary branch of a U.S. financial institution that is a reporting Model 1 FFI. The term qualified intermediary branch of a financial institution means a foreign branch of a U.S. financial institution for which a qualified intermediary agreement is in effect.
- (viii) A registered deemed-compliant FFI also includes any FFI, or branch of an FFI, that is a reporting Model 1 FFI that complies with the registration requirements of a Model 1 IGA.

**Certified deemed compliant FFIs**: These FFIs are a type of deemed compliant FFI. They are different to registered deemed compliant FFIs because they do not need to register with the IRS:

- (i) *Nonregistering local bank*: This category covers certain FFIs that operate solely as (and are licensed and regulated under the laws of its country of incorporation or organization as) a bank or a credit union or similar cooperative credit organization that is operated without profit and that comply with the procedural requirements set out in the U.S. Treasury Regulations. The FFI's business consists primarily of receiving deposits from and making loans to unrelated retail customers. The FFI does not have a fixed place of business outside its country of incorporation or organization. The FFI does not solicit customers or account holders outside its country of incorporation or organization. The FFI does not have more than \$U.S. 175 million in assets on its balance sheet and, if the FFI is a member of an expanded affiliated group, the group does not have more

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28 For example, the U.S. Treasury Regulations have now removed the requirement that the restricted fund certify to the IRS.

19 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

20 For example, the U.S. Treasury Regulations have now expanded this category to include qualified credit card servicers, so that it now covers qualified credit card issuers and servicers.

21 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

22 For example, the U.S. Treasury Regulations now clarify that a sponsoring entity will not be jointly and severally liable for the sponsored FFI's obligations unless the sponsoring entity is also a withholding agent that is separately liable for such obligations.

23 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

than \$U.S. 500 million in total assets on its consolidated or combined balance sheets. With respect to an FFI that is part of an expanded affiliated group, each member of the expanded affiliated group is incorporated or organized in the same country and does not have a fixed place of business outside of that country. The Supplementary Information confirms that this category was intended to apply only to small FFIs. This is the reason for the various thresholds outlined above.

[Various aspects of this category have now been amended<sup>24</sup> as set out in the U.S. Treasury document TD 9657.]<sup>25</sup>

- (ii) *FFIs with only low-value accounts*: This category covers certain FFIs that are not investment entities and that comply with the procedural requirements set out in the U.S. Treasury Regulations. No financial account maintained by the FFI (or, in the case of an FFI 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 \$U.S. 50,000. The FFI does not have more than \$U.S. 50 million in assets on its balance sheet as of the end of its most recent accounting year. In the case of an FFI that is a member of an expanded affiliated group, the entire expanded affiliated group does not have more than \$US 50 million in assets on its consolidated or combined balance sheet as of the end of its most recent accounting year.
- (iii) *Sponsored, closely held investment vehicles*: The Supplementary Information confirms that this category covers sponsored closely held investment vehicles, which are sponsored by a sponsoring FFI in the same manner as the registered deemed compliant category (see above). The entity needs to comply with certain procedural requirements set out in the U.S. Treasury Regulations.
- *Limited life debt investment entities (LLDIEs)*: This category covers certain FFIs (that are the beneficial owner of the payments made in respect of an account) that are collective investment vehicles formed pursuant to a trust indenture or similar fiduciary arrangement and satisfy other criteria.

[Various aspects of this category have now been amended as set out in the U.S. Treasury document TD 9657.<sup>26</sup> The changes in the U.S. Treasury Regulations include: (i) removing the requirement that a LLDIE's organizational documents cannot be amended without the consent of all of its investors; (ii) clarifying that a LLDIE issues debt or equity interests under a trust indenture or similar agreement; (iii) extending the category so that it applies to a LLDIE that issued all of its interests on or before January 17, 2013 (for example, the date that the final Regulations were filed); (iv) allowing a LLDIE to be treated as a certified deemed-compliant FFI until the LLDIE liquidates or terminates; (v) removing the requirement that investors be unrelated to each other; and (vi) expanding the types of assets that the entity can hold and still qualify as a LLDIE.]

- (iv) A certified deemed-compliant FFI also includes any non-reporting IGA FFI.

**Owner documented FFI:** This category covers certain entities that are FFIs solely because they are investment entities. Among the other criteria are:

- The FFI is not owned by or in an expanded affiliated group with any FFI that is a depository institution, custodial institution, or specified insurance company; and
- The FFI does not maintain a financial account for any non-participating FFI;
- The FFI provides the designated withholding agent with all of the relevant information (set out in the U.S. Treasury Regulations) and agrees to notify the withholding agent if there is a change in circumstances; and
- The designated withholding agent agrees to report to the IRS all of the relevant information (as set out in the U.S. Treasury Regulations).

An FFI may only be treated as an owner-documented FFI 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 FFI that is also treated as an owner-documented FFI by such designated withholding agent).

An FFI meeting the requirements set out in the U.S. Treasury Regulations will only be treated as a deemed compliant FFI with respect to a payment or account for which it does not act as an intermediary.

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<sup>24</sup> For example, the U.S. Treasury Regulations now clarify that a credit union or similar cooperative credit organization will be eligible for treatment as a non-registering local bank if its business consists primarily of receiving deposits from and making loans to members, provided that no such member has a greater than five percent interest in such credit union or cooperative credit organization.

<sup>25</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

<sup>26</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

## Annex II of the IGA<sup>27</sup>

52. The definition of Non-Reporting NZFI also covers entities that are described as such in Annex II of the IGA (as being Non-reporting NZFIs that are exempt beneficial owners or deemed compliant FFIs). Annex II is set out in full at Appendix 3. The types of entities that are set out on Annex II as Non-Reporting NZFIs will generally not have any FATCA registration and due diligence obligations. However, we have set out below those types of Non-Reporting NZFIs in Annex II that can (depending on the circumstances) have FATCA registration and due diligence obligations<sup>28</sup> and the circumstances when such obligations will arise.
53. Annex II of the IGA sets out that the following institutions are treated as Non- Reporting NZFIs and as exempt beneficial owners:
- Government entities (as defined in the IGA).<sup>29</sup> This, for the avoidance of doubt includes:<sup>30</sup>
    - The New Zealand Superannuation Fund;
    - The Guardians of New Zealand Superannuation;<sup>31</sup>
    - The Accident Compensation Corporation;
    - The Earthquake Commission;
    - The Māori Trustee;
    - New Zealand Local Government Funding Agency Limited; and
    - The Reserve Bank of New Zealand as per section 5, and all branches and agencies as per section 6, of the Reserve Bank of New Zealand Act 1989.
  - Any international organisation or wholly owned agency or instrumentality thereof (as defined in the IGA).<sup>32</sup>

This is the provision that deals with the 30% withholding by withholding agents (on withholdable payments to foreign financial institutions) that needs to occur when a foreign financial institution does not comply with FATCA. New Zealand exempt beneficial owners and deemed compliant financial institutions that comply with any FATCA obligations that they have should not be subject to withholding in terms of this provision. This is how the categories set out in Annex II (exempt beneficial owner and deemed compliant financial institutions) relate to the 30% FATCA penalty for non-compliance.
  - Maori authorities as defined in section HF 1(1) of the Income Tax Act 2007.<sup>33</sup>
  - Treaty qualified retirement fund (set out on broadly similar terms as the corresponding type of exempt beneficial owner in the U.S. Treasury Regulations). A KiwiSaver scheme registered under the KiwiSaver Act 2006 or superannuation scheme registered under the Superannuation Schemes Act 1989 will be a Treaty-qualified retirement fund, provided the fund satisfies any conditions in Article 16 of the NZ/U.S. DTA (limitation of benefits Article). Generally speaking, a Treaty qualified retirement fund that has mostly New Zealand resident members will fall within the scope of this exemption.
  - Broad participation retirement fund (set out on broadly similar terms as the corresponding type of exempt beneficial owner in the U.S. Treasury Regulations);
  - Narrow participation retirement fund (set out on broadly similar terms as the corresponding type of exempt beneficial owner in the U.S. Treasury Regulations);
  - Pension fund of an exempt beneficial owner (set out on broadly similar terms as the corresponding type of exempt beneficial owner in the U.S. treasury Regulations);
  - Investment entity wholly owned by exempt beneficial owners (set out on broadly similar terms as the corresponding type of exempt beneficial owner in the U.S. Treasury Regulations).<sup>34</sup>

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27 There are a number of references in Annex II of the IGA to section 1471 of the U.S. Internal Revenue Code.

28 As explained below, there is scope for such obligations to be carried out by a sponsor on behalf of the underlying entity.

29 However, the treating of such entities as Non-Reporting NZFIs that are exempt beneficial owners does not apply to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution.

30 This would also include the entities controlled by the New Zealand Government known as Southern Response and Crown Asset Management.

31 This includes any wholly-owned subsidiary of the Guardians of New Zealand authorised by statute to carry out any of the investment functions of the Guardians of New Zealand.

32 However, the treating of such entities as Non-Reporting NZFIs that are exempt beneficial owners does not apply to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution, or depository institution.

33 However, the treating of such entities as Non-Reporting NZFIs that are exempt beneficial owners does not apply to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution, or depository institution.

34 The reference in the Investment entity wholly owned by exempt beneficial owner category to direct holder is concerned with the ownership structure, and not necessarily ownership control. For example, a holder of a 5% equity interest directly held in an Investment entity would be a direct holder but not necessarily a controlling owner (as measured by vote or value of interest). A direct holder would be the first-tier holder as opposed to an indirect or second-tier holder. When considering who is the direct holder, consideration also needs to be taken of the definition of account holder in Article 1(1) (dd) of the IGA. That definition refers in part to an account holder being the person listed or identified as the holder of the financial account, other than where the listed or identified holder (other than a financial institution), holds the interest for another person as agent, custodian, nominee, signatory, investment advisor, or intermediary. For example, an agent (not being a financial institution) who holds an interest on behalf of a principal is not the account holder – the principal is treated as the account holder. The principal should also be considered the direct holder.



These types of entities that are exempt beneficial owners will not (in their capacity as exempt beneficial owners)<sup>35</sup> need to register with the IRS.

54. Annex II of the IGA also treats the following institutions as Non-Reporting NZFIs that are deemed compliant FFIs. These types of entities generally will not need to register with the IRS. [However, we have identified below those Non-Reporting deemed compliant FFIs that can have FATCA registration obligations and the circumstances in which such obligations will arise]:
- Certain financial institutions with a local client base [set out on broadly similar terms as the local FFI type of deemed compliant FFI in the U.S. Treasury Regulations. However, two key differences are that in this category of Annex II in the IGA: (a) the 98% financial account holder test applies to residents of New Zealand<sup>36</sup> or Australia; and (b) the relevant financial institution can be licensed or regulated as a financial institution under the laws of New Zealand, as opposed to needing to be both licensed and regulated under the laws of New Zealand]. These institutions will need to register with the IRS if they maintain certain accounts that they identify as being reportable and report such accounts. These accounts are:
    - Any Financial Account that is identified that is held by a Specified U.S. Person who is not a resident of New Zealand or by a Passive NFFE with Controlling Persons who are U.S. residents or U.S. citizens who are not residents of New Zealand; and
    - With respect to a Pre-existing Account held by an individual who is not a resident of New Zealand or by an Entity, any U.S. Reportable Account or Financial Account held by a NPFI that is identified.
  - Certain non-registering local banks, credit unions or similar cooperative credit organisations, such as building societies, that are locally focused (set out on broadly similar terms as the Non-Registering local bank type of deemed compliant FFI in the U.S. Treasury Regulations);
  - Certain financial Institutions that are not investment entities and that have only low value accounts (set out on broadly similar terms as the corresponding type of deemed compliant FFI in the U.S. Treasury Regulations);
  - Certain entities that are financial institutions solely because they issue credit cards that accept deposits where the institution implements various required policies and procedures in relation to deposits (set out on broadly similar terms to the corresponding type of deemed compliant FFI in the U.S. Treasury Regulations);
  - Trustee-documented Trusts: A trust that is an investment entity (and that is established under the laws of New Zealand) to the extent that the trustee of the trust is a Reporting U.S. Financial Institution, Reporting Model 1 FFI, or Participating FFI and reports all information required to be reported pursuant to the IGA with respect to all U.S. Reportable Accounts of the trust.<sup>37</sup>
  - Sponsored Investment Entity and Controlled Foreign Corporation (set out on broadly similar terms to the corresponding type of deemed compliant FFI in the U.S. Treasury Regulations);<sup>38</sup> [The sponsored entity in this category needs to be an entity that is a financial institution described in section IV B(1) or B(2) of Annex II of the IGA and that has a sponsoring entity that: (i) is authorised to act on behalf of the sponsored entity (such as a fund manager, trustee, corporate director, or managing partner) to fulfil applicable FATCA registration requirements; (ii) has registered as a sponsoring entity for FATCA purposes; (iii) if they identify any U.S. Reportable accounts with respect to the sponsored entity, registers the sponsored entity with the IRS (on or before the later of 31 December 2015 and the date that is 90 days after any U.S. Reportable Account is first identified); (iv) agrees to perform on behalf of the sponsored entity all due diligence, withholding, reporting, and other FATCA requirements; (v) identifies the sponsored entity and includes the identification number (Global Intermediary Identification Number - GIIN) of the sponsored entity in all reporting completed on behalf of the sponsored entity; and (vi) has not had its status as a sponsor revoked];
  - Sponsored Closely Held Investment Vehicle (set out on broadly similar terms to the corresponding type of deemed compliant FFI in the U.S. Treasury Regulations) [The sponsored closely held investment vehicle category is highly prescriptive. However, a key aspect of this definition is that certain closely held financial institutions that are solely investment entities (and do not hold themselves out as being investment vehicles for unrelated parties) will be able to be sponsored entities (provided that the sponsoring entity also complies with its obligations – see below). The sponsoring entity (that has registered as a sponsoring entity for FATCA purposes and has not had its status as sponsor revoked) will need to be a Reporting U.S. financial institution, Reporting Model 1 FFI, or participating FFI that is authorised to act on behalf of the sponsored entity (such as a professional manager, trustee, or managing partner) and agrees to perform on behalf of the sponsored entity all due diligence, withholding, reporting, and other FATCA requirements (and retains documentation collected with respect to the sponsored entity for a period of 6 years), and will need to identify the sponsored entity in all such reporting];

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35 However, as noted above, Government entities, International Organisations, and Maori authorities will not be Non-Reporting financial institutions with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a specified insurance company, custodial institution, or depository institution.

36 A NZFI may use, as a proxy for New Zealand tax residence of account holders, account holders of the NZFI which are subject to resident withholding tax (RWT) under the RWT rules in subpart RE of the Income Tax Act 2007.

37 The trust of a trustee-documented trust does not need to register for FATCA with the IRS.

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

- Investment Advisors and Investment Managers: An investment entity established in New Zealand that is a financial institution solely because it (1) renders investment advice to, and acts on behalf of, or (2) manages portfolios for, and acts on behalf of, a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a financial institution other than a NPFI. [This category may (depending on the circumstances) be relevant to investment entity DIMS providers (and other entities) that facilitate investments between customers and financial institutions];
- An investment entity established in New Zealand that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of U.S. \$50,000) are held by or through one or more exempt beneficial owners, Active NFFEs described in section VI (B)(4) of Annex I of the IGA, U.S. Persons that are not Specified U.S. Persons, or financial institutions that are not NPFI.

## Part IV – Application of FATCA to certain New Zealand Entities and Funds

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### Partnerships

55. A partnership for IGA purposes will include a partnership as defined in the Partnership Act 1908 and a limited partnership as defined in the Limited Partnership Act 2008<sup>39</sup> and would cover, for instance, certain limited partnerships that carry on business activities i.e. private equity funds. A partnership will be a Reporting NZFI if it is resident in New Zealand (or has a branch in New Zealand), carries on a business that meets the financial institution definition (or is managed by an investment entity that meets the financial institution definition), and is not a Non- Reporting NZFI.
56. A Partnership that is a Reporting NZFI will need to register with the IRS.
57. A partnership that is a Non-Reporting NZFI will *generally* not need to register with the IRS.
58. However, a partnership that is a Non-Reporting NZFI will need to be registered with the IRS if for example:
  - The partnership is a sponsored investment entity and the sponsoring entity identifies that the partnership maintains any U.S. Reportable accounts. The sponsoring entity would, in such a situation, need to register the partnership with the IRS (on or before the later of December 31, 2015 and the date that is 90 days after such a U.S. Reportable Account is first identified).
  - The Non-Reporting NZFI partnership is a financial institution with a local client base that maintains certain reportable accounts (outlined above).
  - The partnership is a Registered Deemed Compliant FFI.

### Collective Investment Vehicles

59. Many collective investment vehicles will carry out collective portfolio management activities and will satisfy the definition of investment entity in the IGA. This will include pooled funds managed in certain unit trusts, private equity funds and hedge funds. A Collective investment vehicle will be a Reporting NZFI if it is resident in New Zealand (or has a branch in New Zealand), carries on a business that meets the financial institution definition (or is managed by an investment entity that meets the financial institution definition), and is not a Non-Reporting NZFI.
60. Collective investment vehicles that are Reporting NZFIs will need to register with the IRS. Collective investment vehicles that are Non-Reporting NZFI will *generally* not need to register with the IRS. We have set out below the types of categories of Non-Reporting NZFI that collective investment vehicles should consider and where the category still requires that the entity registers with the IRS.
61. A collective investment vehicle could (depending on the circumstances) come within the following categories of Non-reporting NZFI (exempt beneficial owner or deemed compliant FFI) in Annex II of the IGA:
  - Treaty qualified retirement fund;
  - Broad participation retirement fund;
  - Narrow participation retirement fund;
  - Pension fund of an exempt beneficial owner;
  - Investment entity wholly owned by exempt beneficial owners;
  - Financial institution with a local client base (can have registration obligations – see above);
  - Trustee documented trust;

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<sup>39</sup> For the purposes of the IGA the relevant partnership definition is that contained in section YA 1 of the Income Tax Act 2007.



- Sponsored investment entity (can have registration obligations – see above);
  - Sponsored closely held investment vehicle; and
  - Defined collective investment vehicle.<sup>40</sup>
62. A collective investment vehicle could (depending on the circumstances) also come within the following categories of Non-reporting NZFI (exempt beneficial owner or deemed compliant FFI) in the U.S. Treasury Regulations:
- Treaty qualified retirement fund;
  - Broad participation retirement fund;
  - Narrow participation retirement fund;
  - A fund formed pursuant to a plan similar to a section 401(a) plan;
  - Investment vehicle established exclusively to earn income for certain retirement funds;
  - Pension fund of an exempt beneficial owner;
  - Local FFI (is a registered deemed compliant FFI);
  - Qualified collective investment vehicle (is a registered deemed compliant FFI);
  - Restricted fund (is a registered deemed compliant FFI);
  - Sponsored investment entity (is a registered deemed compliant FFI);
  - Sponsored closely held investment vehicle;
  - Limited life debt investment entity; and
  - Owner documented FFI.

## Retirement Funds

63. A retirement fund will be a Reporting NZFI if it is resident in New Zealand (or has a branch in New Zealand), carries on a business that meets the financial institution definition (or is managed by an investment entity that meets the financial institution definition), and is not a Non-Reporting NZFI. Retirement funds that are Reporting NZFIs (and Non-Reporting NZFIs that have registration obligations – outlined above) will need to register with the IRS.
64. Whether such a New Zealand retirement fund will be a Reporting NZFI will depend on whether it meets any of the non-reporting exemptions in the IGA or the U.S. Treasury Regulations.
65. Article 4(3) of the IGA provides one such exemption. Article 4(3) provides that any New Zealand retirement plan that is described and identified in Annex II of the IGA will be a Non-Reporting NZFI. For this purpose, a New Zealand retirement plan would include an entity established or located in and regulated in New Zealand, or a predetermined contractual or legal arrangement, operated to provide pension or retirement benefits under New Zealand law, and regulated with respect to contributions, distributions, reporting, sponsorship, and taxation. The category of retirement plan in Annex II of the IGA that is likely to have the most application to NZFIs (that are retirement funds) is the Treaty qualified retirement fund category.
66. We expect that any KiwiSaver scheme registered under the KiwiSaver Act 2006 or superannuation scheme registered under the Superannuation Schemes Act 1989, that has mostly New Zealand resident members, would fall within the scope of a Treaty-qualified retirement fund in Annex II of the IGA and be an exempt beneficial owner that is a Non-Reporting NZFI. Such retirement funds will not need to register with the IRS.
67. A retirement fund could also come within the following other categories of Annex II of the IGA:
- Broad participation retirement fund;
  - Narrow participation retirement fund;
  - Pension fund of an exempt beneficial owner;
  - Investment entity wholly owned by exempt beneficial owners;
  - Financial institution with a local client base (can have registration obligations – see above);
  - Trustee documented trust;
  - Sponsored investment entity (can have registration obligations – see above);
  - Sponsored closely held investment vehicle; and
  - Defined collective investment vehicle.<sup>41</sup>

However, as noted above, the category of retirement plan in Annex II of the IGA that is likely to have the most application to NZFIs (that are retirement funds) is the Treaty qualified retirement fund category.

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<sup>40</sup> An investment entity established in New Zealand that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of U.S. \$50,000) are held by or through one or more exempt beneficial owners, Active NFFEs described in section VI B(4) of Annex I of the IGA, U.S. Persons that are not Specified U.S. Persons, or financial institutions that are not NPFIs.

<sup>41</sup> An investment entity established in New Zealand that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of U.S. \$50,000) are held by or through one or more exempt beneficial owners, Active NFFEs described in section VI B(4) of Annex I of the IGA, U.S. Persons that are not Specified U.S. Persons, or financial institutions that are not NPFIs.

68. A retirement fund may also be a Non-Reporting NZFI pursuant to the U.S. Treasury Regulations. The categories that could apply to such funds (depending on the circumstances) are:
- Treaty qualified retirement fund;
  - Broad participation retirement fund;
  - Narrow participation retirement fund;
  - A fund formed pursuant to a plan similar to a section 401(a) plan;
  - Investment vehicle established exclusively to earn income for certain retirement funds;
  - Pension fund of an exempt beneficial owner;
  - Local FFI (is a registered deemed compliant FFI);
  - Qualified collective investment vehicle (is a registered deemed compliant FFI);
  - Restricted fund (is a registered deemed compliant FFI);
  - Sponsored investment entity (is a registered deemed compliant FFI);
  - Sponsored closely held investment vehicle; and
  - Owner documented FFI.

However, as noted above, it is the Treaty-qualified retirement fund category that is most likely to be relevant to NZFIs that are retirement funds. A Treaty qualified retirement fund will not need to register with the IRS.

## Trusts

69. A trust will be a Reporting NZFI if it is resident in New Zealand (or has a branch in New Zealand), carries on a business that meets the financial institution definition (or is managed by an investment entity that meets the financial institution definition), and is not a Non-Reporting NZFI.
70. For example, a trading trust, which engages in custodial, depository, or investment activities, will generally<sup>42</sup> be a financial institution for the purposes of FATCA. We would also expect that any unit trust would satisfy the definition of investment entity in the IGA. A unit trust would come within the definition of managed investment scheme in the Financial Markets Conduct Act 2013 and would be an investment entity that is a financial institution.
71. On the other hand, it is likely that many trusts will not be financial institutions because they are not in the business of providing financial services to customers. That is, they do not accept deposits in the ordinary course of a banking business, do not hold financial assets on account of others as a substantial part their business, do not conduct a business of investment (and, indeed, are not managed by an entity that conducts a business of investment), and are not an insurance company.
72. Trusts that are Reporting NZFIs (and Non-Reporting NZFIs that have registration obligations – outlined above) will need to register with the IRS. However, as noted above, a trustee-documented trust (a type of Non-Reporting NZFI) will not need to register with the IRS.
73. Where a trust is a non-US entity (such as a New Zealand entity) that is not a financial institution, or is described in section VI(B)(4)(J) of Annex I of the IGA, it will be a Non-Financial Foreign Entity (NFFE). NFFEs will not, in general terms,<sup>43</sup> have FATCA due diligence obligations. This is because they are not financial institutions in the first place, and, therefore, cannot be Reporting NZFIs. However, to the extent that NFFEs hold financial accounts, NFFEs can be reported on entities pursuant to FATCA (discussed below).

## Non-Financial Foreign Entity

74. A NFFE is defined in Annex I of the IGA as:
- (i) Any non-U.S. entity that is not an FFI as defined in the U.S. Treasury Regulations;
  - (ii) Any entity described in section VI(B)(4)(J) of Annex I of the IGA that is established and operated exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or is established and operated by specified organisations exclusively for the promotion of social welfare; and that meets various other requirements set out in Annex 1. Organisations registered under the *Charitable Trusts Act 1957* and the *Charities Act 2005*, and donee organizations as defined in the *Income Tax Act 2007* will be treated as NFFEs under this section; and
  - (iii) Any non-US entity established in New Zealand or another partner jurisdiction that is not a financial institution.
75. A NFFE will not be a financial institution in the first place. Therefore, it will not be a Reporting NZFI. However, an NFFE may, to the extent that it holds financial accounts, itself be reported on (pursuant to the IGA) by a Reporting NZFI that maintains such accounts. There are two types of NFFEs, an Active NFFE and a Passive NFFE. A Reporting NZFI will only have to report on Passive NFFEs with one or more controlling persons who are Specified U.S. Persons (including U.S. citizens and residents).

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<sup>42</sup> However, this is based on the assumption that the custodial, depository, or investment activities are sufficient to satisfy the relevant definition of financial institution (custodial institution, depository institution, or investment entity) in the IGA. For instance, that the custodial activities would need to satisfy the 20% gross income test set out in the definition of custodial institution in the IGA. This will always be a question of fact.

<sup>43</sup> An exception to this is direct reporting NFFEs and sponsored direct reporting NFFEs.

76. In simple terms a Passive NFFE is any NFFE which is not (i) an Active NFFE or (ii) a withholding foreign partnership or withholding foreign trust pursuant to the U.S. Treasury Regulations. An Active NFFE is defined in Annex I of the IGA.
77. An NFFE will be an Active NFFE if it meets any of the criteria set out in section VI(4) of Annex 1 of the IGA. One of these criteria is that less than 50% of the NFFE's gross income for the preceding calendar year or other appropriate reporting period is passive income and less than 50% of the assets held by the NFFE during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income. A full list of criteria of what comes within the Active NFFE definition in Annex I of the IGA is set out at Appendix 4.

## Part V – Registering with the U.S. Internal Revenue Service ("IRS")

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78. Certain NZFIs will need to register with the IRS. In terms of the IGA, the Commissioner understands that all Reporting NZFIs and Registered Deemed Compliant FFIs will need to register with the IRS. Non-Reporting NZFIs generally are not required to register with the IRS. However, certain<sup>44</sup> Non-Reporting NZFIs (that have reportable accounts), will need to register with the IRS.
79. NZFIs that register with the IRS (in this way) will be issued with a Global Intermediary Identification Number (GIIN) by the IRS. The IRS will publish a list of FFIs (the IRS FFI List) which have registered. This list will be updated periodically. U.S. payers (referred to as withholding agents for FATCA purposes) are able to rely on the published list of compliant FFIs, and will not deduct the 30% withholding on payments to those registered FFIs. Withholding agents are also not required to deduct the 30% withholding until 1 January 2015 on financial institutions that have not yet registered provided that those institutions are from IGA countries.
80. New Zealand has entered into an IGA with the U.S. This means that those NZFIs that are required to register with the IRS will have until 31 December 2014 to finalise their registration. However, it is important to note that such NZFIs will need to start collecting FATCA data from 1 July 2014.
81. NZFIs that want to register are currently able to do so through the IRS website on the FATCA Registration Portal (FATCA portal).

## Appendix 1: The Financial Action Task Force Recommendations (2012) definition of "financial institution":

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—any natural or legal person who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

1. Acceptance of deposits and other repayable funds from the public.
2. Lending.
3. Financial leasing.
4. Money or value transfer services.
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money).
6. Financial guarantees and commitments.
7. Trading in:
  - (a) money market instruments (cheques, bills, certificates of deposit, derivatives etc.);
  - (b) foreign exchange;
  - (c) exchange, interest rate and index instruments;
  - (d) transferable securities;
  - (e) commodity futures trading.

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<sup>44</sup> As noted above, New Zealand sponsored investment entities and sponsored controlled foreign corporations, and New Zealand financial institutions with a local client base are examples of types of Non-Reporting NZFIs that can (depending on the circumstances) be required to register with the IRS.

8. Participation in securities issues and the provision of financial services related to such issues.
9. Individual and collective portfolio management.
10. Safekeeping and administration of cash or liquid securities on behalf of other persons.
11. Otherwise investing, administering or managing funds or money on behalf of other persons.
12. Underwriting and placement of life insurance and other investment related insurance.
13. Money and currency changing.

## Appendix 2: Non-Reporting Financial Institutions: U.S. Treasury Regulations (Summary)

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### Exempt Beneficial Owner – U.S. Treasury Regulations

The meaning of exempt beneficial owner is set out in the U.S. Treasury Regulations. Such owners are exempt from the 30% withholding as they are considered as persons posing a low risk of tax evasion. They also do not have any FATCA reporting requirements (in their capacity as exempt beneficial owner):<sup>45</sup>

- (i) Any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing.
- (ii) Any international organisation or any wholly owned agency or instrumentality thereof. The term includes any intergovernmental or supranational organization—
  - That is comprised primarily of foreign governments;
  - That is recognized as an intergovernmental or supranational organization under a foreign law similar to 22 U.S.C. 288-288f or that has in effect a headquarters agreement with a foreign government; and
  - Whose income does not inure to the benefit of private persons. This is determined under principles set out in the U.S. Treasury Regulations.
- (iii) Any foreign central bank of issue. The term foreign central bank of issue generally means a bank that is by law or government sanction the principal authority, other than the government itself, for issuing instruments intended to circulate as currency. Such a bank is generally the custodian of the banking reserves of the country under whose law it is organized.
- (iv) Any government of a US territory. This is generally determined by applying principles set out in the U.S. Treasury Regulations.
- (v) Certain foreign retirement funds:
  - (a) **Treaty-qualified retirement fund**  
A fund established in a country with which the U.S. has an income tax treaty in force, provided that the fund is entitled to benefits under such treaty on income that it derives from sources within the U.S. (or would be entitled to such benefits if it derived any such income) as a resident of the other country that satisfies any applicable limitation on benefits requirement, and is operated principally to administer or provide pension or retirement benefits;
  - (b) **Broad participation retirement fund**  
A fund established to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that the fund—
    - (i) Does not have a single beneficiary with a right to more than 5% of the fund's assets;
    - (ii) Is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which the fund is established or operates; and
    - (iii) Satisfies one or more of the following requirements—
      - (A) The fund is generally exempt from tax on investment income under the laws of the country in which it is established or operates due to its status as a retirement or pension plan;
      - (B) The fund receives at least 50% of its total contributions (other than transfers of assets from certain accounts or plans referred to in the U.S. Treasury Regulations) from the sponsoring employers;

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<sup>45</sup> However, the U.S. Treasury Regulations provide that, subject to exceptions, certain exempt beneficial owners (such as government) will not be treated as an exempt beneficial owner with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by an insurance company, custodial institution, or depository institution (including the accepting of deposits).

(C) Distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (other than rollover distributions to certain accounts or retirement funds referred to in the U.S. Treasury Regulations) or penalties apply to distributions or withdrawals made before such specified events; or

(D) Contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to earned income of the employee or may not exceed \$US 50,000 annually.

**(c) Narrow participation retirement funds**

A fund established to provide retirement, disability, or death benefits to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for prior services rendered, provided that—

- (i) The fund has fewer than 50 participants;
- (ii) The fund is sponsored by one or more employers that are not investment entities or passive NFFEs;
- (iii) Employee and employer contributions to the fund (other than certain transfers of assets from other funds or accounts referred to in the U.S. Treasury Regulations) are limited by reference to earned income and compensation of the employee, respectively;
- (iv) Participants that are not residents of the country in which the fund is established or operated are not entitled to more than 20% of the fund's assets; and
- (v) The fund is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which the fund is established or operates.

**(d) Fund formed pursuant to a plan similar to a section 401(a) plan**

A fund formed pursuant to a pension plan that would meet the requirements of section 401(a) of the Internal Revenue Code, other than the requirement that the plan be funded by a trust created or organized in the U.S.

**(e) Investment vehicles exclusively for retirement funds**

A fund established exclusively to earn income for the benefit of one or more retirement funds (described in 1.1471-6(f)(1)-(5)) or accounts (described in 1.1471-5(b)(2)(i)(A)) as set out in the U.S. Treasury Regulations.

**(f) Pension fund of an exempt beneficial owner**

A fund established and sponsored by an exempt beneficial owner described in paragraph (b), (c), (d), or (e) of 1.1471-6 (set out in the U.S. Treasury Regulations) to provide retirement, disability, or death benefits to beneficiaries or participants that are current or former employees of the exempt beneficial owner (or persons designated by such employees), or that are not current or former employees, but the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the exempt beneficial owner.

- (vi) Certain entities described in 1.1471-6 (g) (set out in the U.S. Treasury Regulations) that are wholly owned by one or more other exempt beneficial owners.

A person is described in paragraph (g) if it is an FFI solely because it is an investment entity, each direct holder of an equity interest in the investment company is an exempt beneficial owner described in paragraph (b), (c), (d), (e), (f), or (g) of this section, and each direct holder of a debt interest in the investment entity is either a depository institution (with respect to a loan made to such entity) or an exempt beneficial owner described in paragraph (b), (c), (d), (e), (f), or (g) of this section.

- (vii) Any person treated as an exempt beneficial owner pursuant to a Model 1 IGA or Model 2 IGA.

## Deemed Compliant FFI – U.S. Treasury Regulations

The meaning of deemed compliant FFI is set out in U.S. Treasury Regulations (Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities) as including:

### A registered deemed-compliant FFI

A registered deemed-compliant FFI means an FFI that meets the procedural requirements described in paragraph (f)(1)(ii) of 1.1471-5 (set out in the U.S. Treasury Regulations) and that either is described in any of paragraphs (f)(1)(i)(A) through (F) of this section or is treated as a registered deemed-compliant FFI under a Model 2 IGA. A registered deemed-compliant FFI also includes any FFI, or branch of an FFI, that is a reporting Model 1 FFI that complies with the registration requirements of a Model 1 IGA.

The following FFIs are described in paragraphs (f)(1)(i)(A) through (F) of 1.1471-5:

**(A) Local FFIs**

An FFI is described in paragraph (f)(1)(i)(A) of 1.1471-5 if it meets the following requirements:

- (1) The FFI is licensed and regulated as a financial institution under the laws of its country of incorporation or organization (which must be a FATF compliant jurisdiction at the time the FFI registers for deemed-compliant status).
- (2) The FFI does not have a fixed place of business outside its country of incorporation or organization.
- (3) The FFI does not solicit customers or account holders outside its country of incorporation or organization.



- (4) The FFI is required under the laws of its country of incorporation or organization to identify resident account holders for purposes of either information reporting or withholding of tax with respect to accounts held by residents or is required to identify resident accounts for purposes of satisfying such country's AML<sup>46</sup> due diligence requirements.
- (5) At least 98% of the accounts by value maintained by the FFI as of the last day of the preceding calendar year are held by residents (including residents that are entities) of the country in which the FFI is incorporated or organized.
- (6) By the later of December 31, 2013, or the date it registers as a deemed-compliant FFI, the FFI implements policies and procedures (in accordance with the U.S. Treasury Regulations), to monitor whether the FFI opens or maintains an account for a specified US person who is not a resident of the country in which the FFI is incorporated or organized, an entity controlled or beneficially owned by one or more specified US persons that are not residents of the country in which the FFI is incorporated or organized, or a non-participating FFI.
- (7) With respect to each pre-existing account held by a non-resident of the country in which the FFI is organized or held by an entity, the FFI reviews those accounts (in accordance with the procedures set out in the U.S. Treasury Regulations) to identify any U.S. account or account held by a non-participating FFI, and certifies to the IRS that it did not identify any such account as a result of its review, that it has closed any such accounts that were identified or transferred them to a participating FFI, reporting Model 1 FFI, or U.S. financial institution, or that it agrees to withhold and report on such accounts as would be required under 1.1471-4(b) and (d) (set out in the U.S. Treasury Regulations) if it were a participating FFI.
- (8) In the case of an FFI that is a member of an expanded affiliated group, each FFI in the group is incorporated or organized in the same country and, with the exception of any member that is a retirement plan described in 1.1471-6(f), meets the requirements set forth in paragraph (f)(1)(i)(A) of 1.1471-5 and the procedural requirements of paragraph (f)(1)(ii) of this section.
- (9) The FFI does 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 the FFI's country of incorporation or organization.

**(B) Non-reporting members of participating FFI groups**

An FFI that is a member of a participating FFI group is described in paragraph (f)(1)(i)(B) of 1.1471-5 if it meets the following requirements:

- (1) By the later of December 31, 2013, or the date it registers with the IRS pursuant to paragraph (f)(1)(ii) of this section, the FFI 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 non-participating FFI, the FFI either transfers such account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI.
- (2) The FFI reviews its accounts that were opened prior to the time it implements the policies and procedures (including time frames) described in paragraph (f)(1)(i)(B)(1) of this section, using the procedures described in 1.1471-4(c) applicable to pre-existing accounts of participating FFIs, to identify any U.S. account or account held by a non-participating FFI. Within six months of the identification of any account described in this paragraph, the FFI transfers the account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI.
- (3) By the later of December 31, 2013, or the date it registers with the IRS pursuant to paragraph (f)(1)(ii) of this section, the FFI 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 non-participating FFI due to a change in circumstances. Within six months of the date on which the FFI first has knowledge or reason to know of the change in the account holder's chapter 4 status, the FFI transfers any such account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI.

**(C) Qualified collective investment vehicles**

An FFI is described in paragraph (f)(1)(i)(C) of 1.1471-5 if it meets the following requirements:

- (1) The FFI is an FFI solely because it is an investment entity, and it is regulated as an investment fund either in its country of incorporation or organization or in all of the countries in which it is registered and all of the countries in which it operates. A fund will be considered to be regulated as an investment fund under this paragraph if its manager is regulated with respect to the investment fund in all of the countries in which the investment fund is registered and in all of the countries in which the investment fund operates.
- (2) Each holder of record of direct debt interests in the FFI in excess of \$US 50,000, direct equity interests in the FFI, and any other account holder of the FFI is: a participating FFI, registered deemed-compliant FFI, retirement plan described in 1.1471-6(f), non-profit organization described in paragraph (e)(5)(vi) of this section, U.S. person that is not a specified U.S. person, non-reporting IGA FFI, or exempt beneficial owner. This is subject to certain exceptions set out in the U.S. Treasury Regulations.
- (3) In the case of an FFI that is part of an expanded affiliated group, all other FFIs in the expanded affiliated group are participating FFIs, registered deemed-compliant FFIs, sponsored FFIs described in paragraph (f)(1)(i)(F)(1) or (2) of this section, non-reporting IGA FFIs, or exempt beneficial owners.

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<sup>46</sup> Anti-money laundering.



#### **(D) Restricted funds**

An FFI is described in paragraph (f)(1)(i)(D) of 1.1471-5 if it meets the following requirements:

- (1) The FFI is an FFI solely because it is an investment entity, and it is regulated as an investment fund under the laws of its country of incorporation or organization (which must be a FATF-compliant jurisdiction at the time the FFI registers for deemed-compliant status) or in all of the countries in which it is registered and in all of the countries in which it operates. A fund will be considered to be regulated as an investment fund for 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.
- (3) Interests that are not issued directly by the fund are sold only through distributors that are participating FFIs, registered deemed-compliant FFIs, non-registering local banks described in paragraph (f)(2)(i) of this section, or restricted distributors described in paragraph (f)(4) of this section. A distributor means an underwriter, broker, dealer, or other person who participates with the FFI, in the distribution of securities and holds interests in the FFI as a nominee.
- (4) The FFI ensures that by the later of June 30, 2014, or six months after the date the FFI registers as a deemed-compliant FFI, each agreement that governs the distribution of its debt or equity interests prohibits sales and other transfers of debt or equity interests in the FFI (other than interests that are both distributed by and held through a participating FFI) to specified US persons, non-participating FFIs, or passive NFFEs with one or more substantial US owners. In addition, by that date, the FFI's prospectus and all marketing materials must indicate that sales and other transfers of interests in the FFI to specified US persons, non-participating FFIs, or passive NFFEs with one or more substantial US owners are prohibited unless such interests are both distributed by and held through a participating FFI.
- (5) The FFI ensures that by the later of June 30, 2014, or six months after the date the FFI registers as a deemed-compliant FFI, each agreement entered into by the FFI that governs the distribution of its debt or equity interests requires the distributor to notify the FFI of a change in the distributor's chapter 4 status within 90 days of the change. The FFI must certify to the IRS that, with respect to any distributor that ceases to qualify as a distributor identified in paragraph (f)(1)(i)(D)(3) of this section, the FFI 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 FFI 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 identified in paragraph (f)(1)(i)(D)(3) of this section within six months of the distributor's change in status.
- (6) With respect to any of the FFI's pre-existing direct accounts that are held by the beneficial owner of the interest in the FFI, the FFI reviews those accounts in accordance with the procedures (and time frames) described in 1.1471-4(c) applicable to pre-existing accounts to identify any U.S. account or account held by a non-participating FFI.
- (7) By the later of December 31, 2013, or the date that it registers as a deemed-compliant FFI, the FFI implements the policies and procedures described in 1.1471-4(c) to ensure that it either—
  - (i) Does not open or maintain an account for, or make a withholdable payment to, any specified U.S. person, non-participating FFI, 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 FFI had reason to know the account holder became such a person; or
  - (ii) Withholds and reports on any account held by, or any withholdable payment made to, any specified U.S. person, non-participating FFI, or passive NFFE with one or more substantial U.S. owners to the extent and in the manner that would be required under 1.1471-4(b) and (d) if the FFI were a participating FFI.
- (8) For an FFI that is part of an expanded affiliated group, all other FFIs in the expanded affiliated group are participating FFIs, registered deemed compliant FFIs, sponsored FFIs described in paragraph (f)(2)(iii)(B) or (C) of this section, non-reporting IGA FFIs, or exempt beneficial owners.

[Various aspects of this category have now been amended<sup>47</sup> as set out in the U.S. Treasury document TD 9657.]<sup>48</sup>

#### **(E) Qualified credit card issuers**

An FFI is described in paragraph (f)(1)(i)(E) of 1.1471-5 if the FFI meets the following requirements:

- (1) The FFI is an FFI 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 FFI, the FFI implements policies and procedures to either prevent a customer deposit in excess of \$U.S. 50,000 or to ensure that any customer deposit in excess of \$U.S. 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.

[Various aspects of this category have now been amended<sup>49</sup> as set out in the U.S. Treasury document TD 9657.]<sup>50</sup>

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<sup>47</sup> For example, the U.S. Treasury Regulations have now removed the requirement that the restricted fund certify to the IRS.

<sup>48</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

<sup>49</sup> For example, the U.S. Treasury Regulations have now expanded this category to include qualified credit card servicers, so that it now covers qualified credit card issuers and servicers.

<sup>50</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

## (F) Sponsored investment entities and controlled foreign corporations

An FFI is described in paragraph (f)(1)(i)(F) of 1.1471-5 if the FFI is described in paragraph (f)(1)(i)(F)(1) or (2) of this section and the sponsoring entity meets the requirements of paragraph (f)(1)(i)(F)(3) of this section.

- (1) An FFI is a sponsored investment entity described in this paragraph (f)(1)(i)(F)(1) if—
  - (i) It is an investment entity that is not a QI, WP, or WT; and
  - (ii) An entity has agreed with the FFI to act as a sponsoring entity for the FFI.
- (2) An FFI is a sponsored controlled foreign corporation described in this paragraph (f)(1)(i)(F)(2) if the FFI meets the following requirements—
  - (i) The FFI is a controlled foreign corporation as defined in section 957(a) that is not a QI, WP, or WT;
  - (ii) The FFI is wholly owned, directly or indirectly, by a U.S. financial institution that agrees with the FFI to act as a sponsoring entity for the FFI; and
  - (iii) The FFI shares a common electronic account system with the sponsoring entity that enables the sponsoring entity to identify all account holders and payees of the FFI and to access all account and customer information maintained by the FFI including, but not limited to, customer identification information, customer documentation, account balance, and all payments made to the account holder or payee.
- (3) A sponsoring entity described in paragraph (f)(1)(i)(F)(1)(ii) or (f)(1)(i)(F)(2)(ii) of this section meets the requirements of this paragraph (f)(1)(i)(F)(3) if the sponsoring entity—
  - (i) Is authorized to manage the FFI and enter into contracts on behalf of the FFI (such as a fund manager, trustee, corporate director, or managing partner);
  - (ii) Has registered with the IRS as a sponsoring entity;
  - (iii) Has registered the FFI with the IRS;
  - (iv) Agrees to perform, on behalf of the FFI, all due diligence, withholding, reporting, and other requirements that the FFI would have been required to perform if it were a participating FFI;
  - (v) Identifies the FFI in all reporting completed on the FFI's behalf to the extent required under 1.1471-4(d)(2)(ii)(C) and 1.1474-1; and
  - (vi) Has not had its status as a sponsor revoked.
- (4) The IRS may revoke a sponsoring entity's status as a sponsor with respect to all sponsored FFIs if there is a material failure by the sponsoring entity to comply with its obligations under paragraph (f)(1)(i)(F)(3) of this section with respect to any sponsored FFI.
- (5) A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(1)(i)(F)(3) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI.

The procedural requirements, described in paragraph (f)(1)(ii) of 1.1471-5, for FFIs to be registered deemed compliant FFIs are as follows:

A registered deemed-compliant FFI described in paragraph (f)(1)(i)(A) through (E) of this section may use one or more agents to perform the necessary due diligence to identify its account holders and to take any required action associated with obtaining and maintaining its deemed-compliant status. The FFI, however, remains responsible for ensuring that the requirements for its deemed compliant status are met. Unless otherwise provided in this section, a registered deemed-compliant FFI described in paragraph (f)(1)(i)(A) through (E) of this section is required to—

- (A) Register with the IRS pursuant to procedures prescribed by the IRS and agree to comply with the terms of its registered deemed-compliant status.
- (B) Have its responsible officer certify every three years to the IRS, either individually or collectively for the FFI's expanded affiliated group, that all of the requirements for the deemed-compliant category claimed by the FFI have been satisfied since the later of the date the FFI registers as a deemed-compliant FFI or December 31, 2013;
- (C) Maintain in its records the confirmation from the IRS of the FFI's registration as a deemed-compliant FFI and GIIN or such other information as the IRS specifies in forms or other guidance; and
- (D) Agree to notify the IRS if there is a change in circumstances that would make the FFI ineligible for the deemed-compliant status for which it has registered, and to do so within six months of the change in circumstances unless the FFI is able to resume its eligibility for its registered-deemed compliant status within the six month notification period.

[Various aspects of this category have now been amended<sup>51</sup> as set out in the U.S. Treasury document TD 9657.]<sup>52</sup>

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51 For example, the U.S. Treasury Regulations now clarify that a sponsoring entity will not be jointly and severally liable for the sponsored FFI's obligations unless the sponsoring entity is also a withholding agent that is separately liable for such obligations.

52 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

## A certified deemed-compliant FFI

A certified deemed compliant FFI is defined in 1.1471-5(f)(2) as meaning an FFI described in any of paragraphs (f)(2)(i) through (iv) of this section that has certified as to its status as a deemed-compliant FFI by providing a withholding agent with the documentation described in 1.1471-3(d)(6) applicable to the relevant deemed-compliant category. An FFI that is described in paragraph (f)(2)(iv) of this section (a limited life debt investment entity) will be treated as a certified deemed-compliant FFI prior to January 1, 2017. A certified deemed-compliant FFI also includes any non-reporting IGA FFI. A certified deemed-compliant FFI is not required to register with the IRS.

### 1. Nonregistering local bank

An FFI is described in this paragraph (f)(2)(i) if the FFI meets the following requirements.

- (A) The FFI operates solely as (and is licensed and regulated under the laws of its country of incorporation or organization as)-
  - (1) A bank; or
  - (2) A credit union or similar cooperative credit organization that is operated without profit.
- (B) The FFI's business consists primarily of receiving deposits from and making loans to unrelated retail customers.
- (C) The FFI does not have a fixed place of business outside its country of incorporation or organization. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the FFI performs solely administrative support functions.
- (D) The FFI does not solicit customers or account holders outside its country of incorporation or organization. For this purpose, an FFI will not be considered to have solicited customers or account holders outside its country of incorporation or organization merely because it operates a website, provided that the website does not permit account opening, does not indicate that the FFI maintains accounts for or provides services to non-residents, and does not otherwise target or solicit U.S. customers or account holders. An FFI will also not be considered to have solicited customers or account holders outside its country of incorporation or organization 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 organization but is also incidentally distributed or aired in other countries, provided that the advertisement does not indicate that the FFI maintains accounts for or provides services to non-residents and does not otherwise target or solicit U.S. customers or account holders.
- (E) The FFI does not have more than \$U.S. 175 million in assets on its balance sheet and, if the FFI is a member of an expanded affiliated group, the group does not have more than \$U.S. 500 million in total assets on its consolidated or combined balance sheets.
- (F) With respect to an FFI that is part of an expanded affiliated group, each member of the expanded affiliated group is incorporated or organized in the same country and does not have a fixed place of business outside of that country. For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the FFI performs solely administrative support functions. Further, each FFI in the group, other than an FFI described in paragraph (f)(2)(ii) of this section or 1.1471-6(f), meets the requirements set forth in this paragraph (f)(2)(i). For this purpose, a fixed place of business does not include a location that is not advertised to the public and from which the FFI performs solely administrative support functions.

[Various aspects of this category have now been amended<sup>53</sup> as set out in the U.S. Treasury document TD 9657.]<sup>54</sup>

### 2. FFIs with only low-value accounts

An FFI is described in this paragraph (f)(2)(ii) if the FFI meets the following requirements:

- (A) The FFI is not an investment entity.
- (B) No financial account maintained by the FFI (or, in the case of an FFI 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 \$U.S. 50,000. The balance or value of a financial account shall be determined by applying the rules described in paragraph (b)(4) of this section, substituting the term financial account for the term depository account and the term person for the term individual.
- (C) The FFI does not have more than \$U.S. 50 million in assets on its balance sheet as of the end of its most recent accounting year. In the case of an FFI that is a member of an expanded affiliated group, the entire expanded affiliated group does not have more than \$U.S. 50 million in assets on its consolidated or combined balance sheet as of the end of its most recent accounting year.

### 3. Sponsored, closely held investment vehicles.

Subject to the provisions of paragraph (f)(2)(iii)(F) of this section, an FFI is described in this paragraph (f)(2)(iii) if it meets the requirements described in paragraphs (f)(2)(iii)(A) through (E) of this section:

- (A) The FFI is an FFI solely because it is an investment entity and is not a QI, WP, or WT.
- (B) The FFI has a contractual arrangement with a sponsoring entity that is a participating FFI, reporting Model 1 FFI, or US financial institution and that is authorized to manage the FFI and enter into contracts on behalf of the FFI (such as a professional

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<sup>53</sup> For example, the U.S. Treasury Regulations now clarify that a credit union or similar cooperative credit organization will be eligible for treatment as a non-registering local bank if its business consists primarily of receiving deposits from and making loans to members, provided that no such member has a greater than five percent interest in such credit union or cooperative credit organization.

<sup>54</sup> [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

manager, trustee, or managing partner), under which the sponsoring entity agrees to fulfil all due diligence, withholding, and reporting responsibilities that the FFI would have assumed if it were a participating FFI.

- (C) The FFI does not hold itself out as an investment vehicle for unrelated parties.
- (D) Twenty or fewer individuals own all of the debt and equity interests in the FFI (disregarding debt interests owned by participating FFIs, registered deemed-compliant FFIs, and certified deemed-compliant FFIs and equity interests owned by an entity if that entity owns 100 percent of the equity interests in the FFI and is itself a sponsored FFI under this paragraph (f)(2)(iii)).
- (E) The sponsoring entity complies with the following requirements—
  - (1) The sponsoring entity has registered with the IRS as a sponsoring entity;
  - (2) The sponsoring entity agrees to perform, on behalf of the FFI, all due diligence, withholding, reporting, and other requirements that the FFI would have been required to perform if it were a participating FFI and retains documentation collected with respect to the FFI for a period of six years;
  - (3) The sponsoring entity identifies the FFI in all reporting completed on the FFI's behalf to the extent required under 1.1471-4(d)(2)(ii)(C) and 1.1474-1; and
  - (4) The sponsoring entity has not had its status as a sponsor revoked.
- (F) The IRS may revoke a sponsoring entity's status as a sponsor with respect to all sponsored FFIs if there is a material failure by the sponsoring entity to comply with its obligations under paragraph (f)(2)(iii)(E) of this section with respect to any sponsored FFI. A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(2)(iii)(E) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI.

#### 4. Limited life debt investment entities (transitional)

An FFI is described in this paragraph (f)(2)(iv) if the FFI is the beneficial owner of the payment (or of payments made with respect to the account) and the FFI meets the following requirements. An FFI that meets the requirements of this paragraph (f)(2)(iv) will be treated as a certified deemed-compliant FFI prior to January 1, 2017.

- (A) The FFI is a collective investment vehicle formed pursuant to a trust indenture or similar fiduciary arrangement that is an FFI solely because it is an investment entity that offers interests primarily to unrelated investors.
- (B) The FFI was in existence as of 31 December 2011, and the FFI's organizational documents require that the entity liquidate on or prior to a set date, and do not permit amendments to the organizational documents, including the trust indenture, without the agreement of all of the FFI's investors.
- (C) The FFI 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.
- (D) All payments made to the investors of the FFI are cleared through a clearing organization that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution or made through a trustee that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution.
- (E) The FFI's trust indenture or similar fiduciary arrangement only authorizes the trustee or fiduciary to engage in activities specifically designated in the trust indenture, and the trustee or fiduciary is not authorized through a fiduciary duty or otherwise to fulfil the obligations that a participating FFI is subject to under 1.1471-4 absent a legal requirement to fulfil them, even if the consequence of the trustee failing to fulfil these obligations is to cause the FFI to be withheld upon. Further, no other person has the authority to fulfil the obligations that a participating FFI is subject to under 1.1471-4 on behalf of the FFI.

[Various aspects of this category have now been amended<sup>55</sup> as set out in the U.S. Treasury document TD 9657.]<sup>56</sup>

**An owner documented FFI** (to the extent provided in 1.1471-5(f)(3) set out in the U.S. Treasury Regulations).

In general. An owner-documented FFI means an FFI that meets the requirements of paragraph (f)(3)(ii) of this section. An FFI may only be treated as an owner-documented FFI 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 FFI that is also treated as an owner-documented FFI by such designated withholding agent). A designated withholding agent is a U.S. financial institution, participating FFI, or reporting Model 1 FFI that agrees to undertake the additional due diligence and reporting required under paragraphs (f)(3)(ii)(D) and (E) of this section in order to treat the FFI as an owner-documented FFI. An FFI meeting the requirements of this paragraph (f)(3) will only be treated as a deemed compliant FFI with respect to a payment or account for which it does not act as an intermediary.

- (ii) Requirements of owner-documented FFI status.
  - An FFI meets the requirements of this paragraph (f)(3)(ii) only if—
    - (A) The FFI is an FFI solely because it is an investment entity;

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55 For example, the changes in the U.S. Treasury Regulations include: (i) removing the requirement that a limited life debt investment entity's (LLDIE's) organizational documents cannot be amended without the consent of all of its investors; (ii) clarifying that a LLDIE issues debt or equity interests under a trust indenture or similar agreement; (iii) extending the category so that it applies to a LLDIE that issued all of its interests on or before January 17, 2013 (for example, the date that the final regulations were filed); (iv) allowing a LLDIE to be treated as a certified deemed-compliant FFI until the LLDIE liquidates or terminates; (v) removing the requirement that investors be unrelated to each other; and (vi) expanding the types of assets that the entity can hold and still qualify as a LLDIE.

56 [www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf](http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA.pdf)

- (B) The FFI is not owned by or in an expanded affiliated group with any FFI that is a depository institution, custodial institution, or specified insurance company;
- (C) The FFI does not maintain a financial account for any non-participating FFI;
- (D) The FFI provides the designated withholding agent with all of the documentation described in 1.1471-3(d)(6) and agrees to notify the withholding agent if there is a change in circumstances; and
- (E) The designated withholding agent agrees to report to the IRS (or, in the case of a reporting Model 1 FFI, to the relevant foreign government or agency thereof) all of the information described in 1.1471-4(d) or 1.1474-1(i) (as appropriate) with respect to any specified U.S. persons that are identified in 1.1471-3(d)(6)(iv)(A)(1). Notwithstanding the previous sentence, the designated withholding agent is not required to report information with respect to an indirect owner of the FFI that holds its interest through a participating FFI, a deemed compliant FFI (other than an owner-documented FFI), an entity that is a U.S. person, an exempt beneficial owner, or an excepted NFFE.

## Appendix 3: Annex II of the IGA<sup>57</sup>

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### Non-Reporting New Zealand Financial Institutions and Accounts

#### General

The following Entities shall be treated as exempt beneficial owners or deemed-compliant FFIs, as the case may be, and the following accounts are excluded from the definition of Financial Accounts.

##### *I. Exempt Beneficial Owners other than Funds*

The following Entities shall be treated as Non-Reporting New Zealand Financial Institutions and as exempt beneficial owners for purposes of sections 1471 and 1472 of the U.S. Internal Revenue Code, other than with respect to a payment that is derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution, or Depository Institution.

##### **A. Governmental Entities**

The government of New Zealand, any political subdivision of New Zealand (which, for the avoidance of doubt, includes a state, province, county, region, or municipality), or any wholly owned agency or instrumentality of New Zealand or any one or more of the foregoing (each, a New Zealand Governmental Entity). This category is comprised of the integral parts, controlled entities, and political subdivisions of New Zealand.

1. An integral part of New Zealand means any person, organization, agency, bureau, fund, instrumentality, or other body, however designated, that constitutes a governing authority of New Zealand. The net earnings of the governing authority must be credited to its own account or to other accounts of New Zealand, with no portion inuring to the benefit of any private person. An integral part does not include any individual who is a sovereign, official, or administrator acting in a private or personal capacity.
2. A controlled entity means an Entity that is separate in form from New Zealand or that otherwise constitutes a separate juridical entity, provided that:
  - a) The Entity is wholly owned and controlled by one or more New Zealand Governmental Entities directly or through one or more controlled entities;
  - b) The Entity's net earnings are credited to its own account or to the accounts of one or more New Zealand Governmental Entities, with no portion of its income inuring to the benefit of any private person; and
  - c) The Entity's assets vest in one or more New Zealand Governmental Entities upon dissolution.
3. Income does not inure to the benefit of private persons if such persons are the intended beneficiaries of a governmental program, and the program activities are performed for the general public with respect to the common welfare or relate to the administration of some phase of government. Notwithstanding the foregoing, however, income is considered to inure to the benefit of private persons if the income is derived from the use of a governmental entity to conduct a commercial business, such as a commercial banking business, that provides financial services to private persons.
4. For the avoidance of doubt, the following shall be treated as Non-Reporting New Zealand Financial Institutions and as exempt beneficial owners for purposes of sections 1471 and 1472 of the U.S. Internal Revenue Code:
  - a) The New Zealand Superannuation Fund;
  - b) The Guardians of New Zealand Superannuation;

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<sup>57</sup> All dollar amounts are in U.S. dollars.



- c) The Accident Compensation Corporation;
- d) The Earthquake Commission;
- e) The Māori Trustee;
- f) New Zealand Local Government Funding Agency Limited;
- g) The Reserve Bank of New Zealand as per section 5, and all branches and agencies as per section 6, of the Reserve Bank of New Zealand Act 1989.

**B. International Organization**

Any international organization or wholly owned agency or instrumentality thereof. This category includes any intergovernmental organization (including a supranational organization) (1) that is comprised primarily of non-U.S. governments; (2) that has in effect a headquarters agreement with New Zealand; and (3) the income of which does not inure to the benefit of private persons.

**C. Māori Authorities**

Māori Authorities as defined in section HF 1(1) of the Income Tax Act 2007.

*II. Funds that Qualify as Exempt Beneficial Owners*

The following Entities shall be treated as Non-Reporting New Zealand Financial Institutions and as exempt beneficial owners for purposes of sections 1471 and 1472 of the U.S. Internal Revenue Code.

**D. Treaty-Qualified Retirement Fund**

Any pension fund established in New Zealand and described in Article 3(1)(l) (General Definitions) of the Convention, provided that the pension fund is entitled to benefits under the Convention on income that it derives from sources within the United States (or would be entitled to such benefits if it derived any such income) as a resident of New Zealand that satisfies any applicable limitation on benefits requirement.

**E. Broad Participation Retirement Fund**

A fund established in New Zealand to provide retirement, disability, or death benefits, or any combination thereof, to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that the fund:

1. Does not have a single beneficiary with a right to more than five percent of the fund's assets;
2. Is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in New Zealand; and
3. Satisfies at least one of the following requirements:
  - a) The fund is generally exempt from tax in New Zealand on investment income under the laws of New Zealand due to its status as a retirement or pension plan;
  - b) The fund receives at least 50 percent of its total contributions (other than transfers of assets from other plans described in paragraphs A through D of this section or from retirement and pension accounts described in subparagraph B(1) of section V of this Annex II) from the sponsoring employers;
  - c) Distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (except rollover distributions to other retirement funds described in paragraphs A through D of this section or retirement and pension accounts described in subparagraph B(1) of section V of this Annex II), or penalties apply to distributions or withdrawals made before such specified events; or
  - d) Contributions (other than certain permitted make-up contributions) by employees to the fund are limited by reference to earned income of the employee or may not exceed \$50,000 annually, applying the rules set forth in Annex I for account aggregation and currency translation.

**F. Narrow Participation Retirement Fund**

A fund established in New Zealand to provide retirement, disability, or death benefits to beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered, provided that:

1. The fund has fewer than 50 participants;
2. The fund is sponsored by one or more employers that are not Investment Entities or Passive NFFEs;
3. The employee and employer contributions to the fund (other than transfers of assets from treaty-qualified retirement funds described in paragraph A of this section or retirement and pension accounts described in subparagraph B(1) of section V of this Annex II) are limited by reference to earned income and compensation of the employee, respectively;
4. Participants that are not residents of New Zealand are not entitled to more than 20 percent of the fund's assets; and
5. The fund is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in New Zealand.



### G. Pension Fund of an Exempt Beneficial Owner

A fund established in New Zealand by an exempt beneficial owner to provide retirement, disability, or death benefits to beneficiaries or participants that are current or former employees of the exempt beneficial owner (or persons designated by such employees), or that are not current or former employees, if the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the exempt beneficial owner.

### H. Investment Entity Wholly Owned by Exempt Beneficial Owners

An Entity that is a New Zealand Financial Institution solely because it is an Investment Entity, provided that each direct holder of an Equity Interest in the Entity is an exempt beneficial owner, and each direct holder of a debt interest in such Entity is either a Depository Institution (with respect to a loan made to such Entity) or an exempt beneficial owner.

## III. Small or Limited Scope Financial Institutions that Qualify as Deemed-Compliant FFIs.

The following Financial Institutions are Non-Reporting New Zealand Financial Institutions that shall be treated as deemed-compliant FFIs for purposes of section 1471 of the U.S. Internal Revenue Code.

### A. Financial Institutions with a Local Client Base

A New Zealand Financial Institution satisfying the following requirements:

1. The Financial Institution must be licensed or regulated as a financial institution under the laws of New Zealand;
2. The Financial Institution must have no fixed place of business outside of New Zealand. 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;
3. The Financial Institution must not solicit customers or Account Holders outside of New Zealand. For this purpose, a Financial Institution shall not be considered to have solicited customers or Account Holders outside of New Zealand merely because the Financial Institution (a) operates a website, provided that the website does not specifically indicate that the Financial Institution provides Financial Accounts or services to non-residents, and does not otherwise target or solicit U.S. customers or Account Holders, or (b) advertises in print media or on a radio or television station that is distributed or aired primarily within New Zealand but is also incidentally distributed or aired in other countries, provided that the advertisement does not specifically indicate that the Financial Institution provides Financial Accounts or services to non-residents, and does not otherwise target or solicit U.S. customers or Account Holders;
4. The Financial Institution must be required under the laws of New Zealand to identify resident Account Holders for the purposes of either information reporting or withholding of tax with respect to Financial Accounts held by residents or for the purposes of satisfying New Zealand's anti-money laundering due diligence requirements;
5. At least 98 percent of the Financial Accounts by value maintained by the Financial Institution, as of the last day of the preceding calendar year or other appropriate reporting period, must be held by residents<sup>58</sup> (including residents that are Entities) of New Zealand or Australia;
6. Beginning on or before July 1, 2014, the Financial Institution must have policies and procedures, consistent with those set forth in Annex I, to prevent the Financial Institution from providing a Financial Account to any Nonparticipating Financial Institution and to monitor whether the Financial Institution opens or maintains a Financial Account for
  - (i) any Specified U.S. Person who is not a resident of New Zealand (including a U.S. Person that was a resident of New Zealand when the account was opened but subsequently ceases to be a resident of New Zealand), or
  - (ii) any Passive NFFE with one or more Controlling Persons who are U.S. residents or U.S. citizens who are not residents of New Zealand;
7. Such policies and procedures must provide that if any Financial Account held by a Specified U.S. Person who is not a resident of New Zealand or by a Passive NFFE with Controlling Persons who are U.S. residents or U.S. citizens who are not residents of New Zealand is identified, the Financial Institution must report such Financial Account as would be required if the Financial Institution were a Reporting New Zealand Financial Institution (including by following the applicable registration requirements on the IRS FATCA registration website) or close such Financial Account;
8. With respect to a Preexisting Account held by an individual who is not a resident of New Zealand or by an Entity, the Financial Institution must review those Preexisting Accounts in accordance with the procedures set forth in Annex I applicable to Preexisting Accounts to identify any U.S. Reportable Account or Financial Account held by a Nonparticipating Financial Institution, and must report such Financial Account as would be required if the Financial Institution were a Reporting New Zealand Financial Institution (including by following the applicable registration requirements on the IRS FATCA registration website) or close such Financial Account;
9. Each Related Entity of the Financial Institution that is a Financial Institution must be incorporated or organized in New Zealand and, with the exception of any Related Entity that is a retirement fund described in paragraphs A through D of section II of this Annex II, satisfy the requirements set forth in this paragraph A; and
10. The Financial Institution must not have policies or practices that discriminate against opening or maintaining Financial Accounts for individuals who are Specified U.S. Persons and residents of New Zealand.

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<sup>58</sup> Residents is not defined in the IGA. Inland Revenue considers that, to the extent that the financial institution is a NZFI, the question of whether the financial accounts maintained by the NZFI are held by residents of New Zealand should be determined by applying the residency rules set out in the Income Tax Act 2007. The question of whether the account holder is an Australian resident should be determined by applying the residency rules in the Australian Income Tax Assessment Act 1936.

## **B. Certain Non-Registering Local Banks**

A New Zealand Financial Institution satisfying the following requirements:

1. The Financial Institution operates solely as (and is licensed or regulated under the laws of New Zealand as) (a) a bank (or a Financial Institution offering comparable financial services) or (b) a credit union or similar cooperative credit organization that is operated without profit;
2. The Financial Institution's business consists primarily of receiving deposits from and making loans to, with respect to a bank, unrelated retail customers and, with respect to a credit union or similar cooperative credit organization, members, provided that no member has a greater than five percent interest in such credit union or cooperative credit organization;
3. The Financial Institution satisfies the requirements set forth in subparagraphs A(2) and A(3) of this section provided that, in addition to the limitations on the website described in subparagraph A(3) of this section, the website does not permit the opening of a Financial Account;
4. The Financial Institution does not have more than \$175 million (as of the last day of the preceding calendar year or other appropriate reporting period) in assets on its balance sheet, and the Financial Institution and any Related Entities, taken together, do not have more than \$500 million (as of the last day of the preceding calendar year or other appropriate reporting period) in total assets on their consolidated or combined balance sheets; and
5. Any Related Entity must be incorporated or organized in New Zealand, and any Related Entity that is a Financial Institution, with the exception of any Related Entity that is a retirement fund described in paragraphs A through D of section II of this Annex II or a Financial Institution with only low-value accounts described in paragraph C of this section, must satisfy the requirements set forth in this paragraph B.

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

A New Zealand Financial Institution satisfying the following requirements:

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

## **D. Qualified Credit Card Issuer**

A New Zealand Financial Institution satisfying the following requirements:

1. The Financial Institution is a Financial Institution solely because it is an issuer of credit cards that accepts deposits only when a customer makes a payment in excess of a balance due with respect to the card and the overpayment is not immediately returned to the customer; and
2. Beginning on or before July 1, 2014, the Financial Institution implements policies and procedures to either prevent a customer deposit in excess of \$50,000, or to ensure that any customer deposit in excess of \$50,000, in each case applying the rules set forth in Annex I for account aggregation and currency translation, is refunded to the customer within 60 days. For this purpose, a customer deposit does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns.

## *IV. Investment Entities that Qualify as Deemed-Compliant FFIs and Other Special Rules.*

The Financial Institutions described in paragraphs A through E of this section are Non-Reporting New Zealand Financial Institutions that shall be treated as deemed-compliant FFIs for purposes of section 1471 of the U.S. Internal Revenue Code. In addition, paragraph F of this section provides special rules applicable to an Investment Entity.

### **A. Trustee-Documented Trust**

A trust established under the laws of New Zealand to the extent that the trustee of the trust is a Reporting U.S. Financial Institution, Reporting Model 1 FFI, or Participating FFI and reports all information required to be reported pursuant to the Agreement with respect to all U.S. Reportable Accounts of the trust.

### **B. Sponsored Investment Entity and Controlled Foreign Corporation**

A Financial Institution described in subparagraph B(1) or B(2) of this section having a sponsoring entity that complies with the requirements of subparagraph B(3) of this section.

1. A Financial Institution is a sponsored investment entity if (a) it is an Investment Entity established in New Zealand that is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations; and (b) an Entity has agreed with the Financial Institution to act as a sponsoring entity for the Financial Institution.

2. A Financial Institution is a sponsored controlled foreign corporation if (a) the Financial Institution is a controlled foreign corporation<sup>59</sup> organized under the laws of New Zealand that is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations; (b) the Financial Institution is wholly owned, directly or indirectly, by a Reporting U.S. Financial Institution that agrees to act, or requires an affiliate of the Financial Institution to act, as a sponsoring entity for the Financial Institution; and (c) the Financial Institution shares a common electronic account system with the sponsoring entity that enables the sponsoring entity to identify all Account Holders and payees of the Financial Institution and to access all account and customer information maintained by the Financial Institution including, but not limited to, customer identification information, customer documentation, account balance, and all payments made to the Account Holder or payee.
3. The sponsoring entity complies with the following requirements:
  - a) The sponsoring entity is authorized to act on behalf of the Financial Institution (such as a fund manager, trustee, corporate director, or managing partner) to fulfil applicable registration requirements on the IRS FATCA registration website;
  - b) The sponsoring entity has registered as a sponsoring entity with the IRS on the IRS FATCA registration website;
  - c) If the sponsoring entity identifies any U.S. Reportable Accounts with respect to the Financial Institution, the sponsoring entity registers the Financial Institution pursuant to applicable registration requirements on the IRS FATCA registration website on or before the later of December 31, 2015 and the date that is 90 days after such a U.S. Reportable Account is first identified;
  - d) The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting New Zealand Financial Institution;
  - e) The sponsoring entity identifies the Financial Institution and includes the identifying number of the Financial Institution (obtained by following applicable registration requirements on the IRS FATCA registration website) in all reporting completed on the Financial Institution's behalf; and
  - f) The sponsoring entity has not had its status as a sponsor revoked.

#### C. Sponsored, Closely Held Investment Vehicle

A New Zealand Financial Institution satisfying the following requirements:

1. The Financial Institution is a Financial Institution solely because it is an Investment Entity and is not a qualified intermediary, withholding foreign partnership, or withholding foreign trust pursuant to relevant U.S. Treasury Regulations;
2. The sponsoring entity is a Reporting U.S. Financial Institution, Reporting Model 1 FFI, or Participating FFI, is authorized to act on behalf of the Financial Institution (such as a professional manager, trustee, or managing partner), and agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting New Zealand Financial Institution;
3. The Financial Institution does not hold itself out as an investment vehicle for unrelated parties;
4. Twenty or fewer individuals own all of the debt interests and Equity Interests in the Financial Institution (disregarding debt interests owned by Participating FFIs and deemed-compliant FFIs and 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 described in this paragraph C); and
5. The sponsoring entity complies with the following requirements:
  - a) The sponsoring entity has registered as a sponsoring entity pursuant to applicable registration requirements on the IRS FATCA registration website;
  - b) The sponsoring entity agrees to perform, on behalf of the Financial Institution, all due diligence, withholding, reporting, and other requirements that the Financial Institution would have been required to perform if it were a Reporting New Zealand Financial Institution and retains documentation collected with respect to the Financial Institution for a period of six years;
  - c) The sponsoring entity identifies the Financial Institution in all reporting completed on the Financial Institution's behalf; and
  - d) The sponsoring entity has not had its status as a sponsor revoked.

#### D. Investment Advisors and Investment Managers

An Investment Entity established in New Zealand that is a Financial Institution solely because it (1) renders investment advice to, and acts on behalf of, or (2) manages portfolios for, and acts on behalf of, a customer for the purposes of investing, managing, or administering funds deposited in the name of the customer with a Financial Institution other than a Nonparticipating Financial Institution.

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<sup>59</sup> A controlled foreign corporation means any foreign corporation if more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote, or the total value of the stock of such corporation, is owned, or is considered as owned, by United States shareholders on any day during the taxable year of such foreign corporation. The term a United States shareholder means, with respect to any foreign corporation, a United States person who owns, or is considered as owning, 10 percent or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation.

## E. Collective Investment Vehicle

An Investment Entity established in New Zealand that is regulated as a collective investment vehicle, provided that all of the interests in the collective investment vehicle (including debt interests in excess of \$50,000) are held by or through one or more exempt beneficial owners, Active NFFEs described in subparagraph B(4) of section VI of Annex I, U.S. Persons that are not Specified U.S. Persons, or Financial Institutions that are not Nonparticipating Financial Institutions.

## F. Special Rules

The following rules apply to an Investment Entity:

1. With respect to interests in an Investment Entity that is a collective investment vehicle described in paragraph E of this section, the reporting obligations of any Investment Entity (other than a Financial Institution through which interests in the collective investment vehicle are held) shall be deemed fulfilled.
2. With respect to interests in:
  - a) An Investment Entity established in a Partner Jurisdiction that is regulated as a collective investment vehicle, all of the interests in which (including debt interests in excess of \$50,000) are held by or through one or more exempt beneficial owners, Active NFFEs described in subparagraph B(4) of section F of Annex I, U.S. Persons that are not Specified U.S. Persons, or Financial Institutions that are not Nonparticipating Financial Institutions; or
  - b) An Investment Entity that is a qualified collective investment vehicle under relevant U.S. Treasury Regulations; The reporting obligations of any Investment Entity that is a New Zealand Financial Institution (other than a Financial Institution through which interests in the collective investment vehicle are held) shall be deemed fulfilled.
3. With respect to interests in an Investment Entity established in New Zealand that is not described in paragraph E or subparagraph F(2) of this section, consistent with paragraph 3 of Article 5 of the Agreement, the reporting obligations of all other Investment Entities with respect to such interests shall be deemed fulfilled if the information required to be reported by the first-mentioned Investment Entity pursuant to the Agreement with respect to such interests is reported by such Investment Entity or another person.

## V. Accounts Excluded from Financial Accounts

The following accounts are excluded from the definition of Financial Accounts and therefore shall not be treated as U.S. Reportable Accounts.

### A. Certain Retirement Accounts or Products

Membership of the Whai Rawa approved retirement savings scheme operated by Te Rūnanga o Ngāi Tahu.

### B. Certain Savings Accounts

1. Retirement and Pension Account. A retirement or pension account maintained in New Zealand that satisfies the following requirements under the laws of New Zealand.
  - a) The account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits);
  - b) The account is tax-favored (i.e., contributions to the account that would otherwise be subject to tax under the laws of New Zealand are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);
  - c) Annual information reporting is required to the tax authorities in New Zealand with respect to the account;
  - d) Withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events; and
  - e) Either (i) annual contributions are limited to \$50,000 or less, or (ii) there is a maximum lifetime contribution limit to the account of \$1,000,000 or less, in each case applying the rules set forth in Annex I for account aggregation and currency translation.
2. Non-Retirement Savings Accounts. An account maintained in New Zealand (other than an insurance or Annuity Contract) that satisfies the following requirements under the laws of New Zealand.
  - a) The account is subject to regulation as a savings vehicle for purposes other than for retirement;
  - b) The account is tax-favored (i.e. contributions to the account that would otherwise be subject to tax under the laws of New Zealand are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);
  - c) Withdrawals are conditioned on meeting specific criteria related to the purpose of the savings account (for example, the provision of educational or medical benefits), or penalties apply to withdrawals made before such criteria are met; and
  - d) Annual contributions are limited to \$50,000 or less, applying the rules set forth in Annex I for account aggregation and currency translation.

### C. Certain Term Life Insurance Contracts

A life insurance contract maintained in New Zealand with a coverage period that will end before the insured individual attains age 90, provided that the contract satisfies the following requirements:

1. Periodic premiums, which do not decrease over time, are payable at least annually during the period the contract is in existence or until the insured attains age 90, whichever is shorter;
2. The contract has no contract value that any person can access (by withdrawal, loan, or otherwise) without terminating the contract;
3. The amount (other than a death benefit) payable upon cancellation or termination of the contract cannot exceed the aggregate premiums paid for the contract, less the sum of mortality, morbidity, and expense charges (whether or not actually imposed) for the period or periods of the contract's existence and any amounts paid prior to the cancellation or termination of the contract; and
4. The contract is not held by a transferee for value.

### D. Account Held By an Estate

An account maintained in New Zealand that is held solely by an estate if the documentation for such account includes a copy of the deceased's will or death certificate.

### E. Escrow Accounts

An account maintained in New Zealand established in connection with any of the following:

1. Legislation, a court order or judgment.
2. A sale, exchange, or lease of real or personal property, provided that the account satisfies the following requirements:
  - a) The account is funded solely with a down payment, earnest money, deposit in an amount appropriate to secure an obligation directly related to the transaction, or a similar payment, or is funded with a financial asset that is deposited in the account in connection with the sale, exchange, or lease of the property;
  - b) The account is established and used solely to secure the obligation of the purchaser to pay the purchase price for the property, the seller to pay any contingent liability, or the lessor or lessee to pay for any damages relating to the leased property as agreed under the lease;
  - c) The assets of the account, including the income earned thereon, will be paid or otherwise distributed for the benefit of the purchaser, seller, lessor, or lessee (including to satisfy such person's obligation) when the property is sold, exchanged, or surrendered, or the lease terminates;
  - d) The account is not a margin or similar account established in connection with a sale or exchange of a financial asset; and
  - e) The account is not associated with a credit card account.
3. An obligation of a Financial Institution servicing a loan secured by real property to set aside a portion of a payment solely to facilitate the payment of taxes or insurance related to the real property at a later time.
4. An obligation of a Financial Institution solely to facilitate the payment of taxes at a later time.

### F. Partner Jurisdiction Accounts

An account maintained in New Zealand and 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 is subject to the same requirements and oversight under the laws of such other Partner Jurisdiction as if such account were established in that Partner Jurisdiction and maintained by a Partner Jurisdiction Financial Institution in that Partner Jurisdiction.

### G. Certain Other Accounts or Products

An interest in a trust established in accordance with section 15S(1)(c) of the Tax Administration Act 1994 by a tax pooling intermediary for the purposes of administering a tax pooling account as defined in section RP 17B of the Income Tax Act 2007.

## VI. Definitions.

The following additional definitions shall apply to the descriptions above:

### A. Reporting Model 1 FFI

The term Reporting Model 1 FFI means a Financial Institution with respect to which a non-U.S. government or agency thereof agrees to obtain and exchange information pursuant to a Model 1 IGA, other than a Financial Institution treated as a Nonparticipating Financial Institution under the Model 1 IGA. For purposes of this definition, the term Model 1 IGA means an arrangement between the United States or the Treasury Department and a non-U.S. government or one or more agencies thereof to implement FATCA through reporting by Financial Institutions to such non-U.S. government or agency thereof, followed by automatic exchange of such reported information with the IRS.

### B. Participating FFI

The term Participating FFI means a Financial Institution that has agreed to comply with the requirements of an FFI Agreement, including a Financial Institution described in a Model 2 IGA that has agreed to comply with the requirements of an FFI Agreement. The term Participating FFI also includes a qualified intermediary branch of a Reporting U.S. Financial Institution, unless such branch is a Reporting Model 1 FFI. For purposes of this definition, the term FFI Agreement means an agreement that sets forth the



requirements for a Financial Institution to be treated as complying with the requirements of section 1471(b) of the U.S. Internal Revenue Code. In addition, for purposes of this definition, the term Model 2 IGA means an arrangement between the United States or the Treasury Department and a non-U.S. government or one or more agencies thereof to facilitate the implementation of FATCA through reporting by Financial Institutions directly to the IRS in accordance with the requirements of an FFI Agreement, supplemented by the exchange of information between such non-U.S. government or agency thereof and the IRS.

## Appendix 4: "Active NFFE" Definition in the Annex 1 of the IGA

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An Active NFFE is defined in section VI B(4) of Annex I of the IGA as meaning any NFFE that meets any of the following criteria:

- a) 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;
- b) 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 regularly traded on an established securities market;
- c) The NFFE is organized in a U.S. Territory and all of the owners of the payee are bona fide residents of that U.S. Territory;
- d) The NFFE is a government (other than the U.S. government), a political subdivision of such government (which, for the avoidance of doubt, includes a state, province, county, or municipality), or a public body performing a function of such government or a political subdivision thereof, a government of a U.S. Territory, an international organization, a non-U.S. central bank of issue, or an Entity wholly owned by one or more of the foregoing;
- e) Substantially all of the activities of the NFFE consist of holding (in whole or in part) the outstanding stock of, or providing financing and services to, one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution, 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;
- f) The NFFE is not yet operating a business and has no prior operating history, but is investing capital into assets with the intent to operate a business other than that of a Financial Institution, provided that the NFFE shall not qualify for this exception after the date that is 24 months after the date of the initial organization of the NFFE;
- g) 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;
- h) The NFFE primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution;
- i) The NFFE is an excepted NFFE as described in relevant U.S. Treasury Regulations;<sup>60</sup> or
- j) The NFFE meets all of the following requirements:<sup>61</sup>
  - i. It is established and operated in its jurisdiction of residence exclusively for religious, charitable, scientific, artistic, cultural, athletic, or educational purposes; or it is established and operated in its jurisdiction of residence and it is a professional organization, business league, chamber of commerce, labor organization, agricultural or horticultural organization, civic league or an organization operated exclusively for the promotion of social welfare;
  - ii. It is exempt from income tax in its jurisdiction of residence;
  - iii. It has no shareholders or members who have a proprietary or beneficial interest in its income or assets;
  - iv. The applicable laws of the NFFE's jurisdiction of residence or the NFFE's formation documents do not permit any income or assets of the NFFE to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the NFFE's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the NFFE has purchased; and
  - v. The applicable laws of the NFFE's jurisdiction of residence or the NFFE's formation documents require that, upon the NFFE's liquidation or dissolution, all of its assets be distributed to a governmental entity or other non-profit organization, or escheat to the government of the NFFE's jurisdiction of residence or any political subdivision thereof.

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<sup>60</sup> An entity established in New Zealand that (i) manages or operates an employee stock option or employee share purchase plan and (ii) is not otherwise a New Zealand Financial Institution, would satisfy this requirement.

<sup>61</sup> Organizations registered under the *Charitable Trusts Act 1957* and the *Charities Act 2005*, and donee organizations as defined in the *Income Tax Act 2007*, are NFFEs that would satisfy these requirements.