



**GUIDE 1 ON THE IMPLEMENTATION OF AN INTERGOVERNMENTAL AGREEMENT TO IMPROVE INTERNATIONAL TAX COMPLIANCE**

DATE:

**SUBJECT : IMPLEMENTATION OF AN INTERGOVERNMENTAL AGREEMENT REQUIRING THE REPORTING OF FINANCIAL INFORMATION FOR EXCHANGE OF INFORMATION PURPOSES**

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**Preamble**

In this guide unless the context indicates otherwise –

- **“AEOI”** means automatic exchange of information;
- **“Agreement”** means the intergovernmental agreement between the Government of the Republic of South Africa and the Government of the United States of America to improve international tax compliance and to implement FATCA (signed 9 June 2014);
- **“Article”** means an Article of the Agreement;
- **“Annex I”** and **“Annex II”** mean the annexes to the Agreement;
- **“BRS: AEOI”** means SARS’s Business Requirement Specification: Automatic Exchange of Information;
- **“Competent Authority”** means the Commissioner for SARS or an authorised representative of the Commissioner;
- **“CRS”** means Common Reporting and Due Diligence Standards;
- **“FATCA”** means the U.S. Foreign Account Tax Compliance Act;<sup>1</sup>
- **“FFI”** means Foreign Financial Institution;
- **“IRS”** means the United States Internal Revenue Service;
- **“Minister”** means the South African Minister of Finance;
- **“NFFE”** means Non-Financial Foreign Entity;
- **“Reportable Account”** means a Reportable Account referred to in the Agreement;
- **“Reporting Institution”** means a Reporting South African Financial Institution referred to in the Agreement;
- **“SARS”** means the South African Revenue Service;
- **“U.S.”** or **“United States”** means the United States of America;
- **“U.S. Regulations”** means the U.S. Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities;<sup>2</sup> and
- any other word or expression in this guide bears the meaning ascribed to it in the Agreement.

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<sup>1</sup> Part of the Hiring Incentives Restore Employment Act of 2010.

<sup>2</sup> The U.S. issued final Regulations on 6 March 2014.

## Preface

This is a general guide on the application and interpretation of specific issues arising from the statutory obligations placed on South African Financial Institutions<sup>3</sup> in terms of the Agreement between the Government of the Republic of South Africa and the Government of the United States of America (the Agreement). While this guide reflects SARS's interpretation of the Agreement, taxpayers who take a different view are free to avail themselves of the normal avenues for resolving such differences.

This guide is not an "official publication" as defined in section 1 of the Tax Administration Act 28 of 2011 and accordingly does not create a practice generally prevailing under section 5 of that Act. It is also not a binding general ruling under section 89 of Chapter 7 of the Tax Administration Act. Should an advance tax ruling be required, visit the SARS website for details of the application procedure.

This guide is based on the Agreement and Annexes signed on 9 June 2014.

For more information you may visit the SARS website at [www.sars.gov.za](http://www.sars.gov.za).

Comments on this draft guide should be sent to [policycomments@sars.gov.za](mailto:policycomments@sars.gov.za) by 27 February 2015.

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<sup>3</sup> For the definition of "South African Financial Institution" refer to the **Glossary** appended to this guide.

## Chapter 1 – Introduction to FATCA

### 1.1 Background

In 2010 the United States of America in an effort to enhance tax compliance by U.S. citizens in foreign jurisdictions or those with offshore accounts, introduced the Foreign Account Tax Compliance Act (FATCA) which institutes identification and reporting obligations on Foreign Financial Institutions (FFIs). The reporting regime requires Financial Institutions to report information to the United States Internal Revenue Service (IRS) relating to U.S. Account Holders. In 2012 the U.S. introduced a model intergovernment agreement (IGA) to enable countries to assist their residents affected by FATCA. Under this model FFIs in participating countries will report the required information to their own governments, followed by automatic exchanges of information under a relevant treaty.

As a result of FATCA, on 13 February 2014 the Organisation for Economic Co-operation and Development (OECD) released a document on a single global standard for automatic exchange of financial account information which contains Common Reporting and Due Diligence Standards (CRS). The CRS is designed to create a global standard for the automatic exchange of financial account information and calls on tax authorities to obtain information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis.

On 9 June 2014 the Government of the Republic of South Africa and the Government of the United States of America signed an intergovernmental agreement (Agreement) to improve international tax compliance and to implement the provisions of FATCA. The Agreement has been ratified in Parliament and publication in the *Government Gazette* is imminent. It is envisaged that the terms of the Agreement will clarify some of the implementation problems faced by South African financial institutions including avoiding the legal difficulty of complying without breaching data protection restrictions as provided for in domestic law. The benefit of compliance with the Agreement for South African financial institutions is that they would not be subject to a 30% withholding tax on U.S. source income, unless they fail to resolve non-compliance with the obligations under the Agreement within 18 months after being notified by the Competent Authority of such significant non-compliance.<sup>4</sup>

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<sup>4</sup> In terms of Article 5.

In accordance with the Agreement a Reporting South African Financial Institution (Reporting Institution)<sup>5</sup> is required to obtain information on Reportable Accounts<sup>6</sup> as from 1 July 2014 and report this information to the South African Revenue Service (SARS). The manner in which reporting is to be done is specified in SARS's Business Requirements Specifications (BRS: AEOI) which is available on the SARS website.<sup>7</sup> SARS is then required to exchange the information with the IRS in accordance with Article 26 of the Double Taxation Convention in force between South Africa and the U.S.

For purposes of the Agreement a South African Financial Institution is a Financial Institution resident in South Africa but excluding any branch of such Financial Institution that is located outside South Africa, and any branch of a Financial Institution not resident in South Africa if the branch is located in South Africa.<sup>8</sup>

Each category of Financial Institution is determined by a set of criteria which must be met. An Entity, which is a non-U.S. Entity, that does not meet the definition of "Financial Institution" will be regarded as a Non-Financial Foreign Entity (NFFE).<sup>9</sup>

A Financial Institution must determine if it has a reporting obligation in terms of the Agreement. A Financial Institution that is a Reporting Financial Institution in terms of the Agreement, has to apply the prescribed due diligence procedures as set out in Annex I of the Agreement in order to identify and report on U.S. Reportable Accounts<sup>10</sup> and on payments to certain Nonparticipating Financial Institutions (NPFIs).<sup>11</sup>

The terms "Financial Institution" and "Financial Account" are specifically defined in the Agreement and are included in the **Glossary** appended to this guide.

The first reporting period in terms of the BRS: AEOI specifications is 1 July 2014 to 28 February 2015. The information required for the first reporting period must be submitted to SARS by 30 June 2015.<sup>12</sup> Thereafter the required information must be submitted annually at the end of May for the reporting period ending February.<sup>13</sup>

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<sup>5</sup> Reporting Institution means a Reporting South African Financial Institution referred to in the Agreement. For the definition of "Reporting South African Financial Institution" refer to the Glossary appended to this guide.

<sup>6</sup> For the definition of "Reportable Account" refer to the Glossary appended to this guide.

<sup>7</sup> The document is available on SARS's Automatic Exchange of Information page, which can be accessed through the following path [www.sars.gov.za](http://www.sars.gov.za) ⇒ Business and Employers ⇒ Modernised 3rd party data Platform ⇒ Automatic Exchange of Information, scroll down to 'Useful Links' and select 'SARS External BRS 2014'.

<sup>8</sup> To be read in conjunction with Article 4(5)(a) – Special Rules Regarding Related Entities and Brances that are Nonparticipating Financial Institutions.

<sup>9</sup> For the definition of "Non-Financial Foreign Entity" refer to the Glossary appended to this guide.

<sup>10</sup> For the definition of "U.S. Reportable Account" refer to the Glossary appended to this guide.

<sup>11</sup> For the definition of "Nonparticipating Financial Institution" refer to the Glossary appended to this guide.

<sup>12</sup> Government Notice No. 509 in *Government Gazette* No. 37778 of 27 June 2014, available at [www.sars.gov.za](http://www.sars.gov.za) ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

<sup>13</sup> The information required to be reported for each reporting period is prescribed in Article 2(2) – Obligations to obtain and exchange information with respect to reportable accounts and Article 3 – Time and manner of exchange of information of the Agreement.

Article 3(3)(a) prescribes the information required for each reporting period with respect to accounts held by Specified U.S. Persons.<sup>14</sup>

## 1.2 Scope of FATCA

This section provides a broad overview of the scope of FATCA; more detail follows under separate chapters in the guide.

FATCA applies to an Entity that is a “Financial Institution” as described in Article 1(1) that maintains Financial Accounts where the Account Holder<sup>15</sup> is a –

- Specified U.S. Person; or
- passive entity with Controlling Persons<sup>16</sup> that are Specified U.S. Persons.

An “Entity” is defined in the Agreement as a legal person or a legal arrangement such as a trust, partnership or an association. An individual or group of individuals acting together will not be classified as an Entity.

The aforementioned Financial Accounts are regarded as Reportable Accounts and the Reporting Institution must identify and report on all such accounts by applying the due diligence procedures set out in Annex I.

An Entity or its representative should ask the following questions to establish if it is required to obtain and provide to SARS the information as set out in the BRS:

- Am I a “Financial Institution”? (Chapter 2)
- Do I maintain “Financial Accounts”? (Chapter 3)
- Are there indicators that any of the account holders are a U.S. Person or a Specified U.S. Person? (Chapter 3)
- After applying the relevant due diligence, do I have any Reportable Accounts? (Chapter 4)

A South African Financial Institution will be classified as either a Reporting Financial Institution or a Non-Reporting Financial Institution. A South African Financial Institution or other Entity resident in South Africa will be a Non-Reporting South African Financial Institution if it is described in Annex II (see 2.9).

Reporting Institutions with no Reportable Accounts will be required to submit a nil return to SARS.

In addition to and for the 2015 and 2016 tax years only, a Reporting Institution must submit the name of each NPFI to which it has made payments and the aggregate amount of such payments.<sup>17</sup>

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<sup>14</sup> For the definition of “Specified U.S. Person” refer to the **Glossary** appended to this guide.

<sup>15</sup> For the definition of “Account Holder” refer to the **Glossary** appended to this guide.

<sup>16</sup> For the definition of “Controlling Persons” refer to the **Glossary** appended to this guide.

<sup>17</sup> Article 4(1)(b).



This situation arises when the Financial Institution is –

- located in a jurisdiction that does not have an Intergovernmental Agreement with the U.S. (or is situated in a jurisdiction with no reporting arrangement with the IRS); or
- classified as being an NPMFI due to significant non-compliance with its obligations.

Under Article 5(2) a Reporting South African Financial Institution will only be classified as an NPMFI if it does not resolve the non-compliance within a period of 18 months after notification from the Competent Authority of significant non-compliance.<sup>18</sup> NPMFIs are discussed in more detail in **2.10**.

### 1.3 Structure of the Agreement

The Agreement is divided into four distinct but interrelated parts:

- The core text of the Agreement
- Annex I
- Annex II
- A Memorandum of Understanding (MOU)

#### 1.3.1 The core text

The core text lays down the general commitments and obligations of both South Africa and the United States. It provides and sets out:

- The definitions with respect to “Financial Institution”,<sup>19</sup> “Financial Account”,<sup>20</sup> “U.S. Person”<sup>21</sup> and payments (Article 1)
- The obligations to obtain and exchange information with respect to Reportable Accounts (Article 2)
- The time and manner of exchange of information (Article 3)
- The application of FATCA to South African Financial Institutions (Article 4)
- Collaboration on compliance and enforcement (Article 5)
- Mutual commitment to continue to enhance the effectiveness of information exchange and transparency (Article 6)
- Consistency in the application of FATCA to Partner Jurisdictions<sup>22</sup> (Article 7)
- Consultations and amendments (Article 8)
- Annexes (Article 9)
- Terms of Agreement (Article 10)

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<sup>18</sup> Article 5(2)(b).

<sup>19</sup> For the definition of “Financial Institution” refer to the **Glossary** appended to this guide.

<sup>20</sup> For the definition of “Financial Account” refer to the **Glossary** appended to this guide.

<sup>21</sup> For the definition of “U.S. Person” refer to the **Glossary** appended to this guide.

<sup>22</sup> For the definition of “Partner Jurisdiction” refer to the **Glossary** appended to this guide.

### 1.3.2 Annex I

Annex I sets out in detail all due diligence obligations that a Reporting Institution, unless otherwise exempt, has to apply to be compliant with the Agreement. It provides rules and provisions regarding the identification and reporting on U.S. Reportable Accounts and clients and on payments to certain NPFIs.

### 1.3.3 Annex II

Annex II lists those Entities<sup>23</sup> that shall be treated as exempt beneficial owners or deemed-compliant FFIs and accounts that are excluded from the definition of “Financial Accounts”.

### 1.3.4 Memorandum of Understanding (MOU)

The MOU signed on 9 June 2014 confirms the understanding between representatives of the Republic of South Africa and the United States of America with regard to the reporting responsibility in a case of securities registered with a South African Central Securities Depository. The text of the MOU has been ratified in Parliament and is legally enforceable in the same manner as the other parts of the Agreement.

## 1.4 Interaction with U.S. Regulations and most favourable nation clause

Article 7 makes provision for South African Financial Institutions to benefit from what is commonly known as the “most favoured nation clause”. In the event that any more favourable terms under Article 4 or Annex I are afforded to another Partner Jurisdiction as contemplated in the Agreement, South Africa will be granted the benefit of such more favourable terms.

It is stipulated that the more favourable terms must be contained in a signed bilateral agreement with such other Partner Jurisdiction in terms of which the Jurisdiction is committed to the same obligations and subject to the same terms and conditions as South Africa as contained in Articles 2 and 3 and Articles 5 to 9.

In terms of the Agreement the United States will notify South Africa of more favourable terms that have been afforded to another Partner Jurisdiction and unless South Africa declines in writing, the more favourable terms will automatically be applicable and effective as of the date of signing of the Agreement incorporating the more favourable terms. Until such time as SARS has posted notices on its website to confirm that the Competent Authority has not declined the more favourable terms, the obligations, terms and conditions per the Agreement are to be adhered to.

If a Financial Institution believes that terms afforded to another Partner Jurisdiction would meet the requirements of “more favourable” but these have not been considered by the IRS to be more favourable, it must be brought to the attention of the Competent Authority who will approach the United States for clarity and to decide on the possible application of such more favourable terms for purposes of the Agreement.

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<sup>23</sup> For the definition of “Entity” refer to the **Glossary** appended to this guide.

Reporting Institutions must apply the definitions described in the Agreement. The Agreement allows for the following exceptions to the rule which are subject to prior approval from SARS:

- Article 1(2) provides that any term not otherwise defined in the Agreement shall, unless the context requires otherwise or the Competent Authorities agree to a common meaning (as permitted by domestic law), have the meaning that it has at that time under the law of the Party applying this Agreement. Any meaning under applicable tax laws of that Party will prevail over a meaning given to the term under other laws of that Party.
- In terms of Article 4(7) South Africa may use, and may permit Reporting Institutions to use a definition in relevant U.S. Regulations in lieu of a corresponding definition in the Agreement, provided that such application would not frustrate the purposes of the Agreement.

SARS will endeavour to provide clarity on terms that are not defined in the Agreement that may create uncertainty. Reporting Institutions may also contact the Competent Authority in this regard.

A Financial Institution that wishes to apply a definition in the U.S. Regulations must approach SARS for approval to apply the alternative definition in its entirety.

## 1.5 Interaction with FATF Recommendations and FICA

The Financial Action Task Force (FATF) Recommendations are mentioned twice in the Agreement and provide, essentially, that the concepts of “Investment Entity” and “Controlling Persons” shall be interpreted in a manner that is consistent with the FATF Recommendations.

FATF is an inter-governmental policy-making body that has a ministerial mandate to establish international standards in order to fulfil the FATF mandate. The FATF Recommendations<sup>24</sup> set out a comprehensive and consistent framework of measures that countries should implement in order to combat money laundering and terrorist financing. South Africa is a member of FATF.

In terms of the Agreement, Reporting Institutions must apply the principles of the FATF Recommendations in interpreting the concepts “Investment Entity” and “Controlling Persons”. The impact of the FATF Recommendations on these two concepts are discussed under **2.6** (Investment Entity) and **3.10** (Controlling Persons).

In effect FATF recommends that where accounts are maintained by entities, the Reporting Institution must have knowledge of the natural persons that ultimately control the entity.

South Africa has introduced law, known as the Financial Intelligence Centre Act (FICA),<sup>25</sup> to combat money laundering. Sections 21 and 22 of FICA and the subsequent Regulations require all accountable institutions to ensure that they have correct details for all their customers by complying with the Know Your Customer (KYC) requirements.

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<sup>24</sup> [www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)

<sup>25</sup> Act 38 of 2001.

Currently FICA only requires financial institutions to identify the natural or legal persons that hold 25% or more of the voting rights at an annual General Meeting.<sup>26</sup> There is currently no requirement to go more than one level down and no requirement to identify the natural person or “warm body”.

FATF has reviewed South Africa’s FICA requirements and noted certain areas of concern during a Plenary meeting on 12–14 February 2014. A Consultation Paper on the review of the Financial Intelligence Centre Act, 2001<sup>27</sup> was published in March 2014 for public comment,<sup>28</sup> which is likely to result in stricter requirements. The U.S. Regulations provide that knowledge of entities up to 10% shareholding must be obtained, notwithstanding the fact that FATF has no *de minimis*<sup>29</sup> and requires knowledge of the “warm body” (see **3.10** for further details).

For Preexisting Entity Accounts financial institutions may not have the information required in terms of the U.S. Regulations because of the difference in the requirements between FICA and the U.S. Regulations. In this regard the IRS has indicated that it will be acceptable to place reliance on the financial institutions’ KYC processes. For all New Entity Accounts, however, compliance with the provisions of the Agreement is required.<sup>30</sup> Financial Institutions should implement procedures to obtain the required information in order to be FATCA compliant notwithstanding the fact that FICA may have less restrictive requirements.

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<sup>26</sup> GNR. 595 of 20 December 2002: Money Laundering and Terrorist Financing Control Regulations.

<sup>27</sup> An electronic version of this Consultation Paper is available on the Internet at [www.fic.gov.za](http://www.fic.gov.za) and [www.treasury.gov.za](http://www.treasury.gov.za).

<sup>28</sup> Respondents were requested to submit written comments, representations or requests to the FIC by 18 April 2014.

<sup>29</sup> For FATCA purposes “*de minimis*” refer to a dollar or rand threshold.

<sup>30</sup> Annex I(V)(3).

## Chapter 2 – Reporting Financial Institutions

### 2.1 Definition of “Financial Institution”

An Entity will be a “Financial Institution”, if it falls within any one or more of the following categories:

- Custodial Institution
- Depository Institution
- Investment Entity
- Specified Insurance Company

These categories are defined in Article 1(1) and discussed in more detail under corresponding headings in this Chapter. The activities performed by the Entity will determine whether or not it is a Financial Institution for purposes of the Agreement.

The definition of “Financial Institution” refers to an “Entity”. Individuals or associations not meeting the definition of “Entity” cannot be a Financial Institution unless they are acting through a trust or partnership.

### 2.2 Definition of “South African Financial Institution”

The first step to be undertaken by an Entity or its representative is to establish whether the said Entity is a South African Financial Institution or an NFFE.

A South African Financial Institution is –

- a Financial Institution resident in South Africa, excluding any branch of such Financial Institution that is located outside South Africa; and
- any branch of a Financial Institution not resident in South Africa, if the branch is located in South Africa.<sup>31</sup>

The term “resident” is not defined in the Agreement and should, therefore, be interpreted in accordance with domestic law. For purposes of the Agreement the Financial Institution will be resident in the country where the Financial Institution and its branch are located.

A foreign company may conduct its business in South Africa in its own name either through a South African branch or a South African subsidiary. These branches and subsidiaries of Financial Institutions that are located in South Africa are included in the definition of “South African Financial Institution”.

Offshore banks may set up representative offices for purposes of identifying potential clients for the offshore bank and doing marketing to such clients. A representative office of a non-resident Financial Institution will be regarded as a Reporting South African Financial Institution and will be subject to the reporting obligations under the Agreement if it carries on activities of a Financial Institution and has Reportable Accounts.

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<sup>31</sup> To be read in conjunction with Article 4(5) – Special Rules Regarding Related Entities and Branches That Are Nonparticipating Financial Institutions.

In most cases it will be clear whether or not a given Financial Institution is resident or located in South Africa for the purpose of the Agreement. Should a Financial Institution have any doubt as to whether or not it is a South African Financial Institution for the purpose of the Agreement, it is recommended that such member liaise with the Competent Authority in order to resolve the issue.

#### **Example 1 – Classification of branches and subsidiaries under the Agreement**

*Facts:*

ABC Bank Ltd, which is located in Johannesburg, has the following entities in its group:<sup>32</sup>

- A subsidiary (S) located in Durban
- A subsidiary (D) located in Mauritius (a Partner Jurisdiction)
- A branch (Z) located in a country that does not have an agreement with the U.S.

*Result:*

- ABC Bank and its subsidiary S will be a South African Financial Institutions and will report to SARS.
- Subsidiary D will be classified as a Partner Jurisdiction Financial Institution and will report to its respective jurisdiction.
- Branch Z will be a Nonparticipating Financial Institution if its country of residence does not have an agreement with the U.S. and if it cannot comply with the obligation to report directly to the U.S.<sup>33</sup>

### **2.3 Holding company**

The U.S. Regulations provide for a fifth category of Financial Institution for certain holding companies or treasury centres.<sup>34</sup> However, the Agreement does not contain a provision for the automatic classification of a holding company as a Financial Institution. A holding company must follow the same process as any other Entity to determine if it meets the definition of “Financial Institution” based on its activities and if it maintains Financial Accounts.

A holding company that meets the definition of “Financial Institution” but does not maintain any “Financial Accounts” is required to register on the IRS website (obtain a GIIN). If it does not maintain any “Financial Accounts” it would be required to submit a nil report to SARS.

As discussed in **2.6**, SARS holds the view that an entity that performs the activities and operations listed in the definition of “Investment Entity”, solely for the benefit of its shareholders (or even related group entities), does not, in principle, qualify as an Investment Entity for the purpose of the Agreement and that activity alone would not make a Holding company a Financial Institution.

<sup>32</sup> Article 1(1)(z)(1) to (3).

<sup>33</sup> See **2.10** for detailed information on Nonparticipating Financial Institutions.

<sup>34</sup> Section 1.1471(5)(e)(4)(v) of the U.S. Regulations.

## 2.4 Custodial Institution

A “Custodial Institution” is defined as any Entity that holds, as a substantial portion of its business, financial assets for the account of others.

An Entity will be regarded as holding financial assets for the account of others as a substantial portion of its business if –

- its gross income attributable to the holding of financial assets and related financial services equals or exceeds 20% of the entity’s gross income during the shorter of –
  - the three-year period that ends on 31 December (or the final day of a non-calendar year accounting period) before the year in which the determination is being made; or
  - the period during which the entity has been in existence.<sup>35</sup>

Examples of income from the following related financial services should be included in calculating the percentage of the entity’s gross income so attributable:<sup>36</sup>

- Custody, account maintenance and transfer fees
- Commissions and fees earned from executing and pricing securities transactions
- Income earned from extending credit to customers with respect to financial assets held in custody (or acquired through such extension of credit)
- Income earned on the bid-offer spread of financial assets
- Fees for providing advice on financial assets held in (or to be held in) custody by the entity and for clearance and settlement services

Certain brokers and trust companies, custodial banks, and clearing organisations that hold assets on behalf of others are all likely to fall into the definition of “Custodial Institution”.

### 2.4.1 Nominee companies

A nominee is generally set up with the sole purpose to be the registered holder of securities for and on behalf of investors as beneficial owners. Entities that hold financial assets for the account of others as a substantial portion of its business will generally meet the definition of “Custodial Institution”.

Nominees are usually used as bankruptcy remote vehicles and are strictly regulated.<sup>37</sup> In the case of such regulated nominees the administration of the underlying assets is generally performed by the applicable holding company or

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<sup>35</sup> Article 1(1)(h).

<sup>36</sup> U.S. Internal Revenue Bulletin: 2014-13 – Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities 24 March 2014 [T.D. 9657].

<sup>37</sup> Regulated by the Financial Services Board (FSB) under the Financial Markets Act 19 of 2012 (FMA), Financial Advisory and Intermediary Services No. 37 of 2002 (FAIS), Pension Fund Act 24 of 1956, Long-Term Insurance Act 52 of 1998 (LTIA), Short-Term Insurance Act 53 of 1998 (STIA) or Securities Services Act 36 of 2004.

administrator [for example, a Linked Investment Service Provider (LISP), stockbroker, or Central Securities Depository Participant (CSDP)]. Clients transact with the applicable administrator and not directly with a nominee. The broker, LISP or CSDP is given the instruction to invest and hold assets on behalf of clients. The nominee is only used to ensure segregation of different customer assets. In this instance the nominee company will not be regarded as being a custodial institution and the applicable holding company or administrator will meet the definition of “Custodial Institution”. (This only applies to regulated nominees and not foreign nominees.)

With regard to nominee companies specifically owned by Strate,<sup>38</sup> South Africa and the United States entered into an MOU<sup>39</sup> that indicates that “in the case of securities registered with a South African Central Securities Depository”, the lower level Financial Institutions (that is, the CSDPs) are, under certain circumstances, to be responsible for any reporting and not the central securities depository (CSD) itself.

Where a company that is wholly owned and controlled by a CSD as contemplated in the Financial Markets Act<sup>40</sup> holds securities in its capacity as nominee, the provisions of the MOU will be applicable to that nominee company in the same manner as it will be applicable to the CSD.

Therefore, where the Issuer’s securities are nominally owned by a nominee company and controlled by Strate, the MOU will have application and any reporting under the Agreement may be made at the level of the CSDPs. The MOU only applies to Strate and its nominees.

#### **Example 2 – Application of the MOU to Strate**

*Facts:*

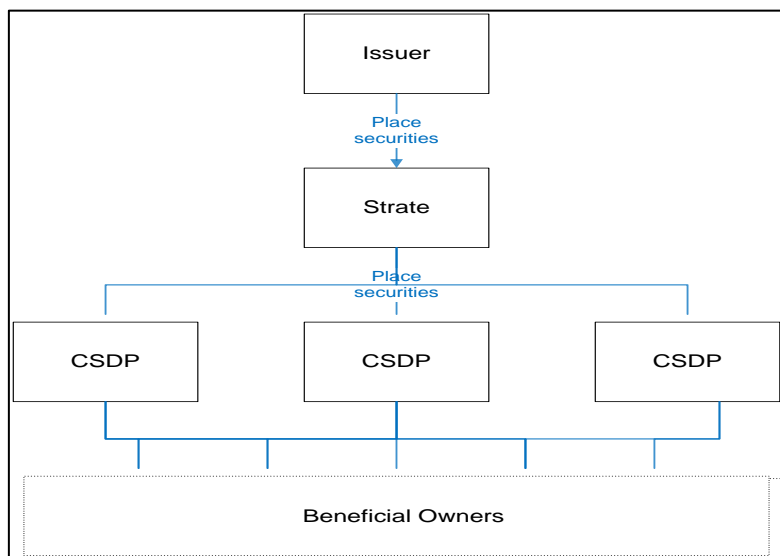
Strate has a number of “participants” (CSDPs) as part of its structure that are licenced by Strate to perform custody, administration, and/or settlement services. These CSDPs are the interface between Strate and the beneficial owners of the securities, and maintain detailed records of the beneficial owners. This can be illustrated as follows:

<sup>38</sup> Strate is South Africa’s Central Securities Depository (CSD).

<sup>39</sup> [www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-04%20-%20FATCA%20IGA%20and%20MOU%20signed%209%20June%202014.pdf](http://www.sars.gov.za/AllDocs/LegalDoclib/Agreements/LAPD-IntA-EIA-2014-04%20-%20FATCA%20IGA%20and%20MOU%20signed%209%20June%202014.pdf)  
[Accessed 11 December 2014].

<sup>40</sup> Financial Markets Act 19 of 2012.





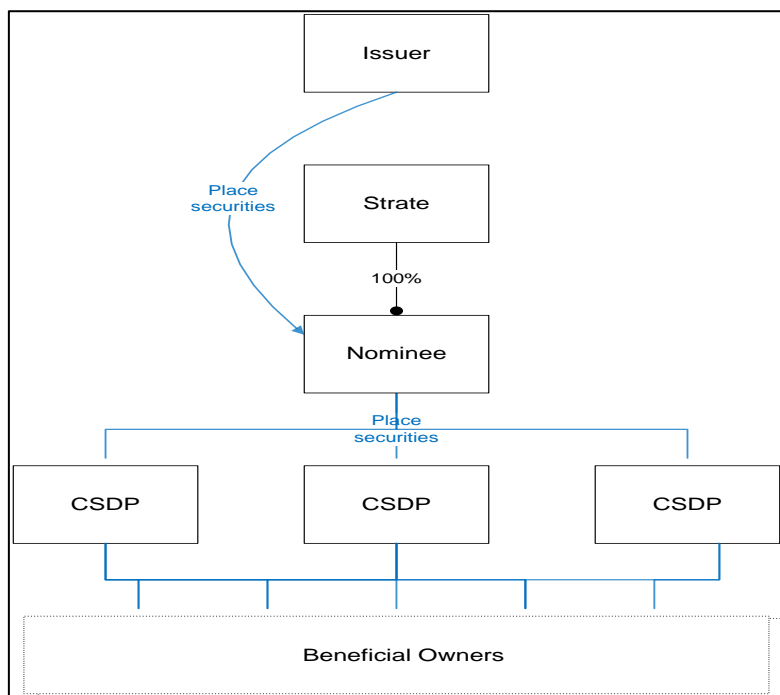
*Result:*

The MOU will have application and any reporting under the Agreement may be done at the CSDP level.

**Example 3 – The application of the MOU to Strate nominees**

*Facts:*

Some of the custodial holding of Issuer’s securities (particularly in the case of dual-listed companies) is not directly with Strate, but with nominee companies that are owned by Strate. The structure can be illustrated as follows:



**Result:**

The reference in the MOU to “a South African Central Securities Depository” is sufficient to include Strate as well as the nominee companies that it owns and controls. In the presented structure where the Issuer’s securities are nominally owned by a nominee company owned and controlled by Strate, the MOU will have application and any reporting under the Agreement may be done at the level of the CSDP.

## 2.5 Depository Institution

A “Depository Institution” is defined as any Entity that accepts deposits in the ordinary course of a banking or similar business.

A Financial Institution accepts a deposit if an amount of money is paid to it, subject to an agreement in terms of which –

- an equal amount or any part of that amount will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and
- no interest will be payable on the amount so paid or interest will be payable on such amount at specified intervals or otherwise.

The requirement that a Financial Institution accept deposits in the ordinary course of a banking business will generally be met if the money received by way of deposit is lent to others or any other activity of the Financial Institution is financed wholly, or to a material extent, out of the capital of, or interest on, money received by way of deposit.

The definition of “Depository Institution” for the purpose of the Agreement is not limited to those entities regulated by the Banks Act.<sup>41</sup> The agreement requires an analysis of the activities carried on by the Entity and may include Entities not specifically regulated by the Banks Act.

Entities that issue payment cards that can be pre-loaded with funds in excess of \$50 000<sup>42</sup> to be spent at a later date, such as a pre-paid credit card or “e-money” will also be considered to be Depository Institutions.

Entities that solely provide asset-based finance services or that accept deposits solely from persons as collateral or security pursuant to a sale or lease of property, a loan secured by property or a similar financing arrangement between such entity and the person making the deposit with the entity will not be a Depository Institution. Entities that facilitate money transfers by instructing agents to transmit funds (but do not finance the transactions) will not be considered to be engaged in banking or similar business as this is not seen as accepting deposits.

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<sup>41</sup> Act 94 of 1990.

<sup>42</sup> A Reporting Institution may elect to apply the threshold for Depository Accounts this means that the account will only be a Reportable Account if the balance is more than \$50 000 (Annex I(II)(A)).

Certain Entities that meet the definition of “Depository Institution” may however be treated as exempt beneficial owners or deemed-compliant FFIs in terms of Annex II, for example, the Government of South Africa and any wholly-owned agency or instrumentality of the Government of South Africa. The South African Reserve Bank, for example, is treated as a Non-Reporting South African Financial Institution and an exempt beneficial owner.

An Entity that receives payments derived from an obligation held in connection with a commercial financial activity of a type engaged in by a Specified Insurance Company, Custodial Institution or Depository Institution, is excluded from being an exempt beneficial owner. Although the Post Bank is a state owned entity it will not be an exempt beneficial owner or deemed-compliant FFI in terms of Annex II because it conducts a commercial banking business as a Depository Institution.

## 2.6 Investment Entity

An “Investment Entity”<sup>43</sup> is defined as an Entity that conducts as a business (or is managed by an Entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:

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

An entity that is managed by a Financial Institution and that performs any of the activities listed above will generally be an Investment Entity and will therefore have to register and comply with the reporting obligations under the Agreement. An Entity will be regarded to be “managed by an Entity” if the Entity that manages it has discretionary authority to manage its assets (see Example 11). An Entity managed by an individual will not be an Investment Entity because an individual cannot be an Investment Entity. Similarly an individual (or non-entity) managed by an Investment Entity will not be regarded as an Investment Entity. In both instances the definition of “Entity” should first be met.

The Agreement further provides that the above definition of “Investment Entity” shall be interpreted in a manner consistent with similar language described in the definition of “Financial Institution” in the FATF Recommendations.

In terms of the FATF Recommendations “financial institution” means any natural or legal person who conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- Acceptance of deposits and other repayable funds from the public<sup>44</sup>

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<sup>43</sup> An “Investment Entity” is defined in Article 1(1)(j).

<sup>44</sup> This also captures private banking.

- Lending<sup>45</sup>
- Financial leasing<sup>46</sup>
- Money or value transfer services<sup>47</sup>
- Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money)
- Financial guarantees and commitments
- Trading in –
  - money market instruments (cheques, bills, certificates of deposit, derivatives etc.);
  - foreign exchange;
  - exchange, interest rate and index instruments;
  - transferable securities;
  - commodity futures trading.
- Participation in securities issues and the provision of financial services related to such issues
- Individual and collective portfolio management
- Safekeeping and administration of cash or liquid securities on behalf of other persons
- Otherwise investing, administering or managing funds or money on behalf of other persons
- Underwriting and placement of life insurance and other investment related insurance<sup>48</sup>
- Money and currency changing

The activities and operations listed in the definition of “Investment Entity” in the Agreement match some of the activities described under the FATF definition of “Financial Institution”.

The definition in the Agreement is different from the definition of “Investment Entity” set out in the U.S. Regulations.<sup>49</sup> The definition of “Investment Entity” in the Agreement shall be the only definition of reference for purposes of assessing the status of an Entity under the Agreement.<sup>50</sup> If a Financial Institution wishes to apply

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<sup>45</sup> This includes *inter alia*: consumer credit; mortgage credit; factoring, with or without recourse; and finance of commercial transactions.

<sup>46</sup> This does not extend to financial leasing arrangements in relation to consumer products.

<sup>47</sup> It does not apply to any natural or legal person that provides financial institutions solely with message or other support systems for transmitting funds.

<sup>48</sup> This applies both to insurance undertakings and to insurance intermediaries (agents and brokers).

<sup>49</sup> Investment entity in terms of the U.S. Regulations has the meaning set forth in subsection 1.1471-5(e)(1)(iii) US Revenue Code that has the meaning as defined in paragraph (e)(4).

<sup>50</sup> See **1.4** circumstances where a definition from the U.S. Regulations can be applied.

the definition of “Investment Entity” in the U.S. Regulations it should approach SARS for approval to apply the alternative definition in its entirety.

An Entity must ask the following questions in determining if it is an Investment Entity:

- Does the Entity perform any of the activities or operations listed in the Agreement and/or the activities listed under the FATF Recommendations?
- Are the abovementioned activities or operations performed for or on behalf of a customer?
- Is the said Entity managed by an Entity that performs the listed activities for or on behalf of a customer?

SARS takes the view that the concept “customer”, when applied to the definition of “Investment Entity”, shall be interpreted in the sense ascribed to it from a commercial perspective, meaning, in essence, the recipient of a good, service or product obtained from a seller, vendor, supplier for a monetary or other valuable consideration.

Annex II provides for several categories of Investment Entities that qualify either as exempt beneficial owners or deemed-compliant FFIs and are thus exempt from the registration and reporting requirements otherwise applicable to Investment Entities.<sup>51</sup>

The following examples show the application of the definition of “Investment Entity” in various scenarios:

#### **Example 4 – Investment advisor**

*Facts:*

Fund Manager is an Investment Entity and amongst its various business operations, organises and manages a variety of funds, including Fund A, a fund that invests primarily in equities. Fund Manager hires Investment Advisor, an Entity, to provide advice and discretionary management of a portion of the financial assets held by Fund A.

*Result:*

Because Investment Advisor primarily conducts a business of managing financial assets on behalf of clients, Investment Advisor is an Investment Entity and an FFI.

#### **Example 5 – Entity that is managed by an FFI**

*Facts:*

The facts are the same as in Example 3. In addition, in every year since it was organised, Fund A has earned income from investing in financial assets.

*Result:*

Fund A is an Investment Entity because it is managed by Fund Manager and Investment Advisor. Its gross income is also attributable to investing, reinvesting or trading in financial assets.

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<sup>51</sup> An exception applies with respect to entities qualifying as Sponsored Investment Entity under Annex II.

**Example 6 – Investment manager***Facts:*

Investment Manager, an Entity, is an Investment Entity that organises and registers Fund A in Country A. Investment Manager is authorised to facilitate purchases and sales of financial assets held by Fund A in accordance with Fund A's investment strategy. Fund A earned its gross income from investing, reinvesting or trading in financial assets.

*Result:*

Fund A is an Investment Entity and an FFI.

**Example 7 – Foreign real estate investment fund that is managed by an FFI***Facts:*

The facts are the same as in Example 3, except that Fund A's assets consist solely of non-debt, direct interests in real property.

*Result:*

Fund A is not an Investment Entity even though it is managed by Investment Manager, because its gross income is not attributable to investing, reinvesting or trading in financial assets.

**Example 8 – Trust managed by an individual***Facts:*

On January 1, 2013, X, an individual, establishes Trust A, for the benefit of X's children, Y and Z. X appoints Trustee A, an individual, to act as the trustee of Trust A. Trust A's assets consist solely of financial assets, and its income consists solely of income from those financial assets. Pursuant to the terms of the trust instrument, Trustee A manages and administers the assets of the trust. Trustee A does not hire any entity as a third-party service provider to perform any of the activities listed.

*Result:*

Trust A is not an Investment Entity because it is managed solely by Trustee A, an individual.

**Example 9 – Trust managed by a trust company***Facts:*

The facts are the same as in Example 5, except that X hires Trust Company, an FFI, to act as trustee on behalf of Trust A. As trustee, Trust Company manages and administers the assets of Trust A in accordance with the terms of the trust instrument for the benefit of Y and Z.

*Result:*

Because Trust A is managed by an FFI, Trust A is an Investment Entity and an FFI. A Trustee-Documented Trust will qualify as a deemed-compliant FFI under Annex II and a Non-Reporting South African Financial Institution. A Trustee-Documented Trust is a trust established under the laws of South Africa where the trustee of that trust is a Reporting Institution and reports all information pursuant to the Agreement on behalf of the trust.<sup>52</sup>

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<sup>52</sup> Annex II(IV)(A).

A unit trust will be an Investment Entity if the trust or trustee engages another Financial Institution to manage the trust or financial assets on its behalf (see 5.9 for detail on Sponsored Investment Entities that do not qualify as deemed-compliant FFIs). The fact that a trust holds a Financial Account (for example, a Depository Account) with a Financial Institution does not mean that the trust is a Financial Institution.

A trust will be an Investment Entity if the trustee –

- is a Financial Institution;
- engages a Financial Institution to manage the trust; or
- engages a Financial Institution to manage the financial assets of the trust.

A trust that is not professionally managed will be treated as an NFFE.

## 2.7 Specified Insurance Company

An insurance company (or the holding company of an insurance company) is a Specified Insurance Company if it issues, or is obligated to make payments pertaining to a Cash Value Insurance Contract or an Annuity Contract.

The term “Cash Value Insurance Contract” means an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value greater than \$50 000.

The term “Cash Value” is specifically defined in the Agreement and means the greater of –

- 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
- the amount the policyholder can borrow under or with regard to the contract.

Cash Value does not include an amount payable under an Insurance Contract as a –

- personal injury or sickness benefit or other benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against;
- 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
- policyholder dividend based upon the underwriting experience of the contract or group involved.<sup>53</sup>

Insurance companies that only provide general insurance or term life insurance will not be Financial Institutions under this definition and neither will reinsurance companies that only provide indemnity reinsurance contracts.

A Specified Insurance Company can include both an insurance company and its holding company. However, the company itself will only be a Specified Insurance

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<sup>53</sup> Article 1(1)(z)(1) to (3).

Company if it issues or is obligated to make payments pertaining to Cash Value Insurance Contracts or Annuity Contracts. It is unlikely that an insurance holding company will in itself issue or will be obligated to make payments pertaining to Cash Value Insurance Contracts or Annuity Contracts.

In terms of the Agreement “Annuity Contract” means 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.

A Preexisting Individual Account that is a Cash Value Insurance Contract or Annuity Contract is not required to be reviewed, identified or reported if the laws or regulations of South Africa or the U.S. prevent the sales of such a Cash Value Insurance Contract an Annuity Contract to U.S. residents.<sup>54</sup>The onus of proof of the existence of such a law or regulation rests on the Financial Institution.

## 2.8 Related Entities

An Entity is regarded as being related to another Entity for purposes of the Agreement if either Entity controls the other Entity, or the two entities are under common control. For purposes of determining control for a Related Entity, control includes direct or indirect ownership of more than 50% of the vote or value in an Entity. Notwithstanding the foregoing, South Africa may treat an Entity as not a Related Entity of another Entity, if the two entities are not members of the same “expanded affiliated group” as defined in section 1471(2) of the U.S. Internal Revenue Code. Should a Reporting Institution wish to refer to the definition of “expanded affiliated group” it must do so in its entirety. The relevant definition is included in **Annexure A**.

The definition “Related Entity” is relevant in the context of the obligations placed on a Reporting Institution that has any related entities that are NPFIs.

An NPFI is a Financial Institution that is not FATCA compliant. For example, a Reporting Institution that has any related entities in other countries that do not have an Intergovernmental Agreement with the U.S. or that has not entered into a FATCA arrangement with the IRS, must treat those related entities as NPFIs and fulfil the obligations as set out in Article 4(5) [see **2.10** for a further discussion on NPFIs].

## 2.9 Non-Reporting South African Financial Institutions

A Non-Reporting South African Financial Institution is a South African Financial Institution (or another Entity resident in South Africa),<sup>55</sup> that is described as such in Annex II.

A Non-Reporting South African Financial Institution generally does not need to obtain a GIIN from the IRS or carry out reporting obligations under the Agreement.

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<sup>54</sup> Annex I(II)(A)(3).

<sup>55</sup> Certain entities listed under section I in Annex II or certain exempt beneficial owners for the purpose of the FATCA Regulations are not, in the first instance, Financial Institutions or, as the case may be, FFIs.



A Non-Reporting South African Financial Institution is in most cases subject to due diligence requirements in order to determine whether or not it qualifies for the relevant Non-Reporting status under Annex II. Certain monitoring is required by the Reporting Institution to ensure that the same conditions are still met over time.

## **2.10 Nonparticipating Financial Institutions (NPFIs)**

For the purpose of the Agreement, an NPFI is, in substance, a Reporting Institution that failed to comply with the obligations vesting in it pursuant to applicable South African law implementing the Agreement and is classified as such by the IRS pursuant to the procedure set out in Article 5(2).

For a Reporting Institution to be treated as an NPFI, non-compliance must be “significant” and thus excludes minor and administrative errors, as per Article 5(1). This concept, which is left at the exclusive discretion of the Competent Authorities under the Agreement, is further discussed in Chapter 5 (Withholding Obligations).

NPFIs are subject to a 30% withholding on U.S. Source Withholdable Payments under section 1471 of the U.S. Internal Revenue Code and Article 4(1)(d) and (e).

For the years 2015 and 2016, Reporting Institutions are required to report annually to the Competent Authority –

- the name of each NPFI to which it has made payments; and
- the aggregate amount of such payments.

As further discussed in **5.3.2**, this reporting should, relate to payments made to Financial Institutions established in a country that has not signed an Intergovernmental Agreement with the U.S.

## **2.11 Non-Financial Foreign Entities (NFFEs)**

An NFFE is any Non-U.S. Entity that is not treated as a Financial Institution. An NFFE will be either an Active NFFE or a Passive NFFE.

### **2.11.1 Active NFFEs**

Active NFFEs consist of a series of entities defined in the Agreement under Annex I(VI)(B)(4).

Active NFFEs are generally not subject to withholding and shall not perform reporting or due diligence obligations under the Agreement.

A Reporting Institution that maintains a Financial Account for an Active NFFE will need to perform due diligence procedures on the basis of Annex I in order to exclude the possibility that the NFFE under review is a Passive NFFE.

For the purpose of general guidance, the different categories of Active NFFEs can be summarised as follows:

- (a) An NFFE that meets the following, cumulative income and asset tests:
- Under the income test, the Entity must have less than 50% of its gross income from the preceding calendar year or appropriate reporting period<sup>56</sup> as passive income; and
  - Under the asset test, the entity must have less than 50% of its assets for the preceding calendar year as passive assets (that is, assets that produce or are held for the production of passive income).

The concept “passive income” is not defined in the Agreement. Additional guidance may be found by reference to the applicable definition set out in the U.S. Regulations,<sup>57</sup> whereby passive income is, in essence, the part of gross income that consists of –

- dividend;
- interest;
- rents and royalties (other than rents and royalties derived from the active conduct of a trade);
- annuities;
- income from swap contracts;
- rental income of real estate property (provided that this income can be obtained by performing little to no activities); and
- excess of gains over losses from the sale or exchange of the assets that give rise to the foregoing categories of income.

The U.S. Regulations add that the value of the assets of the NFFE under review shall be determined based on the fair market value or book value of the assets that are reflected on such NFFE’s balance sheet (and profit and loss account).<sup>58</sup>

- (b) An NFFE, the shares of which are regularly traded on an established securities market or, as the case may be, an entity which is a Related Entity of an Entity the shares of which are regularly traded on an established securities market.

As per Article 1(1)(s), 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” means an exchange that is officially recognised 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 [in South Africa it is the Johannesburg Stock Exchange (JSE)]. 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

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<sup>56</sup> South Africa has elected 28/29 February as the reporting period.

<sup>57</sup> U.S. Regulations section 1.1472-1(c)(1)(iv)(A) to (C).

<sup>58</sup> This enumeration is not exhaustive and exceptions apply. A complete overview of passive income can be found in the aforementioned provisions in the U.S. Regulations.

Financial Institution acting as an intermediary) is registered on the books of such Financial Institution.<sup>59</sup>

- (c) An NFFE organised in a U.S. Territory<sup>60</sup> wholly owned by one or more *bona fide* residents of the same U.S. Territory.
- (d) A national government (other than the U.S. Government), a political subdivision of such government (including a state, province, county or municipality), or a public body performing a function of such government, or a political subdivision of such government, a government of a U.S. Territory, an international organisation, a non-U.S. central bank of issue, or an entity wholly owned by one or more of the foregoing.
- (e) An NFFE in which substantially all of the activities consist of holding (in whole or in part) the outstanding shares of, or providing financing and services to one or more subsidiaries that engage in trades or businesses other than the business of a Financial Institution.

An NFFE shall not qualify for this status if the NFFE functions (or holds itself out) as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund, or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes.

- (f) Start-up companies investing capital in assets with the intent to operate a business other than that of a Financial Institution within two years as of the date of incorporation of the said company.
- (g) Nonfinancial entities that are liquidating or emerging from reorganisation or bankruptcy, to the extent that the entity under review was not a Financial Institution in the past five years.
- (h) An NFFE that primarily engages in financing and hedging transactions with, or for, Related Entities that are not Financial Institutions, and that does not provide financing or hedging services to any Entity that is not a Related Entity, provided that the group of any such Related Entities is primarily engaged in a business other than that of a Financial Institution.
- (i) An Entity otherwise qualifying as a “excepted NFFE” under the relevant U.S. Treasury Regulations.
- (j) Most charitable organisations, non-profit organisations and professional organisations that meet the specific requirements listed in Annex I(VI)(B)(4)(j) of the Agreement.

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<sup>59</sup> This will not apply to interests first registered on the books of such Financial Institution prior to 1 July 2014, and with respect to interests first registered on the books of such Financial Institution on or after 1 July 2014, a Financial Institution is not required to apply the sentence prior to 1 January 2016.

<sup>60</sup> Under the Agreement the term “U.S. Territory” means American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, the Commonwealth of Puerto Rico, or the U.S. Virgin Islands.

SARS-approved Public Benefit Organisations that meet the requirements of section 30 of the Income Tax Act, 1962 with fall under this category.

### **2.11.2 Passive NFFEs**

A Passive NFFE means any NFFE that is not –

- an Active NFFE (as described in **2.11.1** above), or
- a withholding foreign partnership or withholding foreign trust pursuant to the relevant U.S. Regulations.

### **2.12 Exempt beneficial owners**

For the purpose of the Agreement, exempt beneficial owners consist of a series of entities defined under Annex II, Section I and II.

In the same vein as Active NFFEs, exempt beneficial owners are generally not subject to withholding and shall not perform reporting or due diligence obligations under the Agreement.

For the purpose of general guidance only, the different categories of exempt beneficial owners can be summarised as follows:

- The South African Government, as well as any of its political subdivisions, wholly-owned agencies and instrumentalities
- International organisations located in South Africa
- The South Africa Central Bank
- Treaty-Qualified Retirement Fund<sup>61</sup>
- Broad Participation Retirement Fund
- Narrow Participation Retirement Fund
- Pension Fund of an exempt beneficial owner
- Certain Investment Entities wholly-owned by one or more of the foregoing

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<sup>61</sup> Reference made to retirement funds for this purpose will include provident funds and preservation funds.

## Chapter 3 – Financial Accounts

### 3.1 Definition of “Financial Account”

Pursuant to Article 4(1)(a), Reporting Institutions are required to provide information to the Competent Authority on an annual basis in relation to Financial Accounts maintained by such Reporting Institutions held either by –

- Specified U.S. Persons; or
- a Non-U.S. Entity with one or more Controlling Persons that are Specified U.S. Persons.

These accounts are referred to under the Agreement as U.S. Reportable Accounts.

As a result of the foregoing, and subject to additional details herein, a Reporting Institution, unless otherwise exempt, must identify, for the purpose of the Agreement –

- if it holds any Financial Accounts;
- the type of Financial Accounts held;
- if the accounts under review are eligible for an exemption under the Agreement;
- failing the latter, whether the holder of those Financial Accounts are –
  - Specified U.S. Persons; or
  - a Non-U.S. Entity that is a Passive NFFE for the purpose of the Agreement; and
- in the case of an account held by a Passive NFFE, the Financial Institution should determine whether the entity under review ultimately has one or more Controlling Persons that are Specified U.S. Persons.

For the purpose of the Agreement, the term Financial Account is broadly defined and therefore may include products or obligations that would not normally be regarded as a Financial Account in terms of other South African legislation or in everyday commercial use.

As per the set of definitions in Article 1(1)(s) to 1(z), the concept “Financial Account” is divided into four main categories:

- Depository Accounts
- Custodial Accounts
- Equity Interests
- Cash Value Insurance Contracts and Annuity Contracts

A Financial Account is, in the first instance, an account maintained by a Financial Institution. The meaning ascribed to this term varies from one sub-category of Financial Account to another and so do the applicable exclusions and exemptions.

A Financial Institution may maintain more than one type of Financial Account. For instance, a Depository Institution may also maintain Custodial Accounts in addition to Depository Accounts.

Chapter 4 sets out the due diligence procedures that must be followed by Reporting Institutions in order to identify Reportable Accounts.

### 3.2 Depository Accounts

As per Article 1(1)(t), a Depository Account 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 where cash is placed on deposit with a Financial Institution engaged in a banking or similar business.

The concept “Depository Account” refers in the first instance to Depository Institutions. A Depository Account is, for the purpose of the Agreement, maintained by the Financial Institution which is committed to make repayments with respect to such account. The account does not need to be an interest-bearing account, or to provide for a specific return to qualify as a Depository Account.

### 3.3 Custodial Accounts

As per Article 1(1)(u), 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. As per the Agreement, for the purpose of the present definition, financial instruments or contracts 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 contract for difference;<sup>62</sup>
- an Insurance Contract or Annuity Contract; and
- any option or other derivative instrument.

The purpose of the above list of instruments and contracts is to provide examples of assets that can be held in a Custodial Account for the purpose of the Agreement. This does not necessarily mean that the same instruments and contracts are as such Financial Accounts for the purpose of the Agreement.

A “financial instrument” for the present purpose shall exclude cash as a cash account maintained by a Financial Institution falls under the definition of “Depository Account”.

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<sup>62</sup> A notional principal contract typically refers to a contract that provides for the payment of amounts by one party to another at specified intervals. These amounts are calculated by reference to a specified index upon a notional principal amount in exchange for specified consideration or a promise to pay similar amounts.

### 3.4 Certain Equity and Debt Interests

Article 1(1)(s) provides that a Financial Account will include an account maintained by a Financial Institution, including any equity or debt in the Financial Institution. The specific inclusion listed in the Article is discussed below.

The term “Equity Interest”, when applied to partnerships and trusts that are Financial Institutions, is defined under Article 1(1)(v). An “Equity Interest”, in the case of a –

- partnership that is a Financial Institution, means either a capital or profits interest in the partnership; and
- trust that is a Financial Institution, 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.

#### 3.4.1 Equity or Debt Interest in an Investment Entity

Pursuant to Article 1(1)(s)(1), any equity or debt interest in an Entity that is a Financial Institution solely because it is an Investment Entity for the purpose of the Agreement, qualifies as a Financial Account maintained by such Financial Institution unless the equity or debt interest under review is regularly traded on an established securities market.

As per Article 1(1)(s), 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” means an exchange that is officially recognised 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.

An Equity or Debt Interest will be regarded as “regularly traded” in South Africa if it is listed on a recognised exchange.

#### 3.4.2 Equity or Debt Interest linked to assets that give rise to U.S. Source Withholdable Payments

In the case of a Financial Institution not described under Article 1(1)(s)(1), an Equity or Debt Interest that is not regularly traded on an established securities market qualifies as a Financial Account for the purpose of the Agreement only if –

- the value of the Equity or Debt Interest under review is determined, directly or indirectly, primarily by reference to assets that give rise to U.S. Source Withholdable Payments;<sup>63</sup> and
- the class of interest was established with a purpose of avoiding reporting in accordance with the Agreement.

The sole fact that an Equity or Debt Interest is denominated in U.S. dollars does not mean that the value of the interest is determined by reference to assets that give rise to U.S. source Withholdable Payments.

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<sup>63</sup> For the definition of “U.S. Source Withholdable Payment” refer to the **Glossary** appended to this guide.

### 3.5 Cash Value Insurance Contracts and Annuity Contracts

For purposes of Article 1(1)(s)(3), a noninvestment linked, non-transferable immediate life annuity issued to an individual to monetise a pension or disability benefit provided from a registered long-term insurer (an account excluded under Annex II)<sup>64</sup> is excluded from the definition of “Financial Account”. Cash Value Insurance Contracts and Annuity Contracts refer in the first instance to Specified Insurance Companies.

According to Article 1(1)(y), a Cash Value Insurance Contract means an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value greater than \$50 000. As per Article 1(1)(w), an Insurance Contract is 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.

As per Article 1(1)(x), an Annuity Contract is a contract under which the issuer agrees to make payments for the 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.

For the purpose of the Agreement, a Cash Value Insurance Contract or an Annuity Contract is maintained by the Financial Institution that is obligated to make payments with respect to such contract.

### 3.6 Account Holders

The status of the holder of a Financial Account is instrumental for the purpose of determining whether the account is a U.S. Reportable Account for the purpose of the Agreement.

As per Article 1(1)(dd), the Account Holder means in the first instance the person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account.

Specific rules apply under the Agreement to accounts held by a person other than a Financial Institution organised or incorporated outside a U.S. Territory for the benefit or account of another person as an agent, custodian, nominee, signatory, investment advisor or intermediary, in which case the said person is not treated as an Account Holder with respect to such accounts and such other person is treated instead as holding the account.

In the case of Cash Value Insurance Contracts and Annuity Contracts special rules apply, whereby 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 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

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<sup>64</sup> Annex II(V)(G).



Account Holder. This implies that a Cash Value Insurance Contract or an Annuity Contract may have several Account Holders.

As per the aggregation rules for Individual Accounts set out in the Agreement in Annex I (VI)(C)(1), where a Financial Account is jointly held, the balance or value in the account is to be attributed in full to all joint holders of the account.

If an account is jointly held by an individual and an entity, the Financial Institution that maintains the account will need to apply the due diligence requirements separately to both the individual and entity in relation to that account.

There may be instances in which an Account Holder grants a general power of attorney to another person allowing that person to transact on the account to varying degrees. The provisions of the Agreement clearly refer to the Account Holder only. Therefore, the Reporting Institution is only required to perform due diligence procedures and report on the person in whose name the account is registered.

In the case of Financial Accounts opened for a minor with the assistance of a parent or guardian, the Account Holder is subject to the due diligence requirements and potential reporting. Generally under common law a minor can transact in his or her own name with assistance from a parent or guardian. A minor over the age of 16 years is specifically dealt with in the Banks Act<sup>65</sup> and may, without the consent or assistance of a parent or guardian, transact as he or she thinks fit. The Reporting Institution must report the information of the Account Holder that is a Specified U.S. Person.

### **3.7 Accounts not treated as Reportable Accounts**

Section V in Annex II of the Agreement sets out certain accounts (or products) that are excluded from the definition of “Financial Account” for the purpose of the Agreement and that are therefore not treated as a U.S. Reportable Account.

For the purpose of general guidance only, the different categories of accounts excluded from the definition of “Financial Account” set out in Annex II, each subject to a series of cumulative requirements, can be summarised as follows:

- Certain Savings Accounts including –
  - Retirement and Pension Accounts maintained in South Africa that satisfy specific requirements under the laws of South Africa; and
  - NonRetirement Savings Accounts maintained in South Africa (other than an insurance or Annuity Contract) that satisfy specific requirements under the laws of South Africa;
- Certain term life insurance contracts;
- Accounts held by an estate;
- Certain escrow accounts;
- Partner Jurisdiction Accounts;
- Living Annuities; and

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<sup>65</sup> Act 94 of 1990.

- Compulsory Annuities.

In addition to the restricted list of exempt accounts (or products) set out in Annex II, Article 1(1)(cc) provides for a general carve out whereby an account shall not be treated as a U.S. Reportable Account if such account is not identified as such after application of the due diligence procedures set out in Annex I.

### 3.8 Reportable Accounts

For the purpose of the Agreement, the term Reportable Account refers, as the context requires, to either a U.S. Reportable Account or a South African Reportable Account.

As mentioned above and subject to the exemptions mentioned in 3.7 a Financial Account maintained by a Reporting Institution is, for the purpose of the Agreement, a U.S. Reportable Account where it is held by one or more Specified U.S. Persons, or by a Non-U.S. Entity with one or more Controlling Persons that are Specified U.S. Persons. The latter two concepts are discussed in 3.9 and 3.10.

Chapter 4 discusses the due diligence procedures set out in Annex I that must be followed by a Financial Institution, or by a third party on behalf of the Financial Institution,<sup>66</sup> in order to identify Reportable Accounts.

An account shall be treated as a U.S. Reportable Account beginning as of the date it is identified as such pursuant to the due diligence procedures set out in Annex I.<sup>67</sup>

U.S. Reportable Accounts need to be reported by Reporting Institutions to the Competent Authority, for further reporting to the IRS, according to the framework set out in Article 2 and Article 3. Chapter 5 discusses the reporting obligations applicable to Reporting Institutions.

In addition to the general rules described above, specific reporting requirements apply to payments made in 2015 and 2016 to NPFIs.<sup>68</sup> The application of these specific requirements calls for in the first instance that the relevant payee is an NPFI, as further discussed in 5.3.2.

### 3.9 Specified U.S. Persons

A Financial Account is reportable to the Competent Authority if it is held by one or more Specified U.S. Persons.

The term “Specified U.S. Person” means in the first instance a U.S. Person, save for the exhaustive list of exceptions set out in Article 1(1)(ff). One of the most notable exceptions refers to shares of corporations which are regularly traded on one or more established securities markets, as well as any corporation that is a member of the same expanded affiliated group<sup>69</sup> as the foregoing corporations, both categories not qualifying as Specified U.S. Person for the purpose of the Agreement.

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<sup>66</sup> Provided for under Article 5(3).

<sup>67</sup> In terms of Annex I(1)B(4).

<sup>68</sup> In terms of Article 4(1)(b).

<sup>69</sup> For the definition of “expanded affiliated group” refer to the **Glossary** appended to this guide.

As per Article 1(1)(ee), the term “U.S. Person” means –

- an individual that is a U.S. citizen or resident in the United States;
- a partnership or corporation organised in the U.S. or under the laws of the U.S. or any State of the U.S.;
- a trust, subject to the following cumulative requirements –
  - a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust (“court test”); and
  - one or more U.S. Persons have the authority to control all substantial decisions of the trust, or an estate of the decedent that is a citizen or a resident of the United States (“control test”).

### 3.10 Controlling Persons

Article 2 sets out certain obligations to obtain and exchange information. In terms of Article 2(2)(a) each Reporting Institution has to obtain and report on the set criteria for all U.S. Reportable Accounts.

In fulfilling these obligations the Reporting Institution is required to apply the due diligence procedures contained in Annex I in order to identify any U.S. Reportable Account and accounts held by Nonparticipating Financial Institutions.

The due diligence procedures in Annex I will have to be carried out on an account and the Controlling Persons in relation to the account. A Reporting Institution that, in applying the due diligence procedures, ascertains that a Passive NFFE<sup>70</sup> account holder has one or more Controlling Persons that are Specified U.S. Persons, must report the name, address and U.S. TIN<sup>71</sup> of such Entity and also each Specified U.S. Person.

The term “Entity” is defined in the Agreement to mean a legal person or a legal arrangement such as a trust, partnership or association.

For purposes of the Agreement the term “Controlling Persons” means the natural persons who exercise control over an Entity. The Agreement specifically provides who the Controlling Person is for trusts and partnerships:

- In the case of a trust: 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 (for example, a partnership): such term means persons in equivalent or similar positions.

The purpose of this definition of “Controlling Persons” is to identify the natural persons who have effective control over entities for purposes of the Agreement. In complying with the provisions of the Agreement a Reporting Institution may search

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<sup>70</sup> For the definition of “Passive NFFE” refer to the **Glossary** appended to this guide.

<sup>71</sup> For the definition of “U.S. TIN” refer to the **Glossary** appended to this guide.

for U.S. indicia (prescribed in Annex I)<sup>72</sup> in documentation or information held by the Reporting Institution or collected when maintaining or opening a new account.

In terms of the Agreement the term “Controlling Persons” shall be interpreted in a manner consistent with the Financial Action Task Force Recommendations (FATF).

FATF is an inter-governmental policy-making body that has a ministerial mandate to establish international standards in order to fulfil the FATF mandate.

The FATF Recommendations<sup>73</sup> set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing.

As discussed in 1.5 South Africa is a member of FATF and has introduced law, known as the Financial Intelligence Centre Act (FICA), to combat money laundering. Sections 21 and 22 of FICA and the subsequent Regulations, require accountable institutions<sup>74</sup> to ensure that they have correct details for all their customers by complying with the Know Your Customer (KYC) requirements. In determining which individuals (who are Specified U.S. Persons) have control in an entity, the Reporting Institution must identify the individuals who hold 25% or more of the voting rights at an annual General Meeting and report their name, address and U.S. TIN. Under the FATF Recommendations the Reporting Institution must have knowledge of the natural persons that ultimately control the entity.

As discussed in 1.5 for Preexisting Entity Accounts Financial Institutions may not have the information required in terms of the U.S. Regulations due to the difference in the requirements between FICA and the U.S. Regulations. The IRS has indicated that it will be acceptable to place reliance on the financial institutions’ KYC process. For all new entity accounts compliance with the U.S. Regulations is required. Financial Institutions should implement procedures to obtain the required information in order to be FATCA compliant notwithstanding the fact that FICA may have less onerous requirements. It is noted that the KYC requirement under FICA is only one method to search for and identify U.S. Persons and the Reporting Institution may use other procedures to comply with their obligations under Annex I.

The KYC requirements to obtain and verify information for South African companies are set out in Regulations 7 and 8 of FICA.<sup>75</sup>

Amongst other KYC requirements, accountable institutions are required to obtain the names of all shareholders who hold 25% or more of the voting rights at an annual General Meeting of a South African company.

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<sup>72</sup> The Oxford Dictionary (British and World English) online defines the term indicia as “Signs, indications, or distinguishing marks”.

<sup>73</sup> International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – the FATF Recommendations [www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaundryingandthefinancingofterrorismproliferation-thefatfrecommendations.html](http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaundryingandthefinancingofterrorismproliferation-thefatfrecommendations.html) [Accessed: 11 December 2014].

<sup>74</sup> The term “accountable institution” is defined in section 1 of FICA.

<sup>75</sup> GNR. 1595 of 20 December 2002: Money Laundering and Terrorist Financing Control Regulations.

In terms of the Agreement the Controlling Persons in the case of a trust are one or all of the following, where relevant:

- The settlor
- Trustees
- Protector (if any)
- Beneficiaries
- Any other person who exercises ultimate effective control over the trust.

Under section 1 of the Trust Property Control Act<sup>76</sup> a trustee is any person (including the founder of a trust) who acts as trustee and shall act in that capacity only if authorised as such in writing by the Master.<sup>77</sup> Section 9 of the Trust Property Control Act provides that the trustee shall in the performance of his or her duties and the exercise of his or her powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

The trustees are held accountable and they are the only persons that administer the trust assets. The same applies in the case of a vested trust; although interest vests in the beneficiary, the trustee administers the trust assets. It is sufficient for a trust that is subject to the provisions of the Trust Property Control Act to consider the trustee as the Controlling Person.

If the trust is not regulated by the provisions of the Trust Property Control Act, the Reporting Institution must report the required information for the trust and each Specified U.S. Person identified, if any U.S. indicia is found, when performing the due diligence procedures prescribed in Annex I to the Agreement. A Reporting Institution that has reason to believe that a person other than the trustee has effective control over the trust assets must report such person who is a Specified U.S. Person.

A partnership is regarded as a legal arrangement (agreement) between individuals. As such “Controlling Persons” means persons in equivalent or similar positions, for example, the account holder.

According to FICA Regulations,<sup>78</sup> in the case of a partnership, information must be obtained for –

- every partner, including every member of a partnership *en commandite*, an anonymous partnership or any similar partnership;
- the person who exercises executive control over the partnership; and
- each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the partnership.

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<sup>76</sup> 57 of 1988.

<sup>77</sup> The term “Master” is defined in section 1 of the Trust property Control Act to mean the Master, Deputy Master or Assistant Master of the Supreme Court.

<sup>78</sup> Regulation 13 of FICA (GNR. 1595 of 20 December 2002: Money Laundering and Terrorist Financing Control Regulations).

In the case of extraordinary partnerships (commanditarius partner and a silent or anonymous partner) the partners are undisclosed and the information would therefore not be available to Reporting Institutions to search for U.S. Indicia on those partners. The Reporting Institution must perform the due diligence procedures to search for U.S. Indicia on all other partners and information on the account.

In line with the FICA requirements the Reporting Institution would therefore in the case of a partnership, report names of the partners exercising control over the partnership or any partner who can enter into transactions on behalf of the partnership and each Specified U.S. Person identified, if any U.S. indicia is found when performing the due diligence procedure prescribed in Annex I to the Agreement.

For clarity, the set criteria relating to Reportable Accounts to be obtained and reported to SARS for exchange purposes covering the first reporting period of 1 July 2014 to 28 February 2015, are:<sup>79</sup>

- Name
- Address
- U.S. federal taxpayer identifying number (U.S. TIN)<sup>80</sup>
- Account number
- Name and identifying number of the Reporting Financial Institution
- The account balance or value as of end of the calendar year or other appropriate reporting period<sup>81</sup>

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<sup>79</sup> In terms of Article 2(2)(a)(1).

<sup>80</sup> In terms of Article 3(4) is not required to obtain and include the U.S. TIN of any relevant person if such taxpayer identifying number is not in the records of the Reporting Institution. In such case the date of birth of the relevant person should be reported, if it is in the records of the Reporting Institution.

<sup>81</sup> Additional information is required for the 2015, 2016 and subsequent reporting periods (refer to Article 3(3)(a)(2) read with Article 2(2)).

## Chapter 4 – Due diligence obligations under Annex I of the Agreement

### 4.1 General

Annex I to the Agreement sets out the procedures applicable for the identification and reporting by South African Financial Institutions of Financial Accounts held by Specified U.S. Persons and Passive NFFEs with one or more Controlling Persons that are Specified U.S. Persons.<sup>82</sup>

Annex I to the Agreement also provides for a distinction between Financial Accounts maintained as of 30 June 2014 (Preexisting Accounts) and those accounts opened on or after 1 July 2014 (New Accounts). A further distinction is made between accounts held by natural persons (Individual Accounts) and those accounts held by entities (Entity Accounts). Four different categories of accounts are thus envisaged in Annex I:

- Preexisting Individual Accounts
- New Individual Accounts
- Preexisting Entity Accounts
- New Entity Accounts

According to Notice 2014-33 published by the IRS on 2 May 2014,<sup>83</sup> FFIs covered by a Model 1 IGA or a Model 2 IGA will be allowed to treat Entity Accounts opened between 1 July 2014 and 31 December 2014 as Preexisting Accounts with certain exclusions (see 4.2).

Besides the capacity of the account holder and the opening date of the account, the applicable review, identification and communication requirements vary essentially in accordance with the balance or value of the account as of the applicable cut-off date. Preexisting Accounts the balance or value of which does not exceed \$50 000 are generally not required to be reviewed, (unless the Financial Institution elects to ignore the monetary thresholds),<sup>84</sup> identified or reported. This threshold is increased to \$250 000 for –

- Preexisting Individual Accounts that are Cash Value Insurance Contracts or Annuity Contracts; and
- Preexisting Entity Accounts.

Such a *de minimis* rule is also applicable for New Individual Accounts that are either Depository Accounts or Cash Value Insurance Contracts.<sup>85</sup> The same is, however, the exception for New Entity Accounts.<sup>86</sup> For accounts denominated in a currency other than the U.S. dollars (see 4.4), the applicable threshold amount must be converted into such other currency using a published spot rate as of the last day of

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<sup>82</sup> The concepts “Financial Account”, “Specified U.S. Person” and “Controlling Person” are discussed in Chapter 3 – Financial Accounts.

<sup>83</sup> [www.irs.gov/pub/irs-drop/n-14-33.pdf](http://www.irs.gov/pub/irs-drop/n-14-33.pdf)

<sup>84</sup> Annex I(II)(A).

<sup>85</sup> Annex I(III)(A).

<sup>86</sup> Annex I(V)(A).

the calendar year preceding the year in which the balance or value shall be determined.<sup>87</sup>

For the purpose of determining the aggregate balance or value of Financial Accounts held by a particular person, a Reporting Institution is required to aggregate all Financial Accounts maintained by such Financial Institution only to the extent that such Financial Institution's computerised systems link the Financial Accounts by reference to a data element such as client number or taxpayer identification number, and allow account balances or values to be aggregated.<sup>88</sup> For High Value Accounts<sup>89</sup> known to a relationship manager, aggregation requirements also apply when the relationship manager knows, or has reason to know, that the Financial Accounts are directly or indirectly owned, controlled, or established (other than in a fiduciary capacity) by the same person.<sup>90</sup>

For Preexisting Accounts, the review procedure generally starts with a search for U.S. indicia in the electronically searchable data maintained by the Reporting Institution. These indicia vary depending on whether the account holder is an individual<sup>91</sup> or an entity.<sup>92</sup> Reliance on self-certification or documentary evidence provided by the account holder is generally admitted, unless the Reporting Institution knows or has reason to know that the self-certification or documentary evidence is incorrect or unreliable.<sup>93</sup> Self-certification is not limited to IRS Forms W-8 and W-9 and may include any other similar agreed form (see 4.5).

For Preexisting Individual Accounts, a Reporting Institution that previously obtained documentation from an Account Holder to establish the Account Holder's status as neither a U.S. citizen nor a U.S. resident in order to meet its obligations, amongst others, under a qualified intermediary (QI) agreement with the IRS, is not required to perform the procedures otherwise applicable for the purpose of the review of Lower Value Accounts and High Value Accounts.<sup>94</sup> This suspension rule does not apply to the relationship manager enquiry set out under Annex I(II)(D)(4). SARS takes the view that the benefits associated with this provision might be limited in practice, as its implementation would require in the first instance segregation of the accounts that have been documented under a QI agreement from those accounts that have not been documented for the same purpose.

#### **4.2 New Entity Accounts: U.S. Notice 2014-33**

In order to comply with the obligation to obtain and report on the required information, a Reporting Institution must apply the due diligence procedures in Annex I. Annex I provides for a distinction between Financial Accounts maintained as of 30 June 2014 (Preexisting Accounts) and accounts opened on or after 1 July 2014 (New Accounts).

A further distinction is made between accounts held by natural persons (Individual Accounts) and accounts held by entities (Entity Accounts).

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<sup>87</sup> Annex I(VI)(C)(4).

<sup>88</sup> Annex I(VI)(C)(1) and (2).

<sup>89</sup> Accounts with a balance or value that exceeds \$1 000 000.

<sup>90</sup> Annex I(VI)(C)(3).

<sup>91</sup> Annex I(II)(B)(1).

<sup>92</sup> Annex I(IV)(D)(1).

<sup>93</sup> Annex I(VI)(A).

<sup>94</sup> Annex I(II)(F).



In Notice 2014-33<sup>95</sup> the IRS announced that it is expected that Annex I of future Model 1<sup>96</sup> and Model 2 Agreements will include new due diligence procedures for an entity account opened on or after 1 July 2014 and before 1 January 2015 to allow an FFI covered by a Model 1 IGA or Model 2 Agreement to treat such an account as a Preexisting Entity Account, but without permitting application to such accounts of the \$250 000 exception for Preexisting Entity Accounts whereby those accounts are not required to be reviewed, identified, or reported.

The Notice further states:

“A partner jurisdiction with an IGA that has been signed or that has reached an agreement in substance will be permitted to adopt the revised due diligence procedures described above pursuant to the most-favored nation provision contained within its IGA, once an IGA with the revised procedures has been signed with another partner jurisdiction.”

Therefore, once the U.S. has signed or reached agreement in substance with another jurisdiction, in terms of their revised Annex I, the provisions of Article 7 between South Africa and the U.S. will be instituted and Annex I will be revised accordingly.

However, the Notice goes on to state:

“Annex I of the Model 1 IGA contains a provision that allows a partner jurisdiction to permit a reporting Model 1 FFI to rely on the procedures described in relevant U.S. Treasury regulations to establish whether an account is a U.S. reportable account or an account held by a nonparticipating financial institution.”

“Prior to the publication of the proposed amendments to the chapter 4 regulations, a partner jurisdiction may rely on the provisions of this notice to permit a reporting Model 1 FFI to apply the due diligence procedures for documenting entity accounts described in this section IV”.

Section IV of Notice 2014-33 therefore has immediate effect and entity accounts opened between 1 July 2014 and 31 December 2014 can be regarded as Preexisting Accounts, before the revision of Annex I. The Notice does not affect the timeline provided for the due diligence and reporting requirements for Preexisting Entity Accounts, New Individual Accounts and Preexisting Individual Accounts. A Reporting Institution that has already amended its onboarding processes for entities is not precluded from applying the enhanced provisions before 1 January 2015.

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<sup>95</sup> Section IV of Notice 2014-33 [www.irs.gov/irb/2014-21\\_IRB/ar04.html](http://www.irs.gov/irb/2014-21_IRB/ar04.html) [Accessed 11 December 2014].

<sup>96</sup> Model 1 was chosen by South Africa. Model 1 intergovernmental agreement is a reciprocal agreement and provides for the implementation of FATCA through reporting by Financial Institutions to the competent authority of SARS followed by automatic exchange of reported information to the IRS. The U.S. will reciprocate in a like manner.

### 4.3 Reporting of New Individual Accounts

The following New Individual Accounts are not required to be reviewed, identified, or reported as U.S. Reportable Accounts in terms of section III(A) of Annex I unless the Reporting Institution elects otherwise:

- A Depository Account<sup>97</sup> unless the account balance exceeds \$50 000 at the end of any calendar year or other appropriate reporting period; and
- A Cash Value Insurance Contract<sup>98</sup> unless the Cash Value exceeds \$50 000 at the end of any calendar year or other reporting period.

A Reporting Institution must perform a check, at the end of the reporting period each year (28 or 29 February), of all depository accounts and cash value insurance contracts that were initially not required to be reviewed, identified or reported. To the extent that the balances on these accounts exceed \$50 000 at the reporting date (28 or 29 February), these accounts will now have to be reported on.

For all other New Individual Accounts the Reporting Institution must, upon account opening, in terms of section III(B) of Annex I –

- obtain a self-certification (see 4.5) that allows the Institution to determine whether the Account Holder is a resident in the United States for tax purposes;<sup>99</sup> and
- confirm the reasonableness of such self-certification.

In the case of Depository Accounts and Cash Value Insurance Contracts that exceed \$50 000 at the reporting date, the Reporting Institution must obtain the above-mentioned self-certification within 90 days of the calendar year in which the account becomes reportable. South Africa has elected a reporting date different to that of a calendar year. In this instance the Reporting Institution has 90 days from 28 or 29 February to test the balances on these accounts and to obtain the required self-certification.

For self-certification purposes a U.S. citizen is considered to be resident in the United States for tax purposes even if the Account Holder is also a tax resident of another tax jurisdiction.

In confirming the reasonableness of the self-certification the Reporting Institution may use the information that it already holds on its data base or obtains when opening the account, including any documentation obtained for AML/KYC procedures.

If self-certification (for example the U.S. W-8 form), establishes that the Account Holder is resident in the United States for tax purposes, the Reporting Institution must treat the account as a U.S. Reportable Account and obtain a self-certification that includes the Account Holder's U.S. TIN (IRS Form W-9).

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<sup>97</sup> For the definition of "Depository Account" refer to the **Glossary** appended to this guide.

<sup>98</sup> For the definition of "Cash Value Insurance Contract" refer to the **Glossary** appended to this guide.

<sup>99</sup> Self-certification must be obtained upon opening for such New Individual Accounts (Annex I(III)(B)).

If there is a change of circumstances to a New Individual Account that causes the Reporting Institution to know or have reason to know that the original self-certification is incorrect or unreliable, the Institution must obtain a valid self-certification and not rely on the original self-certification.

If the Reporting Institution is unable to obtain a valid self-certification the account must be treated as a U.S. Reportable Account.

#### 4.4 Currency conversion

For every account (Preexisting or New) a determination has to be made as to whether the account is reportable or not. With regard to making this determination, threshold limits have been set. The threshold limits are:

- \$50 000 (Individual accounts)
- \$250 000 and \$1 000 000 (Entity accounts)

In determining whether an account denominated in South African rand (or a currency other than the U.S. dollar) must be reported, the balance needs to be compared to the threshold limit. The above threshold limits must therefore be translated into rands (or the currency other than the U.S. dollar) using the published spot rate at 31 December of the preceding reporting period, in terms of Annex I(VI)(C)(4).

In terms of Annex I(I)(B)(3), in respect of Preexisting Accounts, the relevant balance or value must be determined as at 30 June 2014. In respect of all other accounts where a balance or value threshold is to be determined, the relevant balance or value shall be determined as of the last day of the calendar year or other reporting period. In the case of South Africa the reportable accounts will then be translated using the published spot rate as at 28 or 29 February each year. The Reporting of amounts and balances must be submitted to SARS in rand.

#### **Example 10 – Preexisting Accounts**

*Facts:*

Assume a Preexisting Individual Depository Account has a balance of R750 000 on 30 June 2014. In order to determine whether this account is reportable, the balance must be compared to the threshold amount of \$50 000. This threshold limit must be translated at the published spot rate at 31 December 2013.

Assume the rate at 31 December 2013 was \$1:R10. The threshold limit in rand will be R500 000. The account is therefore a reportable account as the balance of R750 000 exceeds the threshold of R500 000.

*Result:*

As a result of the account being a reportable account, the balance or value must be reported at 28 February 2015 if identified as a Reportable Account before the said date.

**Example 11 – New accounts***Facts:*

Depository Accounts or Cash Value Insurance Contracts do not have to be reported, unless the balance on these accounts exceeds \$50 000 at the end of the reporting period.

Assume the exchange rate at 31 December 2014 is now \$1:R11.

*Result:*

The \$50 000 threshold value must be converted at a rate of \$1:R11 which is R550 000. Any depository account or cash value insurance contract held by a financial institution at 28 or 29 February 2015 would be compared to R550 000 and those in excess of that amount will be reported. For the reporting period ending 29 February 2016, the spot rate at 31 December 2015 must be used to determine if the *de minimis* thresholds have been exceeded.

The review for U.S. Indicia of Preexisting Individual Accounts that are Lower Value Accounts<sup>100</sup> must be completed by 30 June 2016.<sup>101</sup>

**4.5 Self-certification**

Any indicia that an Account Holder holds a U.S. Reportable Account needs to be reported unless the Reporting Institution obtains or currently maintains a record of all of the following:

- Self-certification showing that the Account Holder is neither a U.S. citizen nor a U.S. resident for tax purposes; and
- Evidence of the Account Holder's citizenship or nationality in a country other than the U.S. (for example, a passport or other government issued identification).

Self-certification is a form of confirmation by the Account Holder of the Account Holder's citizenship or U.S. resident status and confirmation of any other information that may be reasonably requested by a Reporting Institution to fulfil its reporting and due diligence obligations.

A Financial Institution must obtain self-certification from an account holder or the Controlling Person of a Passive NFFE where applicable.

For purposes of self-certification this may be on an IRS Form W-8 which is available on the IRS website<sup>102</sup> or other similar agreed form. The U.S. does not need to approve the format of other self-certifications that a country or a Financial Institution may develop provided those self-certifications satisfy the "substitute forms" requirements described in the Instructions for the Requester of Forms W-8BEN,

<sup>100</sup> Preexisting Individual Accounts with a balance or value as of 30 June 2014 that exceeds \$50 000 (\$250 000 for a Cash Value Insurance Contract or Annuity Contract) but does not exceed \$1 000 000 is regarded as Lower Value Accounts.

<sup>101</sup> Annex I(C)(1).

<sup>102</sup> [www.irs.gov/pub/irs-pdf/fw8ben.pdf](http://www.irs.gov/pub/irs-pdf/fw8ben.pdf) [Accessed 11 December 2014].

W-8BEN-E, W-8FCI, W-8EXP, and W-8IMY which are also available on the IRS website. Any other substitute forms would need to be agreed upon by the U.S.

In the absence of any further guidance from the U.S. it is suggested that the IRS Form W-8 is used for self-certification purposes or such form that is developed that complies with the requirements contained in the Instructions for the Requester of Forms W-8BEN, W-8BEN-E, W-8FCI, W-8EXP, and W-8IMY.<sup>103</sup> A substitute Form W-8 is valid only if it contains the same penalties of perjury statement and certifications as the official forms and the required signature.

If a Financial Institution's search fails to establish an indicium and the attempt to obtain self-certification or documentary evidence is unsuccessful, the Reporting Institution must report the account.

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<sup>103</sup> [www.irs.gov/pub/irs-pdf/iw8.pdf](http://www.irs.gov/pub/irs-pdf/iw8.pdf) [Accessed 11 December 2014].

## Chapter 5 – Reporting and withholding obligation

### 5.1 General

The reporting obligations applicable to Reporting Institutions under the Agreement are prescribed in –

- Article 2(2) [Obligations to obtain and exchange information with respect to Reportable Accounts];
- Article 3 [Time and manner of exchange of information]; and
- Article 4(1)(b) that prescribe the reporting obligation of a Reporting Institution with regard to payments made to NPFIs.

Specific mention will also be made regarding communication requirements applicable to a Reporting Institution by virtue of Article 4(1)(e) that makes a payment of, or acts as an intermediary for U.S. Source Withholdable Payments to NPFIs.

### 5.2 Who needs to report

As far as Non-US Entities are concerned, reporting obligations apply to Reporting South African Financial Institutions.

Non-Reporting South African Financial Institutions and NFFEs are not bound by any reporting obligations under the Agreement. However, three notable exceptions apply to this rule:

- A South African Financial Institution qualifying under Annex II as a Financial Institution with a Local Client Base is required to report any U.S. Reportable Account (unless the account is closed) or any Financial Account held by an NPMI (unless the account is closed).<sup>104</sup>
- An entity qualifying under Annex II as a Sponsored Investment Entity (or Controlled Foreign Corporation) in which case the sponsoring entity is required to report any U.S. Reportable Account of the sponsored entity on behalf of such entity.<sup>105</sup>
- An NFFE that is an “excepted NFFE” as described in the U.S. Regulations.<sup>106</sup>

### 5.3 What needs to be reported

#### 5.3.1 Accounts held by Specified U.S. Persons

The reportable information required is described in Article 2(2)(a). All reportable information described in Article 2(2)(a) relates to Financial Accounts existing as of 30 June 2014. Any Financial Account closed on or before 29 June 2014 is not subject to reporting obligations under the Agreement.

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<sup>104</sup> Annex II(III)(A), items 7 and 8.

<sup>105</sup> Annex II(IV)(B).

<sup>106</sup> Annex I(VI)(B)(4)(i) Included an excepted NFFE as an Active NFFE. An excepted NFFE includes, among other things, a direct reporting NFFE and a sponsored direct reporting NFFE. Internal Revenue Bulletin: 2014-13 dated 24 March 2014 (T.D.9657).

For each Specified U.S. Person that is the holder of a Reportable Account and for each Controlling Person of a Passive NFFE that is a Specified U.S. Person, the information to be reported is the following:

1. Name
2. Address
3. U.S. TIN
4. Account number (or functional equivalent in the absence of an account number)
5. Name and GIIN of the Reporting Institution
6. Account balance or value<sup>107</sup> as of the end of the relevant calendar year or other appropriate reporting period or, if the account under review was closed during such year, immediately before closure. South Africa has elected the last day of February as the reporting period.

Where the account is a Custodial Account, the following information in addition to the items listed in 1 to 6 above is also required for the reporting period ending February:

- The total gross amount of interest paid or credited to the account
- The total gross amount of dividends paid or credited to the account
- The total gross amount of other income paid or credited to the account
- The total gross proceeds from the sale or redemption of property paid or credited to the account with respect to which the Reporting Institution acted as a custodial, broker, nominee or otherwise as an agent for the Account Holder

Where the account is a Depository Account, in addition to the items listed in 1 to 6 above, the total amount of gross interest paid or credited to the account is also required to be reported.

For oOther accounts, that is, Financial Accounts that are not Depository Accounts or Custodial Accounts, in addition to the items listed in 1 to 6 above the total gross amount paid or credited to the account including the aggregate amount of any redemption payments made to the account holder are required to be reported.

### **5.3.2 Payments made to Nonparticipating Financial Institutions (NPFIs)**

In accordance with Article 4(1)(b) and for each of 2015 and 2016, each Reporting Institution must report annually to the Competent Authority –

- the name of each NPFI to which it has made payments; and
- the aggregate amount of such payments.

The procedure for this reporting requirement is not defined in the Agreement and shall be agreed upon by separate instrument between the competent authorities in South Africa and the United States, as provided for in Article 3(6)(c). The reporting obligations under Article 4(1)(b) will only apply to a Reporting Institution if the

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<sup>107</sup> For Cash Value Insurance Contracts or Annuity Contracts, this includes the cash value or surrender value of the contract.

relevant payments are paid in connection with a Financial Account held by an NPFI maintained by such Reporting Institution.

In addition Article 4(1)(e) provides that, in the case of a Reporting Institution that is not acting as a qualified intermediary (QI) that has elected to assume primary withholding responsibility and that makes a payment of, or acts as an intermediary pertaining to a US Source Withholdable Payment to any NPFI, the Reporting Institution is to provide to any immediate payor of such payment the information required for withholding and reporting to occur for such payment. The applicable format for the transmission of the relevant information is not defined in the Agreement and should be agreed upon by the Reporting Institution with the immediate payor of the payment under review.

#### **5.4 Whom to report to**

The information required under Article 2(2)(a) [accounts held by Specified U.S. Persons] and Article 4(1)(b) [payments made to NPFIs] shall be provided to the Competent Authority in the manner specified in SARS's BRS:AEOI.

The information required under Article 4(1)(e) shall be provided to the immediate payor of the relevant payment, meaning a private counterparty. The purpose of this communication is to ensure that any withholding applicable under FATCA will be effected.

#### **5.5 When to report**

Article 3(3)(a) provides for the timetable below for the reporting of the information required for accounts held by Specified U.S. Persons.

The first reporting period in terms of the BRS: AEOI specifications is 1 July 2014 to 28 February 2015. The information required for the first reporting period must be submitted to SARS by 30 June 2015.<sup>108</sup> Thereafter the required information must be submitted annually at the end of May for the reporting period ending February.<sup>109</sup>

##### **5.5.1 For the reporting year 2014**

With respect to –

- each Specified U.S. Person holding a U.S. Reportable Account; and
- each Specified U.S. Person being a Controlling Person of a Passive NFFE holding a Financial Account,

Reporting Institutions shall report:

- Name
- Address
- U.S. TIN or date of birth

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<sup>108</sup> Government Notice No. 509 in *Government Gazette* No. 37778 of 27 June 2014, available at [www.sars.gov.za](http://www.sars.gov.za) ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

<sup>109</sup> The information required to be reported for each reporting period is prescribed in Article 2(2) – Obligations to obtain and exchange information with respect to reportable accounts and Article 3 – Time and manner of exchange of information of the Agreement.



- Account number or functional equivalent
- Name and GIIN of the Reporting Institution
- Account balance or value as at end of the reporting period (or as of the date of closure if the account was closed in the course of the year)<sup>110</sup>

The Agreement provides that the reportable information shall be exchanged to the U.S. Competent Authority by the South African tax authorities no later than 30 September 2015.<sup>111</sup>

### **5.5.2 For the reporting year 2015**

Reporting Institutions shall report the same information as for 2014 plus the following:

- For Custodial Accounts:
  - Total gross amount of interest
  - Total gross amount of dividends
  - 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)
- For Depository Accounts:
  - Total amount of gross interest paid or credited to the account in the year ending 28 February 2016
- For other Financial Accounts:
  - Total amount of gross amount paid or credited to the Account Holder including the aggregate amount of any redemption payments made to the account holder during the year ending 28 February 2016

### **5.5.3 For the reporting year 2016**

Reporting Institutions shall report the same information as for 2015. In respect of Custodial Accounts the total gross proceeds from the sale or redemption of property paid or credited to the account during the year ending 29 February 2017 for which the Reporting Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder, must be provided.

### **5.5.4 For the reporting year 2017 onwards**

Reporting Institutions shall report all the above information.

## **5.6 How to report**

A Reporting Institution is required to obtain information on Reportable Accounts as from 1 July 2014 and report this information to SARS. The manner in which reporting

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<sup>110</sup> As mentioned above, reporting obligations apply with respect to 2014 only if the account under review exists as of 30 June 2014.

<sup>111</sup> In terms of Article 3(5) the information described in Article 2 shall be exchanged within 9 months after the end of the calendar year to which the information relates.

is to be done is specified in SARS's BRS: AEOI which is available on the SARS website.<sup>112</sup>

## 5.7 Duty to keep records

In terms of section 26 of the Tax Administration Act 28 of 2011<sup>113</sup> a Reporting Institution is required to submit a return in the form of a data file compiled in accordance with the BRS: AEOI.

Section 29 of the Tax Administration Act imposes a duty on a person to retain the records, books of account or documents needed to comply with a tax Act, which applies to a person who has submitted a return, or who is required to submit a return for the tax period and has not submitted such return for that period.

A person obliged to keep records must keep the records in the form generally prescribed by the Commissioner for SARS by public notice.<sup>114</sup> These records, books of account or documents need only be retained for a period of five years from the date of the submission of the return to which those records relate.<sup>115</sup>

## 5.8 Reporting requirements when closing a Reportable Account

In the event that a Reportable Account is closed during a year, Article 2(2)(a)(4) requires that the Reporting Institution reports on the balance of such account immediately before closure.

A situation may arise where a Preexisting Account<sup>116</sup> is closed before identification. This will not affect the reporting such Preexisting Account as the account was in existence at 30 June 2014. The Reporting Institution will therefore have to report the account as well as the closure of the account as prescribed.

A dormant account is not necessarily a closed account. If an Account Holder requests the Reporting Institution to close its account, the Reporting Institution must report to SARS the balance as at one day immediately before the Reporting Institution closes the account. Closure of an account means the day that the account is finally closed and the Reporting Institution transfers the funds in the account.

Electronic form of record keeping is generally prescribed by the Commissioner for SARS by public notice.<sup>117</sup>

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<sup>112</sup> The document is available on SARS's Automatic Exchange of Information page, which can be accessed through the following path [www.sars.gov.za](http://www.sars.gov.za) ⇒ Business and Employers ⇒ Modernised 3rd party data Platform ⇒ Automatic Exchange of Information, scroll down to 'Useful Links' and select 'SARS External BRS 2014'.

<sup>113</sup> Government Notice No. 509 in *Government Gazette* No. 37778 of 27 June 2014, available at [www.sars.gov.za](http://www.sars.gov.za) ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

<sup>114</sup> Government Notice No. 508 in *Government Gazette* No. 37778 of 27 June 2014, available at [www.sars.gov.za](http://www.sars.gov.za) ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

<sup>115</sup> Section 29(3)(a) of the Tax Administration Act, 2011.

<sup>116</sup> Preexisting Account is an account at 30 June 2014.

<sup>117</sup> Government Notice No. 787 in *Government Gazette* No. 35733 of 1 October 2014, available at [www.sars.gov.za](http://www.sars.gov.za) ⇒ Legal & Policy ⇒ Secondary Legislation ⇒ Public Notices.

## **5.9 Sponsored Investment Entity**

Section IV of Annex II provides for certain Investment Entities to be treated as deemed-compliant FFIs and prescribes other special rules relating to the registration and reporting obligations of a Sponsored Investment Entity.

A Sponsored Investment Entity will qualify as a deemed-compliant FFI if it has a sponsoring entity that complies with all the requirements listed in Annex II(IV)(3). A Financial Institution is a Sponsored Investment Entity if –

- it is an Investment Entity established in South Africa that is not a qualified intermediary, withholding foreign partnership or withholding foreign trust pursuant to relevant U.S. Treasury Regulations; and
- an Entity has agreed with the Financial Institution to act as a sponsoring entity for the Financial Institution.

Essentially the sponsoring entity will register on the IRS FATCA registration website as the sponsoring entity of the Sponsored Investment Entity and perform all due diligence, withholding, reporting and other requirements on its behalf. With regards to Collective Investment Schemes that operate through a management company structure, the management company may take on the responsibility of a sponsoring entity if all of the requirements in Annex II(IV) are met.

## **5.10 Withholding obligation**

Verification of a GIIN is not required for payments made before 1 January 2015 with respect to any payee that is a Reporting Model 1 FFI.

The absence of a GIIN at the level of a South African Financial Institution cannot alone constitute a conclusive element of significant non-compliance. The assessment of the compliant (or non-compliant) status of a given South African Financial Institution is at the discretion of the Competent Authorities of South Africa and the United States pursuant to the procedure set out in the Agreement under Article 5(2).

## **Chapter 6 – Miscellaneous Issues**

### **6.1 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. The change will be relevant if it indicates that an Account Holder's status has changed, that is, it either indicates that the Account Holder is now a U.S. Person or that it is no longer a U.S. Person. For instance, a change of address will only be a change in circumstances if it changes to an address in the United States.

In circumstances where no U.S. indicia listed in the Agreement are discovered on Low Value Accounts then no further action is required unless there is a change in circumstance that results in one or more U.S. indicia being discovered on the account or the account becomes a High Value Account.<sup>118</sup> Financial Institutions should have procedures in place to check annually if there is a change in circumstance on Low Value Accounts.

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

If the Account Holder fails to respond to a Financial Institution's requests for a self-certification or other documentation to verify the Account Holder's status then the Financial Institution should treat the account as a Reportable Account until the Financial Institution is provided with the necessary information to be able to correctly verify the status of the Account Holder.

### **6.2 Third party service providers**

A Financial Institution can rely on third party service providers to fulfil its obligations under the legislation. However, when doing so, the obligations remain the responsibility of the Financial Institution and any failure to comply with the provisions of the Agreement will be seen as a failure on the part of the Financial Institution.

For example, 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.

### **6.3 Errors**

#### **6.3.1 Minor errors**

The IRS may contact the Competent Authority if there are minor errors in the return. The IRS will not contact Reporting Institutions directly and all contacts will be between the Competent Authorities. Examples of minor errors could include:

- Data fields missing or incomplete
- Data that has been corrupted

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<sup>118</sup> Annex I(B)(2).

- An incompatible format has been used

Reporting Institutions that need to resubmit a return will have to submit the revised return via SARS.

Continual and repeated administrative or minor errors could be considered as significant non-compliance if they continually and repeatedly disrupt and prevent transfer of the information

### **6.3.2 Other errors/queries**

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

### **6.4 Significant non-compliance**

Significant non-compliance may be determined from either an IRS or the Competent Authority's perspective. In either event, the relevant Competent Authority will notify the other regarding the circumstances. A Financial Institution has 18 months from notification in which to resolve the non-compliance.

Significant non-compliance by a Reporting Institution may result in SARS applying any relevant penalties under the implementing legislation should the situation so dictate.

The Competent Authority will also engage with the Reporting Institution to –

- discuss the areas of non-compliance;
- discuss remedies/solutions to prevent future non-compliance,

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

A Financial Institution that fails to comply after a period of 18 months will be treated as an NPMFI. The IRS will publish a list of entities that are to be treated as NPMFIs. Details of how such an entity can correct its status will be published at a later date.

Examples of what would be regarded as significant non-compliance include –

- 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; and
- repeated failure to file a return or repeated late filing.

## 6.5 The interaction between the Agreement and the Protection of Personal Information Act (POPI)

In terms of Article 4(1)(e), a Reporting Institution [not described in Article 4(1)(d)] that makes a payment or acts as an intermediary for a U.S. Source Withholding Payment<sup>119</sup> to any Nonparticipating Financial Institution, must provide the information required for withholding and reporting to the immediate payor of such U.S. Source Withholdable Payment.

The fact that a Reporting Institution will have to, given certain specific circumstances, provide information to a withholding agent under Article 4(1)(e) must, however, be seen in the context of legislation covering the protection of personal information.

The requirement placed on a Reporting Institution is, however, in terms of legislation and agreements enacted with a view to facilitating the exchange of information between international tax regimes and the ultimate improvement in international tax compliance, and the providing of a data subject's information is done in terms thereof.

It may be that the data subject indicates that they are not prepared to consent to the information relevant to them being made available to a third party but the obligation in terms of the Agreement remains with the Reporting Institution to report such information to the withholding agent.

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<sup>119</sup> For the definition of "U.S. Source Withholding Payment" refer to the **Glossary** appended to this guide.

## Glossary

Article 1(1) to the Agreement defines certain terms as follows:

### Account Holder

The term “**Account Holder**” means 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 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.

### Annuity Contract

The term “**Annuity Contract**” means 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.

### Cash Value

The term “**Cash Value**” means 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.

### Cash Value Insurance Contract

The term “**Cash Value Insurance Contract**” means an Insurance Contract (other than an indemnity reinsurance contract between two insurance companies) that has a Cash Value greater than \$50,000.

### Controlling Persons

The term “**Controlling Persons**” means the 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, and 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 Financial Action Task Force Recommendations.

### Custodial Account

The term “**Custodial Account**” 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).

### Custodial Institution

The term “**Custodial Institution**” means any Entity that holds, as a substantial portion of its business, financial assets for the account of others. An entity holds financial assets for the account of others as a substantial portion of its business if the entity’s gross income attributable to the holding of financial assets and related financial services equals or exceeds 20 percent of the entity’s gross income during the shorter of: (i) the three-year period that ends on December 31 (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or (ii) the period during which the entity has been in existence.

### Depository Account

The term “**Depository Account**” 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.

### Depository Institution

The term “**Depository Institution**” means any Entity that accepts deposits in the ordinary course of a banking or similar business.

### Equity Interest

The term “**Equity Interest**” means, 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 of all or a portion of the trust, or any other natural person exercising ultimate effective control over the trust. 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.

### Entity

The term “**Entity**” means a legal person or a legal arrangement such as a trust.



## Financial Account

The term “**Financial Account**” 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 in subparagraph 1(s)(1) of this Article, 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 this Agreement; and
- (3) any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a noninvestment-linked, nontransferable 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.

Notwithstanding the foregoing, the term “Financial Account” does not include any account that is excluded from the definition of Financial Account in Annex II. For purposes of this Agreement, 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” 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 purposes of this subparagraph 1(s), 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.

## Financial Institution

The term “**Financial Institution**” means a Custodial Institution, a Depository Institution, an Investment Entity, or a Specified Insurance Company.

## Insurance Contract

The term “**Insurance Contract**” means 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.

## Investment Entity

The term “**Investment Entity**” means any Entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer:

- (1) trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- (2) individual and collective portfolio management; or

- (3) otherwise investing, administering, or managing funds or money on behalf of other persons.

This subparagraph 1(j) shall be interpreted in a manner consistent with similar language set forth in the definition of “financial institution” in the Financial Action Task Force Recommendations.

## **NFFE**

An “**NFFE**” means any Non-U.S. Entity that is not an FFI as defined in relevant U.S. Treasury Regulations or is an Entity described in subparagraph B(4)(j) of this section, and also includes any Non-U.S. Entity that is established in South Africa or another Partner Jurisdiction and that is not a Financial Institution.

## **Nonparticipating Financial Institution**

The term “**Nonparticipating Financial Institution**” means a nonparticipating FFI, as that term is defined in relevant U.S. Treasury Regulations, but does not include a South African Financial Institution or other Partner Jurisdiction Financial Institution other than a Financial Institution treated as a Nonparticipating Financial Institution pursuant to subparagraph 2(b) of Article 5 of this Agreement or the corresponding provision in an agreement between the United States and a Partner Jurisdiction.

## **Non-Reporting South African Financial Institution**

The term “**Non-Reporting South African Financial Institution**” means any South African Financial Institution, or other Entity resident in South Africa, that is described in Annex II as a Non-Reporting South African Financial Institution or that otherwise qualifies as a deemed-compliant FFI or an exempt beneficial owner under relevant U.S. Treasury Regulations in effect on the date of signature of this Agreement.

## **Non-U.S. Entity**

The term “Non-U.S. Entity” means an Entity that is not a U.S. Person.

## **Participating FFI**

The term Participating FFI means a Financial Institution that has agreed to comply with the requirements of an FFI Agreement, including a Financial Institution described in a Model 2 IGA that has agreed to comply with the requirements of an FFI Agreement. The term Participating FFI also includes a qualified intermediary branch of a Reporting U.S. Financial Institution, unless such branch is a Reporting Model 1 FFI. For purposes of this definition, the term FFI Agreement means an agreement that sets forth the requirements for a Financial Institution to be treated as complying with the requirements of section 1471(b) of the U.S. Internal Revenue Code. In addition, for purposes of this definition, the term Model 2 IGA means an arrangement between the United States or the Treasury Department and a non-U.S. government or one or more agencies thereof to facilitate the implementation of FATCA through reporting by Financial Institutions directly to the IRS in accordance with the requirements of an FFI Agreement, supplemented by the exchange of information between such non-U.S. government or agency thereof and the IRS.

### **Related Entity**

An Entity is a “**Related Entity**” of another Entity if either Entity controls the other Entity, 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. Notwithstanding the foregoing, South Africa may treat an Entity as not a Related Entity of another Entity if the two Entities are not members of the same expanded affiliated group as defined in section 1471(e)(2) of the U.S. Internal Revenue Code.

### **Reportable Account**

The term “**Reportable Account**” means a U.S. Reportable Account or a South African Reportable Account, as the context requires.

### **Reporting Financial Institution**

The term “**Reporting Financial Institution**” means a Reporting South African Financial Institution or a Reporting U.S. Financial Institution, as the context requires.

### **Reporting Model 1 FFI**

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

### **Reporting South African Financial Institution**

The term “**Reporting South African Financial Institution**” means any South African Financial Institution that is not a Non-Reporting South African Financial Institution.

### **South African Financial Institution**

The term “**South African Financial Institution**” means (i) any Financial Institution resident in South Africa, but excluding any branch of such Financial Institution that is located outside South Africa, and (ii) any branch of a Financial Institution not resident in South Africa, if such branch is located in South Africa.

### **Specified Insurance Company**

The term “**Specified Insurance Company**” means any Entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract.

### Specified U.S. Person

The term “**Specified U.S. Person**” means a U.S. Person, other than: (i) a corporation the stock of which is regularly traded on one or more established securities markets; (ii) any corporation that is a member of the same expanded affiliated group, as defined in section 1471(e)(2) of the U.S. Internal Revenue Code, as a corporation described in clause (i); (iii) the United States or any wholly owned agency or instrumentality thereof; (iv) any State of the United States, any U.S. Territory, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing; (v) any organization exempt from taxation under section 501(a) of the U.S. Internal Revenue Code or an individual retirement plan as defined in section 7701(a)(37) of the U.S. Internal Revenue Code; (vi) any bank as defined in section 581 of the U.S. Internal Revenue Code; (vii) any real estate investment trust as defined in section 856 of the U.S. Internal Revenue Code; (viii) any regulated investment company as defined in section 851 of the U.S. Internal Revenue Code or any entity registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-64); (ix) any common trust fund as defined in section 584(a) of the U.S. Internal Revenue Code; (x) any trust that is exempt from tax under section 664(c) of the U.S. Internal Revenue Code or that is described in section 4947(a)(1) of the U.S. Internal Revenue Code; (xi) a dealer in securities, commodities, or derivative financial instruments (including notional principal contracts, futures, forwards, and options) that is registered as such under the laws of the United States or any State; (xii) a broker as defined in section 6045(c) of the U.S. Internal Revenue Code; or (xiii) any tax-exempt trust under a plan that is described in section 403(b) or section 457(g) of the U.S. Internal Revenue Code.

### U.S. Person

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

### U.S. Reportable Account

The term “**U.S. Reportable Account**” means a Financial Account maintained by a Reporting South African Financial Institution and 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. Notwithstanding the foregoing, 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.

### U.S. Source Withholdable Payment

The term “**U.S. Source Withholdable Payment**” means any payment of interest (including any original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States. Notwithstanding the foregoing, a U.S. Source Withholdable Payment does not include any payment that is not treated as a withholdable payment in relevant U.S. Treasury Regulations.

## Annexure A – Definitions

An “affiliated group” is defined in section 1504(a) as follows:

For purposes of this subtitle—

### **(1) In general**

The term “affiliated group” means—

- (A)** 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if—
- (B)**
  - (i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and
  - (ii) stock meeting the requirements of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.

### **(2) 80-percent voting and value test**

The ownership of stock of any corporation meets the requirements of this paragraph if it—

- (A)** possesses at least 80 percent of the total voting power of the stock of such corporation, and
- (B)** has a value equal to at least 80 percent of the total value of the stock of such corporation.

### **(3) 5 years must elapse before reconsolidation**

#### **(A) In general**

If—

- (i) a corporation is included (or required to be included) in a consolidated return filed by an affiliated group for a taxable year which includes any period after December 31, 1984, and
- (ii) such corporation ceases to be a member of such group in a taxable year beginning after December 31, 1984,

with respect to periods after such cessation, such corporation (and any successor of such corporation) may not be included in any consolidated return filed by the affiliated group (or by another affiliated group with the same common parent or a successor of such common parent) before the 61st month beginning after its first taxable year in which it ceased to be a member of such affiliated group.

#### **(B) Secretary may waive application of subparagraph (A)**

The Secretary may waive the application of subparagraph (A) to any corporation for any period subject to such conditions as the Secretary may prescribe.

### **(4) Stock not to include certain preferred stock**

For purposes of this subsection, the term “stock” does not include any stock which—

- (A)** is not entitled to vote,
- (B)** is limited and preferred as to dividends and does not participate in corporate growth to any significant extent,
- (C)** has redemption and liquidation rights which do not exceed the issue price of such stock (except for a reasonable redemption or liquidation premium), and
- (D)** is not convertible into another class of stock.

**(5) Regulations**

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including (but not limited to) regulations—

- (A) which treat warrants, obligations convertible into stock, and other similar interests as stock, and stock as not stock,
- (B) which treat options to acquire or sell stock as having been exercised,
- (C) which provide that the requirements of paragraph (2)(B) shall be treated as met if the affiliated group, in reliance on a good faith determination of value, treated such requirements as met,
- (D) which disregard an inadvertent ceasing to meet the requirements of paragraph (2)(B) by reason of changes in relative values of different classes of stock,
- (E) which provide that transfers of stock within the group shall not be taken into account in determining whether a corporation ceases to be a member of an affiliated group, and
- (F) which disregard changes in voting power to the extent such changes are disproportionate to related changes in value.

Under section 7701(b)(1)(A) of the Internal Revenue Code a resident “alien” is defined as follows:

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

- (i) Lawfully admitted for permanent residence Such individual is a lawful permanent resident of the United States at any time during such calendar year.
- (ii) Substantial presence test Such individual meets the substantial presence test of paragraph (3).
- (iii) First year election Such individual makes the election provided in paragraph (4).

Under section 7701(a)(30) of the Internal Revenue Code United States person means:

- (A) a citizen or resident of the United States,
- (B) a domestic partnership,
- (C) a domestic corporation,
- (D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and
- (E) any trust if—
  - (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and
  - (ii) one or more United States persons have the authority to control all substantial decisions of the trust.