HM Revenue & Customs

Implementation of International Tax Compliance (United States of America) Regulations 2013

Guidance Notes

Today we are publishing the following: -

- **The draft UK regulations to implement the US/ U.S. Treaty - the International Tax Compliance (United States of America) Regulations 2013**
- **The Summary of responses to the Consultation document issued on the 18 September 2012**
- **Draft guidance**

We recognise that there are still some gaps in both the legislation and guidance as some areas of the process, such as how Financial Institutions will register for FATCA and the format for the submission of data, are not yet finalised. Discussions on these issues are continuing and we will publish further details as soon as they are available.

We would however welcome further comments on the legislation published on the 11th December, the draft legislation published today and the draft guidance by the 13th February 2013. We will also continue to work with business and their advisors on additional examples for inclusion in the guidance and welcome comments on areas where further examples would be of helpful.

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1 Background

The Foreign Account Tax Compliance provisions (commonly known as FATCA) contained in the HIRE Act 2010 is US legislation aimed at reducing tax evasion by their citizens. It requires Financial Institutions outside the US to pass information about their US customers to the US tax authorities, the Internal Revenue Service (IRS). A 30% withholding tax is imposed on the US source income of any financial institution that fails to comply.

On 12 September the UK and the US signed a Treaty to Implement FATCA in the UK (The UK-US Agreement to Improve International Tax Compliance and to Implement FATCA). The Treaty and the legislation introduced to enact it, will remove some of the implementation problems faced by UK Financial Institutions, for instance the legal difficulty of complying without breaching data protection restrictions. The end result is that UK Financial Institutions should not be subject to a 30% withholding tax on US source income, unless they fail to meet the requirements of the Treaty and UK legislation.

The UK legislation dealing with the implementation of the UK-US treaty is the International Tax Compliance (United States of America) Regulations 2013

Where this guidance use the term Agreement; this refers to the Treaty.

1.1 The purpose of these guidance notes

The guidance is for use by both business and HMRC staff who deal with entities affected by FATCA and applies to:

- Financial institutions
- Entities that will need to certify their entity “classification” for the purposes of FATCA and
- Entities that undertake FATCA obligations on behalf of financial institutions

1.2 Scope of FATCA

FATCA and the UK legislation implementing the Agreement signed on the 12th September 2012, applies to United Kingdom Financial Institutions In order to determine if the legislation applies it will be necessary for a Financial Institution to consider a number of stages. They are: -

- Am I a Financial Institution?
- Do I hold Financial Accounts?
- Are there indicators that any of the account holders' are Specified US Persons?
- After applying the relevant due diligence do I have any reportable accounts?

In addition where an entity is a UK Reporting Financial Institution that is making payments to a Non Participating Financial Institution (NPFI) they may need to report those. See 8.4 and 9.3 of the guidance on identification of NPFIs and the reporting of payments to them.

2 Financial Institutions

A Financial Institution will fall into at least one of these categories unless it is able to take advantage of one of the exemptions available. The four categories are:-

- Custodial institution - section 2.11
- Depositary institution - section 2.12
- Investment entity - section 2.13
- Specified Insurance company – section 2.14

A Financial Institution may offer more than one type of financial account

2.1 Registration

It is the intention that Financial Institutions will be required to register with the IRS.

Note details of the registration process are not currently known but will be inserted as soon as they are available.

2.2 Exemptions

There are certain exemptions from the legislation. Depending on the nature of the exemption an entity may either be entirely exempted from complying with the legislation or its compliance obligations may be reduced, e.g. because some of its financial products are treated as exempt products.

The exemptions that are available are set out in detail the following sections.

2.3 Exempt Beneficial Owner

If an entity falls in to this category it will be deemed to pose a low risk of US tax evasion. Such entities will not have any reporting requirements in relation to any financial accounts that they maintain, nor will Reporting United Kingdom Financial Institutions be required to review or report on accounts held by such Exempt Beneficial Owners

2.4 UK Governmental Organisations

The organisations listed below are Non Reporting Financial Institutions and will be treated as Exempt Beneficial Owners for the purposes of section 1471 of the US Internal Revenue Code:

- The Devolved Administrations as per :the Northern Ireland Act 1998 (updated by The Northern Ireland (St Andrews Agreement) Acts 2006 & 2007, and the Northern Ireland Act 2009)
- the Scotland Act 1998
- the Government of Wales Act 2006
- Local Government Authorities as per:
- Section 33 of the Local Government Act 2003

- the Local Government Act (NI) 1972 (as amended by The Local Government (Miscellaneous Provisions) Act (NI) 2010 and Local Government Finance Act (NI) 2011)
- the Local Government etc. (Scotland) Act 1994
- the Local Government (Wales) Act 1994

2.5 Central Bank

The Bank of England and any of its wholly owned subsidiaries are Non Reporting Financial Institutions and will be treated as Exempt Beneficial Owners for the purposes of section 1471 of the US Internal Revenue Code:

2.6 International Organisations

The organisations listed below are Non Reporting Financial Institutions and will be treated as Exempt Beneficial Owners for the purposes of section 1471 of the US Internal Revenue Code:

Any UK office of:

The International Monetary Fund

The World Bank

The International Bank for Reconstruction and Development

The International Finance Corporation

The International Finance Corporation Order, 1955 (SI 1955 No.1954)

The International Development Association

The Asian Development Bank

The African Development Bank

The European Community

The European Coal and Steel Community

The European Atomic Energy Community

The European Investment Bank

The European Bank for Reconstruction and Development

The OECD Support Fund

The Inter-American Development Bank

2.7 Retirement Funds

Any pension scheme or other retirement arrangement established in the United Kingdom and described in Article 3 (General Definitions) of the Convention, including pension funds or pension schemes covered by IRS Announcement 2005-30, 2005-1 C.B. 988, on the Mutual Agreement on U.K. Pension Agreements will also be Non Reporting.

2.8 Deemed Compliant Financial Institutions

There are two types of entity that can take advantage of this exemption.

i. Non –profit organisations. They will not have any reporting requirements in relation to any financial accounts that they may hold. This applies to:

    - Any entity registered as a charity with the Charity Commission of England and Wales,
    - Any entity registered with HMRC for charitable tax purposes
    - Any entity registered as a charity with the Office of the Scottish Charity Regulator
    - Any Community Amateur Sports Club if registered as such with HMRC

ii. Financial Institutions with a local client base will have a reduced reporting requirement if they meet the criteria set out in 2.9

2.9 Local Client Base Financial Institution

There are 9 criteria that must all be met before a Financial Institution can claim this exemption:

a) The Financial Institution must be licensed and regulated under the laws of the United Kingdom;

b) The Financial Institution must have no fixed place of business outside the United Kingdom;

This applies even if the fixed place of business is within a jurisdiction that has entered into an agreement with the United States with regard to FATCA.

c) Each Related Entity of the Financial Institution must be incorporated or organised in the United Kingdom and must meet the requirements set forth in this paragraph.

So all group entities must comply with all the criteria and must all be located within the United Kingdom.

d) The Financial Institution must not solicit account holders outside the United Kingdom. For this purpose, a Financial Institution shall not be considered to have solicited account holders outside of the United Kingdom merely because it operates a website, provided that the website does not specifically indicate that the Financial Institution provides accounts or services to non-residents or otherwise target or solicit US customers.

This does not prevent a US person who is resident in the UK from opening an account. There is no intention to prevent such persons from accessing financial services within the UK.

However where the financial institution does intentionally market and provide accounts or services to persons who are not resident in the UK then the financial institution will not be able to meet this requirement.

e) The Financial Institution must be required under the tax laws of the United Kingdom to perform either information reporting or withholding of tax with respect to accounts held by residents of the United Kingdom;

For insurance products the following reporting or taxing regimes will apply to this section.

- Non qualifying policies subject to the chargeable events reporting regime
- Qualifying policies subject to the reporting requirements that apply on or after 6 April 2013.
- Qualifying Investment life Insurance policies that are subject to Income minus Expense Regime (I-E)

f) At least 98 percent of the accounts by value provided by the Financial Institution must be held by residents (including residents that are entities) of the United Kingdom or another Member State of the European Union;

This measurement can include the accounts of US persons if they are resident within the UK. It applies to both individuals and entities accounts.

g) Subject to subparagraph h), below, beginning on January 1, 2014, the Financial Institution does not provide accounts to (i) any Specified US Person who is not a resident of the United Kingdom (including a US Person that was a resident of the United Kingdom when the account was opened but subsequently ceases to be a resident of the United Kingdom), (ii) a Non-participating Financial Institution, or (iii) any Passive NFFE with Controlling Persons who are US citizens or residents;

So a Financial Institution should not open accounts for persons or entities listed above, after the 1 January 2014, if it wants to qualify as having a local client base. This also means that where a Financial Institution under this exemption is able to open accounts for US citizens resident in the UK and they would not need to be reported unless the account holder subsequently ceases to be a resident of the United Kingdom.

h) On or before January 1, 2014, the Financial Institution must implement policies and procedures to establish and monitor whether it provides accounts to the persons described in subparagraph g) , and if any such account is discovered, the Financial Institution must report that account as though the Financial Institution were a Reporting United Kingdom Financial Institution or, close the account;

This means that even if accounts have been provided to Specified US Persons, Non-Participating Financial Institution or, any Passive NFFE with Controlling Persons who are US citizens or residents prior to the 1 January 2014, the Financial Institution can still be within the exemption if those accounts are reported.

i) With respect to each account that is held by an individual who is not a resident of the United Kingdom or by an entity, and that is opened prior to the date that the Financial Institution implements the policies and procedures described in subparagraph 2(g), above, the Financial Institution must review those accounts in accordance with the procedures applicable to Pre-existing Accounts, described in Annex I of the Agreement, to identify any U.S. Reportable Account or account held by a Non-participating Financial Institution. Where such accounts are identified, they must be closed or the Financial Institution must report those accounts as if it were a Reporting United Kingdom Financial Institution;

   This allows a financial institution to take advantage of the exemption whilst reporting on relevant accounts that were opened prior to the adoption of the requirements set out in this section.

   The reporting of accounts will follow the same rules that apply to reporting financial institutions.

2.10 Regulations exemption

Financial Institutions should not be at a disadvantage from applying the UK legislation implementing the Agreement as compared to the position that they would have been in if applying the US Regulations. So if the US regulations subsequently introduce additional or broader exemptions it is that additional or broader exemption that should apply.

2.11 Custodial Institution

A Custodial Institution is one which earns a substantial portion of its gross income from either its last 3 accounting periods, or since it commenced business, from the holding of assets on behalf of others and from related financial services. A substantial proportion in this context means 20 percent or greater.

Related services are any ancillary service which is directly related to the holding of assets by the institution on behalf of others.

Such institutions could include brokers, custodial banks, trust companies, clearing organisations and nominees.

2.12 Depositary Institution

A Depository Institution means a person carrying on an activity that is a regulated activity for the purposes of the Financial Services and Markets Act 2000 by virtue of Article 5 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(1).

Entities within this definition could include, for example, entities regulated in the UK as a savings or commercial bank, a credit union, industrial and provident societies and building societies. This is not an exhaustive list and regard will need to be had to what an entity does.

([1]) S.I. 2001/544

Entities that issue payment cards that can be pre-loaded with funds to be spent at a later date, such as a pre-paid credit card will also be considered to be Depositary Institutions for the purposes of the legislation.

2.13 Investment Entity

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

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

The description above should be interpreted in a manner consistent with similar language set forth in the definition of “financial institution” in the Financial Action Task Force Recommendations.

2.15 provides further guidance on Collective Investment Vehicles.

2.14 Specified Insurance Company

The Specified Insurance Company definition encompasses both the company and its holding company.

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

Insurance Companies that only provide General insurance or term life insurance will not be Financial Institutions under this definition.

2.15 Collective Investment Vehicles

The definition of Investment Entity in Article 1 subparagraph 1(j)(3) of the Agreement includes collective investment vehicles, as well as fund managers, investment managers, fund administrators, transfer agents, depositories and trustees of unit trusts as all of these entities could be investing, administering or managing collective investment vehicles.

The only financial accounts that are relevant to collective investment vehicles are the equity and debt interests in the collective investment vehicle.
No other entity otherwise within the definition of investment entity only by virtue of investing, administering or managing collective investment vehicles is considered to have financial accounts for which the identification and reporting requirements will apply.

The U.K. regulations state that where the Investment Entity is a collective investment vehicle (within the meaning in the Financial Services and Markets Act 2000), only the collective investment vehicle will be regarded as a reporting Financial Institution in relation to the financial accounts of that collective investment scheme. Therefore an entity which is regarded as an Investment Entity and therefore a Financial Institution solely because of its relationship with a collective investment vehicle will not be regarded as a Reporting Financial Institution. However such an entity will be a Reporting Financial Institution if it maintains Financial Accounts other than those of the collective investment vehicle – see the section on fund distributors below.

2.16 Platforms and other distributors of funds

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

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

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

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

2.17 Fund nominees - Distributors in the chain of legal ownership

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

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

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

HMRC will treat fund nominees, fund intermediaries and fund platforms as custodial institutions unless specific factors indicate that their businesses are better characterised as falling within the definition of investment entity. Normally, the primary business of a fund nominee, fund intermediary or fund platform will be to hold financial assets for the account of others.

For the purpose of aggregating accounts to determine whether any pre-existing custodial accounts are below the de minimis threshold (See section 4.6), a Custodial Institution will need to consider all the financial accounts of its customers, without reference to whether the customers underlying interests are in different collective investment vehicles.

2.18 Advisory-only distributors

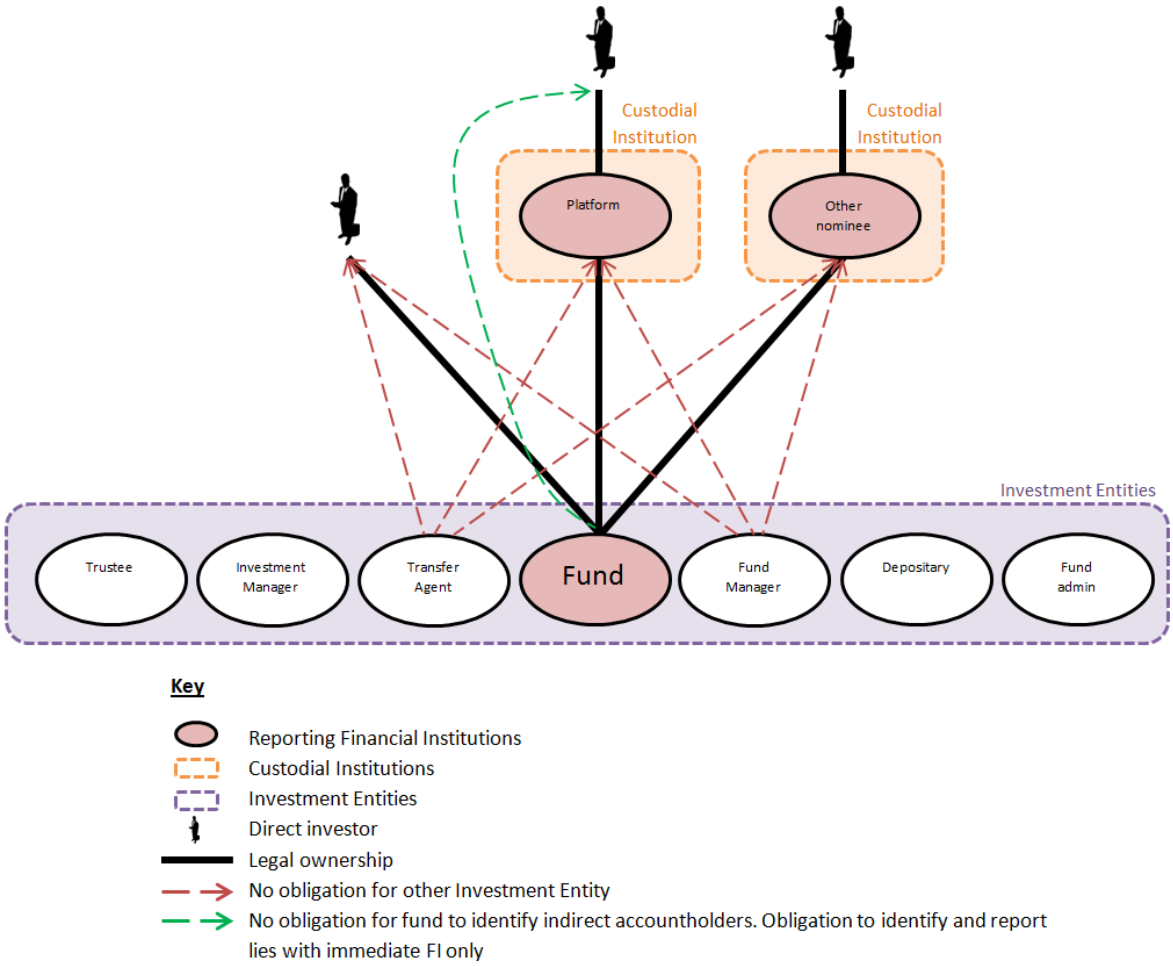
Distributors that act in an advisory-only capacity and are not in the chain of legal ownership of a collective investment vehicle will not be regarded as a Financial Institution in respect of any accounts they advise on.

Such distributors, which may include, some IFAs, may nevertheless be asked by Financial Institutions to provide assistance in identifying accountholders, and obtaining self-certifications (See section 4.2) For example, IFAs will often have the most in-depth knowledge of the investor and direct access to the customer so will be best placed to obtain self-certifications. However HMRC does not regard such advisory-only distributors as Financial Institutions and they will only have obligations pursuant to contractual agreements with those Financial Institutions where they act as a third party service provider in relation to those accounts.

In practice HMRC believes that reliance on third parties for account identification and self-certification in FATCA should work in a similar manner to Regulation 17 of the Money Laundering Regulations 2007. As with Regulation 17 of the Money Laundering Regulations 2007, Financial Institutions should have no obligation to use distributors to comply with their FATCA obligations, and may instead obtain self-certifications directly.

2.19 Identification and reporting on interest in a collective investment vehicle

The diagram below illustrates how HMRC believes the account identification and reporting obligations under the Regulations should work for collective investment vehicles.



Depending on how the fund is structured, various entities may fall within the definition of Investment Entity. However, provided the fund is a collective investment vehicle within the meaning of the Financial Services and Markets Act 2000, only the fund has obligations under the Regulations. The fund itself will need to determine which entity carries out the obligations to identify and verify and report on account holders that are specified US persons, by reference to its own governance structure, and contractual arrangements.

Example

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

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

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

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

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

2.20 Trusts

The following section sets out how HMRC see the identification and reporting of accounts of Specified US Persons working in relation to Trusts.

A Trust will be an entity under the definitions in the Agreement, what type of entity will depend on what the Trust does.

In most cases Trusts will fall to be Non Financial Foreign Entities (NFFEs) as they will not fall within the definitions of the four types of Financial Institution. That is, Trusts generally do not accept deposits, , operate as an insurance company or hold financial assets as a substantial part of its business for the account of others.

Trusts would also not normally conduct as a business the activities relevant to the Investment Entity definition but where the Trust is managed by another Investment Entity the Trust would be an Investment Entity.

Unit Trusts however would be expected to be Financial Institutions as they clearly fall within the definition of an Investment Entity.

As an NFFE a Trust would have to provide a self certification in relation to its status as either a Passive or Active NFFE where required.

Trustees acting on behalf of Trusts will be seen as a Financial Institution for the purposes of this legislation, where they are a remunerated independent legal professional or a trust or company service provider as defined in the Money Laundering Regulations 2007.

In such a case as long as the Trustees fulfil the due diligence and reporting requirements on behalf of the Trust of which they are the trustee or one of the trustees then no other Financial Institution need report on the financial accounts of those Trusts.

Where a Trustee (who is a remunerated Independent legal professional or a Trust or company service provider) fails to meet its obligations then it would be subject the relevant penalties under the legislation.

For those Trusts where the Trustee is not a Financial Institution then those Financial Institutions that hold accounts for those Trusts will need to follow the relevant due diligence for NFFEs.

2.21 Partnerships

A partnership is also an entity under the definitions in the Agreement, again the type of entity it will be regarded as will depend on the type of activities undertaken by the partnership.

Where a partnership is a Financial Institution it will need to identify any Financial Accounts it holds, this will include any Equity Interest. This means that a partnership will be required to identify and where necessary report on the capital or profits interest of any of the partners who are Specified US Persons.

2.22 United Kingdom Financial Institutions

The Agreement applies to United Kingdom Financial Institutions and therefore entities that are resident in or located in the UK. In many cases whether or not a Financial Institution, such as a bank, is resident in or located in the UK will be clear but there may be situations where this is less obvious, in which case it may be necessary to determine the tax residence of an entity.
Such entities are within the scope of the UK agreement if they are resident for tax purposes in the UK. Resident for tax purposes means:

For a Company or professional trust company – if the company is incorporated in the UK or centrally managed and controlled here it will be treated as UK resident

A company not resident in the UK is within the charge to corporation tax if, and only if, it carries on a trade in the UK through a permanent establishment in the UK

For Trusts, if all the trustees are resident in the UK for tax purposes then the trust is UK resident. Where all the trustees are non-UK residents for tax purposes then the trust is also non-UK resident. Where some of the trustees but not all are UK resident, then the trust is UK a resident if the settlor is both resident and domiciled in the UK for tax purposes

For partnerships (both General Partnerships and Limited Liability Partnerships) the country in which control and management of the business of the partnership as a reporting financial institution takes place will be the country of residence

If an entity is a dual resident, so resident in the UK and also resident in another country it will need to apply the UK legislation.

2.23 Subsidiaries and branches

Subsidiaries and branches of UK entities that are not located in the UK are excluded from the scope of the UK Agreement and will be covered by the any relevant rules in the Country in which they are located.

Subsidiaries and branches of overseas entities that are located in the UK will be within the scope of the UK agreement and legislation.

Examples

Albion Bank PLC, located in London, has within its group the following entities;

- a subsidiary (S) located in Edinburgh,
- a foreign subsidiary (D) located in Partner Jurisdiction 1
- a foreign branch (F) located in Partner Jurisdiction 2 ,
- a foreign branch (X) located in Eurasia and
- a foreign branch (Y) located in New York

Under the terms of the Agreement:

- Albion Bank in London and its subsidiary S will be United Kingdom Financial Institutions and report to HMRC.
- D and F will be classified under the Agreement as Partner Jurisdiction Financial Institutions and will report to their respective jurisdictions

- X will be a Non Participating Financial Institution if Eurasia does not have an agreement with the US and will need to undertake the obligations required under the US regulations if the legislation in Eurasia allows it to do so.
- Y will report on U.K. persons who hold accounts to the IRS.

Example where an overseas bank has a branch located in the UK:-

- Oceania Bank of Australia has a branch Z located in London.

- Z will be a UK Financial Institution and will therefore fall under the UK Agreement and will need to comply with the UK regulations and legislation and report information on any Reportable Financial Accounts to HMRC.

2.24 Related Entities

An entity is related to another entity if one entity controls the other or the two Entities are under common control.

For this purpose control includes direct or indirect ownership of more than 50 percent of the vote or value in an Entity.

This rule is not intended to apply more broadly than the IRS consolidated group rules. Where this may be the case, HMRC may treat an entity as not related to another if it is shown that they would not both be members of the same expanded affiliated group as defined in section 1471 (e) (2) of the US Internal Revenue Code.

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

Where a U.K. Financial Institution has any Related Entities that because of the jurisdiction it operates in is a NPFI, the UK Financial Institution must treat the related entity as an NPFI and fulfil any reporting or withholding obligations in respect to that NPFI.

2 25 Non Participating Financial Institutions (NPFI)

A Non Participating Financial Institution (NPFI) is a financial institution that is not FATCA compliant. This situation will arise where: -

- The Financial Institution is located in a jurisdiction that does not have an Intergovernmental Agreement with the US and the Financial Institution has not entered into a FATCA agreement with the IRS.

- Or where the financial institution is classified as being a NPFI after the procedures for significant non compliance have been concluded

A U.K. Financial Institution will only be classed as an NPFI where there is significant non compliance with the legislation and, after a period of enquiry, that non compliance has not been addressed. For details about compliance with the UK legislation see section 10.

Where a financial institution becomes a NPFI details will be published by the IRS.

2.26 Non Financial Foreign Entities (NFFE)

An NFFE is any Non US Entity that is not a Financial Institution. There are two categories of NFFE, either Active or Passive, and unless an entity is an Active NFFE it will fall to be treated as a Passive NFFE.

Only the accounts of Passive NFFEs need to be reviewed when applying the due diligence procedures to identify Specified US Persons and reportable accounts. Unless an NFFE is an Active NFFE it will be a Passive NFFE.

Only accounts of Passive NFFEs need to be considered by Financial Institutions when applying the due diligence procedures to identify Specified US Persons.

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

- 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;

- The stock of the NFFE is regularly traded on an established securities market or the NFFE is a Related Entity of an Entity the stock of which is traded on an established securities market;

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

- The NFFE is a non-US government, a government of a US Territory, an international organization, a non-US central bank of issue, or an Entity wholly owned by one or more of the foregoing;

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

- 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;

- 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;

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

- The NFFE meets all of the following requirements:

  (1) It is established and maintained in its country of residence exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes;

  (2) It is exempt from income tax in its country of residence;

  (3) It has no shareholders or members who have a proprietary or beneficial interest in its income or assets;

(4) The applicable laws of the Entity's country of residence or the Entity's formation documents do not permit any income or assets of the Entity to be distributed to, or applied for the benefit of, a private person or non-charitable Entity other than pursuant to the conduct of the Entity's charitable activities, or as payment of reasonable compensation for services rendered, or as payment representing the fair market value of property which the Entity has purchased; and

(5) The applicable laws of the Entity's country of residence or the Entity's formation documents require that, upon the Entity's liquidation or dissolution, all of its assets be distributed to a governmental Entity or other non-profit organization, or escheat to the government of the Entity's country of residence or any political subdivision thereof.

2.27 Treatment of Reporting United Kingdom Financial Institutions

As long as UK Financial Institutions are in compliance with the legislation then they will not be subject to any withholding tax on their US source income under S1471 of the US Internal Revenue Code.

2.28 Non Reporting Financial Institutions

A non reporting U.K Financial Institution is generally any Financial Institution identified as a non reporting U.K. Financial Institution in Annex II of the agreement or one which otherwise qualifies as a Deemed Complaint Financial Institution, Exempt Beneficial Owner , or an excepted Financial Institution under the relevant U.S. Treasury regulations

Any UK Financial Institution that is not a Non Reporting Financial Institution will be a reporting Financial Institutions.

There is however one scenario in which an entity which is treated as Deemed Compliant under Annex II could still have some reporting obligations. That is where an entity meets the criteria of a Financial Institution with a local client base. See section 2.9

3 Financial Accounts

The objective of FATCA is to provide information on the financial accounts held by Specified US persons. A Financial Institution, unless otherwise exempted, must therefore identify: -

- whether it offers any financial accounts
- the type of financial accounts that it offers
- whether those accounts are held by a specified US person

In this context the term financial account may be broader than would be the case in other UK legislation, for instance the definition of financial account includes any capital or profits interest in a partnership, if that partnership is an Investment Entity.

A financial account is an account maintained by a UK Financial Institution or UK branch of a non-UK Financial Institution but excludes certain equity and debt interests in the Financial Institution if they are regularly traded on a recognised securities market (See paragraph 3.7)

A financial account is a reportable account, where it is held by one or more Specified US Persons, or by a non-US. Entity with one or more controlling persons that are Specified US. Persons, it follows that if there are no accounts that are held by specified US persons then there will be no reportable accounts. Financial Institution with no reportable accounts will have to make a nil return.

Section 4 and subsequent paragraphs set out the due diligence procedures that must be followed in order to indentify reportable accounts

3.1 Exempt Products

Annex II of the Agreement sets out certain products that have been agreed to be low risk (in terms of the likelihood of being used for tax evasion) and which are therefore exempted from being treated as Financial Accounts.

The Agreement also provides the capacity mechanism for Annex II to be updated, either to allow for other low risk products to be added or to remove products that are no longer deemed low risk.

3.2 Retirement Accounts and Products

Exempt pension schemes include the following:

- Pension savings schemes registered with HMRC under Part 4 of the Finance Act 2004
- Pension annuities to monetise the pension savings in a registered pension savings scheme and which are themselves either registered with HMRC or deemed registered under applicable law
- Pension arrangements not registered with HMRC or deemed registered as described above where the annual contributions are limited to £50,000 and funds contributed cannot be accessed before the age of 55 except in circumstances of serious ill health.
- UK-registered pension arrangements (including authorised payments) as set out in the Finance Act 2004 that otherwise would be within the definition of Financial Account set out in Article 1(s)(3) of the Agreement.

3.3 Certain Other Tax Favoured Accounts or Products

The following accounts or products are not to be treated as financial accounts for the purposes of the legislation:

- Individual Savings Accounts (ISAs) - as defined in the Individual Savings Account Regulations 1998 (SI 1998 No.1870) and subsequent Amendment Regulations
- Junior ISAs - as defined in the Individual Savings Account Regulations 1998 No.1870, and subsequent Amendment Regulations
- Child Trust Funds - as defined in the Child Trust Funds Act 2004 and subsequent Amendment Regulations

- Premium Bonds - where issued by NS&I (UK National Savings and Investments)
- Children's Bonus Bonds - where issued by NS&I (UK National Savings and Investments)
- Fixed Interest Savings Certificates - where issued by NS&I (UK National Savings and Investments)
- Index Linked Savings Certificates - where issued by NS&I (UK National Savings and Investments)
- Tax Exempt Savings Plans - where issued by a friendly society within the meaning of the Friendly Societies Act 1992 (c. 40)
- Save As You Earn Share Option Schemes - approved by HMRC under Schedule 3 Income Tax (Earnings and Pensions) Act 2003
- Share Incentive Plans - approved by HMRC under Schedule 2 Income Tax (Earnings and Pensions) Act 2003
- Company Share Option Plans - approved by HMRC under Schedule 4 Income Tax (Earnings and Pensions) Act 2003

These accounts will not therefore be subject to the due diligence procedures and are not reportable accounts.

3.4 Depositary Account

A Depositary account is any commercial current account, and savings account that is evidenced by a certificate of deposit, investment certificate, certificate of indebtedness, or other similar instrument where cash is placed on deposit

Pre-paid payment cards that can be pre-loaded with funds to be spent at a later date, such as a pre-paid credit card, will be treated as depository accounts for the purposes of this legislation.

Therefore any pre-paid payment cards that exceed the depositary account threshold of $ 50,000 may fall to be reportable.

This is not meant to include a credit card which can be in credit either due to an overpayment or refund.

3.5 Custodial Account

A Custodial account is an account (other than an Insurance Contract or Annuity Contract) for the benefit of another person that holds any financial instrument or contract held for investment.
Financial instruments / contracts which can be held in such accounts can include but are not limited to:

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

3.6 Insurance Contract

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

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

3.7 Cash Value Insurance Contract

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

This definition excludes indemnity reinsurance contracts between two insurance companies.

The cash value does not include an amount payable under an Insurance Contract in the following situations:

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

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

3.8 Annuity Contract

This includes a contract under which the issuer agrees to make payments for a period of time, determined in whole or in part by reference to the life expectancy of one or more individuals. The term annuity contract also includes a contract that is considered to be such in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

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

3.9 Joint Accounts

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

In the instance that an account is jointly held by an Individual and an Entity the Financial institution will need to apply both the Individual and Entity due diligence requirements in relation to that account.

3.10 An equity or debt interest in an Investment Entity

A Financial account includes any debt or equity interest of an Investment Entity that is solely an Investment Entity (other than interests that are regularly traded on an established securities market.)

In the case of a partnership that is a financial institution, the term equity interest means either a capital or profits interest in the partnership

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

3.11 Debt or equity interests regularly traded on an established securities market.

Regularly traded is to be applied as defined under Schedule 26 Finance Act 2007.

3.12 Undesignated Accounts

Guidance will be finalised in due course.

3.13 Designated accounts

Guidance will be finalised in due course

3.14 Segregated Accounts

Guidance will be finalised in due course

3.15 Dormant Accounts

Guidance will be finalised in due course

3.16 Accounts of Deceased Persons

Guidance will be finalised in due course

4 Due Diligence General Requirements

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

The process focuses on the identification of certain US indicia linked to an account holder and allows for the possibility of obtaining further documents to cure or repair, the finding of the indicia before the financial institution concludes that an account is reportable.

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

4.1 Self Certification

As part of the process of identifying the status of account holders, entities and identifying the controlling persons of entities, financial institutions can rely on self certification.

Self certification is required in a number of different circumstances:

In relation to individual accounts holders

- In order to repair the finding of US indicia associated with a Lower value or high value pre-existing individual account holder, that is, in order to show that an individual is not in fact a US citizen or US resident for tax purposes.
- To establish the status of an individual account holder of a new account and whether or not they are a US citizen or US resident for tax purposes.
- To obtain a US TIN from a new individual account holder that is a US resident for tax purposes

In relation to entities

- To verify the status of an entity where information indicates the account holder is a specified US person unless a Financial Institution can reasonably determine that the account holder is not a Specified US Person based on information in its possession or that is publicly available.
- To verify the status of a financial institution that is neither a United Kingdom Financial Institution nor a Partner Jurisdiction Financial Institution unless a Financial Institution's status can be verified from an IRS published list.
- To establish whether an entity is a Passive NFFE
- To establish the status of a controlling person of a Passive NFFE and whether or not they are a resident in the United States for tax purposes

A self certification can not be relied upon if a Financial Institution has reason to know that it is incorrect or unreliable.

4.2 Self Certification for New Individual Accounts

Obtaining a self-certification

Unless the Financial account is of a type that does not need to be reviewed, identified or reported, a Financial Institution is required to obtain a self-certification that would enable it to determine whether the accountholder is resident in the US for tax purposes.

For these purposes a citizen of the US is considered to be resident for US tax purposes even if they may also be a tax resident in another jurisdiction

Wording of self-certification

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

A Financial Institution may in any case want to know where the account holder is resident for tax purposes as this may enable the Financial Institution to comply with other reporting requirements or to claim benefits under a double tax treaty on behalf of the accountholder. In such cases where the individual has specified a country of tax residence that is not the US the individual will also need to include a confirmation that they are not a US citizen or considered to be resident for US tax purposes to complete the self certification is complete.

Format of the self-certification

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

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

Telephone Applications

Example 1

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

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

Online applications

Example 2

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

Paper Applications

Example 3

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

Example 4

An individual fills out an application form to open an account with a Financial Institution.

In one of the boxes on the application the individual is required to provide “Country of residence for tax purposes”. Where the application form is returned with the country of residence box incomplete the application is rejected.

The individual would need to be provided with guidance on how to asses if they were resident for tax purposes or not. For the US this would include that US citizens are considered resident for US tax purposes.

Example 5

An individual fills out an application form to open an account with a Financial Institution.

The signature box on the application form includes the following wording: “by signing this form you confirm that you are not resident in the US for tax purposes and that you are not a US citizen.

Confirming the reasonableness of the self-certification

The legislation requires a Financial Institution to confirm the reasonableness of the self-certification based on information obtained by the Financial Institution. This may include information obtained by the Financial Institution pursuant to its Anti-Money Laundering (AML) and Know Your Customers (KYC) procedures.

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

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

In these cases the Financial Institution can meet the obligations of by obtaining a certification from the third party that they have confirmed the reasonableness of the self-certification based on other documentation the third party has received.

However, where the self-certification is received directly by the Financial Institution, there is no requirement to ensure that a third party performing AML procedures has confirmed its reasonableness. The Financial Institution is required to confirm this based on any other information it alone has obtained or holds.

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

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

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

Example 2

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

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

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

Example 3

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

Example 4

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

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

4.3 Self Certification for Pre-existing Individual accounts

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

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

4.4 Self Certification for New Entity accounts

For Entities that are Passive NFFEs the Financial Institution must identify the Controlling Persons and obtain a self-certification from them to determine whether any such person is a citizen or resident of the US

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

4.5 Self Certification for Pre-existing Entity accounts

Self certification is required where:

- An entity account holder is indentified as a Specified US Person then the Financial Institution will be required to treat the account as reportable unless it obtains a self certification to determine that the account holder is not a Specified US person

  The self-certification in this instance is IRS form W8 or W9 other similar agreed form.

- The account is not a UK Financial institution or Partner Jurisdiction Financial Institution then a self certification is required to identify if the entity is a certified deemed-compliant FFI, an exempt beneficial owner, or an excepted FFI, as those terms are defined in relevant US Treasury Regulations;

  The self-certification could again be a form W8 or other similar agreed form.

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- An entity account holder will be a Passive NFFEs if it is not an Active NFFEs (see section 2.26) Where the account holder is a Passive NFFE, the Financial Institution must obtain a self-certification (which may be on an IRS Form W-8 or W-9, or on a similar agreed form) from the account holder to establish its status, unless it has information in its possession or that is publicly available, based on which it can reasonably determine that the entity is an Active NFFE.

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

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

4.6 Aggregation

A Financial Institution will need to consider aggregation of accounts of both individuals and entities in certain circumstances.

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

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

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

Relationship Manager

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

Exempt Products

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

Funds

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

Related Entities

Where a computer system links accounts across Related Entities, wherever they are located, then the Financial Institution will need to aggregate in considering whether any of the reporting thresholds apply. However, once it has considered the thresholds the Financial Institution would only be responsible for reporting the accounts it holds.

Example 1

Bank A is a UK Financial Institution and has a related entity Bank C which is also a UK Financial Institution. Bank A can link the depositary account of US person X to another depositary account in the name of US person X with Bank C by virtue of the Taxpayer Identification Number. The aggregation exercise shows that US person X is above the depositary account threshold for reporting.

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

If Bank C was located in another jurisdiction it would have to report on the account it held if it was a Reporting Financial Institution.

Aggregation of individual accounts

Example 2

Two US Persons have 3 accounts between them, one deposit account each and a jointly held deposit account with the following balances

US Person A	$35,000
US Person B	$25,000
Joint Account	$30,000

The joint account is able to be associated with both A and B by reference to a data element in the Financial Institutions computer system. The system shows the account balances for the accounts however, the system does not show a combined balance for the accounts. The fact that the system does not provide a combined balance does not prevent the aggregations rules applying.

The balance on the joint account is attributable in full to each of the account holders. The aggregate balance for A would be $65,000 and for B $55,000.

As the amounts after attribution are in excess of the $50,000 threshold both account holders will be reportable.

If A was not a US person then only B would be reportable following an aggregation exercise.

For aggregation negative balances are to be treated as nil balances
Example 3
Two US Persons have 3 accounts between them, one account each and a jointly held account all with the same Financial Institution with the following balances

US Person A	$53,000
US Person B	$49,000
Joint Account	($8,000) treated as nil

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

Once an aggregation exercise has taken place and it is determined that the accounts are reportable the accounts to be reported are the individual accounts balance should be reported separately. A Financial Institution should not consolidate the accounts into one reportable for reporting purposes.

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

4.7 Determining a balance or value of a Financial Account

For Depositary accounts that balance or value will that shown on the 31 December unless the account is closed on a date before that.

For other Financial Accounts the balance or value will either be that shown on 31 December or where it is not possible to or usual to value an account at 31 December the normal valuation point for the account that is nearest to the 31 December is to be used

Example

For a reportable Depository Account the balance or value to be reported will be the balance or value as of the 31 December 2014. This will be reported in 2015.

For an insurance product that is valued at the anniversary date of the opening of the policy, opened for example on 3 June 2013, it will be valued on the 2 June 2014. If it exceeds the reporting threshold then it is the 2 June 2014 value that will be reported for the year ending 31 December 2014. This will be reported to HMRC in 2015.

Where the 31 December falls on a weekend or non working day, the date to be used is the last working day before the 31 December.

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

Joint Accounts

For joint accounts the balance or value to be attributed is the entire balance or value of the account. This will be attributable to each holder of the account.

For example where a jointly held account has a balance or value of $100,000 and one of the account holder is a Specified US person then the amount to be attributed to that person would be $100,000.

If both account holders were Specified US Persons then each would be attributed the $100,000 and reports would be made for both.

Account Closures

The balance or value to be recorded when an account is closed, will be the balance or value at the time the Financial Institution receives instructions from the account holder to close the account.

4.8 Currency conversion

Where accounts are denominated in a currency other than U.S. dollars then the threshold limits must be converted into the currency in which the accounts are denominated before determining if they apply.

This should be done using a published spot rate as of 31 December of the year for which you are reporting.

Example 1

The threshold to be applied to GBP denominated pre-exisiting individual depositary accounts when a published spot rate as of 31 December 2013 is 1.6500 would be £30,864. ($50,000/ 1.6500)

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

Example 2

A pre-existing insurance contract is valued at £155,000 as of 30 April 2013. It will be measured against the $250,000 threshold at 31 December 2013when a published GBP/USD spot rate is 1.6500.This would result in a threshold of £151,515. ($250,000/1.6500)

Examples of acceptable published exchange rates include, Reuters, Bloomberg, Financial Times and exchange rates published on the HMRC website. (www.hmrc.gov.uk)

4. 9 Taxpayer Identification Numbers (TINs)

Where it has been established that an account holder is a US person a Financial Institution is required to obtain a US.TIN in several instances. When referred to a US. TIN means a US. federal taxpayer identifying Number.

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

In line with the Agreement HMRC has introduced legislation to require reporting Financial Institutions to obtain the US. TIN for relevant pre-existing individual accounts from the 1 January 2017.

For all new individual accounts that are identified as Reportable Accounts from 1 January 2014 onwards the reporting institution **must** obtain a self-certification from account holders identified as resident in the US. that includes a US. TIN. This self certification could be on, for example, IRS form W9 or other similar agreed form.

Where for a new individual account the proposed account holder fails to provide a US TIN and the account becomes active, the account is to be treated as reportable regardless of the provision of the US TIN.

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

There is no requirement for a financial institution to verify that any US TIN provided is correct. A Financial institution will not be held accountable where information supplied by an individual proves to be inaccurate and the Financial Institution has no reason to know.

4.10 Change of Circumstance

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

If there is a change of circumstances that causes the Financial Institution to know or have reason to know that the original self-certification, such as one obtained on the opening of New Individual account is incorrect or unreliable, the Financial Institution cannot rely on the original self certification and the Financial Institution should obtain a new self-certification that establishes whether the account holder is a US citizen or US tax resident.

In the event there is a change of circumstance occurs which indicates an account belongs to a specified US person the Financial Institution should verify the account holders actual status within a period of [90] days from the date the financial institution was made aware of the change in circumstance.

If the account holder fails to respond to a Financial Institutions requests for a self certification or other documentation to verify the account holders status then the Financial Institution should treat the accounts as reportable until such time the financial institution is provided the necessary information to be able to correctly verify their status.

4.11 Third Party Service Providers

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

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

5 Pre-existing Individual accounts

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

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

5.1 Threshold Exemptions that apply to pre-existing individual accounts

The legislation allows for Financial Institutions to elect to apply the following exemptions when reviewing and identifying pre-exiting individual accounts.

If a Financial institution does not make an election under the Regulations to apply the threshold exemptions reportable accounts then it will need to include the following accounts when reviewing and identifying Pre-Existing Individual Accounts

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

- Any Depository Accounts with a balance or value of $50,000 or less.
- Pre existing individual accounts with a balance not exceeding $50,000 at the 31 December 2013, unless the account subsequently becomes a High Value Account.

- Pre existing individual accounts that qualify as Cash Value Insurance Contracts or Annuity Contracts with a balance or value of $250,000 or less of the 31 December 2013 unless the account subsequently becomes a High Value Account.
- All Pre-exisiting Cash Value Insurance Contracts and Annuity Contracts regardless of the value or balance if sale to US residents is effectively prevented by either UK or US law or regulatory procedure and UK law requires reporting or withholding with respect to insurance products held by residents of the UK

No law of the United Kingdom prevents the sale of Cash Value Insurance products or annuity contracts to US residents. The sale of contracts to US residents will be considered effectively prevented if the issuing insurance company is not licensed to sell insurance in any state of the United States and is not registered with the Securities and Exchange Commission.

Assignment of pre-existing insurance contracts

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

Once the insurance company has been made aware that an assignment has been made, the insurance company will need to undergo checks on the new account holder, before any payments are made to the account holder.. If the policyholder is reluctant to self-certify their status or provide relevant documentation, the UK insurance company will assume the person to be a US person and will provide the relevant reports to HMRC on an annual basis."

5.2 Reportable accounts

Reportable Pre-Exisiting accounts will be reportable if they are not exempt and the Financial Institution has identified US Indicia. (see section 5.4) and these indicia have not been cured or repaired

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

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

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

5.3 Lower Value Accounts

These are Pre-existing individual accounts with a balance or value that exceeds the appropriate threshold of $50,000 for depositary and other pre-existing individual accounts or exceed $250,000 for Cash Value Insurance Contracts and Annuity Contracts, but do not exceed $1,000,000.

5.4 Electronic Record Searches and lower value accounts

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

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

- Current effective power of attorney or signatory authority granted to a person with a US address
- An ‘in care of’ or ‘hold mail’ address that is the sole address the FI holds for the account holder. An in care of address outside the US shall not be treated as US indicia for Lower Value Accounts.

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

Where none of the indicia listed above are discovered through an electronic search, no further action is required in respect of lower value accounts, unless there is a change of circumstance that results in one or more US indicia being associated with the account. Where that happens the account will become reportable unless further action is taken by the financial institution to attempt to cure or repair the indicia .See sections 5.5 to 5.8

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

Qualified Intermediaries

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

5.5 Unambiguous U.S. Place of Birth

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

- .A self certification showing that the account holder is neither a US Citizen nor a US. resident for tax purposes. This may be an IRS W8 form or other similar agreed form.
- Evidence of the account holder's citizenship or nationality in a country other than the US (e.g. passport or other government-issued identification); and
- A copy of the account holder's Certificate of Loss of Nationality of the United States or a reasonable explanation of, the reason the account holder does not have such a certificate, or the reason the account holder did not obtain US citizenship at birth

5.6 Current U.S. mailing address/residence address/U.S. telephone numbers

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

- .A self certification that the account holder is neither a US Citizen nor a US resident for tax purposes. This may be an IRS W8 form or other similar agreed form; and
- .Evidence of the account holder's citizenship or nationality in a country other than the US (e.g. passport or other government-issued identification);

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

Where the indicia found is Standing Instructions to transfer funds to an account maintained in the United States, the account must be reported unless the United Kingdom Financial Institution obtains or currently maintains a record of

i. A self certification that the account holder is neither a US Citizen nor a US resident for tax purposes. This may be an IRS W8 form or other similar agreed form; and
ii. Acceptable documentary evidence which establishes the account holder non US status. This evidence can be

- A certificate of residence issued by an appropriate tax official of the country in which the payee claims to be a resident.
- Any valid identification issued by an authorized government body (for example, a government or agency thereof, or a municipality), that includes the individual's name and is typically used for identification purposes.
- Any financial statement, third-party credit report, bankruptcy filing, or US Securities and Exchange Commission report.

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

(d) Driving licence

(e) Shotgun certificate issued by a UK police authority

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

5.8 Effective Power of Attorney or signatory authority

Where the indicia found is a current effective power of attorney or signatory authority granted to a person with a US address; an 'in care of' or 'hold mail' address that is the sole address the Financial Institution holds for the account holder or, where one or more US telephone numbers are associated with the account (if a non US telephone number is also associated with the account.) the account must be reported unless the United Kingdom Financial Institution obtains or currently maintains a record of one of the following

- A self certification showing that the account holder is neither a U.S. Citizen nor a U.S. resident for tax purposes. This may be an IRS W8 form or other similar agreed form ;or
- Acceptable documentary evidence which establishes the account holder non U.S. status. See section 5.7

Where none of the indicia listed in section 5.4 are discovered through an electronic search, no further action is required for lower value accounts unless there is subsequently a change of circumstance that results in one or more U.S. indicia being associated with the account.

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

5.9 High Value Accounts

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

5.10 Electronic Record Searches and High Value Accounts

A Financial Institution must review its electronically searchable data in the same manner as for to lower value accounts.

However a Financial Institution that has previously obtained documentation from a pre-existing individual account holder to establish the account holder's status in order to meet its obligations under a Qualified Intermediary, Withholding Partnership or Withholding Trust agreement, or to fulfil its reporting obligations as a US payor under chapter 61 of the Code, is not required to perform the electronic search or the Paper Record search (See paragraph 5.11) for such accounts.

Example

Any United Kingdom Financial Institution that falls into this category is required, however, to perform the relationship manager enquiry (See section 5.13) where the accounts are High value Pre-Existing Individual accounts.

5.11 Paper Record search and High Value Accounts

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

- The account holder's nationality or residence status;
- The account holder's resident address and mailing address currently on file;
- The account holder's telephone number(s) currently on file;
- Whether there are standing instruction to transfer funds to another account;

- Whether there is a current “in-care-of” address or “hold mail” address for the account holder; and
- Whether there is any power of attorney or signatory authority for the account.

The Paper Record Search should include a review of the current customer master file and, and to the extent they are not contained in the current master file the following documents associated with the account and obtained by the Financial Institution within the last 5 years. This should be reviewed for any US indicia as set at section 5.4

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

5.12 Exceptions

[A Financial Institution is not required to perform the paper record search for any pre-existing individual account with respect to which it has obtained a Form W-8BEN and documentary evidence which establishes the account’s status as an account other than a US reportable account.]

5.13 Relationship Manager

In addition to the electronic and paper searches the Financial Institution must also consider whether any relationship manager associated with the account (including any accounts aggregated with such account) has actual knowledge that would identify the account holder as a Specified US person.

If the relationship manager does know that the account holder is a Specified US Person then the account must be reported unless the indicia can be cured.

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

For example, if a relationship manager is notified that the account holder has a new mailing address in the US, this would be a change in circumstance and the Financial Institution would either need to report the account or obtain the appropriate documentation to cure or repair that indicia.

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

The electronic search and paper search only need to be done once for each account identified as a High Value account However; the relationship manager enquiry must be carried out annually.

5.14 Effects of Finding US Indicia

Where one or more of the indicia are discovered through the enhanced review procedures and none of the cures or repairs can be applied the Financial Institution must treat the account as a US Reportable Account for the current and all subsequent years.

This applies for all accounts except for Depository Accounts (See paragraph 5.2) unless the account holder ceases to be a Specified US Person.

Where none of the indicia are discovered in the Electronic Search, the Paper Record Search or by making enquiries of the relationship manager, no further action is required unless there is a subsequent change in circumstances.

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

5.15 Timing of reviews

Lower Value Accounts

The review of pre-exisiting accounts that are Lower Value accounts at 31 December 2013 must be completed by 31 December 2015.

For Pre-existing Lower Value accounts that are identified as reportable they are only reportable from the year in which the account is identified as such.

Example

The due diligence procedures are carried out on a Lower Value account during March 2015 and the account is determined as reportable; the Financial institution is only required to report on the account information for the year ending 2015 onwards.

High Value Accounts

The review of pre-exisiting accounts that are Higher Value Accounts at 31 December 2013 must be completed by 31 December 2014.

Once identified as reportable because it has a balance over $1m at 31 December 2013 the Financial Institution must report the account for both the year ending 31 December 2013 and the year ended 31 December 2014

Example

The due diligence procedures are carried out on a High Value Individual account during April 2014 and the account is determined as reportable; the Financial Institution is required to report on the account for both calendar years 2013 and 2014.

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

Where the balance or value of an account does not exceed $1,000,000 as of 31 December 2013, but does as of the last day of a subsequent calendar year, the Financial Institution must perform the procedures described for High Value Accounts by 30 June of the year following the year in which the balance or value exceeded $1,000,000.

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

6 New Individual Accounts

A New Individual Account is an account opened on or after 1 January 2014. Where a new account is opened by an individual account holder who already has a pre-exisiting account with the same entity then the Financial Institution still needs to apply the due diligence requirements to the new account.

However, that due diligence can then be relied upon for any subsequent accounts that individual opens with that Financial Institution

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

6.1 Threshold Exemptions that apply to New Individual accounts

The legislation allows for Financial Institutions to elect to apply the following exemptions when reviewing and identifying pre-exiting individual accounts.

If a Financial institution does not make an election under the Regulations to apply the threshold exemptions reportable accounts then it will need to include the following accounts when reviewing and identifying pre-existing individual accounts

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

Cash Value Insurance Contracts do not need to be reviewed, identified or reported unless the cash value exceeds $50,000.

6.2 Reportable Accounts

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

6.3 Identification of New Individual accounts

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

- Obtain a self certification (See section 4.2) that allows the Financial Institution to determine whether the account holder is US tax resident; and

- Confirm the reasonableness of this self-certification based on the information the Financial Institution obtains in connection with the opening of the account, including any documentation obtained for AML/KYC Procedures
- For these purposes a US citizen is considered to be resident in the US for tax purposes even where they are also tax resident of another country.

6.4 Reliance on Self-Certification and Documentary evidence

Where information already held by a Financial Institution conflicts with any statements or self-certification or the Financial Institution has reason to know that the self certification or other documentary evidence is incorrect then it may not rely on that evidence or self-certification.

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

7 Pre-existing Entity Accounts

Pre- existing entity accounts are those accounts that are in existence at 31 December 2013.

7.1 Threshold Exemptions that apply to Pre-existing entity accounts

The legislation allows for Financial Institutions to elect to apply the following exemptions when reviewing and identifying pre-exiting individual accounts.

If a Financial institution does not make an election under the Regulations to apply the threshold exemptions reportable accounts then it will need to include the following accounts when reviewing and identifying pre-existing individual accounts

Where the account balance or values does not exceed $250,000 at 31 December 2013 there is no requirement to review, identify or report the account, until the account balance exceeds $1,000,000.

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

7.2 Reportable Accounts

An account is only reportable where the account is held by one or more Specified US Persons or by Passive NFFEs with one or more Controlling Persons who are US citizens or residents.

If the account holder is a Non-participating Financial Institution then payments made to the NPFI will be reportable. (See section 9.3)

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

7.3 Identification of an entity as a Specified U.S. Person

In order to identify if an entity is a Specified US Person; information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon.

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

- If the account holder is determined to be a Specified US Person then the account should be treated as reportable unless a self certification is obtained from the account holder which shows that the account holder is not a Specified US Person.

7.4 Identification of an entity as a Financial Institution

In order to identify if an entity is a Financial Institution, information maintained for regulatory or customer relationship purposes (including information collected as part of any AML/KYC procedure) can be relied upon.
If the entity is a Financial Institution then the account is not a reportable account unless the entity is a Non-Participating Financial Institution (See section 9.3 for payments to Non Participating Financial Institutions)

7.5 Identification of an entity as a Non Participating Financial Institution

If the entity is a UK Financial Institution or a Financial Institution in another Partner Jurisdiction, no further review, identification or reporting will normally be required the exception is the Financial Institution is a NPFI by the IRS following significant non compliance.

If the account holder is a Financial Institution but not a United Kingdom Financial Institution or a Financial Institution in another Partner Jurisdiction, then it should be treated as a Non-participating Financial Institution unless the entity provides a self-certification stating that it is a certified deemed-compliant Financial Institution , an exempt beneficial owner, or an excepted Financial Institution ; unless the Financial Institution is able to verify that the entity is a participating Financial Institution or registered deemed-compliant Financial Institution for instance from its FATCA identifying number etc.

If the account holder is a Non-participating Financial Institution then the Financial Institution will need to report on payments made to it (see section 9.3).

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

When an entity account holder is not identified as either a Specified US Person or a Financial Institution, the Financial Institution must consider whether the entity is a Passive NFFE and if any of the Controlling Persons of that entity are a US citizen or tax resident of the United States.

An entity will be a Passive NFFE if is not an Active NFFE. (See section 2.26) To determine whether the entity is a Passive NFFE, the Financial Institution must obtain a self-certification from the account holder establishing its status, unless it has information in its possession or that is publicly available, which enable the Financial Institution to reasonably determine that the entity is an Active NFFE.

To identify the Controlling persons of an entity, you may rely on information collected and maintained pursuant to AML/KYC Procedures.

To determine whether the Controlling persons of a Passive NFFE are citizens or residents of the United States for tax purposes, you may rely on:

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

7.7 Timing of reviews

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

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

Example

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

8 New Entity Accounts

A New entity Account is an account opened on or after 1 January 2014

8.1 Exemptions that apply to New Entity Accounts

There is no deminmis threshold for New Entity accounts also all new entity accounts are subject to the review and the due diligence procedures.
As there are no deminmis thresholds for New Entities there will be no need to apply the aggregation or currency conversion rules.

8.2 Reportable Accounts

An account holder of a New Entity Account must be classified as either

i. a Specified US Person
ii. a United Kingdom Financial Institution or other Partner Jurisdiction Financial Institution
iii. a participating FFI, a deemed-compliant FFI, an exempt beneficial owner, or an excepted FFI, as those terms are defined in relevant US Treasury Regulations; or
iv. an Active NFFE or Passive NFFE.

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

- a Specified US person

- One or more Controlling Person of a Passive NFFE who is a citizen or resident of the US

8.3 Identification of an entity as a UK Financial Institution

A Financial Institution may rely on publicly available information or information within the Financial Institution's possession to identify whether an account holder is an Active NFFE or a UK or Partner Jurisdiction Financial institution. In all other instances the Financial Institution must obtain a self certification from the account holder to establish the account holder's status.

8.4 Identification of an entity as a Non Participating Financial Institution

If the entity is a UK Financial Institution or a Financial Institution in another Partner Jurisdiction, no further review, identification or reporting will normally be required the exception is the Financial Institution is a NPFI by the IRS following significant non compliance.

If the account holder is a Financial Institution but not a United Kingdom Financial Institution or a Financial Institution in another Partner Jurisdiction, then the entity is treated as a Non-participating Financial Institution unless the Financial Institution obtains a self-certification from the entity stating that it is a certified deemed-compliant Financial Institution , an exempt beneficial owner, or an excepted Financial Institution ; or verify it as a participating Financial Institution or registered deemed-compliant Financial Institution for instance from its FATCA identifying number etc.

If the account holder is a Non-participating Financial Institution then reports on certain payments made to such entities will be required (see section 9.3)

8.5 Identification of an entity account holder as a Specified U.S. person

If the Financial Institution indentifies the account holder of a New Entity Account as a Specified US Person, the account will be a US Reportable Account and the Financial Institution must obtain a self-certification that includes a USs. TIN. The self certification could be, for example IRS form W9.

8.6 Identification of an entity as Non Financial Foreign Entities (NFFE)

If on the basis of a self certification the holder of a New Entity Account is established as a Passive NFFE, the Financial Institution must identify the Controlling Persons of the entity as determined under AML/KYC Procedures.
To determine whether the Controlling Persons of a Passive NFFE is a citizen or resident of the United States for tax purposes the reporting institution must obtain a self-certification from the account holder or Controlling Person.
If they are a citizen or resident of the United States, the account shall be treated as a reportable account.

9 Reporting

Once a Financial institution has applied the procedures and due diligence in respect of the accounts it holds and has identified reportable accounts then it must report certain information regarding those accounts to HMRC.

9.1 Information Required

In relation to each specified U.S. Person that is the holder of such an account and in relation to each Controlling Person of a entity account who is a Specified U.S Persons the information to be reported is:

1. Name
2. Address
3. U.S. TIN where applicable (See section 4.9)
4. The account number of functional equivalent
5. he name and identifying number of the reporting Financial Institution
6. The account balance or value as of the end of the calendar year or other appropriate period (see below). Where an account is closed (see below) during the year the balance or value to be reported is the one immediately before closure.

Where the account is a Custodial account the following information is also required in relation to the calendar year or other appropriate reporting period

7. The total gross amount of interest paid or credited to the account
8. The total gross amount of dividends paid or credited to the account
9. The total gross amount of other income paid or credited to the account

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

Where the account is a Depositary account the following information is also required

11. The total amount of gross interest paid or credited to the account in the calendar year or other appropriate reporting period

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

12. The total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account during the calendar year or other appropriate reporting period

9.2 Timetable for Reporting

The reporting requirements are phased in over a three year period starting from 2013.

With respect to 2013 and 2014 the information that needs to be reported is 1-6 shown in section 9.1.

With respect to 2015 the information required to be reported are 1-9 and 11-12 shown in section 9.1

With respect to 2016 and subsequent years the information required to be reported are 1-12 shown in section 9.1

9.3 Reporting on Non participating Financial Institutions

Where a Financial Institution makes payments to a Non-Participating Financial Institutions under the Agreement it is required to report the aggregate value of payments made to each Non Participating Financial Institution for the years 2015 and 2016.

This obligation was included as a temporary solution to the requirement to withhold on passthru payments which is intended in the US provisions.

Whether or not this reporting requirement continues will need to be considered alongside any discussion on the longer term solution that delivers the underlying policy objectives of passthru but which removes the legal problems for Financial Institutions outside the US.

The payments to be reported are fixed or determinable annual or periodical payments that would be a withholding payment if they were from sources within the United States. This means a payment does not need to have a US source to be reportable. This applies to all payments and not just those associated with account held by an NPFI at the UK Reporting Financial Institution.

Payments for non-financial services, goods, and the use of property made in the ordinary course of business do not have to be reported. Such payments include payments for nonfinancial services, wages, office and equipment leases, software licenses, transportation, freight, gambling winnings, awards, prizes, scholarships, and interest on outstanding accounts payable arising from the acquisition of nonfinancial services, goods, and other tangible property.

Ordinary course of business payments do not include dividends; any interest other than interest described in the preceding sentence; dividend equivalent payments with respect to which the Financial Institution acts as custodian, intermediary, or agent; or bank or broking fees. So such payments will need to be included when reporting.

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

9.4 Withholding on US Source Withholdable Payments paid to Non Participating Financial Institutions

Our consultations with business suggest that the UK does not have any Financial Institutions who are Qualified Intermediaries (QI's) **and** have elected to assume primary withholding responsibility. There are a number of QI's in the UK but any withholding is undertaken by a withholding agent and the primary withholding is not done by the UK Financial Institution itself. Therefore we do not expect Article 4. 1 (d) of the Agreement to apply to UK Financial Institutions, who should instead fall within the provisions of Article 4. 1 (e). This means that UK Financial Institutions will not have to withhold on US source Withholdable payments to a Non Participating Financial Institution but they may have to report on such payments to any immediate payor.

9.5 Reporting payments of US Source Withholdable Payments to Non Participating Financial Institutions

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

Any audit of systems and processes, of either CRM or non CRM businesses may also encompass a review of whether or not a Financial Institution is able to correctly identify its account holders and meets its reporting obligations.

9.6 Third party Service Providers

Any Reporting Financial Institution can rely on third party service providers to meet some of its obligations under this legislation, however fulfilling all those obligations remain the responsibility of the Reporting Financial Institution.

Example

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

9.7 Format

The format in which reporting will be required is still to be finalised.

9.8 Transmission

The way in which Financial Institutions will submit the information to HMRC is still to be finalised

9.9 Penalties

The regulations set out that penalties will be applicable where a Reporting Financial Institution fails to provide the required information and where it provides inaccurate information.

10 Compliance

10.1 Minor Errors

In the event that the information reported is corrupted or incomplete the recipient country will be able to contact the reporting financial institution directly to try and resolve the problem.

Examples of Minor errors could include:

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

Where this leads to the information having to be resubmitted this will have to be via HMRC.

Where a reporting UK financial institution is concerned that an enquiry from the US extends beyond an enquiry on the quality or format of the data and potentially presents difficulties in respect of their obligations under the Data Protection Act 1988 (DPA) or implementing the requirements of the Data Protection Directive (Directive 95/46/EC) then they should contact the UK Competent Authority.

For more specific enquiries, for instance regarding a specific individual or entity, the US will need contact the UK Competent Authorities who will the contact the financial institution.

10.2 Significant Non Compliance

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

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

Where HMRC is notified of significant non-compliance by a UK Financial Institution HMRC will apply any relevant penalties under this legislation

HMRC will also engage with the Financial Institution to:

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

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

In the event that the issues remain unresolved after a period of 18 months then the financial institution will be treated as a Non Participating Financial Institution. The IRS will publish a list of entities that are to be treated as a Non participating financial institution

Details of how such an entity can correct its status will be published at later date.

Examples of what would be regarded as significant Non compliance

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

10.3 Tax Compliance Risk Management Process

For those Financial Institutions with a Customer Relationship Manager (CRM), as part of the normal relationship management activity, a CRM should seek to understand how a business intends to meet its obligations under the legislation and the systems and process that it has put in place.

Areas of difficulty or particular risk could form part of the discussions about business systems and governance and the CRM should work with the company/ entity to identify and deal with any risks that could lead to non compliance. And it is envisioned that compliance with the legislation could form part of any Business Risk Review carried out with the business.

CRMs will be able to call on support from Governance specialists in LBS and Audit specialists in both LBS and Local Compliance to help them to understand and address any issues identified.

For those Financial Institutions where there is no CRM, compliance activity will follow a risk based approach and will focus on those Financial Institutions where information indicates they are potentially in non compliance with the Legislation.

11 Anti Avoidance

The regulations include an Anti avoidance measure which is aimed arrangements taken by any person to avoid the obligations placed upon them by the regulations.

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