

## **Ministry of Finance**



### **Bermuda**

**FREQUENTLY ASKED QUESTIONS (FAQ) ON THE INTERNATIONAL TAX  
COMPLIANCE REQUIREMENTS OF THE INTERGOVERNMENTAL AGREEMENTS  
BETWEEN BERMUDA AND THE UNITED STATES OF AMERICA AND THE  
UNITED KINGDOM**

**MARCH 2015**

This Frequently Asked Questions document (**FAQ**) on the international tax compliance requirements of the FATCA-related intergovernmental agreements (**IGAs**) between Bermuda and the United States of America (**U.S.**) and the United Kingdom (**UK**) applies to the legislation and regulation in place as at the time and date of publication. These FAQ are not intended nor should they be relied upon as legal or tax advice pertaining to any jurisdiction. These FAQ are also not intended to be comprehensive in nature.

The content of these FAQ is intended and should be read and interpreted as general information on matters relating to the implementation and effect that both U.S. and UK FATCA may have on Bermuda businesses. These FAQ also provide information to assist Bermuda businesses in understanding the nature, purpose and implications of U.S. and UK FATCA on Bermuda businesses generally.

It is recommended that you seek independent legal and tax advice specific to your circumstances and you should not rely upon the content of these FAQ as being specifically applicable to you or your business circumstances.

We do not warrant or guarantee the accuracy or completeness of the information contained herein.

## 1. **GENERAL**

### 1.1 Purpose of these FAQ

These FAQ are intended to provide general information on the purpose and practical implications of FATCA on Bermuda businesses. These FAQ are also intended to illustrate how FATCA impacts Bermuda's legal and regulatory infrastructure.

These FAQ are not intended to contain legal or tax advice, nor are they exhaustive in their nature. Readers are advised to seek specific advice from appropriate legal and tax professionals relevant to their own circumstances and industry.

Most of the FAQs are in respect of U.S. FATCA. However there are certain FAQs in respect of UK FATCA and, where applicable, these are specifically identified as such.

Capitalised terms used but not otherwise defined herein shall have the same meanings ascribed thereto in the IGAs, U.S. FATCA or UK FATCA legislation, as applicable.

### 1.2 Background to FATCA

The Foreign Account Tax Compliance Act 2009 (**U.S. FATCA**) was enacted by the U.S. Congress as part of the Hiring Incentives to Restore Employment Act 2010 to target non-compliance with U.S. tax laws by U.S. persons using foreign accounts. U.S. FATCA was designed to increase compliance by U.S. taxpayers rather than to enforce collection from foreign, non-U.S. taxpayers. It requires Foreign Financial Institutions (**FFI**) to enter into legal agreements with the U.S. Internal Revenue Service (**IRS**) according to which they would have to comply with due-diligence, information reporting and tax withholding obligations with respect to their U.S. accounts. Where the applicable documentation and reporting requirements are not met, U.S. FATCA imposes a 30% U.S. withholding tax on certain payments relating to U.S. source income.

### 1.3 Intergovernmental Agreements

U.S. FATCA imposes new and substantial burdens on businesses in various countries in identifying U.S. taxpayers, and registering and reporting information to the IRS. Individual countries may also have legal restrictions that preclude businesses from withholding tax or passing the required information to the U.S.

IGAs are intended to establish a partnership between the U.S. and foreign countries to:

- improve international tax compliance;
- establish uniform reporting standards and an automatic information exchange;
- eliminate local legal obstacles to FATCA compliance; and
- implement FATCA in a manner that will reduce compliance burdens and costs on Financial Institutions.

The U.S. Treasury has published two forms of IGAs to improve tax compliance and to implement FATCA: IGA Model 1 and IGA Model 2.

Under an IGA Model 1, the U.S. and a partner country (**FATCA partner**) enter into an IGA whereby the FATCA partner agrees to implement legislation to require FFIs in its jurisdiction to collect and report information (including Specified U.S. Persons) to the tax competent authority in the FATCA partner. The FATCA partner will in turn report such information to the IRS.

IGA Model 1 is structured to avoid local law conflicts with FATCA and provides that FFIs in a FATCA partner would not be required to enter into an agreement with the IRS but rather would be subject to an IRS registration requirement. IGA Model 1 requires substantial local laws to be implemented in the FATCA partner.

On 19<sup>th</sup> December 2013 Bermuda signed an IGA Model 2 with the U.S. to implement U.S. FATCA. Under an IGA Model 2 the U.S. and the FATCA partner enter into an IGA whereby the FATCA partner would agree to implement legislation to direct and enable FFIs in its jurisdiction to collect and report FATCA required information (including Specified U.S. Persons) directly to the IRS. It is important to note Bermuda law already enables FFIs in its jurisdiction to collect and report FATCA required information directly to the IRS, as there is no Bermuda law conflict that prevents FFIs from doing so, unlike in those countries that do have conflicting laws that do not enable FFIs to report directly to the IRS and therefore had to adopt IGA Model 1. Hence in Bermuda's case Bermuda only needs to amend its law so as to direct FFIs in its jurisdiction to abide by the US's FATCA Regulations as may be modified by the IGA Model 2 and to impose a fine and or penalty if the FFIs do not, whereby such fine and or penalty is sufficient to serve as a deterrent to non-compliance.

The IGA Model 2 to implement FATCA is primarily aimed for use by those FATCA partners that have little or no local law conflicts with FATCA and where substantial local legislation is not required. IGA Model 2 provides that FFIs in such FATCA partnerships enter into a FFI agreement with the IRS. Such FFI agreements introduce obligations that are similar to the obligations on FFIs under an IGA Model 1 who comply with the IRS registration requirement.

#### 1.4 Benefits of IGA Model 2

- Certainty – FFIs in Bermuda are aware of all the requirements to register their relevant entities with the IRS through the issuance of the IGA Model 2 by the Ministry of Finance.
- Lower Cost of Compliance – The Bermuda Government will not be required to build the infrastructure required to collect and pass on FATCA-related reporting to the IRS or introduce potentially expensive legislation or pass on the costs associated with these activities to local FFIs. This is especially important when considering the rest of the world's version of FATCA, i.e. the OECD CRS under the Multilateral Competent Authority Agreement signed at the Berlin meeting of the OECD in October 2014 which the world intends to use in tandem with Article 6

of the Joint Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance on tax matters (“the Convention”).

Unlike other countries, Bermuda’s competent authority for tax matters (“the Minister of Finance”) only needs a web Portal on the one format, the CRS format upon, to receive information from Bermuda FFIs and to in turn make available to other countries’ tax competent authorities, as opposed to two formats on its Portal, such as a second format for the US FATCA format. Hopefully, if/when the US eventually switches to accept the rest of the world’s CRS format as fully satisfying the policy objectives of US FATCA and the US repeals the necessity of requiring US FATCA formatted information, the Minister’s web Portal will need no restructuring. The UK has already announced that its UK Son-of-FATCA with the UK Overseas Territories (which is based on US FATCA formatted information) will be repealed in 2015 and replaced by the CRS format. However as of January 1<sup>st</sup>, 2015 the US has not entered into force under US Law the US’s participation in the Convention and hence the US is unable to use as a legal mechanism Article 6 of the Convention like the rest of the World.

- Control over Information Flow – FFIs in Bermuda have direct control over the information reported to the IRS and the timing of the reporting. There is no intermediary to collect and report information as required under an IGA Model 1. Furthermore, the level of diligence required by FFIs under IGA Model 2 is the same as under IGA Model 1 as the existence of an intermediary under IGA Model 1 does not reduce the level of diligence required by FFIs.
- Exemptions and Simplified Compliance Options – The exemptions and simplified compliance options provided to Bermuda FFIs are laid out clearly in Annex 2 of the IGA.
- “Most Favored Nation” Clause – This is available to Bermuda in the IGA 2. Any favourable terms granted by the U.S. Government will automatically be applied to the IGA 2 unless Bermuda declines.
- Option to move to IGA Model 1 – There is a commitment on the part of the U.S. Government which will allow Bermuda to negotiate a change to an IGA Model 1 if desired at any point in the future. Bermuda may consider further its options if the US ever entered into force under US Law the US’s participation in the Convention that enables the US to use the legal mechanism of Article 6 of the Convention and the US expressed a willingness to use the Convention’s Article 6. This consideration would be further enhanced if at that time the US also expressed a willingness to switch to the rest of the world’s CRS formatted information as one that fully satisfies the policy objectives of US FATCA.

#### 1.5 Applicable Local Legislation and Regulation

The Bermuda Government expects to pass combined OECD-CRS/ US FATCA related legislation within the first quarter to first half of 2015.

#### 1.6 The Bermuda Competent Authority

The Bermuda Competent Authority will mean the Bermuda Ministry of Finance, specifically the Minister of Finance or his authorised delegate.

The Minister of Finance or his delegate is deemed the "Competent Authority" in Bermuda. According to the IGA signed between Bermuda and the U.S., the U.S. Competent Authority may make group requests to the Bermuda Competent Authority based on the aggregate information reported to the IRS for all the information about Non-Consenting U.S. Accounts and Foreign Reportable Amounts paid to Non-participating Financial Institutions that the Reporting Bermuda Financial Institution would have had to report under an FFI Agreement had it obtained consent. The Bermuda Competent Authority shall, within six months of the receipt of the group request, provide to, or assist with the communication of information to, the U.S. Competent Authority of all such requested information, in the same format in which the information would have been reported if it had been reported directly to the IRS by the Reporting Bermuda Financial Institution.

## 2.1 U.S. FATCA Timeline/Milestones

### **July 1, 2014**

New account opening procedures and classification processes must be in place to establish FATCA status of new individual and entity accounts

Begin FATCA withholding on U.S. source FDAP income paid to new undocumented entities, documented NPFIs, and recalcitrants.

Start recording data that needs to be reported for FATCA.

Preexisting account due diligence begins.

### **January 1, 2015**

First date on which verification of GIINs is required with respect to payees that are reporting Model 1 FFIs.

### **March 15, 2015**

Begin annual reporting on Form 1042-S regarding U.S. FDAP payments

### **March 31, 2015**

Begin annual reporting on Form 8966:

- U.S. account reporting: account balance/personal details for year-end (**YE**) 2014.
- Owners of documented FFIs and NFFEs with substantial U.S. owners.
- Reporting of the aggregate number and value of YE recalcitrant accounts broken out by U.S. persons, those with U.S. indicia, those without U.S. indicia, passive NFFEs and dormant accounts for YE 2014.
- Aggregate reporting of non-consenting accounts.

### **June 30, 2015**

FFIs complete identification, review, and classification of pre-existing high-value (>\$1M) individual accounts.

### **December 31, 2015**

Transition period ends for IRS enforcement and administration of due diligence, withholding and reporting provisions for 2014 and 2015 calendar years (where good faith efforts apply).

Transition period for Limited FFIs and Limited Branches ends.

Begin rechecks for high value accounts and annually thereafter.

### **January 1, 2016**

Latest date for sponsoring entity to register sponsored FFIs (RDCFFIs or CFC) unless date FFI identifies itself as qualifying is later.

### **March 15, 2016**

Form 1042-S, foreign reportable amounts included in reporting for NPFFIs

**March 31, 2016**

U.S. account reporting: as 2014 plus reporting account credits and income paid for YE 2015.

Report for YE 2015, certain payments made to NPFFIs (in aggregate for non-consenting NPFFIs).

**June 30, 2016**

Complete identification, review, and classification of all other pre-existing account classification.

**July 1, 2016**

Begin withholding on U.S. FDAP payments to pre-existing NPFFIs

**August 29, 2016** (June 30 plus 60 days)

Responsible Officer must by this date:

- Certify high value account review;
- Certify all other account review; and
- Certify anti-avoidance.

**March 31, 2017**

Reporting on Form 8966:

- U.S. account reporting: as 2014 & 2015 plus gross proceeds.

**December 31, 2017**

End of first Compliance Certification period.

**June 30, 2018**

Responsible Officer Compliance Certification for first Compliance Certification period ending December 31, 2017.

2.2 UK FATCA/CRS Timeline/Milestones

**July 1, 2014**

Effective date of UK CD/BOT Agreements.

New account opening procedures and classification processes must be in place to establish FATCA status of new individual and entity accounts.

Start recording data that needs to be reported for AEOI.

Preexisting account due diligence begins.

**June 30, 2015**

FFIs complete identification, review, and classification of pre-existing high-value (>\$1M) individual accounts.

**December 31, 2015**

Begin rechecks for high value accounts (>\$1M) and annually thereafter.

**January 1, 2016**

Implementation of CRS

**June 30, 2016**

Complete classification of high value account found in recheck (<6 months) and annually thereafter.

Complete identification, review, and classification of all remaining pre-existing individual and entity accounts.

**September 30, 2016**

First Automatic Exchange of Information under the DTA, TIEA, or equivalent bilateral or multilateral exchange of information mechanism (as appropriate) between the UK and CD/OT Competent Authorities by this date and annually thereafter.

Begin FI reporting on reportable accounts.

- For YE 2014: include account balance and personal details.
- For YE 2015: as above plus, credits and additional specific data.

**September 30, 2017**

Reporting same as in 2016, plus reporting of gross proceeds paid to reportable accounts for YE 2016.

### 3. **INDUSTRY SPECIFIC**

#### 3.1 Banking

FATCA will generally require Bermuda Financial Institutions to classify all account holders as U.S., UK, or non-U.S./UK and as individuals or entities, which are further broken down as financial and non-financial. Furthermore, certain non-U.S./UK non-financial entities must be examined through to determine whether they contain any U.S. or UK Controlling Persons.

The impact of FATCA on banks in Bermuda is pervasive, possibly more than any other entity or business, due to the volume and diversity of the businesses holding accounts with Bermuda banks. It is important for banks to be fully compliant with U.S. and UK FATCA. However, the nature of these provisions is very invasive and clients and counterparties of the banks will be required to provide information and documentation on an extensive scale.

##### 3.1.1 What is the definition of a Controlling Person?

“Controlling Persons” means the natural persons who exercise control over an Entity. As set out by the Financial Action Task Force, the ability to exercise control is met if ownership of an Entity is more than 25%.

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.

For purposes of determining the Controlling Persons of an account holder, a Reporting Bermuda Financial Institution may rely on information collected and maintained pursuant to AML/ATF compliance procedures.

##### 3.1.2 How are deceased accounts handled under FATCA?

Deceased accounts that remain as individual accounts will be considered out of scope for FATCA classification if the Bermuda Financial Institution is in possession of a formal notification of the account holder’s death (for example a copy of the deceased’s death certificate or a copy of the will).

Estate accounts (an account that is held solely by an estate if the documentation for such account includes a copy of the deceased's will or death certificate) are not treated as financial accounts for FATCA purposes.

An account belonging to an individual should automatically be treated as belonging to the individual’s estate upon the validated death of the individual until the account

is transferred to the beneficiary. Thus, the account would be treated as out of scope for FATCA purposes if a copy of the will or death certificate is on file.

### 3.1.3 How are dormant accounts handled under FATCA?

A dormant account is an account which is treated as a dormant or inactive account under applicable laws or regulations in Bermuda or the normal operating procedures of the Bermuda Financial Institution that are consistently applied for all accounts maintained by such institution in Bermuda.

If neither applicable laws and regulations nor the normal operating procedures of the Bermuda Financial Institution maintaining the account address dormant or inactive accounts, an account will be a dormant account if the account holder has not initiated a transaction with regard to the account or any other account held by the account holder with the FFI in the past three years.

In addition, the account holder must not have communicated with the FFI that maintains such account regarding the account or any other account held by the account holder with the FFI in the past six years. The account must also not be linked to an active account belonging to the same account holder.

An account will cease to be a dormant account when the account holder:

- (a) initiates a transaction in the account or any other account held by the account holder with the Bermuda Financial Institution; or
- (b) communicates with the Bermuda Financial Institution that maintains such account regarding the account or any other account held by the account holder with the Bermuda Financial Institution; or
- (c) ceases to be treated as a dormant account under applicable laws or regulations or the Bermuda Financial Institution's normal operating procedures.

If a dormant account is classified reportable and subject to withholding under U.S. FATCA, in lieu of depositing the tax withheld, the Bermuda Financial Institution may set aside the amount held in escrow until the date that the account ceases to be a dormant account.

Any such U.S. tax withheld in escrow will become due 90 days following the date that the account ceases to be a dormant account if the account holder does not provide the required documentation or becomes refundable to the account holder if the account holder does provide the required documentation.

The Bermuda Financial Institution is required to report annually the aggregate number and the aggregate value of accounts held by IGA Model 2 non-consenting U.S. account holders at the end of a calendar year, including dormant accounts.

- 3.1.4 Does the Bermuda Financial Institution need to receive an original hard copy W-form or Self-Certification Form for it to be valid?

A Bermuda Financial Institution is treated as having retained a record of a withholding certificate, written statement or documentary evidence used for determining FATCA status if it retains either an original, certified copy, or photocopy (including a microfiche, electronic scan, or similar means of electronic storage).

Documentation stored electronically must have the capacity to be made available in hard copy on request for audit purposes.

- 3.1.5 What are my obligations in respect of accounts that are closing or closed?

Under U.S. FATCA, where a pre-existing account that is yet unclassified and closes prior to the classification deadline of June 30, 2016 (or June 30, 2015 if subject to enhanced review) the Bermuda Financial Institution holding such account does not have an obligation to remediate the account prior to account closure.

Accounts that were closed prior to June 30, 2014 will not be considered pre-existing accounts, and remediation will not be required.

If there is a change in circumstance, or the Financial Institution has reason to know of U.S. indicia on the account to be closed, the Financial Institution will need to remediate such account and apply the 90 day window.

In some cases accounts which have already been classified and closed during the relevant tax year will comprise Reportable Accounts. When this is the case the spot rate to be used for reporting balances will be the rate on the date the account was closed.

Under UK FATCA, where an account is closed on or after July 1, 2014 and the Bermuda Financial Institution has no continuing contractual relationship with the account holder and therefore is unable to undertake action in relation to any indicia or is unlikely to receive a response to any query made to the Account Holder, the account should be treated as reportable in that reporting year.

- 3.1.6 What are the obligations when there is a merger or bulk acquisition of accounts?

Where a Bermuda Financial Institution acquires accounts by way of a merger or bulk acquisition of accounts, the Bermuda Financial Institution can rely on the status of account holders as determined by a predecessor that is a Reporting Model 2

Financial Institution, Reporting Model 1 Financial Institution, U.S. withholding agent, or a Participating Financial Institution, for a period of six months; provided that the predecessor Financial Institution has met its due diligence obligations.

The Financial Institution may continue to rely on the due diligence work of the predecessor beyond the six month period where the documents that it holds, including any documentation (or copies of documentation) that was acquired as part of the merger or acquisition, continues to support the claimed status of account holders. An account holder's status will need to be verified by the acquiring Financial Institution in accordance with the due diligence procedures should the acquirer have reason to know that it is incorrect or if there is a change in circumstance.

Where a Non-Reporting Financial Institution becomes part of a group as the result of a merger or acquisition, the status of any account maintained by the Non-Reporting Financial Institution can be relied upon unless there is a change in circumstance in relation to the account.

The Bermuda Financial Institution may treat accounts acquired in a merger or bulk acquisition that takes place after June 30, 2014 as pre-existing accounts for the purposes of applying the identification and documentation procedures by treating the accounts as if they had been acquired on June 30, 2014.

3.1.7 How long does customer documentation (W8/W9/ KYC/Self-Certification) need to be retained?

In general, FATCA requires Bermuda Financial Institutions to retain a record of documents utilised for classifying accounts. Document retention will be the longer of local retention laws (currently 6 years) or as long as the account is maintained and the documentation is relied upon for the determined FATCA status.

The Bermuda Financial Institution must retain each withholding certificate (Forms W-8/W-9 or valid self-certification form), written statement (entities) and/or copy of documentary evidence for as long as it may be relevant to the determination of the Bermuda Financial Institution's tax liability under FATCA.

For High Value pre-existing Accounts where a Relationship Manager enquiry is required, records of electronic searches, requests made and responses to Relationship Manager enquiries should also be retained for six years following the end of the year in which the due diligence was undertaken.

3.1.8 What are UK/U.S. indicia in respect of entities?

For both the UK and U.S. FATCA, the following indicia will need to be cured if present on the account:

- (a) UK/U.S. place of incorporation or organisation; and
- (b) current UK/U.S. mailing or UK/U.S. residence address (including a post office box, "in-care-of" or "hold mail" address).

3.1.9 What is the time-frame to remediate a "change in circumstance"?

Generally, when a change in circumstance occurs, a Bermuda Financial Institution will have 90 days to remediate the account. Following a change in circumstances (other than a change in account balance or value in a subsequent year that causes an individual account to be identified as a high-value account), if the required valid documentation is not received, the account holder will be treated as a Model 2 non-Consenting U.S. account holder beginning on the date that is 90 days after the change in circumstance.

Where a change in circumstance is related to a former Low Value Account which qualifies as a High Value Account as of the last day of 2015 or any subsequent calendar year, the Bermuda Financial Institution must complete an enhanced review with respect to such account within six months after the last day of the calendar year in which the account becomes a High Value Account.

A Registered Deemed-Compliant FFI will need to notify the IRS if there is a change in circumstances that would make the Financial Institution ineligible for the deemed-compliant status for which it has registered. IRS notification will need to take place within six months of the change in circumstances unless the Financial Institution is able to resume its eligibility for its registered deemed-compliant status within the six-month notification period.

3.1.10 How long do we have to classify pre-existing accounts when UK/U.S. indicia are discovered on an account?

Where pre-existing accounts (current accounts opened with the Bermuda Financial Institution before July 1, 2014) with account balances above their respective *de minimis* thresholds have indicia on the account, a request to remediate the account must be sent to the account holder. The account holder's account will need to be remediated and documented with a FATCA classification by June 30, 2016.

3.1.11 U.S./UK FATCA lists a Certificate of Residence as acceptable Documentary Evidence to cure indicia. How does a resident of Bermuda obtain a Certificate of Residence for U.S./UK FATCA purposes?

The Bermuda Government has stated that for FATCA purposes the Department of Immigration will provide upon request a Certificate of Residence, or similar document to be confirmed, to Bermuda Residents wishing to prove Bermudian residency status.

## 3.2 Trusts

### 3.2.1 What is a Bermuda resident trust?

The reporting obligations imposed under the IGAs only apply to Bermuda financial institutions including trusts, organised under Bermuda law where any of the following persons is identified as a Specified U.S. or UK Person, such as:

- settlor;
- beneficiary or class of beneficiary;
- trustee;
- protector/enforcer; or
- any other natural person exercising ultimate effective control over the trust.

A trust is resident in Bermuda, for the purposes of the IGAs, if it has a Bermuda resident trustee even if there are no Bermuda settlors, beneficiaries or protectors. A Bermuda resident trust may be established under Bermuda law or under the law of another jurisdiction. Accordingly, a trust which is established or governed under Bermuda law or administered in Bermuda but has no Bermuda resident trustees does not fall within the scope of the IGAs.

### 3.2.2 What if a trust has multi-jurisdictional trustees?

In circumstances where there are trustees in different jurisdictions, there is a risk of duplicate reporting. The Reporting Bermuda Financial Institutions or Bermuda resident trustee must undertake the reporting obligations in respect of a Bermuda resident trust, where required, unless it has actual knowledge that the information that is required to be reported under the Agreements is being reported by another Financial Institution, whether that Financial Institution is a Bermuda Financial Institution or not.

A Bermuda resident trustee will have actual knowledge where they hold written confirmation from the trustee in the other jurisdiction that the trust has been reported for the purposes of the U.S. or UK IGAs. There is no need for the Bermuda resident trustee in these circumstances to report in respect of that trust. This does not remove the responsibility for the Bermuda resident trustee to ensure that a report has been made. Should it be determined that no report has been made by any Reporting Financial Institution, then a report must be filed by the Bermuda resident trustee. Where the Bermuda resident trustee has received a written annual confirmation from the Reporting Financial Institution, then the responsibility of the Bermuda resident trustee for reporting has been discharged.

### 3.2.3 What is an Investment Entity?

A trust that is an FFI will most likely fall under the definition of an Investment Entity. The Bermuda IGA defines an Investment Entity in Article 1, 1(k). This definition differs from the definition under the U.S. Regulations; however, the Bermuda IGA provides that a Bermuda Financial Institution may use the U.S. Regulations definition provided that the application will not frustrate the purposes of the Bermuda IGA (see Article 3, 6).

Corporate trustees and private/individual trustees may be treated differently under the definitions. A trust that is managed by an individual will not be an Investment Entity according to the "managed by" test in the definition; however, it may still be an Investment Entity by virtue of its activity.

#### Example 1

*A Trust managed by an individual.*

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 consists 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 described in the definition of Investment Entity.

Under the definition in the Bermuda IGA, Trust A is not an Investment Entity because it does not conduct as a business any of the activities in the Investment Entity definition and it is not managed by a Financial Institution.

Under the U.S. Regulation definition, Trust A is not an investment Entity because it is managed solely by Trustee A, an individual.

#### Example 2

The facts are the same as in Example 1, except that X hires Trust Company, a Financial Institution, 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.

Under the definition in the Bermuda IGA, Trust A is an Investment Entity because it is managed by an entity that carries on the business of an Investment Entity (or another Financial Institution).

Under the U.S. Regulation definition, Trust A is an Investment Entity because it is managed by a Financial Institution and all of its income is attributable to financial assets.

### Example 3

*A Trust managed by a trust company – only asset is real estate*

Y, an individual, establishes Trust B for his two grandchildren. Y hires Trust Company, a Financial Institution, to act as trustee of Trust B. Trust B's assets consist solely of shares of a Bermuda holding company. The Bermuda holding company's only asset is real estate.

As Trust B's only indirect holdings are real estate, which is not a financial asset, Trust B is an NFFE. The fact that Trust B has a professional trust company as trustee is not relevant in this example as the underlying assets are not financial assets.

#### 3.2.4 What is a non-reporting Financial Institution?

A Bermuda Financial Institution that qualifies as one of the Certified Deemed Compliant categories will not need to register to obtain a GIIN. It will need to certify its status by providing documentation regarding its owners to withholding agents, where relevant.

The categories of Certified Deemed Compliant most relevant to the trust industry are:

- Trustee Documented Trust;
- Sponsored Closely Held Investment Vehicle; and
- Owner Documented Financial Institution.

#### 3.2.5 What is a Trustee Documented Trust?

A Trustee Documented Trust is a trust resident in Bermuda whereby the trustee of the trust is a Reporting Foreign Financial Institution and reports all information required to be reported pursuant to the Agreements with respect to the Reportable Accounts of the trust.

Under the U.S. Agreement only, the trust itself is not required to register. The trustee will register by virtue of being a Foreign Financial Institution but will not have to separately register the trust.

#### 3.2.6 What is a Sponsored Investment Entity?

Under the U.S. IGA, any trust that is an Investment Entity (and therefore a FFI), even if professionally managed, may appoint a sponsor to undertake its due diligence, registration and reporting responsibilities, except where it is a withholding foreign trust in accordance with U.S. Regulations.

If a sponsoring entity is appointed by a trust, no registration of the trust is required unless there is a U.S. Reportable Account. If a U.S. Reportable Account is identified, the sponsoring entity must register the trust. This contrasts with a Trustee-Documented Trust which is not required to be registered at any time.

Under the UK Agreement, a Bermuda resident trust that is an Investment Entity, even if professionally managed, may appoint a Bermuda sponsoring entity to undertake its due diligence and reporting responsibilities.

### 3.2.7 When is a trust a Non-Financial Foreign Entity (NFFE)?

A trust that is not an Investment Entity is unlikely to be a Financial Institution and therefore would be an NFFE. Depending on the trust activities, it will either be a Passive NFFE or an Active NFFE.

For example, a family trust that is not professionally managed and has no income or predominantly passive income may be classified as a Passive NFFE. A trust, whether or not it is professionally managed, that only holds real estate may be treated as a Passive NFFE.

A trust that does not fit the definition of a Passive NFFE may be categorized as an Active NFFE. Under the U.S. Regulations and Annex 1, VI,B,4(j) of the Intergovernmental Agreement, a trust established for religious, charitable, scientific, artistic, cultural or educational purposes may be classified as an Active NFFE.

### 3.2.9 What is the financial account of a trust?

Where a trust has reporting obligations under the Agreements as a Reportable FFI, or where, as a trustee, a sponsoring or other Reporting FFI has taken on the reporting obligations, the information to be reported relates to the Financial Account held in the trust by a Specified Person. Trusts that are NFFEs do not have any reporting obligations themselves (although any Financial Institution that holds a Financial Account for such a trust which has a Specified Person as the Controlling Person will need to report information to the IRS).

The Equity Interest in the trust is the Financial Account. The Financial Account will depend on the nature of the trust and the relationship between the trust and the

account holder as described below in this section. In determining the value of the Financial Account consideration must be given to the value of the property which is subject to the Financial Account. This will include underlying companies and other assets owned by the trust.

Where any of the trust property is a non-financial asset, such as real estate (which is considered to be a non-financial asset under U.S. Regulation), the value of this asset should be included in valuing the Reportable Account where it forms part of the account holder's equity interest in the trust.

#### 3.2.10 Who has an Equity Interest in a trust for reporting purposes?

In practice, the following will be treated as having an Equity Interest in the trust and reporting will apply to those individuals who are identified as a Specified Person:

- settlor of the trust;
- beneficiary that is entitled to a mandatory distribution or benefit (directly or indirectly) from the trust;
- beneficiary that receives a discretionary distribution or benefit (directly or indirectly) from the trust; and
- any person that exercises ultimate effective control over the trust.

#### 3.2.11 How to calculate the Equity Interest in a trust?

The Equity Interest in a trust is the value of the proportion of the trust assets in which any person (set out above in 3.2.10 above) has an interest. The value of the Equity Interest will be the most recent value of the trust calculated by the FFI and should include the value of all assets, financial and non-financial, but can exclude Exempt Products.

The total value of the assets of the trust must be consistent with that used by the trustees for valuation purposes and should be based on a recognised accounting standard. Listed securities should be valued at the appropriate market rate on the day concerned. Unlisted securities may be valued at the original book value unless another accounting basis was used by the trust for normal valuation purposes.

The Equity Interest attributable to the settlor of any trust where the settlor can revoke the trust or has a power to appoint the assets in favour of the settlor or is the beneficiary of the trust is the whole value of the trust. Where a settlor is excluded from the trust, the Equity Interest can be considered to be nil but will still be a Financial Account and hence reportable.

The Equity Interest of a beneficiary that is entitled to mandatory distributions (directly or indirectly) from a trust will be the net present value of amounts payable in the future and should be measured on a recognised actuarial basis. It is recognised that this may be difficult and expensive to calculate in which case it is permitted to use the accounting net asset value of the assets in which the beneficiary has an interest.

For a discretionary trust, the Equity Interest attributable to a beneficiary in receipt of a distribution will be the amount of the distribution made in the relevant reporting year.

### 3.2.12 How to classify specific types of trusts?

#### Employee Benefit Trusts (EBTs)

EBTs should be considered in the same way as any trust and categorized accordingly.

#### Trusts set up to pay school fees

The Equity Interest of a trust formed solely and specifically to pay school fees will depend on the contractual obligation of the trust. If the contract to pay the school fees is made directly with the school, no reporting is required in relation to that agreement. If there is no agreement with the school, the Equity Interest of the trust should be disclosed in respect of the settlor and not the minor beneficiaries.

#### Non-professional trustees/family trusts/family offices

The obligations of the trust and trustees will depend on the nature of the trust. Each trust will need to be analysed to determine whether it is a Financial Institution or an NFFE. A trust that is managed by an individual may not be a Financial Institution and so may be a Passive or Active NFFE, depending on the nature of its activities.

## 3.3 Funds/Investments

### 3.3.1 If a fund is not registered in the U.S. or does not have U.S. investors or investments, is it subject to the U.S. FATCA regulations?

All investment funds domiciled outside the United States will be treated as FFIs under FATCA. As such, they will be subject to 30% withholding on all "withholdable payments" and potentially any "foreign pass thru payments" in the future that they receive, unless they are in an IGA2 country such as Bermuda, or in a country without an IGA, and become a Reporting Model 2 FFI/Participating Foreign Financial Institution (**PFFI**) by entering into an FFI agreement with the IRS, or establish their qualification for one of the very narrow categories of FFIs treated as deemed

compliant or exempt from FATCA. Maintaining PFFI status will require extensive due diligence reviews of investors and compliance with FATCA withholding and reporting requirements.

PFFIs will also be required to apply withholding to individual investors that fail to provide adequate documentation of their U.S. or non-U.S. status, and to institutional investors that fail to provide adequate documentation of their own FATCA compliance. PFFIs that are flow-through entities will also be required to pass information regarding the FATCA status of their controlling persons to their withholding agents.

Funds holding no U.S. assets may also need to comply with FATCA rules if they are part of an "expanded affiliated group" (**EAG**) of FFIs, and other FFIs in the group hold U.S. assets and wish to avoid FATCA withholding.

3.3.2 What about entities in a Fund structure which do not qualify to be included in an EAG?

Each entity that is not included will have to determine its own FATCA status on an individual basis.

3.3.3 Who may act as a Sponsor?

A trustee, fund manager, fund administrator, general partner, corporate director, transfer agent, company service provider, or authorized third party may act as a Sponsor. Generally, a contractual arrangement between the Sponsor and Sponsored Entity would be required from a legal perspective.

3.3.4 What are the responsibilities of a Sponsor?

A Sponsor agrees to perform the due diligence, withholding and reporting obligations for their Sponsored Entities that otherwise the Sponsored Entity would be required to perform. Generally, a contractual arrangement clarifying all the responsibilities assumed by the Sponsor on behalf of the Sponsored Entity would be required from a legal perspective.

3.3.5 How do Fund Managers register Sponsored Entities?

A Fund Manager will register its Sponsored Entities via the IRS portal. At this time, no guidance has been issued by the IRS as to exactly how this process of registration will function. For now, a Fund Manager can register for a GIIN as a Sponsoring Entity using the IRS portal and their Sponsored Entities are allowed to provide the Sponsor's GIIN number when asked. The required registration date for Sponsored Entities is January 1, 2016.

3.3.6 What if a Bermuda-based Fund Manager has a Fund in a Model 1 FATCA partner that has not yet signed an Agreement with the U.S. Treasury?

Until an IGA is signed, a jurisdiction that is currently in negotiations with the U.S. (who have reached agreement in substance with the U.S. but the IGA is unsigned) will be treated as having in effect the relevant model provisions. Jurisdictions such as these are known as the "white list countries." An FFI resident in, or organized under the laws of, such a jurisdiction can register on the FATCA registration website consistent with its treatment under the relevant model IGA and will be allowed to certify its status to a withholding agent consistent with that treatment. However, this concession expires on 31 December, 2014 and once the deadline has passed, the "white list countries" will no longer have IGA status. The financial industry is waiting for announcements from the U.S. Treasury as to how these issues will be addressed.

Further, unless the Treasury website provides that a jurisdiction is treated as having an IGA in effect, then, because of its local law restrictions, an FFI should register as a Limited FFI provided it meets the definition. A Limited FFI means an FFI that, due to local law restrictions, cannot comply with the terms of an FFI Agreement, or otherwise be treated as a PFFI or RDCFFI, and that is agreeing to satisfy certain obligations for its treatment as a Limited FFI.

3.3.7 What if a Fund Manager has funds in various jurisdictions?

An FFI will need to confirm the specific requirements of applicable IGAs. Certain IGAs apply to FFIs that are "resident" in the relevant country. "Resident" may mean tax resident as defined under the country's existing laws. In contrast, other IGAs (including the IGA of the Cayman Islands), apply to FFIs that are "organized under the laws of" the relevant country. Accordingly, depending on the circumstances, an FFI may potentially be subject to multiple IGAs.

3.3.8 Can a Fund expect that its service providers (custodian, fund accountant, transfer agency) will take care of its FATCA compliance?

All non-U.S. investment funds will be considered FFIs and will be responsible for compliance with their obligations under FATCA. As such, it is important for each Fund to understand what its responsibilities under FATCA will entail. Under the proposed regulations, FFIs will be permitted to contract with their transfer agents or other agents to perform certain due diligence and other FATCA obligations on their behalf. However, funds will retain ultimate responsibility and liability for FATCA compliance and the actions of an agent will be imputed to the Fund on whose behalf it is acting. In addition, Reporting Model 2 FFIs/PFFIs will have to agree to verification procedures or reviews (e.g. internal audits) to ensure their compliance with the FFI Agreement requirements.

While the need for a Fund to comply with FATCA is obvious, an investment manager may have additional FATCA obligations beyond those of the Fund; for example, in relation to other legal entities (such as a management company) or FATCA compliance in trade execution. The transfer agent or fund administrator may be asked to perform due diligence on all investors listed in the investor record, report on U.S. individuals and institutions investing in the Fund, and withhold on pass thru payments made to noncompliant investors. The Fund accountant may be asked to calculate pass thru payment withholding for the Fund. There should be an agreement in place between the Fund manager and other service providers, who will perform the due diligence, to confirm such duties.

3.3.9 Does a Fund with no U.S. investors need to do anything to comply with FATCA?

To prevent being subject to FATCA withholding on certain payments of U.S.-source income, FFIs will need to satisfy the requirements of one of the deemed-compliant FFI categories or enter into an FFI Agreement with the IRS, agree to identify U.S. accounts, perform annual reporting to the IRS and withhold on pass thru payments to noncompliant investors. This is true even if the FFI does not have any direct U.S. investors. Therefore, even if a Fund has no direct U.S. investors, under FATCA it will be required to perform due diligence on all foreign entity investors to confirm they are FATCA-compliant FFIs, and that any nonexempt NFFEs provide information regarding their U.S. owners (or certify that they do not have any).

It is possible that certain funds without U.S. investors may meet the requirements for a registered deemed-compliant FFI (i.e. either as a qualified investment vehicle or a restricted fund). However, registered deemed-compliant FFIs generally are still required to certify to the IRS that all of the requirements for deemed-compliant status have been satisfied, register with the IRS and obtain an FFI-EIN, renew their certification every three years, and agree to notify the IRS if there is a change in circumstances which would make the FFI ineligible for deemed-compliant status.

3.3.10 Are compliant investors in a Fund harmed by the presence of noncompliant investors?

FATCA withholding will apply (if required) to payments (distributions and redemptions) made by a Fund to its investors. The Fund (or its transfer agent on its behalf) must apply FATCA withholding to the amounts allocable to those account holders or investors who are not compliant. As a result, noncompliant investors will suffer withholding; compliant investors in a compliant Fund will not.

Of course, it is possible that the presence of noncompliant investors may prevent a Fund from taking advantage of the lower compliance burdens available to deemed-compliant FFIs, such as qualified collective investment vehicles or restricted Funds.

3.3.11 What additional corporate considerations should be considered for my Funds?

Compliance manuals should be updated to include a short description of FATCA and the compliance procedures required to be carried out.

Subscription agreements should be updated to state that investors will generally be required to provide certain information and documentation to avoid withholding under FATCA, such as an applicable IRS Form W-8 or W-9.

Offering memoranda should include a description of FATCA as a risk factor and a more detailed explanation in the tax section if the risk factor is not detailed. Standalone domestic funds should have a short FATCA risk factor section. Offshore funds should have a more detailed description of FATCA.

Funds will want to review their governing documents (e.g. Bye-laws or Limited Partnership Agreement) to determine whether or not their governing documents need to be updated to permit special allocation of withholding taxes to non-compliant investors or mandatory redemption of such investors.

A resolution should be adopted designating an appropriate person as the reporting officer.

3.4 Insurance

3.4.1 Pursuant to FATCA, FFIs include a "specified insurance company". What is a "specified insurance company"?

A Specified Insurance Company is an Entity (i.e. a legal person or legal arrangement) that is an insurance company that issues, or is obligated to make payments with respect to, Cash Value Insurance Contract or an Annuity Contract.

Furthermore, a holding company of an insurance company will be treated as a Financial Institution only if it is part of an EAG that includes a Specified Insurance Company.

3.4.2 What are Cash Value Insurance Contracts and Annuity Contracts?

A Cash Value Insurance Contract is an insurance contract (other than an indemnity reinsurance contract between two insurance companies and a term life insurance) that has an aggregate cash value greater than U.S. \$50,000 at any time during the calendar year.

An Annuity Contract is (a) 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, or (b) 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.

The balance or value of a Cash Value Insurance Contract or Annuity Contract shall be determined as of the last day of the calendar year or the most recent contract anniversary date.

In the case of a Cash Value Insurance Contract or an Annuity Contract, any person entitled to access the Cash Value or change the beneficiary of the contract is considered the Account Holder. 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.

#### 3.4.3 How would a Specified Insurance Company be determined under Bermuda law?

The Insurance Act 1978, as amended (**Insurance Act**) provides that no person shall carry on insurance business in or from within Bermuda unless he is registered by the Bermuda Monetary Authority as an insurer.

The Insurance Act distinguishes between insurers carrying on long-term business, insurers carrying on general business and insurers carrying on special purpose business. There are six general business classifications (Classes 1, 2, 3, 3A, 3B and 4) and five long-term business classifications (Classes A, B, C, D and E) of insurance company, with Class 1, 2, A and B insurers considered "captive" insurers and Class 3, 3A, 4, C, D and E insurers considered "commercial" insurers.

Special purpose business is defined under the Insurance Act as insurance business under which an insurer fully funds its liabilities to the persons insured through (a) the proceeds of any one or more of (i) a debt issuance where the repayment rights of the providers of such debt are subordinated to the rights of the person insured, or (ii) some other financing mechanism approved by the Bermuda Monetary Authority; (b) cash; and (c) time deposits.

It is understood that an insurer conducting long-term business will be most likely to issue, or be obligated to make payments with respect to, Cash Value Insurance Contracts and Annuity Contracts. As a result, insurers conducting long-term business may be Specified Insurance Companies.

Insurers conducting general business or special purpose business are less likely to issue, or be obligated to make payments with respect to, Cash Value Insurance

Contracts and Annuity Contracts. As a result, insurers conducting general business or special purpose business are less likely to be Specified Insurance Companies.

3.4.4 If an insurance company has made an election under section 953(d), how is this entity treated under FATCA?

The term "U.S. person" means, *inter alia*, a foreign insurance company (e.g. an insurance company registered under the Insurance Act) that has made an election under section 953(d); provided that either (a) the foreign insurance company is not (i) a Specified Insurance Company and (ii) licensed to do business in any U.S. State, or (b) the foreign insurance company is (i) a Specified Insurance Company and (ii) licensed to do business in any State.

The term "U.S. person" does not include a foreign insurance company that has made an election under section 953(d) if it is a Specified Insurance Company and is not licensed to do business in any State.

Therefore if an insurance company meets this criteria, it will not be required to register as an FFI with the IRS. However, the insurance company will have to provide a Form W-9 to confirm their FATCA status to counterparties where they hold a financial account.

## 4. **REGISTRATION/REPORTING**

### 4.1 Registration

4.1.1 What is required for an entity to be a Lead FI?

4.1.2 A Lead FI means an FFI or a Compliant FI that will initiate the FATCA Registration process for each of its Member FIs that is a PFFI, RDCFFI, or Limited FFI and that is authorized to carry out most aspects of its Members' FATCA Registrations. A Lead FI is not required to act as a Lead FI for all Member FIs within an EAG. Thus, an EAG may include more than one Lead FI that will carry out FATCA Registration for a group of its Member FIs. A Lead FI will be provided the rights to manage the online account for its Member FIs. However, an FFI seeking to act as a Lead FI cannot have Limited FFI status in its country of residence. Can a Member FI complete its FATCA registration and obtain a GIIN if the Lead FI for that Member FI has not registered under FATCA?

No, a Member FI can only register after its Lead FI has registered. When the Member FI does register, it should indicate in Part 1, line 1, that it is a member of an EAG.

In Part 2 of the Lead FI's registration, the Lead FI will add basic identifying information for each Member, and the system will create the Member FATCA accounts. Each Member FI will then be required to log into the system and complete its registration.

4.1.3 What is an Expanded Affiliated Group (**EAG**) and who qualifies to be in it?

An FFI and its branches and affiliates are defined as an "expanded affiliated group" (EAG). An entity is a part of an EAG if it is affiliated with a common parent that directly or indirectly owns over 50% of the shares by vote and value of such corporation, or in the case of a partnership or non-corporate entity, owns over 50% by value of the beneficial interest of such partnership or non-corporate entity.

Each member financial institution of the EAG will need to complete a registration, once the Lead FI has created its account. In Part 2 of the Lead FI's registration, the Lead FI will add basic identifying information for each member, and the system will create the member FATCA accounts. Each member will then need to log into the system and complete its registration.

### 4.2 Reporting

4.2.1 Does Form 8966 need to be submitted if the FFI has no reportable persons?

FFIs report directly to the IRS on Form 8966 not only certain information about their U.S. accounts but also accounts held by owner-documented FFIs (and Trustee-Documented Trusts), and certain aggregate information concerning non-consenting U.S. accounts, and, for a transitional period, accounts held by nonparticipating FFIs as required under the applicable IGA and the Regulations. However, if a FFI has no reportable persons to be reported, it is not required to submit a nil return to the IRS or HMRC.

4.2.2 Does a 1042-S/1042 need to be submitted if there were no withholding on reportable payments?

A Reporting Model 2 FFI that makes a U.S. FDAP payment that is reportable under FATCA and/or the U.S. Qualified Intermediary (**QI**) Regulations must be reported on the following IRS forms:

- **Form 1042-S** – Foreign Person’s U.S. Source Income Subject to Withholding; *AND*
- **Form 1042** – Annual Withholding Tax Return for U.S. Source Income of Foreign Persons

If a Reporting Model 2 FFI does not withhold tax under FATCA in respect of non-compliant customers and is not a QI under the U.S. QI regulations, it is not required to perform Form 1042 and/or Form 1042-S reporting, even in respect of nil returns.

However, if the Reporting Model 2 FFI is a QI under Chapter 3, it is required to perform Form 1042 and/or Form 1042-S reporting including nil returns, even if it has not withheld tax under FATCA in respect of non-compliant customers.

4.2.3 What are the reporting requirements which will continue into the future and how often do I need to report?

The Reporting Model 2 FFI has an obligation to report certain information annually to the IRS with respect to U.S. accounts, non-consenting U.S. account holders and NPFFIs.

A Reporting Model 2 FFI 's reporting obligations include:

- Form 8966, FATCA Report with respect to its U.S. account holders that are specified U.S. persons; with respect to substantial U.S. owners of an NFFE that is a U.S.-owned foreign entity that is an account holder, and with respect to owners of owner-documented FFIs that are specified U.S. persons. The IRS also requires reporting on Form 8966 (in the aggregate) with respect to accounts maintained for non-consenting Account Holders as well as transitional reporting with respect to payments of foreign reportable amounts to NPFFIs in calendar years 2015 and 2016.

- Reporting on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding (if appropriate as per 3.2.2); and
- Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, for payments of chapter 4 reportable amounts made to recipients, recalcitrant account holders and NPFFIs (if appropriate as per 3.2.2);

The Reporting Model 2 FFI must file these forms on magnetic media with the IRS:

- Form 8966 - on or before March 31 of the year following the end of the calendar year to which the form relates.
- Form 1042/1042-s - on or before March 31 of the year following the end of the calendar year to which the form relates.

#### 4.2.4 What forms are required by the IRS?

The forms required by the IRS in respect of withholding and reporting are as follows:

1. Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons;
2. Form 1042-s Foreign Persons U.S. Source Income subject to Withholding;
3. Form 8809, Application for Extension of time to File Information Returns;
4. Form 8966, FATCA Report (U.S. Persons that are one of the reportable persons on this form can instead be reported on Forms 1099); and
5. Form W-8 BEN, W-8 BEN-E, W-8 BEN-ECI, W-8IMY and the associated documentation if appropriate or W-8 BEN-EXP

#### 4.2.5 What is the International Data Exchange Services (IDES) System?

IDES is a system that allows the IRS to exchange tax payer information with FFIs and foreign tax authorities. Bermuda FIs will submit FATCA Form 8966 reporting to the IRS through IDES. An overview of data transmission to the IDES system is currently available on the IRS website at [FATCA International Data Exchange Resources and Support Information \(IDES\)](http://www.irs.gov/Businesses/Corporations/FATCA-IDES-Resources-and-Support-Information) at:

<http://www.irs.gov/Businesses/Corporations/FATCA-IDES-Resources-and-Support-Information>

#### 4.2.6 Is there an extension to Form 8966 reporting for 2014?

For reporting with respect to calendar year 2014 only, an automatic 90-day extension of time to file Form 8966 from 31 March 2015 will be provided to all filers (including those filing electronically) without the need to file any form or take any action. After calendar year 2014, to extend the Form 8966 filing deadline, an application for extension of time to file will be required.

## 5. COMPLIANCE

### 5.1 What is a Point of Contact?

The Responsible Officer can authorize a Point of Contact to receive FATCA-related information regarding the FFI, and to take other FATCA-related actions on behalf of the FFI. While the Point of Contact must be an individual, that person does not need to be an employee of the FFI. For example, should an FFI have retained the services of a consulting firm to help complete and submit the FATCA Registration on behalf of an FFI then the individual consultant can be identified as the Point of Contact.

### 5.2 Who can act as a Responsible Officer?

A Reporting Model 2 FFI is required to appoint a “responsible officer” to oversee its compliance with the FFI Agreement that it is required to execute. The responsible officer is generally an officer of any Reporting Model 2 FFI in the Reporting Model 2 FFI’s EAG, who has sufficient authority to fulfil the requirements of the FATCA regulations and the FFI Agreement, including the required duties and certifications described below.

### 5.3 What are the responsibilities of a Responsible Officer?

In general, the Responsible Officer is required to establish a compliance program that includes policies, procedures and processes sufficient to comply with the FATCA rules. The Responsible Officer may designate persons to help accomplish these tasks. The Responsible Officer (or a designee) must periodically review the sufficiency of the FFI’s compliance program and its compliance with the FFI Agreement, and these reviews must be considered in making the required periodic certifications described below. There are two types of certifications required: a periodic certification of compliance, and a certification regarding completion of due diligence procedures. The Responsible Officer must personally make these certifications to the IRS.

### 5.4 Does the Responsible Officer have to be an officer of the Company?

The term Responsible Officer means, with respect to a Reporting Model 2 FFI, an officer of any Reporting Model 2 FFI with sufficient authority to fulfil the duties which include the requirement to periodically certify to the IRS regarding the FFI’s compliance with the FFI Agreement. The term Responsible Officer means, in the case of a registered deemed-compliant FFI, an officer of any deemed-compliant FFI or Reporting Model 2 FFI in the deemed-compliant’s FFI’s EAG with sufficient authority to ensure that the FFI meets all applicable requirements.

### 5.5 What certifications are required to be submitted?

On or before July 1 of the calendar year following the certification period, the Responsible Officer is required provide a certification to the IRS. The first certification period begins on the effective date of the FFI Agreement and ends at the close of the third full calendar year following the effective date of the FFI Agreement. Each subsequent certification period is the

three calendar year period following the previous certification period, unless the FFI Agreement provides for a different period.

At that time, the Responsible Officer must make one of the following two certifications:

1. That the Reporting Model 2 FFI maintains effective internal controls, or
2. That if the Reporting Model 2 FFI has identified an event of default or has failed to remediate any material failures as of the date of the certification ("qualified certification").

#### Certification of effective internal controls

For a valid certification of effective internal controls, the Responsible Officer must make the following statements relevant to the certification period:

- the Responsible Officer (or designee) has established a compliance program that is in effect as of the date of the certification and that has been subjected to the review as described under the regulations;
- there are no material failures for the certification period, or, if there have been, appropriate actions were taken to remediate such failures and to prevent such failures from reoccurring; and
- if there has been any failure to withhold, deposit, or report any amount under the requirements of the FFI agreement, the FFI has corrected such failure by paying any taxes due (including interest and penalties) and by filing the appropriate return (or amended return).

#### Certification of completion of due diligence procedures

The Responsible Officer must separately certify to the IRS that the Reporting Model 2 FFI is compliant with the due diligence identification procedures for pre-existing accounts. Generally this certification must be made no later than 60 days following the two year anniversary of the after the effective date of the FFI agreement.

As part of this certification, the Responsible Officer must certify that the following statements are true:

- the Reporting Model 2 FFI has completed a review of all high-value accounts and has in place procedures to ensure that all recalcitrant account holders are identified.
- the Reporting Model 2 FFI has completed the account identification procedures and documentation requirements for all other pre-existing accounts.

- to the best of the Responsible Officer's knowledge, the Reporting Model 2 FFI did not have any formal or informal practices or procedures in place to assist account holders in the avoidance of FATCA.

If the Responsible Officer is unable to make any of these certifications, he/she must make a qualified certification stating that such a certification cannot be made and that appropriate corrective action will be taken by the Responsible Officer.

#### 5.6 Qualified Certification

If the Responsible Officer has identified an event of default or a material failure that the Reporting Model 2 FFI has not corrected as of the date of the certification, he/she must make a qualified certification by certifying to the following statements:

- the Responsible Officer (or designee) has identified an event of default, or the Responsible Officer has determined that as of the date of the certification, there are one or more material failures with respect to the Reporting Model 2 FFI's compliance with the FFI Agreement and that appropriate actions will be taken to prevent such failures from reoccurring.
- With respect to any failure to withhold, deposit, or report any amount under the requirements of the FFI Agreement, the FFI will correct such failure by paying any taxes due (including interest and penalties) and filing the appropriate return (or amended return); and
- The Responsible Officer (or designee) will respond to any notice of default (if applicable) or will provide to the IRS upon request a description of each material failure and a written plan to correct each such failure.