Inland Revenue
Te Tari Taake

IR1087
October 2017

Foreign Account Tax Compliance Act (FATCA)

Trusts guidance notes

Please direct all comments and correspondence to **FATCA@ird.govt.nz**

Contents

Background

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 FATCA due diligence on their financial accounts, and provide details to the IRS about reportable accounts held by U.S. citizens/residents (and certain passive entities that are controlled by U.S. citizens/residents), and non-participating financial Institutions.
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. Accompanying domestic legislation required to give effect in New Zealand to FATCA received Royal Assent on 30 June 2014 and the IGA and the associated domestic legislation have effect from 1 July 2014. The IGA was brought into effect by Order in Council and came into force on 3 July 2014. Under the IGA, certain New Zealand financial institutions will be required to register with the IRS, carry out FATCA due diligence on their financial accounts, and provide information to Inland Revenue annually about accounts that they maintain that are U.S. Reportable accounts or held by non-participating financial institutions. Inland Revenue will then exchange this information with the U.S. The IGA is also reciprocal in nature. The U.S. will exchange information with Inland Revenue about accounts maintained by U.S. financial institutions that are held by New Zealand residents.

Introduction

3. This guidance sets out how the Inland Revenue considers FATCA applies in New Zealand to trusts that maintain or hold financial accounts.
4. A trust is an entity that is within the scope of FATCA. An "entity" is defined in Article 1(1)(gg) of the IGA as "a legal person[1] or a legal arrangement such as a trust". A New Zealand trust[2] is likely to be either a financial institution or a non-financial foreign entity ("NFFE") for FATCA purposes. **[The circumstances when a New Zealand trust will be a New Zealand financial institution ("NZFI") are summarised in the chart at paragraph 44 of this guidance. This chart is likely to be particularly relevant to New Zealand family trusts that are seeking to determine their FATCA status. The examples set out at paragraphs 42-43 of this guidance should also provide some useful context to the chart.]**
5. A trust that is a Reporting New Zealand financial institution ("Reporting NZFI")[3] will be required to register with the IRS and will have FATCA due diligence and reporting obligations under the IGA. Specifically, such trusts will need to carry out due diligence on the accounts that they maintain (that are not exempted or excluded)[4] to determine whether those accounts are U.S. Reportable Accounts held by Specified U.S. Persons or passive NFFEs (a type of passive vehicle that is not a financial institution) with U.S. Controlling Persons[5]. They will need to report such U.S. Reportable Accounts to Inland Revenue. They will also need to report accounts that they maintain that are held by non-participating financial institutions.[6]
6. A New Zealand trust that is not a financial institution is likely to be a NFFE. NFFEs do not have FATCA due diligence obligations under the IGA, but may be account holders that are "reported on" for FATCA purposes by the financial institution that maintains the account (i.e. if they are passive NFFE account holders with U.S. Controlling Persons). The reasons why a trust can be an account holder, the circumstances when a trust will be an account holder, and the implications that this will have for Reporting NZFIs that maintain such trust accounts are outlined in detail below.

---

[1] A natural person is not a legal person in this context. Therefore, a natural person cannot be an entity under the IGA. This is consistent with the U.S. Treasury Regulations definition of "entity" which states at §1.1471- 1(b)(35) that the term "entity" means "any person other than an individual".

[2] The phrase "New Zealand trust" is used in this guidance to refer to a trust that is a New Zealand resident (or a New Zealand branch) for FATCA purposes under the IGA.

[3] The references in this guidance to "Reporting New Zealand financial institution" should also be read as covering those "Non-Reporting New Zealand financial institutions" that have FATCA due diligence obligations. The types of Non-Reporting New Zealand financial institutions that have some (generally limited) FATCA due diligence obligations are set out in detail in Inland Revenue's FATCA "registration" guidance notes. All of Inland Revenue's FATCA guidance notes are set out on the Important FATCA documents web page, at **www.ird.govt.nz/fatca**

[4] These exemptions and exclusions are outlined in detail in Inland Revenue's FATCA "due diligence" and "reportable accounts" guidance notes.

[5] The definitions of "passive NFFE" and "Controlling Persons" are set out in detail below from paragraph 74 under the heading "Determining whether a New Zealand family trust account holder is a passive NFFE with U.S. Controlling Persons."

[6] The trust will need to report (to Inland Revenue) payments that it makes to non-participating financial institutions on an annual basis for 2015 (the FATCA period ended 31 March 2016) and 2016 (the FATCA period ended 31 March 2017): see Article 4(1)(b) of the IGA. The type of payments that will need to be reported are outlined in detail in Inland Revenue's "due diligence" guidance notes.

7. This guidance will begin by setting out how trusts can be financial institutions that are NZFIs. This will focus on the investment entity type of financial institution, which is the type of financial institution that is most likely to apply to trusts. The guidance will then outline the FATCA due diligence obligations of Reporting NZFI investment entity trusts. The guidance will then shift focus to how FATCA will apply to trusts that hold accounts with Reporting NZFIs. This will include a framework that Reporting NZFIs that maintain new[7] trust accounts can apply as part of their FATCA due diligence.
8. As part of this analysis, this guidance will outline specifically how FATCA applies to the following types of trust arrangements, which are common forms of trusts in New Zealand:
   (a) Unit trusts.
   (b) Family trusts.
   (c) Trading trusts.
   (d) Charitable trusts.

   Inland Revenue will also produce separate guidance on the application of FATCA to Solicitors' trust accounts.

A trust can be a "financial institution"

9. A trust is an entity that can (depending on the activities that it carries out or how it is managed) be a financial institution. There are four categories of entities that are financial institutions under the IGA: investment entity, custodial institution, depository institution, and specified insurance company.[8] The category of financial institution that is most likely to apply to trusts is the investment entity category. Therefore, this guidance will focus on the circumstances where a New Zealand trust will be an investment entity NZFI.

When a financial institution trust will be a "NZFI"

10. A trust that is a financial institution will, in general terms, only have FATCA due diligence obligations under the IGA if it is a NZFI that is a Reporting NZFI.[9] Therefore, this guidance will now briefly outline the circumstances where a financial institution trust will be a NZFI in the first place.
11. The IGA defines a "New Zealand financial institution" (in this respect) as meaning:
    - any financial institution "resident" in New Zealand, excluding any branch of such financial institution located outside New Zealand; and
    - any branch of a financial institution not resident in New Zealand, if such branch is located in New Zealand.

When a Financial Institution Trust will be Resident in New Zealand

12. This then raises the question of what the reference to "resident" in New Zealand means in the context of financial institution trusts. In other words, when will a financial institution trust be a New Zealand resident (as contemplated by the IGA) that is a NZFI? As explained below, there are separate rules that apply (in this regard) depending on whether the trust is a unit trust or a trust other than a unit trust.

---

[7] The IGA defines new accounts as being accounts entered into on or after 1 July 2014.

[8] These categories are outlined in detail in Inland Revenue's FATCA "registration" guidance notes.

[9] Inland Revenue's FATCA "registration" guidance notes set out the principles that will be relevant to determining whether an entity will be either a Reporting NZFI or a Non-Reporting NZFI. As outlined in those guidance notes, Non-Reporting NZFIs can sometimes have some (generally) limited FATCA due diligence obligations.

13. The IGA does not define "resident." Article 1(2) of the IGA provides that:

> "[a]ny term not otherwise defined in this Agreement [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 this Agreement [the IGA], any meaning under the applicable tax laws of that Party prevailing over the meaning given to the term under the laws of that Party (Emphasis added)."

Unit Trusts

14. Section YD 2 of the Income Tax Act 2007 ("ITA 2007") provides rules for the residency of companies (including entities which are deemed to be companies for the purposes of the ITA 2007). A unit trust is deemed to be a company for the purposes of the ITA 2007. The residency rules for companies in section YD 2 of the ITA 2007 should be applied to unit trusts (subject to necessary modification to accommodate the differences in legal formation and governance) to determine whether such trusts are resident in New Zealand under the IGA.

Trusts that are not Unit Trusts

15. Trusts that are not unit trusts are not separate legal entities in New Zealand, and thus New Zealand does not have residency rules for income tax purposes for such trusts.
16. The Competent Authorities of the U.S. and New Zealand have entered into a Competent Authority Arrangement ("the Arrangement") concerning the meaning of the term "resident in New Zealand" that applies to a financial institution that is a trust (other than a "unit trust" which, as noted above, is deemed to be a company for purposes of the ITA 2007).
17. The Arrangement provides that:
    - prior to April 1, 2017, a trust (other than a unit trust) may rely on any reasonable definition for the term "resident in New Zealand" including, for instance, in the context of a financial institution that is a trust (other than a unit trust), a trust that is established under the laws of New Zealand, whereby the trust is settled, executed, and governed by New Zealand law; and
    - beginning on or before April 1, 2017, the term "resident in New Zealand" means, in the context of a financial institution that is a trust (other than a unit trust), a trust that has one or more trustees resident in New Zealand for New Zealand income tax purposes at any time during the reporting period, or is managed by a branch of a trustee located in New Zealand provided that the branch of the trustee is subject to regulatory supervision in New Zealand. However, a financial institution that is a trust (other than a unit trust) would not be considered "resident in New Zealand" if the trust is resident in a Partner Jurisdiction or in another jurisdiction that permits the trust to comply with the requirements of a participating FFI under the U.S. Treasury Regulations, and the trust reports all the information required to be reported pursuant to the Partner Jurisdiction's IGA or the U.S. Treasury Regulations, as applicable, with respect to Financial Accounts maintained by the trust.

    The Arrangement allows financial institution trusts (other than unit trusts) discretion prior to 1 April 2017 to rely on any reasonable definition for the term "resident in New Zealand", before moving to a prescriptive definition from 1 April 2017.
18. This guidance will now, having outlined how trusts can be NZFIs, set out the circumstances when a trust will be a NZFI investment entity (the category of financial institution that is most likely to apply to trusts). The guidance will then outline the FATCA due diligence and reporting obligations that Reporting NZFI investment entity trusts have.

When trust will be a NZFI "investment entity"

19. As noted above, a trust can be an investment entity that is a Reporting NZFI. This then raises the question of **when** a trust will be an investment entity in the first place. As explained below, the term "investment entity" is defined in both the IGA and the FATCA U.S. Treasury Regulations.
20. There are a number of parts of the IGA that permit "New Zealand" to make decisions regarding choices that NZFIs can make. The Commissioner of Inland Revenue (on behalf of New Zealand) has made a decision under Article 4(7) of the IGA to allow NZFIs to use a definition in relevant U.S. Treasury Regulations in lieu of a corresponding definition in the IGA, provided that such application would not frustrate the purposes of the IGA. This means that an entity (such as a trust) is able to choose to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA to determine its FATCA status, provided that such application would not frustrate the purposes of the IGA.
21. An entity that chooses to use a definition in the U.S. Treasury Regulations (such as the definition of investment entity) in lieu of a corresponding definition in the IGA to determine its FATCA status will, subject to the following, be applying the definition in a way that is consistent with the purposes of the IGA and that does not frustrate the purposes of the IGA:
    (a) The entity applying a definition in the U.S. Treasury Regulations must adopt the entire definition;
    (b) The entity which applies a definition in the U.S. Treasury Regulations (such as the definition of investment entity) in lieu of a corresponding definition in the IGA to determine its FATCA entity status, must, if it is an account holder, notify any

Reporting NZFI in which it holds an account, that it has decided to use a U.S. Treasury Regulations definition. [The rationale for this "notification" requirement is set out in detail below]; and

(c) The substitution of a U.S Treasury Regulations definition for a corresponding IGA definition does not frustrate the purposes of the IGA. [The use of such a definition in the U.S. Treasury Regulations is unlikely to frustrate the purposes of the IGA provided that terms (a) and (b) are satisfied].

22. As noted above, an entity which applies a definition in the U.S. Treasury Regulations (such as the definition of investment entity) in lieu of a corresponding definition in the IGA to determine its FATCA entity status must notify any Reporting NZFI in which it holds an account that it has elected to use a U.S. Treasury Regulations definition in this way. The rationale for this requirement is that an entity that chooses to use a definition in the U.S. Treasury Regulations (such as the definition of investment entity) in lieu of a corresponding definition in the IGA to determine its status is likely to do so where the circumstances are such that it, therefore, falls outside that definition and is instead an NFFE. Therefore, such decisions will affect the relevant entity's FATCA status. As explained below, this has the potential to cause gaps in FATCA reporting, absent of such a notification requirement. Therefore, to the extent that an entity (such as a trust) chooses to use the U.S. Treasury Regulations definition of investment entity to determine its status and holds an account it will be important that the entity informs the account maintainer (i.e. the bank) that it has used the U.S. Treasury Regulations in this way. This will help ensure that the account maintainer is in a position to determine the account holder's FATCA status in a way that does not lead to underreporting. For example, in the case of an entity that is, as a result of choosing to apply the U.S. Treasury Regulations definition of investment entity, a passive NFFE with U.S. Controlling Persons, a Reporting NZFI account maintainer that is notified of this choice will be in a better position to correctly determine the entity's status. Therefore, this notification process will help ensure that entities are able to use the definition of investment entity in the U.S Treasury Regulations in a way that is consistent with the purposes of the IGA and so aligns with the language in Article 4(7) of the IGA.

23. The Inland Revenue provides the following guidance as to the application of the IGA and U.S. Treasury Regulations definitions of investment entity to assist trusts to make this choice about what definition to use. This guidance will focus on: the key elements of the investment entity definition in the IGA and U.S. Treasury Regulations, the key differences between these definitions, and the circumstances where trusts would be investment entities under these definitions.

Definitions of Investment Entity

IGA definition of Investment Entity

24. Article 1(1)(j) of the IGA defines an "investment entity" to mean:

> ...any Entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities[10] or operations for or on behalf of a customer:
>
> (1) 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;
>
> (2) individual and collective portfolio management; or
>
> (3) otherwise investing, administering, or managing funds or money on behalf of other persons.
>
> This subparagraph 1(j) shall be interpreted in a manner consistent with similar language set forth in the definition of "financial institution" in the Financial Action Task Force Recommendations.

25. Therefore, an entity (such as a trust) will be an investment entity under the IGA definition if it carries on (as a business) specified investment activities for or on behalf of a customer (an "in business" investment entity) or is managed by an "in business" investment entity (a "deemed" investment entity).

U.S. Treasury Regulations definition of investment entity

26. The definition of investment entity in §1.1471-5(e)(4) of the U.S. Treasury Regulations provides:

> (4) *Investment entity*—(i) *In general.* The term *investment entity* means any entity that is described in paragraph (e)(4)(i)(A), (B), or (C) of this section.
>
> (A) The entity primarily conducts as a business one or more of the following activities[11] or operations for or on behalf of a customer—
>
> (1) Trading in money market instruments (checks, bills, certificates of deposit, derivatives, etc.); foreign currency; foreign exchange, interest rate, and index instruments; transferable securities; or commodity futures;

[10] For the purposes of this guidance such activities will be referred to as being "specified investment activities".

[11] For the purposes of this guidance such activities will be referred to as being "specified investment activities".

(2) Individual or collective portfolio management; or

(3) Otherwise investing, administering, or managing funds, money, or financial assets on behalf of other persons.

(B) The entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets (as defined in paragraph (e)(4)(ii) of this section) and the entity is managed by another entity that is described in paragraph (e)(1)(i), (ii), (iv), or (e)(4)(i)(A) of this section.[12] For purposes of this paragraph (e)(4)(i)(B), an entity is managed by another entity if[13] the managing entity performs, either directly or through another third- party service provider, any of the activities described in paragraph (e)(4)(i)(A) of this section on behalf of the managed entity.

(C) The entity functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

(ii) *Financial assets.* For purposes of this paragraph, the term financial asset means a security (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interest, commodity (as defined in section 475(e)(2)), notional principal contract (as defined in §1.446-3(c)), insurance contract or annuity contract, or any interest (including a futures or forward contract or option) in a security, partnership interest, commodity, notional principal contract, insurance contract, or annuity contract.

(iii) *Primarily conducts as a business—*

(A) *In general.* An entity is treated as primarily conducting as a business one or more of the activities described in paragraph (e)(4)(i)(A) of this section if the entity's gross income attributable to such activities equals or exceeds 50 percent of the entity's gross income during the shorter of—[14]

(1) The three-year period ending on December 31 of the year preceding the year in which the determination is made; or

(2) The period during which the entity has been in existence.

(B) Special rule for start-up entities

An entity with no operating history as of the date of the determination is treated as primarily conducting as a business one or more of the activities described in paragraph (e)(4)(i)(A) of this section if such entity expects to meet the gross income threshold described in paragraph (e)(4)(iii)(A) of this section based on its anticipated functions, assets, and employees, with due consideration given to any purpose or functions for which the entity is licensed or regulated (including those of any predecessor).

(iv) *Primarily attributable to investing, reinvesting, or trading in financial assets—*

(A) *In general.* An entity's gross income is primarily attributable to investing, reinvesting, or trading in financial assets for purposes of paragraph (e)(4)(i)(B) of this section if the entity's gross income attributable to investing, reinvesting, or trading in financial assets equals or exceeds 50 percent of the entity's gross income during the shorter of—[15]

(1) The three-year period ending on December 31 of the year preceding the year in which the determination is made; or

(2) The period during which the entity has been in existence.

(B) Special rule for start-up entities

An entity with no operating history as of the date of the determination will be considered to have income that is primarily attributable to investing, reinvesting, or trading in financial assets for the purposes of paragraph (e)(4)(i)(B) of this section if such entity expects to meet the income threshold described in paragraph (e)(4)(iv)(A) of this section based on its anticipated functions, assets, and employees, with due consideration given to any purpose or functions for which the entity is licensed or regulated (including those of any predecessor).

27. Therefore, an entity (such as a trust) will be an investment entity under the U.S. Treasury Regulations if:[16]

- The entity conducts (as a business) specified investment activities for or on behalf of a customer **and** the entity derives its income **primarily** (50% or more in the specified period) from these activities (an "in business" investment entity);
- The entity is managed by a **relevant financial institution** that conducts specified investment activities for the entity **and** the managed entity derives its income **primarily** (50% or more in the specified period) from investing, reinvesting, or trading in financial assets (a "deemed" investment entity); or

---

[12] The relevant "manager" in this respect needs to be an entity that is a depository institution, custodial institution, defined type of insurance company, defined type of holding company, defined type of treasury centre, or an "in business" investment entity. For the purposes of this guidance any reference to a "**relevant financial institution**" in the context of a "manager" under the U.S Treasury Regulations definition of "investment entity" should be read as covering these types of entities.

[13] The literal wording of this part of the definition of investment entity is broad in scope. However, it should be read in the context of Internal Revenue Bulletin: 2014-13 (which contains final and temporary regulations relating to FATCA), which provides that, for example, an introducing broker does not manage an entity, in this regard, if it does not have discretionary authority to manage its clients' assets.

[14] For the purposes of this guidance this period will be referred to as "the specified period."

[15] For the purposes of this guidance this period will be referred to as "the specified period."

[16] As noted above, this definition is only relevant to determining an entity's FATCA status if the entity chooses to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA.

- The entity functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

28. Therefore, the definitions of investment entity in the IGA and the U.S. Treasury Regulations are similar in the sense that they both have "in business" and "deemed" investment entity elements. However, this guidance will now briefly set out some of the key differences between these definitions.

Key differences between the IGA and U.S. Treasury Regulations definitions of "investment entity"

29. An entity will be an "investment entity" under the U.S. Treasury Regulations in the following circumstances:
    a. The entity primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:
        - Trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc); foreign currency; foreign exchange, interest rate, and index instruments; transferable securities; or commodity futures;
        - Individual or collective portfolio management; or
        - Investing, administering, or managing funds, money, or financial assets on behalf of other persons.

        [This is the "in business" part of the definition of investment entity in the U.S. Treasury Regulations. This part of the definition refers to broadly the same types of specified investment activities as the corresponding part of the definition in the IGA. However, a key difference is the "primarily" requirement in this part of the U.S. Treasury Regulations, which is not in the corresponding part of the definition in the IGA. The U.S. Treasury Regulations also provide that an entity is treated as "primarily conducting as a business" one or more of the specified investment activities (in this respect), if the entity's gross income attributable to such activities equals or exceeds 50% of the entity's total gross income (i.e. if the entity's income is **primarily attributable** to such activities) during the specified period (see §1.1471- 5(e)(4)(iii) of the U.S. Treasury Regulations). This is different from the IGA investment entity definition, which covers entities where the investment service activity can be minor or an incidental part of the entity's activities as measured by gross income.]

    b. The entity is managed by a relevant financial institution [depository institution, custodial institution, defined type of insurance company, defined type of holding company, defined type of treasury centre, or an "in business" investment entity as set out in §1.1471-5(e)(4)(i)(B) of the U.S. Treasury Regulations] that conducts specified investment activities for the entity **and** the entity derives its income primarily from investing, reinvesting, or trading in financial assets over the specified period. An entity is "managed" by another entity under the Regulations if the managing entity performs, either directly or through another third-party service provider, any of the specified investment activities on behalf of the managed entity.[17]

        [This is the "deemed" part of the definition of investment entity in the U.S. Treasury Regulations. This part of the definition differs from the corresponding part of the definition in the IGA in two key respects. Firstly, the "deemed" part of the "investment entity" definition in the U.S Treasury Regulations only applies where the "managed" entity's gross income is **primarily attributable** to (equal or more than 50% of the entity's total gross income during the specified period – set out in §1.1471-5(e)(4)(iv) of the U.S. Treasury Regulations) investing, reinvesting or trading in financial assets. This is different from the "deemed" part of the "investment entity" definition in the IGA which does not require a consideration of the managed entity's income. Secondly, the class of "manager" (which could be, for example, a trustee or other manager) in this part of the definition in the U.S. Treasury Regulations can be **any** of a number of types of financial institution as defined in the U.S. Treasury Regulations and is not limited to investment entities only. This guidance sets out a number of examples below, which outline how the "deemed" part of the "investment entity" definitions in the U.S. Treasury Regulations and the IGA will apply in practice.]

    c. The entity functions or holds itself out as a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leverage buy fund, or similar investment vehicle established with an investment strategy of investing, reinvesting, or trading financial assets.

        [The third part of the "investment entity" definition in the U.S. Treasury Regulations covers various types of entities that function or hold themselves out as types of investment vehicles. The IGA definition of "investment entity" does not contain a corresponding part. However, such investment vehicles would be likely to be "in business" or "deemed" investment entities (under the U.S. Treasury Regulations and the IGA). Therefore, this guidance will focus on the "in business" and "deemed" parts of the "investment entity" definitions in the U.S. Treasury Regulations and the IGA.]

30. This guidance will now, having outlined (1) the key elements of the IGA and U.S. Treasury Regulations definitions of investment entity and (2) the key differences between these definitions, explain (with examples) the circumstances where trusts would be investment entities under these definitions.

[17] The literal wording of this part of the definition of investment entity is broad in scope. However, it should be read in the context of Internal Revenue Bulletin: 2014-13 (which contains final and temporary regulations relating to FATCA), which provides that, for example, an introducing broker does not manage an entity, in this regard, if it does not have discretionary authority to manage its clients' assets.

Trusts as "in business" Investment Entities

Application to trusts of the "in business" part of the IGA definition of investment entity

31. A trust will be an "in business" investment entity under the IGA definition if the following elements are satisfied:
    - The trust is carrying on a business. A "business" is defined in section YA 1 of the ITA 2007 as including "…any profession, trade, or undertaking carried on for profit"[18].
    - The trust's business needs to involve carrying on specified investment activities (i.e. the trading in certain instruments, securities and derivatives; individual and collective portfolio management; or investing, administering, or managing funds or money on behalf of other persons); and
    - The trust's business must be conducted for or on behalf of a customer.
32. The "in business" part of the definition of investment entity in the IGA simply requires that the relevant entity "conducts as a business" any of the specified investment activities for or on behalf of a customer. The definition of investment entity does not contain a qualifying adverb such as "solely" or "primarily" to describe the scope of the investment activity that the entity conducts. This means that an entity can come within the definition of investment entity in the IGA even if the investment activity that the entity carries out is incidental or an adjunct to an entity's core non-investment business. This is different from the corresponding definition in the U.S. Treasury Regulations, which is elaborated on below.
33. A unit trust established under the Unit Trust Act 1960 that carries on specified investment activities as a business for customers will be a common form of "in business" investment entity financial institution under the IGA definition.[19]
34. The regulation of unit trusts is subject to transition and regulation under the Financial Markets Conduct Act 2013. A "managed investment scheme" ("MIS") is defined in section 9 of the FMCA 2013 (subject to various exclusions) as a scheme to which all of the following elements apply:
    (a) the purpose or effect of the scheme is to enable persons taking part in the scheme to contribute money, or to have money contributed on their behalf, to the scheme as consideration to acquire interests in the scheme;
    (b) those interests are rights to participate in, or receive, financial benefits produced principally by the efforts of another person under the scheme (whether those rights are actual, prospective, or contingent, and whether they are enforceable or not); and
    (c) the holders of those interests do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).
35. An entity (such as a unit trust) that satisfies the MIS definition and that carries on specified investment activities as a business for customers will be a common form of "in business" investment entity financial institution under the IGA definition.[20]
36. A number of other types of trusts (such as family trusts) will generally not carry on a business on behalf of customers. Therefore, if this is the case, they will not be "in business" investment entities under the IGA definition. However, as explained further below, such trusts could still (depending on the circumstances) be "deemed" investment entities.

Example 1 – *Whether a trust is an "in business" investment entity under the IGA definition?*

Collective Trust is a New Zealand unit trust established under the Unit Trust Act 1960 that carries on specified collective portfolio management activities for customers as a business.

Is Collective Trust an "in business" investment entity under the IGA definition?

Yes.

Application to trusts of the "in business" part of the U.S. Treasury Regulations definition of investment entity[21]

37. An entity is an "in business" investment entity under the U.S. Treasury Regulations where it "primarily" conducts as a business one or more of the specified investment activities for or on behalf of a customer. An entity is treated as "primarily conducting as a business" such investment activities, in this regard, if the entity's gross income attributable to these activities equals or exceeds 50% of the entity's total gross income during the specified period (i.e. if the entity's gross income is primarily attributable to such specified investment activities during this period). In other words, the gross income derived from providing investment services to customers must be the primary source of the entity's income.

---

[18] Other elements of the "business" definition are not considered to be relevant in the FATCA context.

[19] A unit trust that is managed by an investment entity will also be a financial institution under the IGA definition (a deemed investment entity – outlined below) even if it does not carry on a business itself.

[20] A MIS that is managed by an investment entity will also be a financial institution under the IGA definition (a deemed investment entity – outlined below) even if it does not carry on a business itself.

[21] This is assuming that the trust has decided to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA to determine its FATCA status.

Trusts as "deemed" Investment Entities

38. This guidance will now, having outlined the circumstances where a trust will be an "in business" investment entity under the IGA and the U.S. Treasury Regulations definitions, outline the circumstances where a trust will be a "deemed" investment entity under the IGA and the U.S. Treasury Regulations definitions.

Application to trusts of the "deemed" part of the definition of investment entity in the IGA

39. The IGA definition of investment entity deems an entity to be an investment entity where the entity is "managed" by an "in business" investment entity.

40. An entity (such as a trust) will be "managed" by an investment entity (in this way) where the "managing" investment entity is in charge of, administers and regulates, or maintains some control or influence over the "managed" entity's activities[22]. This includes management of the entity's assets (in whole or part).

41. The issue of whether an entity "manages" another entity will always be a question of fact. However, an "in business" investment entity trustee of a trust will generally manage the trust. An "in business" investment entity discretionary fund manager that performs specified investment activities for a trust can also manage the trust.

42. However, where a trust obtains merely ad hoc advice on its portfolio management from an "in business" investment entity and the trustees of that trust: (a) are not investment entities; and (b) are otherwise responsible for the management of the trust/trust's assets (including considering such advice, making investment decisions, and managing the portfolio), this will not constitute "management" by an investment entity under the IGA and the trust will not be a "deemed" investment entity under the IGA definition.

Example 2 – *Whether a trust is a "deemed" investment entity under the IGA definition?*

A discretionary family trust is not in business. The trust's assets consist of a share portfolio and the family home. The share portfolio represents 20% of the trust's assets. The trustee is not an investment entity. The trustee out-sources the management of the share portfolio to Fund Manager (which is an "in business" investment entity). Fund Manager has a written mandate to acquire and sell shares subject to the terms of the mandate. Fund Manager regularly buys and sells shares in accordance with this mandate.

Is the trust "managed" by Fund Manager, in terms of the IGA definition of a "deemed" investment entity?

Yes.

The trust is managed by Fund Manager (an "in business" investment entity), which regularly performs specified investment activities for it and manages the share portfolio. Fund Manager is not required to manage all the trust's assets in order for it to manage the trust. The trust is a "deemed" investment entity, and, therefore, a financial institution, under the IGA definition.

Example 3 – *Whether a trust is a "deemed" investment entity under the IGA definition?*

A discretionary trust is not in business. The trust's assets consist of shares and bonds. The trust has two individual trustees. Trustee A (one of the individual trustees) has been empowered to manage and administer all of the assets of the trust. Trustee A manages the trust and does not out-source the management to an "in business" investment entity.

Is the trust a "deemed" investment entity under the IGA definition?

No.

The trust is managed by Trustee A, who is an individual and, therefore, cannot be an "entity" under the IGA. It follows that Trustee A cannot be an "in business" investment entity. Trustee A also does not out-source the management to an "in business" investment entity. Therefore, the family trust is not a "deemed" investment entity under the IGA definition and is not a financial institution.

Example 4 – *whether a trust is a "deemed" investment entity under the IGA definition?*

A discretionary family trust is not in business. The trust's assets consist of a share portfolio.

The trustee of the trust is a corporate trustee that has been specifically set up to be the trustee of only that trust and to manage the trust. There are no other trustees of the trust. The trust does not outsource the management of the portfolio. The corporate trustee is not in business and is not an investment entity. The corporate trustee has been put in place to protect against unlimited liability that would otherwise arise to a natural person trustee.

Is the trust a "deemed" investment entity under the IGA definition?

No.

The trust is managed by the corporate trustee. The corporate trustee in question is not an investment entity. Therefore, the trust is not a "deemed" investment entity under the IGA definition and is not a financial institution.

[22] Refer to definition of "manage" in the Concise Oxford Dictionary 11th Edition.

Application to trusts of the "deemed" part of the definition of investment entity in the U.S. Treasury Regulations[23]

43. A trust will be a "deemed" investment entity under the U.S. Treasury Regulations where:

- The trust is "managed" by a relevant financial institution [depository institution, custodial institution, defined type of insurance company, defined type of holding company, defined type of treasury centre, or an "in business" investment entity as set out in §1.1471-5(e)(4)(i)(B) of the U.S. Treasury Regulations]. An entity (such as a trust) is "managed" by another entity under the Regulations if the managing entity performs, either directly or through another third-party service provider, any[24] of the specified investment activities (set out in the investment entity definition) on behalf of the managed entity]; and
- The trust's gross income is primarily attributable to investing, reinvesting, or trading in financial assets over the specified period. The trust's gross income will be primarily attributable to investing, reinvesting, or trading in financial assets (in this respect) if its gross income attributable to investing, reinvesting, or trading in financial assets equals or exceeds 50% of its gross income over the specified period.

Example 5 – ***Whether a trust is a deemed investment entity under the U.S. Treasury Regulations definition?***

A discretionary trust is not in business. The trust's assets consist of shares and bonds. Over the specified period in the preceding three years, all of the trust's income was attributable to investing in financial assets. Global shares make up 20% by value of the trust's total assets. The global share portfolio is managed by Fund Manager (which has discretionary authority to acquire and sell shares subject to the terms of a mandate), which is an "in business" investment entity.

Is the trust a "deemed" investment entity under the U.S. Treasury Regulations?

Yes.

The trust is managed by Fund Manager (an "in business" investment entity). Fund Manager is not required to manage all the trust's assets in order for it to manage the trust. The trust's income is also primarily attributable to investing in financial assets over the specified period. The trust will be a "deemed" investment entity under the U.S. Treasury Regulations investment entity definition, and therefore will be a financial institution.

Example 6 – ***Whether a trust is a deemed investment entity under the U.S. Treasury Regulations definition?***

A discretionary family trust is not in business. The trust has a share portfolio (representing 40% of the trust's assets) and two rental properties (representing 60% of the trust's assets). Over the specified period in the preceding three years, 40% of the trust's gross income has been derived from investing in these shares and 60% of the trust's gross income has been derived from these rental properties. The trustee is not an investment entity. However, the trustee out-sources the management of the share portfolio to Fund Manager (which is an "in business" investment entity). Fund Manager has a written mandate to acquire and sell shares subject to the terms of the mandate. Fund Manager regularly buys and sells shares for the trust in accordance with this mandate.

Is the trust a "deemed" investment entity under the U.S. Treasury Regulations?

No.

The trust is managed by Fund Manager (an "in business" investment entity). Fund Manager is not required to manage all the trust's assets in order for it to manage the trust. However, the trust's income is not primarily attributable to investing, reinvesting, or trading in financial assets[25] (the trust's share portfolio). This is because the proportion of the trust's gross income derived from such activities is less than 50% of its gross income over the specified period. Instead, the trust's income is primarily attributable to its direct interest in rental properties (non-financial assets). Therefore, the trust is not a "deemed" investment entity under the U.S. Treasury Regulations definition and would not be a financial institution.

---

[23] This is assuming that the trust has decided to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA in order to determine its FATCA status.

[24] The literal wording of this part of the definition of investment entity is broad in scope. However, it should be read in the context of Internal Revenue Bulletin: 2014-13 (which contains final and temporary regulations relating to FATCA), which provides that, for example, an introducing broker does not manage an entity, in this regard, if it does not have discretionary authority to manage its clients' assets.

[25] The expression "financial assets" is defined in §1.1471-5(e) (4)(ii) of the U.S. Treasury Regulations and does not include a direct interest in real property.

44. The table set out below summarises the circumstances when a New Zealand trust will be a NZFI:

Summary of the circumstances when a New Zealand trust will be a NZFI

Step	Question	If yes, then	If no, then
1.	Is the trust a New Zealand resident[26] (or does the trust have a New Zealand branch)?	Go to step 2.	The trust is not a NZFI for the purposes of the IGA.
2.	Does the trust carry on a business?	Go to step 3.	Go to step 4.
3.	Is the trust any of the following? • An "in business" investment entity; • A custodial institution; • A depository institution; or • A specified insurance company.	Go to step 5.	Go to step 4.
4.	Is the trust managed by an investment entity? [See paragraphs 39-42 of this guidance for an explanation of what "managed" means in this context].	Go to step 5.	The trust is a NFFE for the purposes of the IGA. [An NFFE does not have FATCA due diligence and reporting obligations. However, if it is a passive NFFE that holds, for example, a bank account it will need to disclose its Controlling Persons to the bank on request].
5.	*Prima facie*, the trust is a NZFI under the Inter- governmental Agreement (IGA) definitions: *Has the trust decided under Article 4(7) of the IGA to use a definition in the U.S. Treasury Regulations (in lieu of a corresponding definition in the IGA) to determine its status?*	Go to step 6.	The trust is a NZFI for the purposes of the IGA.
6.	Is the trust a NZFI after applying the relevant definition in the U.S. Treasury Regulations?	The trust is a NZFI for the purposes of the IGA.	The trust is a NFFE for the purposes of the IGA. [An NFFE does not have FATCA due diligence and reporting obligations. However, if it is a passive NFFE that holds, for example, a bank account it will need to disclose its Controlling Persons to the bank on request].

45. In broad terms, a trust that is a NZFI will be a Reporting NZFI that needs to register with the IRS and undertake FATCA due diligence on its financial accounts (that are not exempted or excluded) **unless** it is within a category of Non-Reporting NZFI that exempts it from such requirements. The category of Non-Reporting NZFI that is most likely to apply to NZFI trusts (in this way) is the "trustee documented trust" category. Section IV(A) of Annex II of the IGA provides that a trust (such as a family trust) established under the laws of New Zealand that would **otherwise** be a **Reporting** NZFI can be a "trustee documented trust" and engage a trustee (that is a Reporting U.S. Financial Institution, Reporting Model 1 FFI,[27] or Participating FFI) to undertake its FATCA reporting on its behalf. In these circumstances, provided that the financial institution trustee reports all information required to be reported with respect to all reportable accounts of the trust, the trust will be treated as a deemed compliant FFI, and, therefore, a **Non-Reporting** NZFI. **A trustee documented trust is not required to register with the IRS.**

46. This guidance will now, having set out the circumstances where trusts will be NZFIs, explain what FATCA due diligence and reporting obligations Reporting NZFI trusts will have under the IGA. The focus of this part of the guidance will be on Reporting NZFI trusts that are "investment entities" (the category of financial institution that is most likely to apply to trusts).

[26] This excludes any branch located outside New Zealand.

[27] This category would include Reporting NZFIs.

FATCA Due Diligence and Reporting obligations of Reporting NZFI "Investment Entity" Trusts

47. Reporting NZFI investment entity trusts will be required to register with the IRS and undertake FATCA due diligence on their financial accounts (that are not exempted or excluded) to determine whether they have any reportable accounts.[28] Where the Reporting NZFI trust is "solely"[29] an investment entity any equity or debt interests (that are not exempted or excluded)[30] in the trust are financial accounts of the trust. The Reporting NZFI will need to carry out FATCA due diligence on these accounts and (if the accounts are reportable) report on these accounts.

Equity or Debt Interests[31]

48. Equity or debt interests in such an investment entity trust include for the purposes of the IGA:
    - **Equity interest:**
        - Any person that is treated as a settlor or beneficiary of all or a portion of a trust. A Specified U.S. Person is treated as a beneficiary of a trust if they have the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution ("mandatory beneficiary") or may receive, directly or indirectly, a discretionary distribution from the trust ("discretionary beneficiary"). In broad terms, a mandatory beneficiary has an entitlement to an amount of property at a set time, whereas a discretionary beneficiary does not have an enforceable right to an amount of property at any set time. *[In determining whether a discretionary beneficiary is the holder of an "equity interest" (and therefore is an account holder of a financial account), a Reporting NZFI investment entity trust is permitted to apply the definition of "equity interest" in §1.1471- 5(b)(3)(iii)(B) of the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA and treat a discretionary beneficiary as being an equity interest account holder for a period only where they have received a distribution directly or indirectly from the trust in that period].*
        - Any other natural person exercising ultimate effective control over the trust (this could include, for example, a trustee or protector if they exercise ultimate effective control over the trust).
    - **Debt interest:** A debt interest could be held by, for example, a beneficiary (current account) or a third party lender.

49. The following guidance sets out how a Reporting NZFI investment entity trust can calculate the "balance or value" of an equity interest in the trust and how it can determine whether a mandatory or discretionary beneficiary of the trust is a "pre- existing" or "new" account holder of an equity interest. These two points are relevant to FATCA due diligence and reporting (i.e. in the IGA there are "balance or value" dollar threshold exemptions for due diligence and reporting and different due diligence procedures that apply to pre-existing accounts and new accounts.)[32] *[This guidance is based on the assumption that a Reporting NZFI investment entity trust, when determining whether a discretionary beneficiary has an "equity interest" in the trust, will adopt the U.S. Treasury Regulations definition of "equity interest" and treat a discretionary beneficiary as being an equity interest account holder in a period **only** where the beneficiary has received a distribution directly or indirectly from the trust in that period, so that they are only required to carry out due diligence on those specific discretionary beneficiaries.]*

How to calculate the "balance or value" of an equity interest in a Reporting NZFI investment entity trust

50. A Reporting NZFI investment entity trust must, for FATCA due diligence and reporting purposes, determine the "balance or value" of any equity interest (that is not exempted or excluded).

51. The IGA does not define the valuation methodology that a Reporting NZFI needs to adopt to determine the "balance or value" of such equity interests. However, Inland Revenue expects that the Reporting NZFI would adopt the most accurate valuation methodology that is reasonably available in the circumstances.

---

[28] Reporting NZFIs can choose to adopt the due diligence procedures in the U.S. Treasury Regulations in lieu of the procedures in Annex I of the IGA (see Annex I(I)(C) of the IGA). However, this guidance will focus on the application of the procedures under the IGA.

[29] The following guidance is based on the assumption that the relevant trust is "solely" an investment entity. This could be compared with, for example, a circumstance where a trust is both an investment entity and a custodial institution. There is a specific rule in Article 1(1)(s)(2) of the IGA which sets out when equity and debt interests in such financial institutions are financial accounts. This is outlined in detail in Inland Revenue's FATCA "reportable accounts" guidance notes.

[30] These exemptions/exclusions (including the "regularly traded" exclusion) are outlined in detail in Inland Revenue's FATCA "due diligence" and "reportable accounts" guidance notes.

[31] Any reference to "settlor" or "beneficiary" in the following guidance should be read as covering those natural persons that are **solely** settlors or beneficiaries of the trust (cf, for example, a circumstance where a beneficiary may also exercise ultimate effective control over the trust).

[32] This is set out in detail in Inland Revenue's FATCA "due diligence" guidance notes.

52. This may be the value calculated by the Reporting NZFI investment entity trust for the purpose that requires the most frequent determination of value. For settlors and beneficiaries, for example, this may be the value that is used for reporting to them, which will generally align with market value. Other methods (including acquisition value, valuations based on a recognised accounting standard, and valuations measured on a recognised actuarial basis) will also be permissible if they reasonably calculate the value of the interest.

Balance of value of a settlor's equity interest in a Reporting NZFI investment entity trust

53. The balance or value of a settlor's equity interest will be a question of fact. For example, a settlor may sometimes hold an interest in the whole of the trust (as opposed to being excluded from the trust). In such circumstances, the balance or value of the settlor's equity interest could be determined based on the total value of the assets of the trust and the value that is used for reporting to them.

Balance or value of a beneficiary's equity interest in a Reporting NZFI investment entity trust

54. Where a beneficiary is a mandatory beneficiary, the balance or value of their account could be determined as being the amount reported to them as being the total value of all the mandatory distributions that they are entitled to receive (directly or indirectly) from the trust. Where the beneficiary is a discretionary beneficiary, their account balance or value could be determined as being the amount reported to them as being the aggregate value of all discretionary distributions that they have received (directly or indirectly) from the trust in the relevant reporting period.

How to determine whether a mandatory or discretionary beneficiary is a "pre-existing" or "new" account holder of an equity interest

Pre-existing and new accounts of a mandatory beneficiary

55. A mandatory beneficiary holds an equity interest in a Reporting NZFI investment entity trust.

56. A mandatory beneficiary of such a trust should be treated as a pre-existing account holder for FATCA due diligence purposes if they are a mandatory beneficiary as of 30 June 2014. A mandatory beneficiary that is first appointed or acquires an interest in a Reporting NZFI investment entity trust after 1 July 2014 should be treated as a new account holder for FATCA due diligence purposes.

57. A financial account held by a mandatory beneficiary of such a trust should be treated as closed when the beneficiary has been removed as a mandatory beneficiary or the beneficiary disposes of the equity interest in the trust.

Pre-existing and new accounts of a discretionary beneficiary

58. A Reporting NZFI investment entity trust should, if it applies the "equity interest" definition in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA, treat discretionary beneficiaries as pre-existing or new equity account holders for FATCA due diligence purposes as follows:

    - Where a discretionary beneficiary receives a trust distribution directly or indirectly from the trust between 1 July 2013 and 30 June 2014, that financial account should be treated as a pre-existing financial account. If the same discretionary beneficiary also receives a trust distribution directly or indirectly in the period from 1 July 2014-31 March 2015 that financial account should be treated as a pre-existing financial account.
    - Where a discretionary beneficiary receives its **first** trust distribution directly or indirectly from the trust after 1 July 2014, that financial account should be treated as a new financial account that is opened in the first reporting period that the discretionary beneficiary receives the distribution.

Reporting of equity or debt interests

59. If a Reporting NZFI investment entity trust maintains any equity or debt interest financial accounts (that are not exempted or excluded), carries out FATCA due diligence on these accounts, and identifies that they are U.S. Reportable Accounts or held by non-participating financial institutions it will, subject to the following, need to report to Inland Revenue annually about them.[33]

[33] The trust will need to report (to Inland Revenue) payments that it makes to non-participating financial institutions on an annual basis for 2015 (the period ended 31 March 2016) and 2016 (the period ended 31 March 2017): see Article 4(1)(b) of the IGA.

A trust can be an account holder

60. This guidance has focused above on how FATCA applies to New Zealand trusts that "maintain" accounts and are financial institutions. However, trusts can also "hold" accounts for FATCA purposes. The definition of "account holder" is set out in Article 1(1)(dd) of the IGA as meaning:

> "…the person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account. A person, other than a Financial Institution, holding a Financial Account for the benefit of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for the purposes of this Agreement, and such other person is treated as holding the account…"

61. A trust can be an account holder for FATCA purposes even though it is not recognised as a separate legal entity at common law. This is apparent from the following elements of the IGA:

    (a) An "account holder" is defined in Article 1(1)(dd) of the IGA to mean "the person listed or identified as the holder of a Financial Account… A person, other than a Financial Institution, holding a Financial Account for the benefit of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for the purposes of this Agreement, and such other person is treated as holding the account." A "person" is, in turn, defined in the U.S. Treasury Regulations to mean a person defined in section 7701(a)(1) of the Internal Revenue Code. Under section 7701(a)(1) the term "person" includes an individual, a trust, estate, partnership, association, company, or corporation. Therefore, a trust is a "person" that can be an account holder.

    (b) The IGA contemplates that a trust is an "entity" that can be an account holder.

    There are specific FATCA due diligence procedures in Annex I of the IGA that Reporting NZFIs need to apply to "entity" accounts that they maintain. Article 1(1)(gg) of the IGA also defines "entity" as meaning a "legal person or a legal arrangement such as a trust". Therefore, the IGA contemplates that trusts can be entity account holders that will be subject to the "entity" account due diligence procedures (see also the comments below regarding accounts held by trusts that are passive NFFEs).

    (c) The IGA contemplates that a passive NFFE trust is a type of "entity" that can be an account holder. A Reporting NZFI that maintains an account (that is not exempt or excluded) that is held by a passive NFFE trust will need to apply the FATCA due diligence procedures to determine whether the passive NFFE has any U.S. Controlling Persons. The IGA "Controlling Persons" regime attributable to passive NFFEs requires the identification of Controlling Persons which includes (in the context of a trust) a trustee, settlor, protector, beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust[34]. The definition of "Controlling Persons" (which covers various trust roles) clearly contemplates that a trust can be a passive NFFE entity trust account holder.

When a trust will be an account holder

62. This then raises the question of **when** a trust will be an "account holder" for FATCA purposes in terms of Article 1(1)(dd) of the IGA.

63. Where a Reporting NZFI maintains an account that is listed or identified as being held by a trust, the Reporting NZFI should, on the face of it,[35] treat the trust as the account holder and subject the trust to the "entity" FATCA due diligence procedures. For example, where the account holder is listed as:

    - Mr West as trustee of the West family trust; or
    - West family trust; or
    - West family trust account;

    then the Reporting NZFI can, on the face of it, assume that the account holder is a trust and apply the entity due diligence procedures to that financial account.

64. On the other hand, where the account holder is listed or identified as an individual (not in a trustee capacity), then the Reporting NZFI can assume that the account is held by that individual and not as a trustee of a trust. A constructive trust is an example of a trust where a trust relationship may not be identified in the course of a NZFI determining the status of an account holder as an individual or an entity.

---

[34] The scope of the "Controlling Persons" regime is discussed in detail below from paragraph 80.

[35] However, the "listed or identified" element of the definition of "account holder" in Article 1(1)(dd) of the IGA is subject to the fact that "….A person, other than a Financial Institution, holding a Financial Account for the benefit of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for the purposes of this Agreement, and such other person is treated as holding the account." Therefore, the issue of who the account holder is will always be a question of fact.

65. A Reporting NZFI may at first identify an account as being held by an individual but subsequently, as part of the due diligence process, come across information that discloses that the individual is in fact a trustee for the financial account. In these circumstances, the Reporting NZFI has "identified" the account holder as a trust and (if the account is not exempted or excluded) should apply the entity due diligence procedures to determine whether the trust is a Specified U.S. Person, passive NFFE with U.S. Controlling Persons, or a non-participating financial institution (reportable accounts).[36] Reporting NZFIs should implement procedures so that they can identify any trust relationship as part of the account opening documentation process.

66. This guidance will now, having set out some of the key principles about when trusts can be Reporting NZFIs (with a focus on the investment entity category of financial institution, which will be particularly relevant in a trusts context) with FATCA due diligence obligations (and how trusts can also be account holders), outline how FATCA will apply to the following types of trusts (that are common in New Zealand):
    - New Zealand family trusts;
    - New Zealand trading trusts; and
    - New Zealand charitable trusts.

New Zealand Family Trusts

67. A "family trust" is simply a trust that has a beneficiary class centred on a family group. There are no other defining features in respect of the assets they hold or activities they carry out that separate family trusts from other discretionary trusts. They operate in a spectrum from "simple" trusts that hold one asset (such as a family home) through to trusts that hold numerous complex assets and/or engage in complex financial dealings. As such, there is no "one size fits all" approach to family trusts for FATCA purposes.

68. The guidance sets out below:
    (1) The circumstances when New Zealand family trusts will be financial institutions for FATCA purposes; and
    (2) The FATCA obligations that Reporting NZFIs will have when they maintain financial accounts that are held by New Zealand family trusts.

Circumstances when New Zealand Family Trusts will be Financial Institutions

69. The potential application of FATCA to New Zealand family trusts has been touched on in some of the discretionary trust examples outlined above. The key points to note are:
    (a) Most New Zealand family trusts will not be in business and will not have customers. Therefore, they would be unlikely to be custodial institutions, depository institutions, or "in business" investment entities.
    (b) A New Zealand family trust could (depending on the circumstances) be a "deemed" investment entity, and, therefore, a financial institution, under the relevant[37] definition in the IGA or the U.S. Treasury Regulations:
        - A family trust will be "managed" in terms of the "deemed" part of the definition of investment entity in the IGA and the U.S. Treasury Regulations where the relevant[38] financial institution "managing" entity (that could be, for instance, a trustee or discretionary fund manager) manages the trust. This includes management of the trust's assets in whole or part (see the above examples).
        - A family trust that is "managed" by a relevant financial institution would be **less likely** to be a "deemed" investment entity under the U.S. Treasury Regulations definition (compared with the IGA definition). This is because a number of family trusts (even if managed by a relevant financial institution) may not have gross income that is primarily attributable to investing, reinvesting or trading financial assets (equal or exceeding the 50% threshold) during the specified period. Trusts that do not primarily derive income from financial assets in this way will not be "deemed" investment entities under the U.S. Treasury Regulations definition even if they are managed.[39] Example 6 (see above) illustrates this point.

[36] These concepts are explained in detail in Inland Revenue's FATCA "due diligence" guidance notes.

[37] This will depend on whether the trust has chosen to use the U.S. Treasury Regulations definition of "investment entity."

[38] The issue of what will be a "relevant" financial institution (in this regard) will depend on whether the "managed" entity has decided to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA. As noted above, a relevant "managing" entity under the IGA definition will be an "in business" investment entity, whereas under the U.S. Treasury Regulations definition a relevant managing entity extends to cover certain other types of entities as well.

[39] This is based on the assumption that the trust in question chooses to use the U.S. Treasury Regulations definition of "investment entity" in lieu of the corresponding definition in the IGA.

(c) Where a New Zealand family trust is "solely" an investment entity (for example, because it is an investment entity under the relevant[40] IGA or U.S. Treasury Regulations definition but does not come within any other type of financial institution), any equity or debt interest in the trust (that is not exempted or excluded) will be a financial account. A New Zealand family trust investment entity that is a **Reporting NZFI** will need to register with the IRS, carry out FATCA due diligence procedures on its financial accounts and report to Inland Revenue on its U.S. Reportable Accounts and accounts held by non- participating financial institutions[41] on an annual basis.

(d) However, section IV(A) of Annex II of the IGA provides that a trust (such as a family trust) established under the laws of New Zealand that would **otherwise** be a **Reporting** NZFI can be a "trustee documented trust" and engage a trustee (that is a Reporting U.S. Financial Institution, Reporting Model 1 FFI,[42] or Participating FFI) to undertake its FATCA reporting on its behalf. In these circumstances, provided that the trustee reports all information required to be reported with respect to all reportable accounts of the trust, the trust will be treated as a deemed compliant FFI, and, therefore, a **Non-Reporting** NZFI. **A trustee documented trust is not required to register with the IRS.**

(e) A New Zealand family trust that is not a financial institution is likely to be a NFFE. An NFFE does not have FATCA registration, due diligence, and reporting obligations. However, if it is a passive NFFE[43] (a type of passive vehicle that is not a financial institution) that holds a bank account it will need to disclose its controlling persons to the bank on request.

FATCA obligations of Reporting NZFIs that maintain financial accounts held by New Zealand family trusts

70. A Reporting NZFI that maintains an account (that is not exempted or excluded) that is held by a New Zealand family trust will need to carry out FATCA due diligence on the account to determine whether it is reportable (in this context,44 held by a passive NFFE with U.S. Controlling Persons or by a non-participating financial institution).

The trust is most likely to be either a financial institution or an NFFE.[45] Therefore, the Reporting NZFI can proceed on this basis.

Determining whether a New Zealand family trust account holder is a financial institution

71. A Reporting NZFI will need to carry out the following FACTA due diligence procedures to determine whether the New Zealand family trust account holder is a financial institution:

    a. For pre-existing accounts (i.e. accounts as of 30 June 2014), a Reporting NZFI will be required to review information maintained for regulatory or customer relationship purposes [including information collected pursuant to Anti-Money Laundering/Know Your Customer procedures ("AML/KYC" procedures)] to determine whether the information indicates that the trust account holder is a financial institution. If the information indicates that the trust is a financial institution or the Reporting NZFI verifies the trust's GIIN on the published IRS FFI list then the account will not be a U.S. Reportable Account.[46]

    b. For new accounts (i.e. accounts opened on or after 1 July 2014)[47] a Reporting NZFI will be able to reasonably determine that the trust account holder is a NZFI on the basis of the trust's GIIN or other information that is publicly available or in their possession. Alternatively, a Reporting NZFI could obtain a self-certification from the trust account holder whether it is a NZFI. If the Reporting NZFI identifies that the account holder is an NZFI the account will not be a U.S. Reportable Account.[48]

---

[40] This will depend on whether the trust has chosen to use the U.S. Treasury Regulations definition of "investment entity" in lieu of the corresponding definition in the IGA.

[41] The trust will need to carry out FATCA due diligence procedures to identify whether any of its financial accounts are held by non-participating financial institutions and, if so, the trust would need to report such payments to Inland Revenue on an annual basis for 2015 (the period ended 31 March 2016) and 2016 (the period ended 31 March 2017).

[42] This category would include Reporting NZFIs.

[43] The definitions of "passive NFFE" and "controlling persons" are set out in detail below from paragraph 74 under the heading "Determining whether a family trust account holder is a passive NFFE with U.S. Controlling Persons".

[44] This is assuming that the New Zealand family trust is not itself a Specified U.S. Person.

[45] Reporting NZFIs should be aware that there are a number of types of "entity" classification that could be relevant to trusts. For example, a trust could be a Specified U.S. Person, NFFE, U.S. Person that is not a Specified U.S. Person, NZFI or other Partner Jurisdiction financial institution, a participating FFI, a deemed compliant FFI, an exempt beneficial owner, or non-participating financial institution. These different categories of entity classification are explained below (in the context of new entity accounts) under the heading "A framework for Reporting NZFIs applying the new entity account due diligence procedures to Trusts." **However, in practical terms, a New Zealand family trust account holder is most likely to either be a NZFI or an NFFE. Therefore, this guidance will focus on these two categories. If a Reporting NZFI is unable to establish the status of a family trust account holder as being a NZFI or an NFFE it will need to consider the other entity categories.**

[46] However, if the trust is a non-participating financial institution the Reporting NZFI would still need to report payments that it has made to the trust for 2015 (the period ended 31 March 2016) and 2016 (the period ended 31 March 2017).

[47] However, as noted at paragraphs 104-106 of Inland Revenue's FATCA "due diligence" guidance notes, IRS Notice 2014-33 has the effect of allowing Reporting NZFIs to **treat** new entity financial accounts opened on or after 1 July 2014 and before 1 January 2015 as pre-existing accounts for FATCA due diligence purposes. As set out in the Notice, the ability to treat such accounts as pre-existing accounts does not permit application to such accounts of the U.S. $250,000 balance exception for pre-existing accounts that are not required to be reviewed, identified, or reported.

[48] However, if the trust is a non-participating financial institution the Reporting NZFI would still need to report payments that it has made to the trust for 2015 (the period ended 31 March 2016) and 2016 (the period ended 31 March 2017).

72. Therefore, the pre-existing and new accounts categories both provide scope for the Reporting NZFI account maintainer to make "reasonable" determinations (based on various defined sources of information – such as account information, the account holder's GIIN, or other information that is publicly available or in their possession) of whether a family trust account holder is a financial institution. The guidance expands on this ability to "reasonably" determine such an account holder's status below (from paragraph 98) in "A framework for Reporting NZFIs applying the new entity account due diligence procedures to Trusts."

73. For new accounts a Reporting NZFI account maintainer could, alternatively, obtain a self-certification from the family trust account holder to determine whether it is a NZFI.

Determining whether a New Zealand family trust account holder is a passive NFFE with U.S. Controlling Persons

74. A Reporting NZFI that determines that a New Zealand family trust account holder is not a financial institution needs to consider whether the trust is a passive NFFE with U.S. Controlling Persons.

75. Section VI(B)(2) of Annex I of the IGA defines "NFFE" as being a:

- Non-U.S. entity ["Non-U.S. entity" is defined in Article 1(1)(hh) of the IGA as being an entity that is not a "U.S. person"[49]] that is not an FFI as defined in the U.S. Treasury Regulations;
- Entity described in section VI(B)(4)(j) of Annex I (i.e. an active NFFE that comes within that section); or
- Non-U.S. entity ["Non-U.S. entity" is defined in Article 1(1)(hh) of the IGA as being an entity that is not a "U.S. person"] that is established in New Zealand or another Partner Jurisdiction and that is not a financial institution.

76. If the Reporting NZFI identifies that the New Zealand family trust account holder is an NFFE, the next[50] question is whether the NFFE is either an active or passive NFFE.

77. Annex I(VI)(B)(3) of the IGA defines "passive NFFE" as meaning any NFFE that is not (i) an Active NFFE, or (ii) a withholding foreign partnership or withholding foreign trust pursuant to relevant U.S. Treasury Regulations. Annex I(VI)(B)(4) of the IGA, in turn, defines "active NFFE". The definition of "active NFFE" is set out in full in the Appendix 1 to this guidance. Paragraph (a) of that definition (the paragraph of the definition that is likely to apply to qualify an NFFE for active NFFE status) provides that:

> "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."

78. The Reporting NZFI should, if applicable, adopt the following due diligence procedures for determining whether the New Zealand family trust NFFE account holder is either an active or passive NFFE:

- where the account is a pre-existing entity account, obtain a self-certification from the account holder of its status (which may be on IRS form W8 or W9, or similar agreed form), as either a passive or active NFFE, unless the Reporting NZFI has information in its possession or which is publicly available, based on which it can reasonably determine that the account holder is an active NFFE.[51]
- where the account is a new entity account, obtain a self-certification of the account holder's status as either a passive or active NFFE, unless the Reporting NZFI reasonably determines that the account holder is an active NFFE based on information that is publicly available or in the possession of the Reporting NZFI.[52]

79. If the Reporting NZFI determines that the New Zealand family trust account holder is a passive NFFE they will need to identify the "Controlling Persons" of the passive NFFE and determine whether any of the Controlling Persons are U.S. citizens or tax residents ("U.S. Controlling Persons").

Controlling Persons

80. "Controlling Persons" are defined in the IGA to mean (in the context of trusts):

- settlor;
- trustees;
- protector (if any);
- beneficiaries or class of beneficiaries; and
- any other natural person exercising ultimate effective control over the trust.

The term Controlling Persons shall be interpreted in a manner consistent with the Financial Action Task Force Recommendations ("FATFR").

---

[49] Article 1(1)(ee) of the IGA defines "U.S. Person" as meaning: "…..a U.S. citizen or resident individual, a partnership or corporation organized in the United States or under the laws of the United States or any State thereof, a trust if (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust; and (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States. This subparagraph 1(ee) shall be interpreted in accordance with the U.S. Internal Revenue Code….."

[50] However, as explained below, it may be appropriate in certain circumstances for the Reporting NZFI that maintains the account to change the order of the enquiry.

[51] See Annex I section IV(D)(4)(b) of the IGA.

[52] See Annex I section V(B)(1) and (3) of the IGA.

Beneficiaries as Controlling Persons

81. The reference in the definition of "Controlling Persons" to "beneficiaries or class of beneficiaries" is potentially broad in scope. However, as noted above, the definition needs to be interpreted in a manner consistent with the FATFR.

82. If a beneficiary of a passive NFFE trust account holder has a right to receive a mandatory distribution either directly or indirectly from the trust the Reporting NZFI account maintainer will need to identify the beneficiary as a controlling person of the trust.[53]

83. However, FATFR provides that for beneficiary(ies) of trusts that are designated by characteristics or by class, institutions (such as Reporting NZFIs that maintain accounts held by such trusts) only need to obtain sufficient information concerning the beneficiary to satisfy the institution that it will be able to finally establish the identity of the beneficiary at the time of pay-out or when the beneficiary intends to exercise vested rights.[54]

84. By extension of this point, a Reporting NZFI can decide to identify discretionary beneficiaries of a passive NFFE trust account holder as controlling persons of the trust **if and when** the beneficiaries receive a distribution either directly or indirectly in the period. However, a Reporting NZFI would (if they decide to only identify discretionary beneficiaries as controlling persons in such circumstances) need to develop procedures to identify whether, for example, such distributions have been made by the trust.[55]

Reporting NZFIs can rely on AML/KYC Procedures to determine Controlling Persons

85. The IGA also provides that information collected and maintained under AML/KYC procedures can be used to determine "Controlling Persons" as defined in the IGA. For example:
    - where the account is a pre-existing entity account the Reporting NZFI may rely on information collected and maintained pursuant to AML/KYC procedures to determine the Controlling Persons;[56] and
    - where the account is a new entity account the Reporting NZFI must identify the Controlling Persons as determined under AML/KYC procedures.[57]

Determining whether any Controlling Persons are "U.S." Controlling Persons

86. Once a Reporting NZFI has identified the "Controlling Persons" they will then need to determine whether any of those persons are "U.S." Controlling Persons. The Reporting NZFI would need to apply the following process to determine this matter:
    - where the account is a pre-existing entity account the Reporting NZFI may rely on:[58]
        - Information collected and maintained pursuant to AML/KYC procedures when the account has a balance or value that does not exceed U.S. $1,000,000; or
        - A self-certification (which may be on an IRS Form W-8 or W-9, or a similar agreed form) from the account holder or such Controlling Person if the account has a balance or value that exceeds U.S. $1,000,000.
    - where the account is a new entity account the Reporting NZFI may rely on a self-certification from the account holder or such Controlling Person.[59]

87. If the Reporting NZFI that maintains an account identifies that the trust account holder is a passive NFFE with any U.S. Controlling Person(s) the account will (unless exempted or excluded) be a U.S. Reportable Account.

88. It may be appropriate in certain circumstances for the Reporting NZFI that maintains the account to change the order of the enquiry. That is, having identified the trust account holder as being an NFFE, a Reporting NZFI may then decide to determine or obtain a self-certification (in accordance with the procedures in the IGA) for pre-existing entity accounts, or require self-certification for new entity accounts regarding whether a Controlling Person of the NFFE is a U.S. citizen or resident. The further question,[60] as to whether or not the entity is an active or passive NFFE, would only be applied to those NFFEs which have any U.S. Controlling Person(s). Those accounts that are held by passive NFFEs with U.S. Controlling Persons will (unless exempted or excluded) need to be reported as U.S. Reportable Accounts.

---

[53] However, as explained below, a Reporting NZFI can rely on information collected pursuant to AML/KYC procedures to identify controlling persons.

[54] However, as explained below, a Reporting NZFI can rely on information collected pursuant to AML/KYC procedures to identify controlling persons.

[55] However, as explained below, a Reporting NZFI can rely on information collected pursuant to AML/KYC procedures to identify controlling persons.

[56] See Annex I section IV(D)(4)(a) of the IGA.

[57] See Annex I section V(B)(3)(b) of the IGA.

[58] See Annex I section IV(D)(4)(C) of the IGA.

[59] See Annex I section V(B)(3)(b) of the IGA.

[60] For those NFFEs where this "further question" is not posed, the Reporting NZFI would still have determined that the account holder is not a passive NFFE with U.S. Controlling Persons (on the basis of establishing that it is an NFFE that does not have any US Controlling Persons), and, therefore, will have determined that the account is not a U.S. Reportable account. Therefore, this approach is consistent with the scheme of the IGA, which, for NFFE accounts, only requires FATCA reporting (as U.S. Reportable accounts) of accounts held by passive NFFEs with U.S. Controlling Persons.

New Zealand Trading Trusts

89. A New Zealand trust could also be a trading trust. It is likely that New Zealand trading trusts will be either financial institutions or NFFEs, with the NFFE classification being the most likely.

Circumstances when New Zealand Trading Trusts will be Financial Institutions

90. A New Zealand trading trust that is in business should consider whether the activities that it undertakes mean that it is a custodial institution, a depository institution, an "in business" investment entity (in terms of the relevant[61] definition of "investment entity"), or a specified insurance company, and, therefore, a financial institution.
91. A New Zealand trading trust should also consider whether it is a "deemed" investment entity, and therefore, a financial institution on the basis that:
    - It has chosen to apply the IGA definition of "investment entity" and the trust is managed by an "in business" investment entity; or
    - It has chosen to apply the U.S. Treasury Regulations definition of "investment entity" and the following circumstances are satisfied: The trading trust is managed by a relevant financial institution that conducts specified investment activities for the trust and the trust's gross income is primarily attributable (equal or exceeding 50% of the trust's gross income in the specified period) to investing, reinvesting or trading in financial assets.
92. A New Zealand trading trust that is a **Reporting** NZFI will have FATCA registration, due diligence, and reporting obligations.
93. However, section IV(A) of Annex II of the IGA provides that a trust (such as a New Zealand trading trust) established under the laws of New Zealand that would **otherwise** be a **Reporting** NZFI can be a "trustee documented trust" and engage a trustee (that is a Reporting U.S. Financial Institution, Reporting Model 1 FFI,[62] or Participating FFI) to undertake its FATCA reporting on its behalf. In these circumstances, provided that the trustee reports all information required to be reported with respect to all reportable accounts of the trust, the trust will be treated as a deemed compliant FFI, and, therefore, a **Non-Reporting** NZFI. **A trustee documented trust is not required to register with the IRS.**
94. A New Zealand trading trust that is not a financial institution is likely to be an NFFE.

FATCA obligations of Reporting NZFIs that maintain financial accounts held by New Zealand trading trusts

95. As noted above, a trust can also be an account holder in a Reporting NZFI. This point applies equally to New Zealand trading trusts. This means that Reporting NZFIs (such as, for example, banks) that maintain accounts held by trading trusts will (unless the account is excluded or exempted) need to carry out FATCA due diligence (as outlined above regarding family trusts) on the account to determine if the account is reportable.

New Zealand Charitable Trusts

96. The Memorandum of Understanding that New Zealand has entered into with the U.S., with respect to the IGA, provides that:

    > **It is understood that organizations registered under the Charitable Trusts Act 1957 and the Charities Act 2005**, and donee organizations as defined in the Income Tax Act 2007, **would be treated as NFFEs that satisfy subparagraph B(4)(j) of section VI of Annex I** (Emphasis added).

97. Therefore, there is an understanding that such charitable trusts would be treated as active NFFEs coming within section VI(B)(4)(j) of Annex I of the IGA. A Reporting NZFI that maintains accounts held by an active NFFE will not be required to report the accounts.

[61] This will depend on whether the trading trust has decided to apply the U.S Treasury Regulations definition of investment entity.

[62] This category would include Reporting NZFIs.

A framework for Reporting NZFIs applying the new entity account due diligence procedures to Trusts[63]

98. The following guidance sets out an acceptable framework that Reporting NZFIs can apply when carrying out FATCA due diligence on new entity accounts (i.e. accounts opened on or after 1 July 2014) held by trusts. Reporting NZFIs are not required to follow this framework and other approaches to due diligence may be acceptable.
99. Section V(B) of Annex I of the IGA sets out the due diligence procedures for identifying the status for FATCA purposes for new entity accounts, such as trust accounts. A Reporting NZFI is required to determine whether a trust account holder is a:
    - Specified U.S. Person
    - New Zealand Financial Institution
    - Partner Jurisdiction Financial Institution
    - A Participating FFI
    - A deemed compliant FFI
    - Exempt beneficial owner
    - Active NFFE
    - Passive NFFE
    - Non-participating financial institution
100. Reporting NZFIs will need to report accounts that they maintain that are U.S. Reportable Accounts (held by Specified U.S. Persons, passive NFFEs that have U.S. Controlling Persons) or held by non-participating financial institutions.[64]
101. Generally speaking section V(B)(1) of Annex I of the IGA permits a Reporting NZFI to "reasonably determine" whether a new account holder is a NZFI, other Partner Jurisdiction FI, or active NFFE in certain defined circumstances. In all other cases, a Reporting NZFI must obtain self-certification from the account holder of its FATCA status. This process is explained in detail below.

A Reporting NZFI may "reasonably determine" a trust's FATCA status

102. A Reporting NZFI may "reasonably determine" that a trust account holder is a NZFI, other Partner Jurisdiction FI, or an active NFFE, if the Reporting NZFI can reasonably determine such status on the basis of the trust's GIIN, publicly available information, or information in their possession.
103. More specifically, a Reporting NZFI may reasonably determine that a trust account holder is a NZFI, other Partner Jurisdiction FI, or active NFFE on the basis of the following:
    (a) Identifying that the trust is a New Zealand resident entity or Partner Jurisdiction entity that has a GIIN and is a financial institution.
    (b) The Reporting NZFI may be aware, on the basis of publicly available information or information in their possession, that the account holder is a New Zealand unit trust established under the *Unit Trust Act 1960* or a registered MIS under the *Financial Markets Conduct Act 2013* that carries on specified investment activities as a business for customers (or is managed by an investment entity that carries on such activities for it). This information would be sufficient for the Reporting NZFI to reasonably determine that the unit trust or collective investment vehicle comes within the definition of investment entity in the IGA and is a NZFI.[65]
    (c) Where the trust is registered under the *Charitable Trust Act 1957*, registered on the Charities Register established under the *Charities Act 2005*, or is a donee organisation pursuant to the ITA 2007. The Charities Register and list of donee organisations[66] are publicly available information which a Reporting NZFI can rely on, to reasonably determine that the entity is an active NFFE.

[63] This framework assumes that the account is not exempt or excluded.

[64] The Reporting NZFI will need to report (to Inland Revenue) payments that it makes to non-participating financial institutions on an annual basis for 2015 (the period ended 31 March 2016) and 2016 (the period ended 31 March 2017): see Article 4(1)(b) of the IGA.

[65] This is assuming that the trust has not decided to use the definition of investment entity in the U.S. Treasury Regulations in lieu of the corresponding definition in the IGA and informed the Reporting NZFI of this fact.

[66] List available on Inland Revenue's website.

(d) The Reporting NZFI reasonably determines that a New Zealand resident trust account holder is a deemed investment entity that is a NZFI based on the trust having a GIIN (outlined above), or based on other publicly available information or information in their possession. For example, the Reporting NZFI could make such a reasonable determination if:

- They reasonably determine that the trust is managed by an "in business" investment entity such that the trust can be treated as a deemed investment entity.[67] [This "management" could be "reasonably determined" on the basis that, for example, a trustee or discretionary fund manager of the trust has a GIIN. It will be reasonable for the Reporting NZFI to presume in such circumstances (unless they know otherwise) that the trustee or fund manager is an "in business" investment entity (being the type of financial institution mostly likely to apply to trustees/fund managers that are financial institutions with GIINs) that manages the trust]; or
- The trust has decided to apply the U.S. Treasury Regulations definition of investment entity **and** has informed the Reporting NZFI of this fact **and** the Reporting NZFI reasonably determines that the trust is a "deemed" investment entity under the U.S. Treasury Regulations definition (i.e. that the trust is managed by a relevant type of financial institution[68] and the trust's gross income is primarily attributable to investing, reinvesting or trading financial assets over the specified period).

If a Reporting NZFI reasonably determines that an account is held by a NZFI, Partner Jurisdiction FI, or active NFFE, the account will not be a U.S. Reportable Account. However, the account will still be reportable if it is held by a non- participating financial institution.[69]

Steps to follow where a Reporting NZFI has not otherwise "reasonably determined" the trust's status

104. Where a Reporting NZFI has not otherwise "reasonably determined" the trust's status (as being an active NFFE, NZFI, or Partner Jurisdiction FI) it needs to obtain a self- certification from the trust to determine its status. This could occur when the Reporting NZFI has not been able to reasonably determine the trust's status or has gone straight to seeking a self-certification of the trust's status. The Reporting NZFI may proceed on the basis that the most likely categories that could apply to the trust (if not a financial institution) are either the Specified U.S. Person or NFFE categories.[70] The self-certification ordering in section V(B)(3) of Annex I of the IGA reflects this logic.

Self-certification whether the trust is a Specified U.S. Person

105. The relevant definitions for determining whether a trust is a Specified U.S. Person are set out in the IGA. It is necessary to consider both the definitions of "U.S. Person" and "Specified U.S. Person" in Article 1(1)(ee)[71] and (ff) of the IGA. These two definitions contain further definitions of when a trust is a U.S. Person and specific exclusions from this definition for the purpose of determining a Specified U.S. Person (for example, a real estate investment trust as defined in section 856 of the U.S. Internal Revenue code, is not a Specified U.S. Person). The definition of "Specified U.S Person" is set out in full at Appendix 2 to this guidance.

106. Reporting NZFIs can apply the following process for self-certification of trust account holders as Specified U.S. Persons. As part of the account opening documentation which is required to be "signed off" by, for example, the trustees (on behalf of the trust) they could be asked the following questions which relate to determining whether a trust is a U.S. Person:

- Are there any U.S. persons, which have the authority to control all substantial decisions of the trust? [If the answer to this question is yes, then proceed to the next question].
- Would a U.S. Court have authority to render orders or judgments concerning substantially all issues regarding administration of the trust?

107. These questions are cumulative, so only where the answer is "yes" to both questions, will the trust be a U.S. Person. The Reporting NZFI can then treat the trust as being a Specified U.S. Person (unless the trust certifies that it is a U.S. Person that is not a Specified U.S. Person).

108. If the Reporting NZFI identifies that the account is held by a Specified U.S. Person the account will be a U.S. Reportable Account.

---

[67] However, this point is subject to the second bullet point below.

[68] This could be presumed based on, for example, determining that the "manager" has a GIIN.

[69] The Reporting NZFI will need to report (to Inland Revenue) payments that it makes to non-participating financial institutions on an annual basis for 2015 (the FATCA period ended 31 March 2016) and 2016 (the FATCA period ended 31 March 2017): see Article 4(1)(b) of the IGA.

[70] However, if the Reporting NZFI is unable to determine that the account holder comes within one of these categories it will need to consider the other categories (outlined above).

[71] Article 1(1)(ee) of the IGA defines "U.S. Person" as meaning "…..a U.S. citizen or resident individual, a partnership or corporation organized in the United States or under the laws of the United States or any State thereof, a trust if (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust; and (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States. This subparagraph 1(ee) shall be interpreted in accordance with the U.S. Internal Revenue Code….."

Self-certification whether a Trust is a passive NFFE with U.S. Controlling Persons

109. If the Reporting NZFI has not been able to reasonably determine that the trust account holder is a NZFI or Partner Jurisdiction FI or active NFFE and has not identified that the trust is a U.S. Person, they will need to obtain a self-certification from the trust as to whether or not it is a passive NFFE with U.S. Controlling Persons.[72] If the account is held by a passive NFFE with U.S. Controlling Persons, it will be a U.S. Reportable Account. Conversely, if an account is held by an NFFE with no U.S. Controlling Persons it will not be a U.S. Reportable Account.

110. If the trust self-certifies that it is an NFFE,[73] the "next" question which needs to be answered is whether the trust NFFE is a passive or active NFFE. As a key focus of FATCA is passive NFFEs which have Controlling Persons which are either U.S. citizens or U.S. tax resident (these are the only NFFE accounts that are U.S. Reportable Accounts),[74] a Reporting NZFI may wish to first obtain a self- certification from the NFFE account holder or Controlling Persons as to whether any Controlling Person is a U.S. citizen or U.S. tax resident. The Reporting NZFI can then focus on those NFFEs which have U.S. Controlling Persons, to specifically determine which of them are either active or passive NFFEs. A Reporting NZFI may, for these purposes, wish to focus principally on paragraph (a) of the definition of "active NFFE" in section VI(B)(4) of Annex I of the IGA, which deals with the 50% rule for passive income and assets, which is the definition most likely to apply to qualify an NFFE for active NFFE status. For example, the Reporting NZFI may ask questions such as:

    - Was the gross passive income[75] that the NFFE derived during the preceding reporting period less than 50% of the NFFE's total gross income? and
    - Were less than 50% of the assets held by the NFFE during the preceding reporting period, assets that produce or are held for the production of passive income?

111. Where a NFFE trust answers "yes" to both these questions (for example, the trust may confirm that it derives predominantly active income and has assets that predominantly produce or are held for the production of active income), the Reporting NZFI can determine that the trust is an active NFFE. The account will, therefore, not be a U.S. Reportable Account.

---

[72] This is assuming that the trust does not certify that is has another FATCA status (for example, being an exempt beneficial owner).

[73] The definition of NFFE in the IGA covers **certain** New Zealand trusts and trusts from other jurisdictions (excluding U.S. persons) that are not financial institutions. The same self-certification process can be applied to all NFFE account holders.

[74] The purpose here is to determine whether or not the trust account holder is a passive NFFE with U.S. Controlling Persons. As noted above, the IGA provides that a trust account that has been identified as being held by an NFFE **without any** U.S. Controlling persons is not a U.S. Reportable Account. Therefore, to the extent that a Reporting NZFI has obtained a self-certification from the trust that it is a NFFE and has obtained a self-certification (from the trust or the Controlling Persons) that the trust does **not** have any U.S. Controlling Persons, such a certification would be sufficient to determine that the trust is therefore **not** a passive NFFE with any U.S. Controlling Persons. Therefore, the account would **not** be a U.S. Reportable Account. This would be a sufficient self-certification in this context.

[75] Passive income would cover various types of income that are derived "passively", as opposed to, for instance, through "active" trading operations. This would generally be considered to include (but would not be limited to) dividends, interest (and substitute amounts), rents and royalties (other than rents and royalties derived in the active conduct of a trade/business), annuities, and amounts received under cash value insurance contracts.

Appendix 1:

Definition of "active NFFE" in section VI(B)(4) of Annex I of the IGA:

An "Active NFFE" means 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, region 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; or

j) The NFFE meets all of the following requirements:

   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.

Appendix 2:

Definition of "Specified U.S. Person" in Article 1(1)(ff) of the IGA:

The term "Specified U.S. Person" means a U.S. Person, other than:

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

(ii) any corporation that is a member of the same expanded affiliated group, as defined in section 1471(e)(2) of the U.S. Internal Revenue Code, as a corporation described in clause (i);

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

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

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

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

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

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

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

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

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

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

(xiii) any tax-exempt trust under a plan that is described in section 403(b) or section 457(b) of the U.S. Internal Revenue Code.