Inland Revenue
Te Tari Taake

IR1083
November 2017

Foreign Account Tax Compliance Act (FATCA)

U.S. reportable accounts guidance notes

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

Contents

Introduction

1. The Intergovernmental Agreement ("IGA") between the United States of America ("U.S.") and New Zealand ("NZ") to improve international tax compliance and to implement FATCA was signed on 12 June 2014. The domestic legislation required to give effect in New Zealand to FATCA reporting received Royal Assent on 30 June 2014 and the IGA and the associated domestic legislation have effect from 1 July 2014. The IGA has been brought into effect by Order in Council and came into force on 3 July 2014.
2. The following guidance is provided by the Inland Revenue to Reporting New Zealand Financial Institutions ("Reporting NZFIs")[1] to assist them in understanding their obligations to identity and report on U.S. Reportable Accounts - as part of their due diligence requirements under the IGA.
3. Article 2 of the IGA requires the NZ Inland Revenue to annually and automatically exchange with the U.S. the information specified in Article 2(2) relating to U.S. Reportable Accounts. Concurrently, a Reporting NZFI will be treated by the U.S. as complying with FATCA, where, amongst other things,[2] in terms of Article 4(1)(a) of the IGA, it identifies U.S. Reportable Accounts that it maintains and reports on them annually to the NZ Inland Revenue, to enable the NZ Inland Revenue to meet its exchange of information obligations under Article 2 of the IGA.
4. These guidance notes contain a number of examples elaborating on the obligations that Reporting NZFIs have to identify and report on such accounts. These examples are set out in U.S. dollars. This is because the relevant thresholds in the IGA are set out in U.S. dollars. The IGA contains a "currency translation rule" (see Annex I VI C(4) of the IGA). This rule provides that for the purposes of determining the balance or value of financial accounts denominated in a currency other than the U.S. dollar, a Reporting NZFI must convert the U.S. dollar threshold amounts described in Annex I into such currency using a published spot rate determined as of the last day of the calendar year preceding the year in which the Reporting NZFI is determining the balance or value.[3]

What is a U.S. Reportable Account?[4]

5. A "U.S. Reportable Account" is defined in the IGA to mean a financial account:
   - maintained by a Reporting NZFI; and
   - held by one or more Specified U.S. persons; or
   - held by a Non-U.S. entity[5] with one or more controlling persons that is a Specified U.S. person.
6. The following elements of the definition of the U.S. Reportable Account are discussed in more detail below: "*financial account*", "financial account *maintained* by a Reporting NZFI", and "financial account held by one or more *Specified U.S. persons* or by a *Non-U.S. entity* with one or more *controlling* persons that is a Specified U.S. person."

What is a financial account?

7. The first key element of the definition of "U.S. Reportable Account" is that the account is a "financial account". The term financial account is broadly defined and may include products or obligations that would not normally be regarded as a financial account in ordinary commercial terms e.g. an equity interest in an investment entity or a cash value insurance contract.
8. When applying the definition of "financial account" in the IGA a Reporting NZFI will need to consider accounts which are excluded from this definition (discussed below), and, therefore, cannot be U.S. Reportable Accounts. A Reporting NZFI will not be required to report on these accounts to the Inland Revenue.
9. There are also various "balance or value" threshold exemptions in the IGA (see Inland Revenue's "due diligence" guidance notes) that mean that a Reporting NZFI will not be required (or indeed able)[6] to report certain accounts (i.e. accounts with a balance or value that is below the relevant threshold) as being a U.S. Reportable Account.

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1 Non-reporting NZFIs (for example, sponsored investment entities and controlled foreign corporations and financial institutions with a local client base coming within Annex II of the IGA) can also have some limited FATCA due diligence obligations. To the extent that these guidance notes refer to a Reporting NZFI's due diligence obligations these references should also be read as applying to such Non-reporting NZFIs that have these obligations. The distinction between Reporting NZFIs and Non-Reporting NZFIs is outlined in detail in Inland Revenue's "registration" guidance notes.

2 Reporting NZFIs will also have other FATCA obligations (including needing to report on payments that they make to non-participating financial institutions) pursuant to Article 4 of the IGA. This is explained in more detail in Inland Revenue's "due diligence" guidance notes.

3 Inland Revenue's web-site sets out how such currency conversion can occur (See **http://www.ird.govt.nz/how-to/overseas-currency/**).

4 A Reporting NZFI will not need to identify and report an account as a "U.S. Reportable Account" if the account is exempted by balance or value threshold in the IGA, not identified as a "U.S. Reportable Account" after applying the due diligence procedures in Annex I of the IGA (unless there is a change in circumstance, or balance or value that means that further due diligence needs to be carried out and the account is then identified as being a U.S. Reportable Account), or the account is an excluded account (discussed below).

5 However, as outlined below, Reporting NZFIs will only need to report on Non-U.S. entity financial accounts (that are not exempted or excluded) as being U.S. Reportable accounts if the accounts are held by passive NFFEs with one or more controlling persons that are Specified U.S. Persons. A New Zealand trust which is not a financial institution is an example of an entity which could be a passive NFFE (where it is not an Active NFFE).

6 The "reporting" of such accounts is set out as being an "excluded choice" in terms of section 185 F(7) of the Tax Administration Act 1994.

10. The term "financial account" is defined in Article 1(1)(s) of the IGA and means an account maintained by a financial institution, and includes:
    (1) In the case of an entity that is a financial institution solely because it is an investment entity, any equity or debt interest (other than interests that are regularly traded on an established securities market) in the financial institution.
    (2) In the case of a financial institution not described paragraph (1)[7] any equity or debt interest in the financial institution (other than interests that are regularly traded on an established securities market), if (i) the value of the debt or equity interest is determined, directly or indirectly, primarily by reference to assets that give rise to U.S. source withholdable payments, and
        (ii) the class of interests was established with a purpose of avoiding reporting in accordance with the IGA.
    (3) Any cash value insurance contract and any annuity contract issued or maintained by a financial institution, other than a noninvestment-linked, non- transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account, product, or arrangement that is excluded from the definition of financial account in Annex II of the IGA.

    [Notwithstanding the foregoing, the term "financial account" does not include any account, product, or arrangement that is excluded from the definition of financial account in Annex II of the IGA.

    For the purposes of the IGA, interests are "regularly traded" if there is a meaningful[8] volume of trading with respect to the interests on an ongoing basis, and an "established securities market"[9] means an exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange. For the purposes of this definition of "financial account" in the IGA, an interest in a financial institution is not "regularly traded" and shall be treated as a financial account if the holder of the interest (other than a financial institution acting as an intermediary) is registered on the books of such financial institution. The preceding sentence will not apply to interests first registered on the books of such financial institution prior to July 1, 2014, and with respect to interests first registered on the books of such financial institution on or after July 1, 2014, a financial institution is not required to apply the preceding sentence prior to January 1, 2016.]
11. The term "financial account" also covers "depository accounts" and "custodial accounts" maintained by a financial institution.
12. A financial institution may maintain more than one type of account. For example, an entity that is a depository institution may maintain both depository and custodial accounts.

    Example 1: Reporting NZFI is a depository institution that also provides trustee and custodial services. Reporting NZFI maintains both depository accounts and custodial accounts.[10] Reporting NZFI receives gross income from custodial services (the holding of financial assets and related financial services) that equates to 15% of its total gross income (during the previous three years ending 31 December). Therefore, Reporting NZFI is not a custodial institution.[11] Reporting NZFI carries out due diligence in relation to these depository and custodian accounts and identifies that four of them (two of the depository accounts and two of the custodial accounts) have a balance or value that exceeds the reporting threshold[12] and are held by Specified U.S. Persons.

    Is Reporting NZFI required to report on these accounts?

    Yes. Reporting NZFI is a depository institution as defined in the IGA. It is irrelevant that Reporting NZFI is not a custodial institution. The only requirement is that the entity is at least one type of financial institution as defined in the IGA and is a Reporting NZFI.
13. In the following paragraphs we discuss the types of financial accounts in more detail.

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[7] This would cover situations such as where a financial institution is solely a custodial, depository, or specified insurance company or where a financial institution has combined features of various types of financial institution (e.g. both a custodial institution and investment entity), and, therefore, is not "solely" a financial institution because it is an investment entity. The various types of financial institutions are outlined in detail in Inland Revenue's "registration" guidance notes.

[8] Whether there is a "meaningful volume of trading" will be a question of fact and degree. Inland Revenue considers that if, for instance, interests are traded on an established securities market and relate to a "widely held company" (based on the Income Tax Act 2007 definition) there can be a presumption that a meaningful volume of trading has occurred, unless this presumption is rebutted by evidence to the contrary (such as the entity being a dormant entity).

[9] The Inland Revenue considers that the New Zealand Stock Market as administered by NZX Limited, the Australian Stock Market as administered by the Australian Securities Exchange, and the New York Stock Exchange registered under the US Securities Exchange Act 1934 are examples of "established securities markets".

[10] It is assumed, for the purposes of this example, that the accounts are not excluded accounts (discussed below).

[11] The meaning of "custodial institution" is set out in detail in Inland Revenue's "registration" guidance notes.

[12] These thresholds are explained in detail in Inland Revenue's due diligence guidance notes.

Depository Account

14. A depository account maintained by a financial institution will (unless excluded)[13] be a financial account. The term "depository account" is defined in Article 1(1)(t) of the IGA and includes any commercial, checking, savings, time,[14] or thrift account,[15] or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a financial institution in the ordinary course of a banking or similar business. A depository account also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest.

15. A depository account does not require that interest be paid on the account to the account holder[16]. A depository account will also include credit cards[17] (where the financial institution permits deposits to be made by the account holder in excess of the amount due to the financial institution) and pre-loaded cash cards e.g. pre-loaded foreign currency travel cards[18].

16. Therefore, the definition of depository account is broad and extends beyond conventional depository accounts to cover, for example, certificates of indebtedness and instruments maintained by depository institutions in the ordinary course of their business. The breadth of this definition means that, as explained below, for depository institutions there may be an overlap between "depository accounts" and "debt interests." In other words, an account may be both a depository account and a debt interest. This is conceptually similar to how the same entity can be two types of financial institution for FATCA purposes (for example, an entity could be both a depository institution and an investment entity).[19]

Custodial Account

17. A custodial account maintained by a financial institution will (unless excluded)[20] also be a financial account. The term "custodial account" is defined in Article 1(1)(u) of the IGA and means 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 (including, but 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, an insurance contract or annuity contract, and any option or other derivative instrument).

18. An insurance (including a cash value insurance contract) or annuity contract are not custodial accounts, but can be assets held in a custodial account.

Example 2: Custodial Limited is a custodial institution and a Reporting NZFI and provides a safe custody service for securities e.g. debt interest or shares, held on behalf of its customers. Custodial Limited holds the securities as bare trustee for their clients who are the beneficial owners.[21]

Custodial Limited carries out all administrative aspects related to holding the securities i.e. collection of income, taking care of corporate actions relating to shares, sales and acquisitions, and dealing with all correspondence.

Is this a custodial account?

Yes, it is an account for the benefit of clients which holds financial instruments i.e. shares, debt interests, etc. Custodial Limited will (provided that the accounts are not excluded – see below) need to carry out due diligence on the account holders (the clients who are the beneficial owners) to determine whether the accounts are U.S. Reportable Accounts, and, therefore, need to be reported.

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12 These thresholds are explained in detail in Inland Revenue's due diligence guidance notes.

13 These exclusions are discussed below.

14 Inland Revenue views a "time account" as simply the same as a term deposit account. Where a term deposit is in whole or in part rolled over at maturity, the new term deposit is not required to be treated as a "new" account (see Inland Revenue's "due diligence" guidance notes regarding a detailed outline of what constitutes a "new" account). This will apply to term deposits where the roll-over decision is made prior to maturity, or within a reasonable time after the term deposit matures.

15 We are not aware of the expression "thrift account" being used specifically in New Zealand, but would view a thrift account as simply a savings account.

16 This is implicit from the inclusion of checking accounts in the "depository account" definition in Article 1(1)(t) of the IGA. Credit amounts in checking accounts do not normally pay interest to the account holder.

17 We note that FATCA contains a number of provisions that are potentially relevant in the context of credit cards: the U.S. $50,000 rule that applies in relation to new entity accounts (to exempt such accounts where the Reporting NZFI implements policies and procedures to prevent an account balance owed to the account holder exceeding U.S. $50,000) and the "qualified credit card issuer" category in annex II of the IGA. These matters are elaborated on in Inland Revenue's "due diligence" and "registration" guidance notes.

18 Although credit card accounts are not specifically referred to in this definition, the fact they are referred to in other parts of the IGA implies that they are depository accounts. A pre-loaded cash card would perform the same function as a credit card which permits the account holder to make deposits in excess of the amount due, so would also constitute a depository account.

19 The relevant types of financial institutions are outlined in detail in Inland Revenue's "registration" guidance notes.

20 These exclusions are discussed below.

21 For the purposes of this example it is assumed that the clients themselves who hold the relevant beneficial interest, as opposed to the clients holding that interest on behalf of someone else.

Example 3: Online Escrow Ltd provides an on-line escrow service for buyers and suppliers of goods and services. On-line Escrow Ltd is a custodial institution and a Reporting NZFI. John has an antique vase which Julie wishes to buy for U.S. $75,000. To secure the purchase price, John opens an on-line escrow account with On-line Escrow Ltd, and specifies that he is the supplier and Julie is the buyer. Julie deposits 10% of the purchase price into the on-line escrow account as security, pending completion of the transaction. Julie then receives the vase, pays the remaining 90% of the purchase price into the account, and notifies On-line Escrow Ltd that the purchase price (less escrow fees) can be released to John. There is no income earned on the assets in the account.

Is John's escrow account a financial account?

No, whilst it satisfies the definition of custodial account, it is excluded from the definition of financial account under the escrow exclusion in Annex II of the IGA,[22] because it is an account to secure Julie's obligation to pay the purchase price of personal property and the other elements of the escrow account exclusion are satisfied. The escrow account exclusion in the IGA is discussed in more detail below.

Example 4: Margin Ltd is a custodial institution and a Reporting NZFI. It provides margin lending to customers to acquire shares. Vanessa is a Specified U.S. Person, and approaches Margin Ltd for a loan. Vanessa has U.S. $200,000 to invest and based on the margin lending ratio of 50%, Margin Ltd is prepared to lend Vanessa U.S. $200,000. In total then she has U.S. $400,000 to invest in approved securities. To secure the loan to Vanessa, the shares are transferred into the name of Margin Ltd and held as security until the loan is repaid. Dividends on the shares are credited to Vanessa during the term of the security arrangement. A fall in the market value of the shares below U.S. $400,000 will trigger a margin call on the loan to restore the margin lending ratio to 50%.

Is Vanessa's margin loan a U.S. Reportable Account?

Yes, it is a custodial account held by a Specified U.S. Person. The financial account exclusion in Annex II[23] of the IGA for escrow accounts does not apply to margin lending accounts. The escrow account exclusion in the IGA is discussed in more detail below.

Equity or Debt Interests

19. An "equity" or "debt" interest maintained by a financial institution will (unless excluded)[24] also be a financial account in the following circumstances:

    (1) Where the equity or debt interest (other than where those interest are regularly traded on an established securities market) is in a financial institution which is a financial institution solely because it is an investment entity.

    (2) Where the equity or debt interest (other than where those interest are regularly traded on an established securities market) is in a financial institution, other than one described in paragraph (1)[25] if (i) the value equity or debt interest is determined, directly or indirectly, primarily by reference to assets which give rise to U.S. source withholdable payments and (ii) the class of interest was established with a purpose of avoiding reporting in accordance with the IGA.

    [For the purposes of the IGA, interests are "regularly traded" if there is a meaningful volume of trading with respect to the interests on an ongoing basis, and an "established securities market"[26] means an exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange. For the purposes of the definition of "financial account" in the IGA, an interest in a financial institution is not "regularly traded" and shall be treated as a financial account if the holder of the interest (other than a financial institution acting as an intermediary) is registered on the books of such financial institution. The preceding sentence will not apply to interests first registered on the books of such financial institution prior to July 1, 2014, and with respect to interests first registered on the books of such financial institution on or after July 1, 2014, a financial institution is not required to apply the preceding sentence prior to January 1, 2016.]

20. An "equity interest" is defined in Article 1(1)(v) of the IGA to mean, in the case of a partnership that is a financial institution, either a capital or profits interest in the partnership. In the case of a trust that is a financial institution, an equity interest is considered to be held by any person treated as a settlor or beneficiary[27] of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. For example, a settlor of a trust has and holds an equity interest in the trust which the settlor settles.

21. In the context of a company or corporation, the Inland Revenue considers that an equity interest will be either shares or stock which represents an ownership interest in the company or corporation.

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[22] The Annex II (of the IGA) exclusions are discussed in detail below.

[23] The Annex II (of the IGA) exclusions are discussed in detail below.

[24] These exclusions are discussed below.

[25] This would covers situations such as where a financial institution is solely a custodial, depository, or specified insurance company or where a financial institution has combined features of various types of financial institution (e.g. both a custodial institution and investment entity), and, therefore, is not "solely" a financial institution because it is an investment entity.

[26] We consider that the NZX, the NZDX, and the NZAX are examples of established securities markets.

[27] A Specified U.S. person shall be treated as being a beneficiary of a foreign trust if such Specified U.S. person has the right to receive directly or indirectly (for example, through a nominee) a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust.

22. The expression "debt interest" is not defined in the IGA or the U.S. Treasury Regulations. The Inland Revenue considers that a debt interest is any interest created when a lender lends money to a borrower. In the FATCA context any loan by a lender to a financial institution will create a debt interest in the financial institution. The debt interest can arise through, for example, a simple loan, a bond issue or note issue. As noted above, for depository institutions, there could be an overlap between the definition of debt interest and the definition of depository account (due to the breadth of the definition of depository account) i.e. an account could have the character of being both a debt interest and a depository account in the context of such businesses.[28]

Example 5: Reporting NZFI is a property investment trust that is a managed investment scheme under the Financial Markets Conduct Act 2013. Units in the property trust are listed on the NZX. There is a meaningful volume of trading with respect to these interests on an ongoing basis. The NZX is an exchange that is officially recognized and supervised by a governmental authority in New Zealand and that has a meaningful annual value of shares traded on the exchange. Therefore, the NZX is an "established securities market." Reporting NZFI is an investment entity and does not satisfy any of the other "financial institution" definitions in the IGA.

On 1 June 2016 Custodial Institution Limited (a custodial institution) obtains 1,000,000 units in Reporting NZFI (with a value of U.S. $1,000,000) as a custodial intermediary for underlying individual investors, which include Specified U.S. Persons. Custodial Institution Limited is registered as the holder of the units on the books of Reporting NZFI.

Is the interest that Custodial Institution Limited holds in Reporting NZFI (as a result of holding the units) a "financial account" that could be a U.S. Reportable Account from Reporting NZFI's perspective?[29]

Reporting NZFI is a financial institution "solely" because it is an investment entity. This means that paragraph (1) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The units are "equity interests" in Reporting NZFI. This is because the unit holders are beneficiaries of the unit trust. These "equity interests" are "regularly traded" on an established securities market (the NZX). Custodial Institution Limited is the holder of these units and is registered as such on Reporting NZFI's books. Custodial Institution Limited is a financial institution acting as an intermediary (for the underlying investors). Therefore, Custodial Institution Limited's interest in Reporting NZFI is an equity interest that is "regularly traded" and is excluded from the definition of "financial account", and, therefore, cannot be a U.S. Reportable Account. This means that Reporting NZFI will not need to carry out due diligence in relation to this account.

On the other hand, Custodial Institution Limited will[30] be required to report on any Specified U.S. Persons, which are account holders (i.e. the underlying individual investors) of the custodial account.

Example 6: Reporting NZFI is a property investment trust that is a managed investment scheme under the Financial Markets Conduct Act 2013. Units in the property trust are listed on the NZX. There is a meaningful volume of trading with respect to these interests on an ongoing basis. The NZX is an exchange that is officially recognized and supervised by a governmental authority in New Zealand and that has a meaningful annual value of shares traded on the exchange. Therefore, the NZX is an "established securities market." Reporting NZFI is an investment entity and does not satisfy any of the other "financial institution" definitions in the IGA.

On 1 June 2016 Mr Toms obtains 1,000,000 units in Reporting NZFI (with a value of U.S. $1,000,000). Mr Toms is registered as the holder of the units on the books of Reporting NZFI.

Is the interest that Mr Toms holds in Reporting NZFI (as a result of holding the units) a "financial account" that could be a U.S. Reportable Account?[31]

Reporting NZFI is a financial institution "solely" because it is an investment entity. This means that paragraph (1) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The units are "equity interests" in the property trust. This is because the unit holders are beneficiaries of the unit trust. Mr Toms is the holder of these units that is registered as such on Reporting NZFI's books. Mr Toms is not a financial institution. The definition of "financial account" in the IGA deems an equity or debt interest to be **not** "regularly traded", where the holder of that interest (other than a financial institution acting as an intermediary) is "registered on the books" of the financial institution. Therefore, even though the units are factually regularly traded on an established securities market, Mr Toms' interest in Reporting NZFI is an equity interest that is **deemed** to **not** be "regularly traded" (the interest was acquired after the effective dates of the transitional provisions) . This means that this interest is a financial account and could be a U.S. Reportable Account. Therefore, Reporting NZFI will need to carry out due diligence in relation to this account.

We note that this answer would be the same even if Mr Toms' interest was held through a non-financial intermediary (that is not a financial institution) as nominee. In such an instance, Mr Toms would still be the relevant account holder. The definition of "account holder" (in Article 1(1)(dd) of the IGA) is explained in detail below.

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[28] It is noted that such an account would still be a single account (and, therefore, potentially a single U.S. Reportable Account). This point merely relates to the character of the account.

[29] It is assumed for the purposes of this example that the account is not a depository account or a custodial account and is not an excluded account coming within Annex II of the IGA (discussed below).

[30] This is based on the assumption that Custodial Institution Limited will be a Reporting NZFI.

[31] It is assumed for the purposes of this example that the account is not a depository account or a custodial account and is not an excluded account coming within Annex II of the IGA (discussed below).

Example 7: The same facts as example 6, other than as to when Mr Toms acquires the units. On 1 August 2014 Mr Toms obtains 1,000,000 units in Reporting NZFI (with a value of U.S. $1,000,000). Mr Toms is registered as the holder of the units on the books of Reporting NZFI. On 1 January 2016 Mr Toms remains the holder of the interests.

Does Reporting NZFI need to carry out FATCA due diligence on the account of Mr Toms?

Yes.

Reporting NZFI is a financial institution "solely" because it is an investment entity. This means that paragraph (1) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The units are "equity interests" in the property trust. This is because the unit holders are beneficiaries of the unit trust. Mr Toms is the holder of these units that is registered as such on Reporting NZFI's books. Mr Toms is not a financial institution. The definition of "financial account" in the IGA deems an equity or debt interest (held from 1 January 2016) to be **not** "regularly traded", where the holder of that interest (other than a financial institution acting as an intermediary) is "registered on the books" of the financial institution. Therefore, even though the units are factually regularly traded on an established securities market, Mr Toms' interest in Reporting NZFI is an equity interest that is (from 1 January 2016) **deemed** to **not** be "regularly traded". This means that this interest is a financial account and could be a U.S. Reportable Account. Therefore, Reporting NZFI will need to carry out due diligence in relation to this account.

Example 8: The same facts as example 6, other than as to when Mr Toms obtains and sells the units.

On 1 August 2014 Mr Toms obtains 1,000,000 units in Reporting NZFI (with a value of U.S. $1,000,000). Mr Toms is registered as the holder of the units on the books of Reporting NZFI. On 1 December 2015 Mr Toms sells all of his units in Reporting NZFIs.

Did Mr Toms ever have a financial account that Reporting NZFI would need to carry out due diligence on?

No.

Reporting NZFI is a financial institution "solely" because it is an investment entity. This means that paragraph (1) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The units are "equity interests" in the property trust and are factually regularly traded. They were also sold **before** 1 January 2016. They were not financial accounts from the point they were purchased until when they were sold (as the "regularly traded" exclusion from the definition of "financial account" applied - due to the transitional provision). This means that Mr Toms never held a financial account. Therefore, Reporting NZFI does not need to carry out FATCA due diligence on the account that Mr Toms held.

Example 9: Reporting NZFI is a depository institution. Reporting NZFI has issued outstanding bonds with a face value of U.S. $200,000,000 listed on the NZX Debt Market ("NZDX"). There is a meaningful volume of trading with respect to these interests on an ongoing basis. The NZDX is an established securities market. The bonds were not established with a purpose of avoiding reporting in accordance with the IGA.

On 1 June 2016 Ms Glen purchases U.S. $500,000 of Reporting NZFI's corporate bonds. Ms Glen is registered as the holder on the books of Reporting NZFI.

Is Ms Glen's interest in Reporting NZFI a "financial account" that could be a U.S. Reportable Account?[32]

The bonds are "debt interests" in a depository institution. Therefore, Reporting NZFI is not a financial institution "solely" because it is an investment entity (i.e. it is a depository institution). This means that paragraph (2) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The bonds are factually regularly traded on an established securities market. However, Ms Glen is registered as the holder of the bonds on Reporting NZFI's books. Ms Glen is not a financial institution. Therefore, the bonds are deemed to not be "regularly traded".

However, Reporting NZFI did not establish the bonds with a purpose of avoiding reporting in accordance with the IGA. Therefore, in terms of paragraph (2) of the definition of "financial account", the bonds are not a debt interest financial account. This means that, provided that the bonds do not constitute depository accounts,[33] Reporting NZFI will not need to carry out due diligence in relation to this account.

[32] It is assumed for the purposes of this example that the account is not a depository account or a custodial account and is not an excluded account coming within Annex II of the IGA (discussed below).

[33] The definition of "depository account" in Article 1(1)(t) of the IGA "includes any commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar instrument maintained by a Financial Institution in the ordinary course of a banking or similar business. A depository account also includes an amount held by an insurance company pursuant to a guaranteed investment contract or similar agreement to pay or credit interest thereon." This definition is very broad and extends to cover debt instruments maintained by a financial institution in the ordinary course of a banking or similar business. This means that a debt instrument maintained by a depository institution could be a depository account of that institution. This will depend on the nature of the instrument and whether such an institution maintains such an account in the ordinary course of their banking or similar business.

Example 10: Bank Magic Ltd is a depository institution and a Reporting NZFI. To strengthen its capital adequacy position it issues 5 year mandatory conversion convertible notes ("MCCNs") which pay an interest rate based on a standard commercial benchmark. The MCCNs convert to shares in Bank Magic Ltd, at the lower of $20 or a 2% discount to the average of the daily volume weighted average price of the shares for the previous 14 business days. A meaningful volume of the MCCNs are regularly traded on the NZX (an established securities market) on an on-going basis.

On 1 June 2016 Custodial New Zealand Limited (a custodial institution) purchases U.S. $500,000 of Bank Magic Ltd's MCCNs. Custodial New Zealand Limited is registered as such on the books of Bank Magic Ltd as being the holder of the interest as a custodial intermediary for underlying individual investors, which include Specified US Persons.

Is Custodial New Zealand Limited's interest in Bank Magic Ltd a "financial account" maintained by Bank Magic Ltd that could be a U.S. Reportable Account?[34]

No.

The MCCNs are "debt/equity interests" in a depository institution. Therefore, Bank Magic Ltd is not a financial institution "solely" because it is an investment entity. This means that paragraph (2) of the definition of "financial account" in Article 1(1)(s) of the IGA is relevant.

The MCCNs are hybrid securities having both debt and equity characteristics. The MCCNs clearly constitute a "debt or equity interest" in terms of paragraph (2) of the definition of "financial account." The MCCNs are regularly traded on an established securities market and are held by a financial institution acting as an intermediary. Therefore, they come within the "regularly traded" exclusion in paragraph (2) of the definition of "financial account". Accordingly, Custodial New Zealand Limited's interest in Bank Magic Ltd is not a debt or equity interest "financial account". This means that, provided that the interest does not constitute a depository account, Bank Magic Ltd will not need to carry out due diligence in relation to this account.

However, Custodial Institution Limited[35] will be required to report on any Specified U.S. Persons, which are account holders (i.e. the underlying individual investors) of the custodial account.

Cash value insurance contract

23. A "cash value insurance contract" issued or maintained by a financial institution will (unless excluded)[36] also be a financial account.

24. The term "cash value insurance contract" is defined in Article 1(1)(y) of the IGA as meaning an insurance contract (other than an indemnity reinsurance contract between two insurance companies) that has a cash value greater than U.S. $50,000. "Insurance contract" and "cash value" are, in turn, also defined in the IGA.

25. "Insurance contract" is defined in Article 1(1)(w) of the IGA as meaning a contract (other than an annuity contract) under which the issuer agrees to pay an amount upon the occurrence of a specified contingency involving mortality, morbidity, accident, liability, or property risk.

26. "Cash value" is defined in Article 1(1)(z) of the IGA as meaning the greater of (i) the amount that the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan), and (ii) the amount the policyholder can borrow under or with regard to the contract. Notwithstanding the foregoing, the term "cash value" does not include an amount payable under an insurance contract as:

    (1) a personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against;

    (2) a refund to the policyholder of a previously paid premium under an insurance contract (other than under a life insurance contract) due to policy cancellation or termination, decrease in risk exposure during the effective period of the insurance contract, or arising from a redetermination of the premium due to correction of posting or other similar error; or

    (3) a policyholder dividend based upon the underwriting experience of the contract or group involved.

Annuity contract

27. An annuity contract maintained by a financial institution will (unless excluded)[37] also be a financial account provided that it is not a noninvestment-linked, non- transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of financial account in Annex II of the IGA – discussed below.

28. The term "annuity contract" is defined in Article 1(1)(x) of the IGA as meaning a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals. The term also includes a contract that is considered to be an annuity contract in accordance with the law, regulation, or practice of the jurisdiction in which the contract was issued, and under which the issuer agrees to make payments for a term of years.

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[34] It is assumed for the purposes of this example that the account is not a depository account or a custodial account and is not an excluded account coming within Annex II of the IGA (discussed below).

[35] This is based on the assumption that Custodial Institution Limited will be a Reporting NZFI.

[36] These exclusions are discussed below.

[37] These exclusions are discussed below.

When is a financial account *maintained* by a Reporting NZFI?

29. Another key element of the definition of "U.S. Reportable Account" is that the financial account is "maintained"[38] by a Reporting NZFI.
30. A custodial account is "maintained" by a Reporting NZFI that holds custody over the assets in the account. A depository account, cash value insurance contract or annuity contract is "maintained" by a Reporting NZFI that is obligated (excluding an agent) to make payments in respect of the account or contract. Any equity or debt interest in a Reporting NZFI is "maintained" by the issuing NZFI.

> **Example 11:** Mr H has a depository account at Bank A (a Reporting NZFI). The account is a financial account. Bank A is obligated to make payments to Mr H in respect of this account. Therefore, this account is a financial account that is *maintained* by Bank A.

How does a Reporting NZFI that maintains a financial account determine who holds the account?

31. Another key element of the definition of "U.S. Reportable Account" involves determining **who** "holds" the financial account (i.e. whether the account is held by one or more Specified U.S. persons or by a Non-U.S. entity passive NFFE with one or more controlling persons that are Specified U.S. persons, and, therefore, assuming that the account is not exempted or excluded, is a U.S. Reportable account).
32. The IGA does not define "held by". However, the definition of "account holder" in Article 1(1)(dd) of the IGA is relevant for determining what "held by" means in this context.
33. An "account holder" is defined in Article 1(1)(dd) of the IGA to mean:

    "… the person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account. A person, other than a Financial Institution, holding a Financial Account for the benefit or account of another person as agent, custodian, nominee, signatory, investment advisor, or intermediary, is not treated as holding the account for the purposes of this Agreement, and such other person is treated as holding the account. For purposes of the immediately preceding sentence, the term "Financial Institution' does not include a Financial Institution organized or incorporated in a U.S. Territory. In the case of a Cash Value Insurance Contract or an Annuity Contract, the Account Holder is any person entitled to access the Cash Value or change the beneficiary of the contract. If no person can access the Cash Value or change the beneficiary, the Account Holder is any person named as the owner in the contract and any person with a vested entitlement to payment under the terms of the contract. Upon the maturity of a Cash Value Insurance Contract or an Annuity Contract, each person entitled to receive a payment under the contract is treated as an Account Holder."
34. A "person" is defined in §1.471-1(b)(94) of the U.S. Treasury Regulations to mean a person defined in section 7701(a)(1) of the Internal Revenue Code. Under section 7701(a)(1) the term "person" includes an individual, a trust, estate, partnership, association, company, or corporation. It is clear for the purposes of FATCA, that an account holder can be an entity (e.g. trust or partnership) that would not ordinarily have a separate legal personality. This means that trusts and partnerships are "persons" that can be account holders for the purposes of FATCA.
35. In the case of a cash value insurance contract or annuity contract, the account holder is any person entitled to access the cash value or change the beneficiary of the contract. If no person can access the cash value or change the beneficiary, the account holder is any person named as the owner in the contract and any person with a vested entitlement to payment under the terms of the contract. Upon the maturity of a cash value insurance contract or an annuity contract, each person entitled to receive a payment under the contract is treated as an account holder.
36. An "account holder" does not include a person (other than a financial institution[39]) who holds an account for another person as "….agent, custodian, nominee, signatory, investment advisor, or intermediary…." In these circumstances the person on whose behalf the account is held is the account holder. The Inland Revenue expects that Reporting NZFIs will have in place reasonable procedures to determine whether an account holder holds an account on behalf of another person. Where a Reporting NZFI follows those procedures and determines that there is no "on behalf of" relationship, then it will be appropriate for the Reporting NZFI to treat the person that is "listed or identified" as holding the account as being the account holder. For new individual account openings, it would be appropriate that a Reporting NZFI would include questions as to what capacity the account opener intends to hold a financial account so that they are in a position to determine whether such an "on behalf of" relationship exists.

> **Example 12:** On 1 August 2014 Ms B opens up a bank account (a financial account)[40] with a Reporting NZFI and requests that her daughter Lucy be included as a signatory to the account.

The account holder is Ms B. Lucy is not an account holder as she is only a signatory to the account. The Reporting NZFI will need to apply the new individual account due diligence procedures in relation to Ms B's account to determine whether it is a U.S. Reportable Account.

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[38] Refer to §1.1471-5(b)(5) of the U.S. Treasury Regulations for an explanation of when a financial institution will be considered to "maintain" an account.

[39] This reference to "financial institution" does not include a financial institution organized or incorporated in a U.S. Territory.

[40] It is assumed, for the purposes of this example, that the account balance or value exceeds the threshold exemptions in the IGA and that the account is not an excluded account.

Example 13: Ms C is a trustee of her discretionary family trust. The beneficiaries include Ms C's four children. On 1 August 2014 Ms C opens up an account (a financial account)[41] with a Reporting NZFI and it is noted in the account opening documentation that Ms C and the other trustees hold the account in their capacity as trustees for Ms C's family trust.

The account holder is the trust (an entity) and not Ms C or other trustees or any of the beneficiaries. The Reporting NZFI will need to apply the new entity account due diligence procedures[42] in relation to the trust's account to determine whether it is a U.S. Reportable Account.

Example 14: Mr B is a trustee of his fixed family trust. The beneficiaries are Mr B's two children. On 1 August 2014 Mr B opens up an account (a financial account)[43] with a Reporting NZFI but does not advise in the account opening documentation (or otherwise) that the account is to be held in his capacity as trustee for Mr B's family trust. The Reporting NZFI does not know or have reason to know of the existence of the trust relationship.

The account holder will be Mr B and not the trust. The Reporting NZFI will need to apply the new individual account due diligence procedures in relation to Mr B's account to determine whether it is a U.S. Reportable Account.

How does a Reporting NZFI that maintains a financial account determine *whether the account is a U.S. Reportable account?*

37. A Reporting NZFI will also need to determine whether financial accounts that it maintains (that are not exempted or excluded) are, in this respect, "held by" one or more Specified U.S. persons or by a Non-U.S. entity that is a passive NFFE[44] with one or more controlling persons that is a Specified U.S. person, and, therefore, are U.S. Reportable Accounts.
38. The terms "Specified U.S. Person", "Non-U.S. entity", and "controlling persons" are, in turn, all defined in Article 1(1) of the IGA. We will now briefly set out these definitions, before explaining how they feed into the definition of "U.S. Reportable Accounts" and the process that Reporting NZFIs will need to apply to identify such accounts.
39. "Specified U.S. Persons" is defined in Article 1(1)(ff) of the IGA to mean a "U.S. person" other than:[45]
    - a corporation the stock of which is regularly traded on one or more established securities markets [For the purposes of the IGA, interests are "regularly traded" if there is a meaningful volume of trading with respect to the interests on an ongoing basis, and an "established securities market"[46] means an exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange];
    - any corporation that is a member of the same expanded affiliated group as a corporation the stock of which is regularly traded on one or more established securities markets;
    - the U.S. or any wholly owned agency or instrumentality thereof;
    - any State of the U.S., any U.S. Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;
    - any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64);
    - a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the U.S. or any State; or
    - any one of the following as specifically defined in the U.S. Internal Revenue Code: certain organizations exempt from taxation (including certain trusts that are tax exempt or that are otherwise described in the U.S. Internal Revenue Code), certain individual retirement plans, certain banks, certain real estate investment trusts, any common trust fund, certain brokers.[47]
40. A "U.S. Person" is, in turn, defined in Article 1(1)(ee) of the IGA to mean the following:
    - a U.S. citizen or resident individual;
    - a partnership or corporation organized in the U.S. or under the U.S. law;
    - certain trusts that are subject to U.S. law in terms of their administration which are controlled by a US person; or
    - an estate of a deceased U.S. citizen or resident.

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[41] It is assumed, for the purposes of this example, that the account balance or value exceeds the threshold exemptions in the IGA and that the account is not an excluded account.

[42] These procedures are discussed in detail in Inland Revenue's "due diligence" guidance notes.

[43] It is assumed, for the purposes of this example, that the account balance or value exceeds the threshold exemptions in the IGA and that the account is not an excluded account.

[44] Reporting NZFIs will only need to report on Non-U.S. entity financial accounts (that are not exempted or excluded) as being U.S. Reportable Accounts if the accounts are held by passive NFFEs with one or more controlling persons that are Specified U.S. Persons.

[45] This is a summary of the definition of "Specified U.S. Person" in the IGA. The reader should consult the definition of "Specified U.S. Person" in the IGA to see the full definition.

[46] The Inland Revenue considers that the New Zealand Stock Market as administered by NZX Limited, the Australian Stock Market as administered by the Australian Securities Exchange, and the New York Stock Exchange registered under the U.S. Securities Exchange Act 1934 are examples of "established securities markets".

[47] The reader should consult the definition of "Specified U.S. Person" in Article 1(1)(ff) of the IGA to identify the specific section references in the U.S. Internal Revenue Code relating to these entities or persons.

41. An account maintained by a Reporting NZFI that is held by a Specified U.S. person (and that is not exempt or excluded) is a type of U.S. Reportable account.

42. The term "Non-U.S. Entity" is also defined in Article 1(1)(hh) of the IGA as meaning "an Entity that is not a U.S. Person." A Non-U.S. entity that is not a foreign financial institution (as defined in U.S. Treasury Regulations), is an entity described in Annex I VI (B)(4)(j) of the IGA, or is an entity established in New Zealand or another partner jurisdiction and that is not a financial institution, will be a Non- Financial Foreign Entity ("NFFE"). There are two types of NFFEs which are relevant for FATCA purposes: Active or Passive NFFEs. A common type of passive NFFE would be a trust such as a family trust.[48] NFFEs are explained in detail in Inland Revenue's "due diligence" guidance notes. An account maintained by a Reporting NZFI that is held by a Non-U.S. entity passive NFFE that has one or more controlling persons that are Specified U.S. persons (and that is not exempt or excluded) is another type of a U.S. Reportable account.

43. The term "controlling person" is, in turn, defined in Article 1(1)(mm) of the IGA as meaning a natural person who exercises control over an entity. This would include the following:
   - Shareholders and directors of private or publicly listed companies that exercise control over the company.
   - Natural person partners of a partnership that exercise control over the partnership.
   - The IGA specifically defines controlling persons in regard to trust as the settlor, trustees, the protector (if any), beneficiaries or a class of beneficiaries, and any other natural person exercising ultimate effective control over a trust.
   - In the case of legal arrangements other than a trust, control is held by person in "equivalent or similar positions".

44. The term "controlling persons" must be interpreted in a manner consistent with the Financial Action Task Force Recommendations.

45. The due diligence procedures in the IGA provide a framework that Reporting NZFIs need to apply to identify whether financial accounts that they maintain (that are not excluded or exempted) are either held by one or more Specified U.S. persons or by a Non-U.S. entity that is a passive NFFE[49] with one or more controlling persons that is a Specified U.S. person. These are U.S. Reportable Accounts.

46. However, it should be noted that the IGA in its terms, contemplates that the application of the due diligence procedures in Annex I will not be exact. For example, a Reporting NZFI may correctly carry out due diligence procedures set out in Annex I, but ultimately fail to identify an account as being held by a Specified U.S. Person even when the account is, in fact, actually held by a Specified U.S. Person. This possibility is highlighted in the definition of "U.S. Reportable Account" in Article 1(1)(cc) of the IGA, which says "….an account shall **not** be treated as a U.S. Reportable Account if such account is not identified as a U.S. Reportable Account after application of the due diligence procedures in Annex I (Emphasis added)".

47. The converse is also true. There are a number of instances in Annex I where a Reporting NZFI is required to "treat" financial accounts that they maintain (that are not excluded or exempted) as being U.S. Reportable Accounts (i.e. essentially "deeming" these accounts as being held by a Specified U.S. Person or by a Non- U.S. entity passive NFFE with a controlling person that is a Specified U.S. Person) of the Reporting NZFI. This is illustrated by the following:
   - ***Pre-existing individual financial accounts*** where a Reporting NZFI has identified U.S. indicia (such as an unambiguous indication of U.S. place of birth) associated with the account and has not "cured" the indicia.[50] In such a case, the Reporting NZFI must treat the account as being a U.S. Reportable Account.
   - *New individual financial accounts* where the Reporting NZFI has obtained a self-certification from the account holder to the effect that they that they are not a U.S. citizen or tax resident (and has confirmed the reasonableness of this certification) and there is a change of circumstances that causes the Reporting NZFI to know or have reason to know that the original self certification is incorrect or unreliable, and the Reporting NZFI has not been able to obtain a further valid self-certification (that the account holder is not a U.S. citizen or tax resident). In such a case, the Reporting NZFI must treat the account as being a U.S. Reportable Account.
   - *Pre-existing entity financial accounts* where the Reporting NZFI has reviewed information maintained for regulatory or customer relationship purposes (including information collected pursuant to anti-money laundering/know your customer Procedures) and determined that the information indicates that the account holder is a U.S. Person and the Reporting NZFI has not obtained a self-certification from the account holder, or reasonably determined based on information in its possession or that is publicly available, that the account holder is not a Specified U.S. Person. In such a case, the Reporting NZFI must treat the account as being a U.S. Reportable Account.

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[48] However, this will always be a question of fact. A family trust could, for example, be a financial institution or an active NFFE instead.

[49] Reporting NZFIs will only need to report on Non-U.S. entity financial accounts (that are not exempted or excluded) as being U.S. Reportable accounts if the accounts are held by passive NFFEs with one or more controlling persons that are Specified U.S. Persons.

[50] For example, the Reporting NZFI that maintains the account may not have elected to cure U.S. indicia.
Therefore, they will need to treat the account as being a U.S. Reportable Account.

Example 15: A Reporting NZFI maintains a pre-existing financial account (as of 30 June 2014) that is held by a trust. The account is not excluded or exempted by threshold.

The Reporting NZFI applies the entity[51] due diligence procedures and identifies that the trust is a passive NFFE and that a controlling person of the trust is a U.S. citizen. Therefore, the account is treated as a U.S. Reportable Account. Reporting NZFI would need to report on this account annually to the Inland Revenue (the information that would need to be provided, in this regard, is discussed in more detail below). It should be noted that the U.S. Reportable Account is the financial account held by the trust and not the underlying controlling persons. That is, the identification of any controlling person as a U.S. citizen results in the financial account held by the passive NFFE (the trust) being treated as a U.S. Reportable Account (i.e. being held by a Non-US entity passive NFFE with a controlling person that is a Specified US Person).

What accounts are excluded from being U.S. Reportable Accounts?

48. The following accounts are excluded from the definition of "financial account" and therefore shall not be treated as U.S. Reportable Accounts:
    (a) Equity or debt interests which are regularly traded on an established securities market (as outlined in the IGA) and that are not depository accounts or custodial accounts.
    (b) A noninvestment-linked, non-transferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account, product or arrangement that is excluded from the definition of financial account in Annex II of the IGA.
    (c) Any account, product or arrangement excluded from being a financial account in Annex II of the IGA. These products have been agreed as being low risk (in terms of the likelihood that they will be used for tax evasion), and, therefore, are excluded from being financial accounts.

Equity or debt interests which are regularly traded on an established securities market

49. As noted above, there is an exemption from reporting by any Reporting NZFI of any equity or debt interest which is regularly traded (as outlined in the definition of "financial account" in Article 1(1)(s) of the IGA) on an established securities market. These accounts are excluded from the definition of "financial account" and therefore shall not be treated as U.S. Reportable Accounts unless, for example, they constitute depository accounts or custodial accounts.

Non-investment linked annuities (conventional annuity)

50. The non-investment linked annuity exclusion from the definition of "financial account" only applies to an annuity which has all of the following characteristics:
    - It is non-investment linked.
    - It is a non-transferable immediate life annuity.
    - It is issued to an individual and monetizes a pension or disability benefit provided under an account, product, or arrangement that is excluded from the definition of financial account in Annex II of the IGA. There are only a limited number of pension benefits excluded from the definition of financial account in Annex II of the IGA (discussed below).

    These annuities are excluded from the definition of "financial account", and, therefore, shall not be treated as U.S. Reportable Accounts.

Example 16: Mr ABC has an investment linked life insurance policy. The policy allows the amount payable on termination to exceed the annual premiums paid for the contract. Mr ABC decides to terminate the policy and use the proceeds (U.S. $800,000) to acquire a non-investment linked, non-transferable immediate life annuity from Insurance Company LIFE Limited – a Reporting NZFI. The balance of the account is U.S. $800,000.

Is this annuity a financial account?

Yes, the account is an "annuity contract" (a type of financial account) as defined in the IGA and is **not** an excluded account. The exclusion for annuities only applies where it "monetizes a pension or disability benefit provided under an account that is excluded from the definition of financial account in Annex II" of the IGA (discussed below). In this example Mr ABC has monetised an investment linked life insurance contract, which is not excluded from the definition of financial account in Annex II of the IGA. Instead, the account is a financial account. The account balance also exceeds the reporting thresholds. Therefore, the Reporting NZFI will need to carry out due diligence on the account to determine if it is a U.S. Reportable Account.

Excluded Financial Accounts in Annex II of the IGA

51. The following accounts are also excluded financial accounts in Annex II of the IGA, and, therefore, shall not be treated as U.S. Reportable Accounts.

Whai Rawa approved retirement savings scheme

52. Membership of the Whai Rawa approved retirement savings scheme operated by Te Rūnanga o Ngāi Tahu is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account.

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[51] A "trust" comes within the definition of "entity" in Article 1(1)(gg) of the IGA.

Retirement and Pension Account

53. A retirement or pension account maintained in New Zealand that satisfies the following requirements under the laws of New Zealand is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account:
    (a) The account is subject to regulation as a personal retirement account or is part of a registered or regulated retirement or pension plan for the provision of retirement or pension benefits (including disability or death benefits);
    (b) The account is tax-favoured (i.e. contributions to the account that would otherwise be subject to tax under New Zealand law are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);
    (c) Annual information reporting is required to the tax authorities in New Zealand with respect to the account;
    (d) Withdrawals are conditioned on reaching a specified retirement age, disability, or death, or penalties apply to withdrawals made before such specified events; and
    (e) Either (i) annual contributions are limited to U.S. $50,000 or less, or (ii) there is a maximum lifetime contribution limit to the account of U.S. $1,000,000 or less, in each case applying the rules set out in Annex I of the IGA for account aggregation and currency translation.

Non-Retirement Savings Accounts

54. An account maintained in New Zealand (other than an insurance or annuity contract) that satisfies the following requirements under the laws of New Zealand is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account:
    (a) The account is subject to regulation as a savings vehicle for purposes other than for retirement;
    (b) The account is tax-favoured (i.e. contributions to the account that would otherwise be subject to tax under New Zealand law are deductible or excluded from the gross income of the account holder or taxed at a reduced rate, or taxation of investment income from the account is deferred or taxed at a reduced rate);
    (c) Withdrawals are conditioned on meeting specific criteria related to the purpose of the savings account (for example, the provision of educational or medical benefits), or penalties apply to withdrawals made before such criteria are met; and
    (d) Annual contributions are limited to U.S. $50,000 or less, applying the rules set out in Annex I for account aggregation and currency translation.

Certain Term Life Insurance Contracts

55. A life insurance contract maintained in New Zealand with a coverage period that will end before the insured individual attains age 90 is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account, provided that the contract satisfies the following requirements:
    (a) Periodic premiums, which do not decrease over time, are payable at least annually during the period the contract is in existence or until the insured attains age 90, whichever is shorter;
    (b) The contract has no contract value that any person can access (by withdrawal, loan, or otherwise) without terminating the contract;
    (c) The amount (other than a death benefit) payable upon cancellation or termination of the contract cannot exceed the aggregate premiums paid for the contract, less the sum of mortality, morbidity, and expense charges (whether or not actually imposed) for the period or periods of the contract's existence and any amounts paid prior to the cancellation or termination of the contract; and
    (d) The contract is not held by a transferee for value.

Account Held by an Estate

56. An account maintained in New Zealand that is held **solely** by an estate is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account **if** the documentation for such account includes a copy of the deceased's will or death certificate.
57. This exclusion would not include any account held by trustees of a testamentary trust created under the will of a deceased. The exclusion also does not apply when there are two or more account holders, even when an estate is one of the account holders.

Escrow Accounts

58. An account maintained in New Zealand established in connection with any of the following is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account:
    (a) Legislation, a court order or judgment. [For example, if an account is maintained in New Zealand and has been established in connection with a court order or judgment (such as by the Family Court or under the Protection of Personal and Property Rights Act 1988) it will be excluded from the definition of financial account and shall not be treated as a U.S. Reportable Account.]
    (b) A sale, exchange, or lease of real or personal property, provided that the account satisfies the following requirements:
        i. The account is funded solely with a down payment, earnest money, deposit in an amount appropriate to secure an obligation directly related to the transaction, or a similar payment, or is funded with a financial asset that is deposited in the account in connection with the sale, exchange, or lease of the property;

ii. The account is established and used solely to secure the obligation of the purchaser to pay the purchase price for the property, the seller to pay any contingent liability, or the lessor or lessee to pay for any damages relating to the leased property as agreed under the lease;

iii. The assets of the account, including the income earned thereon, will be paid or otherwise distributed for the benefit of the purchaser, seller, lessor, or lessee (including to satisfy such person's obligation) when the property is sold, exchanged, or surrendered, or the lease terminates;

iv. The account is not a margin or similar account established in connection with a sale or exchange of a financial asset; and

v. The account is not associated with a credit card account.

(c) An obligation of a financial institution servicing a loan secured by real property to set aside a portion of a payment solely to facilitate the payment of taxes or insurance related to the real property at a later time.

(d) An obligation of a financial institution solely to facilitate the payment of taxes at a later time.

Example 17: Individual A is a Specified U.S. person. Individual A sells a farm property for U.S. $2,000,000. The purchaser pays a 10% deposit (U.S. $200,000) to the real estate agent as security, which the real estate agent deposits into their trust account with Bank X[52], which is a Reporting NZFI, on behalf of the Individual A (the vendor). The assets of the account, including the income earned thereon, will be paid or otherwise distributed for the benefit of the purchaser or individual A (including to satisfy such person's obligation) when the property is sold.

The account is a depository account which exceeds all relevant depository thresholds for reporting. However, Bank X is not required to treat the account as a U.S. Reportable Account as it meets the criteria of being an exempt "escrow account" under Annex II (V) (E) of the IGA. Therefore, the account is excluded from the definition of financial account and is not a U.S. Reportable Account.

Partner Jurisdiction Accounts

59. The following type of "partner jurisdiction account" is also excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account. That is, an account maintained in New Zealand that is excluded from the definition of financial account under an agreement between the U.S. and another Partner Jurisdiction to facilitate the implementation of FATCA, provided that such account is subject to the same requirements and oversight under the laws of such other Partner Jurisdiction as if such account were established in that Partner Jurisdiction and maintained by a Partner Jurisdiction Financial Institution in that Partner Jurisdiction.

Example 18: Reporting NZFI writes pension business into Country A, but does not have a permanent establishment there. Reporting NZFI maintains these pension accounts in New Zealand. The U.S. has entered into an IGA with Country A. These accounts are excluded from the definition of financial account under the IGA entered into between the U.S. and Country A. The accounts are subject to the same requirements and oversight under Country A's laws **as if** the account were established in Country A **and** maintained by a Country A financial institution in Country A. Therefore, these pension accounts are excluded from the definition of financial account and are not U.S. Reportable Accounts.

Tax Pooling Accounts

60. An account that is an interest in a trust established in accordance with section 15S (1)(c) of the Tax Administration Act 1994 by a tax pooling intermediary for the purposes of administering a "tax pooling account" (as defined in section RP 17B of the Income Tax Act 2007) is excluded from the definition of financial account and therefore shall not be treated as a U.S. Reportable Account.

What information does a Reporting NZFI need to obtain and report about a U.S. Reportable Account?

61. Article 4(1)(a) of the IGA requires that a Reporting NZFI identifies U.S. Reportable Accounts and reports annually to Inland Revenue the information[53] about such accounts that is required to be reported pursuant to Article (2)(2)(a) of the IGA.

62. The information to be obtained and reported is set out in Article 2(2)(a) as follows:

(1) the name, address, and U.S. TIN[54] of each Specified U.S. Person that is an account holder of such account and, in the case of a Non-U.S. Entity that, after application of the due diligence procedures set forth in Annex I of the IGA, is identified as having one or more controlling persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;

(2) the account number (or functional equivalent in the absence of an account number);

(3) the name and identifying number of the Reporting NZFI;

52 As required by section 122 of the Real Estates Agents Act 2008.

53 As explained below, the type of information that a Reporting NZFI will need to provide in relation to a U.S. Reportable Account will depend on the relevant reporting year.

54 Please refer to our *FATCA recalcitrant guidance (IR1085)* dated October 2017 for further detail about how pre-existing recalcitrant accounts should be reported.

(4) the account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) as of the end of the appropriate reporting period (the period ending 31 March of the relevant year)[55] or, if the account was closed during such reporting period, immediately before closure;

(5) in the case of any custodial account:[56]

(A) the total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the appropriate reporting period (the period ending 31 March of the relevant year); and

(B) the total gross proceeds from the sale or redemption of property paid or credited to the account during the appropriate reporting period (the period ending 31 March of the relevant year with respect to which the Reporting NZFI acted as a custodian, broker, nominee, or otherwise as an agent for the account holder;

(6) in the case of any depository account, the total gross amount of interest paid or credited to the account during the appropriate reporting period (the period ending 31 March of the relevant year); and

(7) in the case of any account not described in sub-paragraphs (1) – (6), the total gross amount paid or credited to the account holder with respect to the account during the reporting period (ending 31 March of the relevant year) with respect to which the Reporting NZFI is the obligor or debtor, including the aggregate amount of any redemption payments made to the account holder during the appropriate reporting period (the period ending 31 March of the relevant year).

63. Reporting NZFIs will need to obtain and report to the Inland Revenue the following information in relation to U.S. Reportable Accounts in order to comply with their obligations pursuant to Article 4(1)(a) of the IGA:

- The information set out in Article 2(2)(a)(1)-(4) of the IGA for the 2014 year (the period ending 31 March 2015);[57]
- The information set out in Article 2(2)(a)(1)-(7) of the IGA, except for the "gross proceeds" information described above at Article 2(2)(a)(5)(B), for the 2015 year (the period ending 31 March 2016); and
- The information set out in paragraphs Article 2(2)(a)(1)-(7) of the IGA for the 2016 year (the period ending 31 March 2017) and subsequent years.

In the following paragraphs we discuss two points set out in Article 2(2)(a) of the IGA – "account closures" and the meaning of "paid or credited" – in more detail. These points are relevant to the type of information that Reporting NZFIs will need to provide to Inland Revenue in relation to U.S. Reportable Accounts in order to comply with their obligations pursuant to Article 4(1)(a) of the IGA.

Account Closures

64. Article 2(2)(a)(4) of the IGA refers to the information that Reporting NZFIs will need to provide (in order to comply with their obligations in terms of Article 4(1)(a)) in relation to "account closures" for U.S. Reportable Accounts.

65. Where a Reporting NZFI maintains a U.S. Reportable Account that is closed during a reporting period, the Reporting NZFI must provide details of the account balance or value immediately before closure.

66. In recognition of the fact that Reporting NZFIs will have different account closing procedures, a Reporting NZFI will comply with this "account closure" requirement if they provide the following information to Inland Revenue in relation to such accounts [The intention of the different options is to capture the amount withdrawn as part of the account closure process, as opposed to the amount at the point of closure, given that there is an expectation that the balance of an account will be reduced prior to the point of closure. Additionally, a Reporting NZFI has the option to report the balance or value of an account on receipt of account closing instructions as a proxy date for "immediately before closure"]:

- The balance or value of an account when the Reporting NZFI receives instructions from the account holder to close the account;
- The most recent available balance or value that is obtainable following receipt of instructions from an account holder to close the account, where the Reporting NZFI is unable to record the balance or value at the time of receiving instructions to close the account. This may include a balance or value that predates the closure instructions, if that is the balance or value most readily available; or
- The balance or value of the account on any of the five business days prior to account closure.

Example 19: A Reporting NZFI receives instructions from a customer to close a depository account on Monday. The Reporting NZFI is able to determine the account balance at the time of receiving the account closure instructions. However, internal procedures result in the account being closed on the following Wednesday. The balance of the depository account on Monday prior to the actual closure of the account is the reportable balance in terms of Article 2(2)(a)(4) of the IGA (where the Reporting NZFI chooses to record the account closure balance as at the time of receiving the account closure instructions).

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[55] Section 185M of the Tax Administration Act 1994 provides that the appropriate reporting period that the information must relate to is the period ending 31 March of the relevant year (a tax year).

[56] The fact that Article 2 of the IGA (which, as noted above, relates to the obligations of Reporting NZFIs pursuant to Article 4(1)(a) of the IGA) distinguishes between various types of accounts highlights how Reporting NZFIs will need to consider what type of account a U.S. Reportable Account is (i.e. whether it is a custodial account or a depository account etc) in order to comply with their responsibilities pursuant to Article 4(1)(a) of the IGA.

[57] Section 185M of the Tax Administration Act 1994 provides that the relevant period that the information must relate to is the period ended 31 March.

Amounts Paid or Credited

67. Article 2(2)(a)(5)-(7) of the IGA refers to information that Reporting NZFIs will need to provide (in order to comply with their obligations in terms of Article 4(1)(a)) relating to certain amounts "paid or credited" to U.S. Reportable Accounts that they maintain.
68. It is common for income from a financial account to be paid to or credited to a different account from which the capital is held. Reporting NZFIs should report on all amounts of gross income or proceeds from the sale or redemption of property, irrespective of which account of the account holder, those amounts are paid or credited into.
69. The expression "paid" is not defined in the IGA. However, the expression "pay" is defined in section YA 1 of the Income Tax Act 2007 to include in part, to deal with an amount in a person's "interest or on their behalf". This would include payments of income and gross proceeds to any account of an account holder. Further support in the IGA for this interpretation can be found in Article 2(2)(a)(5)(A) of the IGA, which refers to amounts being "paid or credited to the account (or *with respect to the account*" (emphasis added). An amount paid to an account holder in regard to a U.S. Reportable Account, but paid to another account of the account holder by a Reporting NZFI, would be an amount paid in respect of the U.S. Reportable Account.